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Redaksioneel

Godsdiens en reg in Suid-Afrika

Dit is vir die Nederduitse Gereformeerde Teologiese Tydskrif 'n voorreg om hiermee aan u 'n spesiale uitgawe te bied van voordragte wat tydens 'n Godsdiens en Reg Konferensie in 2011 op Stellenbosch gelewer is.

Law and religion is a subject matter that is increasingly receiving attention from both theologians and legal scholars all over the world. In a sense it is more than just a mere scholarly attempt. In many countries of the world it is of vital importance for the relationship between the state and its subjects and also for the relationship between religions and between religions and the state. This issue of the Dutch Reformed Theological Journal looks at Law and Religion in South Africa from the viewpoint of a diversity of religions in South Africa as well as from the viewpoint of theologians and legal scholars.

Tot op hede is daar nog nie soveel aandag gegee aan die bestudering van Godsdiens en Reg in Afrika en met name in Suid-Afrika nie. In elk geval nie soveel as die aandag wat dit in ander lande kry nie. Dit is ons hoop dat hierdie publikasie 'n begin sal wees van baie meer aandag aan 'n uiters belangrike studieveld. Mag dit help om ons insigte te verdiep maar veral ook om ons aan mekaar bekend te stel en wedersydse respek vir mekaar te bevorder.

P COERTZEN
(Uitgawe redakteur)
Mei 2013

Sheikh Muneer Abduroaf (LL.B/LL.B/LL.M)

Evolution of Muslim personal law in the South African constitutional dispensation[1]

Introduction

This paper was presented by a representative of the Muslim Judicial Council, South Africa. The paper is about the evolution of Muslim personal law in the South African Constitutional dispensation. This paper looks at the advancements of Muslim personal law in the South African courts, and also the advancements as regards to statute law.

First it is very important to understand what is meant by Muslim personal law within the South African context.

What is Muslim personal law?

Muslim personal law is a selected part of the broader body of *Sharee'ah* Law, or which is better known as Islamic law.

Islamic law finds its basis in two primary sources known as the Quran and Sunnah. The Quran is the Devine Revelation that was sent down from the heavens to Prophet Muhammad (Peace be upon him) via an angel by the name of Jibreel. The Sunnah comprises the oral traditions, practical actions and tacit approvals of the Prophet Muhammad (Peace be upon him) from the age of forty until his demise.[2] Muslim Personal Law limits itself, and primarily covers matters of Marriage, divorce and succession.[3] Other parts of Islamic law include commercial law; criminal law; laws of purification; laws of prayer and many other topics concerning a Muslims life, and which does not necessarily fall under the scope of Muslim personal law.

The history of Muslim personal law within the South African context will now be looked at.

History of Muslim personal law in South Africa

Historically, and until the 1999 Supreme Court of Appeal (SCA) decision in the *Amod v Multilateral Motor Vehicle Accidents Fund*[4] case, a marriage contracted according to Muslim personal law was regarded by the South African Courts as null and void, and as being contrary to public policy (*contra bona mores*), with the result that the Muslim marriage and its consequences were not legally recognized in any form at all.[5]

I will now confirm this statement by mentioning a few cases in this regard.

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2 See Kamalie (1997: 14 ff).
3 Seedat (2011: 2).
4 See *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).
5 Mokgoro (2003: 5).

MPL case law before the Constitution

In 1917, in the case of *Seedat's Executors v The Master of the High Court,* the Appellate Division held that foreign polygamous marriages are not to be recognized.[6] This ruling encompassed all marriages, including marriages in terms of Muslim personal law.

In 1983, in the case of *Ismail v Ismail* the Appellate Division (AD) confirmed this position and held that marriages under which polygamy is permitted are regarded as *contra bona mores* under South African Law and are accordingly not recognized.[7]

In 1991, in the case of *Solomons v Abrams* it was confirmed that a marriage contracted in terms of Muslim personal law was not a putative marriage, and could also not be recognized on that basis.[8]

These cases are related to court decisions before the enactment of the Interim[9] or the Final Constitution[10] of the Republic of South Africa. It can be seen that the courts did not at all recognize marriages contracted in terms of Muslim Personal Law in any way prior to the enactment of the Interim or Final Constitution of the Republic of South Africa.

However, in 1993, the Interim Constitution of South Africa was enacted, which provided therein, the right to freedom of religion, the right to freedom of equality, and also the right not be discriminated against.[11] Since the enactment of the 1993 Constitution, the Muslim Community in South Africa made use of these rights that were provided therein, and litigated on the basis thereof. A few cases in this regard will now be looked at.

MPL case law after the Constitution

In 1996, after the enactment of the Interim Constitution of South Africa, in the *Ryland v Edros* case, the then Cape High Court looked at the issue regarding the enforceability *inter partes* of a marriage contract in terms of Muslim personal law. The Court held that a marriage in terms of Muslim personal law is a legal marriage and that it generates a legal contractual duty to support the wife.[12] This was an extension of the common law duty of support.[13]

In 1998, in the case of *Amod v Multilateral Motor Vehicle Accidents Fund,* the Supreme Court of Appeal held that public policy since 1982, in the *Ismail v Ismail*[14] case, has changed, and that there is now a requirement to recognize Muslim marriages. The court thus gave legal recognition to a Muslim marriage for purpose of duty of support.[15]

In 2004, in the case of *Daniels v Campbell,* the Constitutional Court held that parties to a *de facto* monogamous marriage contract in terms of Muslim personal law are recognized as survivors

6 *Seedat's Executors v The Master* (Natal) 1917 302 (AD).
7 *Ismail v Ismail* 1983 (1) SA 1006 (A).
8 *Solomons v Abrams* 1991 (4) All SA 437 (W).
9 See Interim Constitution, Act 200 of 1993.
10 See Final Constitution, Act 108 of 1996.
11 See Chapter 3 of the Interim Constitution of the RSA, Act 200 of 1993.
12 *Ryland v Edros* 1996 (4) All SA 557 (C).
13 See *McDonald v Young* Case, 24 March 2011 Case No. 292/10 (SCA).
14 See *Ismail v Ismail* 1983 (1) SA 1006 (A)
15 *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

in terms of the Maintenance of Surviving Spouses Act[16] and the Intestate Succession Act[17].[18]

In 2005, in the *Khan v Khan* case, the court held that marriages contracted in terms of Muslim personal law, whether monogamous or not, were covered by the Maintenance Act[19].[20]

In 2008, in the most recent case of *Hassam v Jacobs,* the Cape High Court issued a declaration that the word 'survivor' as used in the Maintenance of Surviving Spouses Act, includes a surviving partner to a polygamous Muslim marriage. It was further declared that section 1(4)(f) of the Intestate Succession Act[21] was inconsistent with the Constitution, to the extent that it made provision for only one spouse in a Muslim marriage to be an heir in the intestate estate of their deceased husband.[22]

The above-mentioned cases might seem to the average person as advancements to Muslim personal law within South Africa. However, that is not necessarily the case, as the judgments passed down by the courts were at times in total conflict with the classical and majority understanding of Muslim personal law.

To take the example of the 2004 Constitutional Court case of *Daniels v Campbell,* the court held that parties to a marriage in terms of Muslim personal law would be regarded as 'spouses' and 'survivors' in terms of the Maintenance of Surviving Spouses Act and Intestate Succession Act respectively.[23] However, the provisions provided in these two Acts are not necessarily in accordance with Muslim personal law, as parties to a Muslim marriage contract are only entitled to maintenance for a specific, limited period, and have rights to inheritance to specific amounts. The period and amounts as provided in the said Acts are in conflict with Muslim personal law, and the judgments are thus in contradiction to Muslim Personal Law.

It should also be noted that the case at hand is a Constitutional Court Case, and based on the doctrine of *stare decisis,* the whole of the Republic of South Africa is bound by that decision. The consequence of this would be that the legal right that a spouse or survivor has in terms of South African Law is now in conflict with the legal rights a spouse or survivor has in terms of Muslim personal law.

The same can be said regarding the 2005 *Khan v Khan* case, where it was held that an ex-spouse of a marriage contract in terms of Muslim personal law is entitled to maintenance in terms of the Maintenance Act.[24] Muslim personal law allows an ex-spouse, in the case of divorce, maintenance for the duration on three months only, whereas the Maintenance Act allows for much more than the prescribed three months. If a Muslim spouse makes use of this judgment, he/she would be overstepping the limits as provided in Muslim personal law.

A final case example in this regard would be the 2008 case of *Hassam v Jacobs,* which was

16 Maintenance of Surviving Spouses Act 27 of 1990.
17 See Intestate Succession Act 81 of 1987.
18 *Daniels v Campbell No and Others* 2004 (7) BCLR 735 (CC).
19 See Maintenance Act 99 of 1998.
20 See *Khan v Khan* 2005 (2) SA 272 (TPD).
21 See s (1) (4) (f) Intestate Succession Act 81 of 1987.
22 *Hassam v Jacobs & Others,* July 18 2008, Case 5704/2004 (C). The Indian case of MOHD. AHMED KHAN V. SHAH BANO BEGUM & ORS [1985] RD-SC 99 (23 April 1985) should be looked at in this regard.
23 See *Daniels v Campbell No and Others* 2004 (7) BCLR 735 (CC).
24 See *Khan v Khan* 2005 (2) SA 272 (TPD).

another landmark case for Muslims in the Republic South Africa, and it was seen to the average person to be a great accomplishment for Muslims living within South Africa. The court held the terms 'spouse' and 'survivor' include marriages, be it monogamous or polygynous contracted in terms of Muslim personal law.[25] Again, the maintenance and the inheritance received as provided in these two acts goes against the laws as found in Muslim personal law.

These are but some of the challenges that are faced by the Muslim Community in the Republic of South Africa when enforcing their rights via the court systems.

For the above-mentioned reason, among others, the Muslim Community made various attempts in order to enact laws as Acts of Parliament that would govern certain aspects of Muslim personal law and would also guide the courts when giving judgment. The endeavours of the Muslim Community in this regard will now be looked at.

Legislation regulating MPL in South Africa

It should be noted that the political transformation in South Africa which commenced with the adoption of the Interim Constitution on 27 April 1994, and a Final Constitution, which came into force on 04 February 1997, was the catalyst for renewed attempts at legal recognition and enforcement of aspects of Muslim personal law in South Africa.[26]

Both the interim and final Constitutions guarantee freedom of religion. It further provides that the State may pass legislation that recognizes systems of personal and family law, but subject to the Constitution.[27]

Based on the aforesaid, the Muslim community of the Republic of South Africa endeavoured to seek legal recognition of certain aspects of MPL. The efforts led to the establishments of a Project Committee of the South African Law Commission, to investigate Islamic Marriages and related matters. The then Minister of Justice established this Project Committee on 30 of March 1999. The committee was established in terms of s 7 (A) (b) (ii) of the South African Law Commission Act of 1973.[28]

The Project Committee, which was also known as Project Committee 59, was mandated to investigate Islamic marriages and related matters from 1 March 1999 for the duration of the investigation. The deliberations of the committee led to the compilation of an Issue Paper (better known as Issue paper 15) which was circulated for public comment in July 2000. The purpose of the Issue Paper was to identify issues and problem areas arising out of the investigation, and also with a view to maximize consultation with all interested parties, and to further obtain their responses and input in order to arrive at an appropriate solution to the issues and problems identified in the issue paper. The circulation of the issue paper led to many responses from interested parties. These responses were then used as an aid to compile a discussion paper which included a proposed draft bill which would give effect to the legal recognition of Muslim marriages.[29]

The proposed bill received positive and negative feedback from the Muslim community of the Republic of South Africa. Some scholars and public organizations rejected the bill, stating that

25 *Hassam v Jacobs N.O. Master of the High Court & Others,* July 18 208, Case No. 5704/2004 (C).
26 Mokgoro (2003: 1).
27 S 15 of Act 108 of 1996.
28 Mokgoro (2003: 1-2).
29 Mokgoro (2003: 3-4).

it went totally against the classical and majority understanding of Muslim personal law. Others, were interested in engaging the process and hoped that the bill would be enacted at the soonest time possible. There was in the past, and currently still is no unanimous agreement by the Muslim community as to what the content of the bill should be. Issues such as the equality clause as found in the Constitution, administrative processes, the possibility of constitutional attack, whether or not an inheritance provision should form part of the bill still up till today forms part of the debate.

Untill today, over a decade since the establishment of the Project Committee in 1999, no agreement has been reached as to the content of the bill; however, the process is still on the way.

Conclusion

In conclusion, it can be said that Muslim personal law within the South African context has faced many challenges, and it has come a long way since the *Ismail v Ismail* case in 1983. The case law and the proposed bills bear testimony to this. The reason for the change in face of Muslim personal law within the Republic of South Africa is primarily due to the enactment of the Interim Constitution and Final Constitution of the Republic of South Africa which gave all individuals within the republic equal rights. Cases like the *Ryland v Edros, Daniels v Campbell,* and the more recent *Hassam Jacobs* cases, testify to the fact that our courts are very much in favour of granting Muslims in South Africa their rights. However, judges cannot pass judgment arbitrarily, as they have to apply the law. It is therefore, in the absence of any legislation that governs Muslim personal law within the Republic of South Africa being available; judges will continue granting orders in terms of South African Law Statutes, and as it has been said, many a time is in conflict with Muslim personal law. It is for this reason that it becomes of paramount importance that some type of statute is enacted that governs and regulates Muslim personal law within the Republic of South Africa. This should be done at the soonest time possible as more and more cases are finding their way to the highest courts of our country.

We hope and pray that this becomes a reality. Thank You.

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Benson, Iain T[1]

Seeing through the secular illusion©

ABSTRACT

It is often said that we live in a 'secular' age and that the principles of 'secularism' lead to a 'neutral' public sphere. The central terms 'secular' and 'secularism' however, though they are often used are rarely examined. Related terms, relevant to their meaning, such as 'faith' and 'belief' are also seldom defined or compared alongside each other to evaluate how well they comply with principles of justice. In this paper, a development of others on similar themes, Professor Benson examines various definitions alongside contemporary topics and legal decisions to argue that an open public sphere requires re-thinking how many of the central terms are used.

Only when it is recognized that not all 'faiths' are religious and that all citizens operate out of some sort of faith commitments can we be properly in a position to evaluate non-religious faiths alongside religiously informed ones. This re-adjustment of the usual way of examining matters then should lead, Professor Benson argues, to a more accurate way of viewing current education and politics (and their areas of avoidance) as well as such things as fair access to the public square by religious believers and their communities. The long dominance of atheistic and agnostic forms of social ordering (including funding for such things as education and health care) is based, in part, on a belief that stripping religious frameworks from public sector projects is 'neutral' when it is not.

In addition, the focus on a rights based jurisprudence has a tendency to view rights such as the freedom of religion in individualist ways that ignore the communal importance of religion. The paper will suggest that moves to put pressure on the associational dimension of religions ignore the communal nature of certain forms of belief to the detriment of a more co-operative society and far from encouraging human freedom, actually reduce it.

In the long run, the importance of religions and their communities to the public sphere – which has been recognized by the Constitutional Court of South Africa – will be encouraged by this fresh and more accurate way of viewing belief systems and the communities that form around them. The more accurate way of understanding both the reality of and the need for more articulate public beliefs, will, Benson argues, provide a richer ground for such things as public school curriculum which often drift in the face of fears of moral imperialism and metaphobia (fear of metaphysics)

1 Professor Extraordinary, Department of Constitutional Law and Philosophy of Law, Faculty of Law, University of the Free State, Bloemfontein, South Africa; Senior Associate Counsel, Miller Thomson, LLP, Canada. The opinions expressed are those of the author and not necessarily those of his faculty or firm. Some of this paper is based upon a presentation for the XVII Plenary Session, The Pontifical Academy of Social Sciences, Vatican City, Universal Rights in a World of Diversity: The Case of Religious Freedom, 29th April – 3 May, 2011 as well as on a background paper for the Government of Canada's Policy Research Initiative on 'Religion and Public Policy.' 'Taking a Fresh Look at Religion and Public Policy in Canada: the Need for a Paradigm Shift' (January, 2008, unpublished) and elsewhere as noted below. Some of this paper may be submitted as part of the author's PhD for the University of the Witwatersrand. Address for correspondence: Ferme Loudas, Quartier Serres, 65270 St. Pé de Bigorre, France. iainbenson2@gmail.com

Introduction

I would like to thank the organizers of this conference for inviting me to give this paper at what looks to be a very interesting international conference on religion in South Africa. Over the last decade or so I have been working on the various meanings given to terms such as 'secular' and 'secularism' with a view to understanding the role they have played in important court decisions in the area of constitutional and human rights law. It is my conclusion that many of the terms that are used, not only 'secular', 'secularisation' and 'secularism' but those that relate to them, 'believers/unbelievers' 'communities of faith' and the phrase 'religion AND the state' serve to give a certain tilt to the way in which we view the public sphere. When I started to look at the history of changes in the words 'secular' and 'secularism' and the other terms I've mentioned, and how those terms are used and operate together, I came to see not only that the current uses are largely inaccurate philosophically but that they are unwise culturally and end up creating the likelihood of unjust political and legal outcomes for religious believers and their communities.

How that came about historically has many aspects that cannot be dealt with in this paper but I hope that in what follows I will make a convincing case to suggest that there is a need to avoid the strongly bi-furcationist manner in which we separate religious believers from non-religious believers and religion from the public sphere – a sphere that the freedom of religion cannot help engaging when religion operates in its public dimension either personally or in community.

It is my view that more accurate terminology for the public sphere is needed and that a paradigm shift is not only possible in terms of religion and the state but that it has, at least since the Supreme Court of Canada decision in its 2002 decision in the *Chamberlain* decision[2], already begun.

Part one. Key terms and concepts: Modern beliefs take on implicit forms

I would like to begin this paper with reference to an important insight of Michael Polanyi who once observed that human life is necessarily lived with 'faith' and 'belief' and that something interesting has happened in what he called 'modern beliefs' when he observed:

> Our objectivism*, which tolerates no open declaration of faith, has forced modern beliefs to take on implicit forms...* And no one will deny that those who have mastered the idioms in which these beliefs are entailed do also reason most ingeniously within these idioms, even while… they unhesitatingly ignore all that the idiom does not cover (Polanyi *Personal Knowledge,*1958:288)(emphasis added).

This paper will not try to spell out what sorts of implicit forms modern beliefs have taken on to avoid 'open declarations of faith' but will assert that modern beliefs are often, even usually, based upon implicit forms just as Polanyi says. Related to this, and central both to this paper and the paradigm it suggests is also underway, is the fact that explicit declarations of faith and belief have been often placed at a disadvantage by way of public exclusion as against the implicit forms of atheism and agnosticism. The analysis of a very important decision of Canada's highest court which formed a re-evaluation of the nature of the 'secular' will show just how such an exclusionary strategy was at work in a rather implicit way in the manner that

2 *Chamberlain v. Surrey School District No. 36* [2002] 4 S.C.R. 710 ('*Chamberlain*') (SCC).

the phrase 'secular principles' was being interpreted by the lower court in that case.

These implicit forms may often take the form of denying that faith or belief are involved at all and may, as we shall see, suggest that religious beliefs are non-rational. It is a fairly small step then to the usually implicit marginalization of religious beliefs in relation to those of contemporary agnosticism or atheism.

How such contemporary concepts as 'the dignity of the person' referred to by courts in equality cases are derived or provable is never spelled out but that the concept is important to the rhetoric of contemporary law is undeniable. Note, in that quotation from Polanyi, how what he calls the idioms of the contemporary belief are said to 'unhesitatingly ignore all that the idiom does not cover.' Recognition of the force of this paradigm shift is important to counteract both the pre-emptive silencing of religious voices (usually under the rubric of 'secular') and their exclusion from their just public dimensions (usually under the rubrics of 'secularism' 'separation of church and state' or similar concepts).

Everyone has faith and everyone is a believer: There are, then, no 'unbelievers'

I would like to introduce here to introduce an insight from John Henry Cardinal Newman written about as far away from Polanyi in time as Polanyi was from ours. Newman in his 'Tamworth Reading Room Letters,' recognized that everyone who acts must take matters on faith and wrote:

> Life is for action. If we insist on proofs for everything, we shall never come to action: to act you must assume, and that assumption is faith.[3]

Finally, a scholar of an earlier generation and who spent a considerable part of his life living and working in South Africa, R.F.A. Hoernlé, noted that:

> Every bona fide judgment is characterized by belief… [and] if 'faith' is firm belief, conviction of truth, then faith, in this context is indistinguishable from knowledge.[4]

Against these insights about both the inevitability of belief and faith for human beings, is the current denial of belief. This denial seems to take two main forms. First the denial that one has any beliefs at all (favoured by contemporary popular atheists such as Christopher Dawkins or Christopher Hitchens) or, second, that atheistic beliefs or agnostic beliefs are somehow more rational than those emanating from religious pre-suppositions. This latter category is evident from time to time in legal decisions.

Here is how Christopher Hitchens has described his position and those of his fellow popular atheist writers:

> And here is the point, about myself and my co-thinkers. *Our belief is not a belief. Our principles are not a faith.* We do not rely solely upon science and reason, because these are necessary rather than sufficient factors, but we distrust anything that contradicts science or outrages reason. We may differ on many things, but what we respect is free

3 See *Discussions and Arguments on Various Subjects* (London: Longmans, 1899) at 295.

4 R.F.A. Hoernlé, 'Knowledge and Faith' in D.S. Robinson (ed.) *Studies in Philosophy* (Cambridge: Harvard University Press) pp. 55-61 at 55.

inquiry, open-mindedness, and the pursuit of ideas for their own sake. We do not hold our convictions dogmatically [5](emphasis added).

To claim as Hitchens does, that his belief is not a belief and that the atheistic principles he endorses are not a 'faith' is bad philosophy but helpful since it shows rather well how far such thinkers (and they are the intellectual end of what is a very widely representative popular set of misconceptions) have come from their own roots. George Jacob Holyoake, after all, writing in the 19th Century, and the man credited by the *Oxford English Dictionary* with coining the term 'secularism' recognized the more basic truth of the matter when he subtitled his important book on secularism a 'Confession of Belief' (Holyoake 1896).

There is an exclusionist attitude in many countries towards religious believers. Those with religious belief instead of atheist of agnostic belief are discriminated against as their beliefs apparently falling outside of the 'secular' and hence 'rational' realm of thought. However, much of this discrimination rests on the understanding of secular and the place of belief within society. Two things need to be recognised – 1. That we are all believers in something, it is not a question of whether we believe, but what we believe in. 2. That the secular sphere, correctly understood as it is now under Canadian Law, is inclusive of people of religious belief and that they therefore should have equality under law and be placed at no disadvantage as against non-religious believers.

The fair treatment of religious communities in the contemporary world depends, in part, on obtaining a fair hearing about the fact that atheism and agnosticism and their projects should not be overtly or covertly given stronger public positions than religious communities and their projects. That is what was at issue in a landmark case in Canada a few years ago that touches directly on this discussion of the need for a new and more accurate means of describing religion and the nature of the public sphere.

So atheists are men and women of faith in many ways like the rest of us. Their dogmas are different but they are dogmatic (in that their beliefs emerge from the first principles of their faiths). True, in many things their faiths are different but they are still faiths and their beliefs are still beliefs no matter how much Hitchens and those like him wish it was different. Humans are stuck being believers and that is all there is to it. Being dogmatic does not necessarily mean being rude and it certainly does not equate to understanding what dogma is. That is why so many atheists and men and women on the street, think, like Hitchens, that they don't believe anything: but they do.

Perhaps one of the implicit forms or modern 'beliefs' is hidden in the idea of the 'religious free secular?' That would fit with what the philosophers and theologians have suggested. This is the climate in which people so readily speak and write of themselves being 'unbelievers' in a public order characterized by a religion-free (but not, as I have argued, faith-free) public sphere. The public sphere, if the writers quoted are correct, is necessarily a realm of 'faith' whether or not such faith draws its inspiration from religious presuppositions.

More recently, philosopher, the late Thomas Langan, has written on the idea and importance

5 Christopher Hitchens, *God is Not Great: How Religion Poisons Everything* (Warner Books, 2007) Introduction, emphasis added. I have developed this analysis further in Iain T. Benson '*Taking* Pluralism *and Liberalism Seriously: The Need to Re-Understand 'Faith', 'Beliefs', 'Religion' and 'Diversity'*, in the Public Sphere', Journal for the Study of Religion, Special Issue: Public Faith and the Politics of Faith, Volume 23, Numbers 1 & 2, 2010 at 17-41.

of the category of 'natural faith' which is, as it were, a means of overcoming these dualistic and false constructions to show that everyone is a believer and necessarily has faith of some sort[6]. Again, we need to recall that not all faiths are religious faiths.

This article then is a counter-reading to this common and, I argue, erroneous construction of the public sphere. If 'secular' means 'the opposite of religious' or 'non-religious,' and if the public realm is defined in terms of the 'secular,' then the public sphere has only one kind of believer removed from it – the religious believers. I suggest that this way of using 'secular' is deeply flawed and will tend to lead us in the direction of religious exclusivism. An express meaning to 'secular' or 'public' that rules out religion without arguments based on fairness and justice leaves those realms distorted in relation to principles of accommodation. If we start off with an implicit idea that the public is secular, thus 'non-religious,' then it is difficult to balance or reconcile the various interests held by religious claimants and others in a public setting.

If we want to affirm that a country such as South Africa or Canada does not have a sectarian government then we should say so; this is different than using the concept of 'separation of Church and State' which, in one reading of its American formulation would preclude the 'co-operation of 'Church' and State' which is the better model for the relationship that obtains in countries such as South Africa and Canada.[7]

The meaning and nature of the 'secular'

The term 'secular' has changed its meaning over the last one hundred and fifty years. The term in general usage now means, essentially, free *from* religion as in 'we ought to keep religion out of the schools because they are secular.' This was not the original meaning.

The original and older uses of secular as *saeculorum* meaning in relation to 'the age' or 'the times' or 'the world', in contradistinction to eternity and did not necessarily import a de-sacralised conception of the public sphere; but this has certainly changed in commonly understood usage today. Indeed, in Roman Catholic terminology, both the clergy and certain sorts of institutes have been understood to be properly 'secular' in this earlier use. Thus the clergy are divided between 'secular' and 'regular' clergy and there can be 'secular institutes' none of which are non-religious. This shift from a former religiously inclusive secular to a religiously exclusive one, therefore, is of the utmost importance at a time when the term secular is being used so widely in relation to the public sphere. We would do better, in fact, to banish the use of the term secular entirely when what we really mean is the public sphere and the relation of religion to the sphere. The term 'secular' with its deeply ambiguous usages in our contemporary age simply confuses our analysis at the outset.[8]

We must be careful to guard against definitions that build into their use an assumption that is unexamined. Just as this has happened where convergence pluralism can look like diverse pluralism (when they are very different) so, too, how we define what we mean by the term 'secular' is also important.

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6 Thomas Langan, *Being and Truth* (Missouri: 1999) and with A. Calcanio, *Human Being* (Missouri: 2009).

7 *Big M Drug Mart*, [1985] 1 S.C.R. at 339. In this decision, Chief Justice Dickson stated, '[i]n my view this recourse to categories from the American jurisprudence is not particularly helpful in defining the meaning of freedom of conscience and religion under the *Charter*' at 341.

8 I have written about this in '*Towards a (Re) Definition of the Secular*' University of British Columbia Law Review (2000) 33 at 519-549 (cited with approval by Gonthier J. in Chamberlain).

In fact, this more recent use of 'secular', which we may justly call the atheistic or agnostic interpretation, is seldom viewed alongside alternate understandings. This is not helpful since an atheistic definition, if used as the meaning for a central term such as 'secular', fails to give a proper place to religion in the private and public dimensions of society. The atheistic 'secular' becomes, in effect, a blueprint for the naked public square. A more informed historical understanding, built upon a richer philosophical ground, better reflects both the reality of beliefs in society and the principles of freedom that ought to undergird a properly civil society.

If we start off with the assumption (building into our use of the term 'secular' for example) that religion has no place in 'the secular', then, of course, we will tend to diminish the role of the religious in civil society and drive religion into the private sphere. But this is really to adopt implicitly or explicitly the ideology of atheistically driven 'secularism', because the 'secular', viewed historically, does not require such a removal of the sacred dimension from all aspects of life or their privatisation. The secular is, properly understood, a realm of *competing faith/belief claims*, not a realm of 'non-faith' or 'non-belief' claims because, strictly speaking, there can be no such realm.

In contemporary usage, 'secular schools', 'secular government', etc. are generally understood to mean non-religious or not influenced by religion or religious principles. I suggest that this is because we have adopted a secularist (which may be atheistic, agnostic or even religious) definition of 'secular' rather than a richer and more properly inclusive conception.

The historical shift in the use of 'secular' should be recognized. It is tempting to glance off the historical critique by continuing to use the term 'secular' and 'religious' as if they describe different worlds. But they do not describe different worlds; they describe different functions. When we are tempted to use the term 'secular' when we mean 'the public sphere' or 'the state' we would be better to *say that* as these are free of the religiously *exclusive* baggage that currently encumbers use of the term 'secular.'

When the British Columbia Court of Appeal, in the decision in *Chamberlain v. Surrey School Board,* overturned the newer atheistic use of 'secular' and affirmed the secular as a realm that has, properly, a place for beliefs that emerge from religious commitment, it was performing just the sort of linguistic reclamation argued for in this paper. The Supreme Court of Canada upheld the Court of Appeal on this religiously inclusive 'secular' a finding of central importance for considerations of Government policy in the future.

When the case reached the Supreme Court of Canada all nine judges agreed with the reasoning of McKenzie J. as to the religiously inclusive meaning of 'secular' so that term in Canada now means religiously *inclusive* not exclusive. [9]

At the Supreme Court of Canada, Mr. Justice Gonthier for himself and Justice Bastarache, giving the majority judgment of the Supreme Court of Canada on this point, would have upheld the elected public school Board's decision to keep certain same-sex parenting books out of the classroom and therefore wrote in dissent on that part of the decision, said this about the 'secular':

> 137 *In my view, Saunders J. below erred in her assumption that 'secular' effectively meant*

9 Supra. note #1 above. Madam Justice McLachlin, who wrote the decision of the majority, accepted the reasoning of Mr. Justice Gonthier on this point thus making his the reasoning of all nine judges in relation to the interpretation of 'secular.'

'non-religious'. This is incorrect since nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. I note that the preamble to the Charter itself establishes that '... Canada is founded upon principles that recognize the supremacy of God and the rule of law'. According to the reasoning espoused by Saunders J., if one's moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has 'belief' or 'faith' in something, be it atheistic, agnostic or religious. To construe the 'secular' as the realm of the 'unbelief' is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.

[emphasis added]Needless to say, it will take some time before the full implications of this judgment are understood in relation to the wider public policy in Canada or elsewhere but the principled re-configuration, being based on superior philosophy, history and legal principles, could become more widely known in time.

Confusions regarding secularism and ecularization

As with secular, the term 'secularism' is conspicuous by its general non-definition. Almost everywhere the term is used at variance with its origins in the work of George Jacob Holyoak, the man who is credited by the *Oxford English Dictionary* with defining the term in 1851. In Holyoak's understanding, secularism was a project designed to reconstruct the public order on a 'material' basis to free it from the non-empirical risks inherent in any projects in which metaphysical claims that were not empirical would have a place. In particular, Holyoak sought to replace religious understandings with 'material' ones.[10]

Like the term 'secular' 'secularism' has been used by others in a bewildering variety of ways some open to religious involvement and some diametrically opposed. As with the term 'secular', therefore, 'secularism' is not a particularly helpful term to use in discussing the role of religions in the public sphere. Joining 'secularism' with such terms as 'open' further confuses the matter. Given its origins and the purpose of the man who founded the movement and his followers, it would be wiser to limit secularism to the ideology that is, in fact, anti-religious and speak of an *open public sphere* as the framework within which a contemporary political order is best grounded.

The terms 'secular' and 'secularism' and to a lesser extent 'secularization' are useful only if properly and clearly defined within their context but, it is suggested, would be better *left unused* if clarity and engagement are the purposes of our analysis since their clear definitions seem well beyond capture now that the uses are so confused.

10 See Iain T. Benson *'Considering Secularism' in Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (Montreal: McGill-Queen's University Press, 2004) at 83-98. See also, Iain T Benson '*That False Struggle between Believers and Non-Believers'; 'Le faux combat entre croyants et non-croyants'; 'Quella falsa lotta tra credenti e non credenti'* Invited Article in the English, French, Italian, English-Urdhu and English-Arabic editions of *Oasis*, (Venice, Marcianum Press, 2011) Year 6 No. 12, December 2010.

'Secularism' is not a principle that, properly understood, forms or should form part of our national understanding as it is also deeply ambiguous and from its inception anti-religious. I have written critically of Canadian philosopher Charles Taylor's employment of the concept of 'open secularism'. I argue that this term is mischievous and confusing.[11]

The term 'secularism' is not often examined but when it is I would argue that its historical meaning is such that we should challenge fundamentally any idea that 'secularism' is a valid principle upon which to base an open and democratic societies such as Canada. I have written about this historical background elsewhere[12] and will not repeat that analysis here except to note that 'secularism' is not a term that, properly understood, furthers the kind of religious inclusivity or relation between the state and public policy that we need to embrace in constitutional democracies dedicated to the freedom of religion and the rule of law. Alternative terminology can and should be found in place of this term, laden as it is, with particular anti-religious intent and deep contemporary ambiguity. Secularism from its inception in the mid 19th century was set up as a movement to exclude religious influence from the public square. As such it is not neutral or fair with respect to religion and religious believers.

Why did the majority judges in *Chamberlain* seem to embrace 'secularism' and what did they mean by it? This is not possible to say since, unlike 'secular' (which was argued and was central to the decision) they did not define secularism. Neither did the term appear in the provincial *School Act,* the Reasons for Judgment under review or the arguments of counsel before it. Despite this, it was referred to numerous times in the Supreme Court's reasons as if it was a principle of Canadian constitutionalism. With respect, the Court erred in doing so.

Significantly, the dissenting judges, who gave the analytical framework of the whole court on the meaning of 'secular' as religiously inclusive, did not use the term 'secularism' in their analysis. They were right to avoid it.

The recent work of the Taylor/Bouchard Commission in Quebec has chosen to define 'secularism' as equivalent to 'the separation of Church and State.'[13] This is not a usage of the term that fits with its historic meaning and I do not think that the principle of secularism should be used as something positive in Canada. Further, we should not enmesh ourselves in the language of the 'separation of ambiguity to confusion.

I suggest that this term (secularism) and other terms related to it ('open secularism' and 'radical secularism') ought *not* be used when what is sought is the idea that the State does not recognize any established religion. A better term to describe the State is 'non-religious' or 'non-sectarian.' A 'non-sectarian' State is one thing, a 'secularist' State quite another and we would

11 Iain T. Benson, *Living Together with Difference: Pluralism, the Secular and the Fair Treatment of Beliefs by Law* (Ballan, Australia: Connor Court Publishing, 2012). Charles Taylor's analysis in relation to recent anti-religious developments in the Province of Quebec, is discussed and criticized as being sanguine and ignoring the social and legal realities there (footnote 6, p. 42).

12 Iain T. Benson, '*Considering Secularism'* in, *Douglas Farrow, ed., Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (Montreal: McGill/Queens, 2004) 83 – 93

13 The Consultation Document for the Commission may be seen at: http://www.accommodements.qc.ca/documentation/document-consultation-en.pdf where the definition of 'secularism' in the Glossary defines the term as meaning the equivalent to the French *laïcité* or, as it says, 'the separation of church and state.' Elsewhere the Document defines 'open secularism' and 'radical secularism' but, with respect, the definitions fail to analyze secularism itself as 'anti-religious', 'separation of church and state' as a valid concept that does not preclude co-operation and do not sufficiently locate religious beliefs within the public sphere in the manner anticipated in *Chamberlain*.

do well to keep the terminology clear in this complicated area.

Secularisation

Secularisation is commonly understood as captured in this definition by Brian Wilson as:

> the process in which religious consciousness, activities and institutions lose social significance. It indicates that religion becomes marginal to the operation of the operation of the social system, and that the essential functions for the operation of society become rationalized, passing out of the control of agencies devoted to the supernatural.[14]

Such a definition obscures the anti-religious dimension of secularism by describing its results without reference to their cause – for ideological secularism is indeed prominent among the causes of the process here indicated. Moreover, it falsely suggests that the process is natural, inevitable and all in one direction.

Separation of church and ctate versus co-operation of church and state

The separation of church and state is a jurisdictional distinction important to both the church and the state. A valid separation should not preclude a valid *cooperation* between church and state. Most religious groups in the west, for example, do not in fact want the state to run 'the church' or vice versa.

Yet this separation is often used to justify a stripping of the public dimension of religion that is recognized elsewhere in the law. Both 'secularism' and 'separation' are, as noted above, historically complicated and 'secularism' is, in fact, found to be an expressly anti-religious ideology when examined properly. Neither the Supreme Court of Canada, nor the Taylor/Bouchard Commission which was set the task of examining accommodation in relation to religion in the Province of Quebec, examined the problems with the category of 'secularism' and the importation of American conceptions (rejected by the courts in both South Africa and Canada) of 'the separation of the Church and State.' This was a missed opportunity.

As suggested elsewhere in this paper, we would do well, in light of both the South African and Canadian history, particularly in relation to education and health care (and their constitutional provisions) to recognize that the more appropriate formulation of our relationship is 'the co-operation of church and state.'

The state does not have 'one' view on most matters

The State (as law and politics) exists to maximize diverse ways of living (within certain limits) rather than to enforce conformity. Mediating institutions such as the family, community associations of all sorts, and religions must be allowed to exist in a wide variety of forms. The idea of a singular 'State' with 'a' set of views, on legally contestable matters, that must govern on all topics, is an abstraction and an inaccurate one. Both the temptation to ever extend the State for this or that purpose as with the temptation to reduce the diversity of beliefs that must exist *within the State,* must be carefully guarded against.

Strictly speaking, 'the State' has no beliefs. It is a formal set of inter-locking rules and principles cordoned round by laws many of which admit of great and necessary diversity themselves.

14 B.R. Wilson, 'Secularization,' in Eliade, *The Encyclopedia of Religion*, 15: 160

The existence of administrative discretion in many areas speaks to a certain capacity of flexibility that is necessary. Similarly, the State resiles from stating (as some would wish it did) certain conclusions in certain areas. Thus, to take a controversial but current example, the same-sex marriage issue has raised the question of whether Marriage Commissioners should have their conscience views respected as 'public office holders.' Both views, for and against accommodation, though in conflict, are 'legally contestable' because, as a country, we allow divergence of beliefs as to what constitutes the meaning of marriage. I use this example as it neatly frames how the extension of a Constitutional recognition in one area does not preclude the freedom of citizens to hold other viewpoints on the matter. This is so for many issues in Canada today.

It follows from what I have argued that since there is and should be no one 'State's view' of the matter regarding marriage, the accommodation of divergent views should allow people to perform as Marriage Commissioners who may have a personal conscientious or religious objection to certain kinds of marriage. As long as the objections are clearly set out in a civil manner, it would seem to me we ought to be culturally robust enough to accommodate such diversity of agreement into our laws at whatever level. This view, favourable to accommodation of divergent beliefs seems to have the dominant support in the academic literature in this area but does not seem to have found similar judicial support. [15]

On the other hand, the State must be able to interfere with beliefs of citizens (religious or not) at the margins where there are genuine concerns about threats to life or property or 'civil order' that require intervention by courts on review.[16] Both International Documents and South African and Canadian jurisprudence recognize such marginal limitations on beliefs.

15 Against the position I am taking here, see: Bruce MacDougall, *Refusing to Officiate at Same-Sex Civil Marriages*, 69 Sask. L. Rev. 351,353–54 (2006). Professor MacDougall notes that Prince Edward Island and New Brunswick have amended their Marriage Acts to provide the right of refusal and lists British Columbia, Manitoba, Newfoundland and Labrador, and Saskatchewan as Provinces that have policy statements denying the right to refuse. at 353 n.11. In favour of my position, see: Lorraine P. Lafferty, *Religion, Sexual Orientation and the State: Can Public Officials Refuse to Perform Same-sex Marriage?*, 85 Can. Bar Rev. 287, 307–312 (2007) (arguing that tolerance implies disagreement and requires accommodation and public officials should be entitled to refuse) and Geoffrey Trotter, *The Right to Decline Performance of Same-sex Civil Marriages: The Duty to Accommodate Public Servants – A Response to Professor Bruce MacDougall* ,Vol. 70 (2) Sask. L. Rev. (2007) 365-392 (deals with issue as a 'collision of rights' the 'duty to accommodate' requires the ability to decline; does not deal with the problem of viewing 'the state' as having one viewpoint on the matter). The Saskatchewan Court of Appeal (leave to appeal was refused by the Supreme Court of Canada) adopted an approach to 'public' roles that was inconsistent with the logic of the approach to 'secular' accepted by the Supreme Court of Canada in *Chamberlain*. The clarity of the courts' reasoning was not helped by the fact that the many counsel before the court failed completely to argue in their written arguments, the relevance of the *Chamberlain* decision for a richer understanding of a shared public sphere. *Chamberlain* and its historical significance and jurisprudential relevance to such cases as the Marriage Commissioner's case appears to be largely unrecognized by the learned members of the Bar as well as the judges of the Saskatchewan Court of Appeal: see, *In the matter of the Marriage Commissioner, Appointed under the Marriage Act, 1995 S.s. 1995*, C.M-4.1 2011 SKCA 3 (January 10, 2011). See also, Kevin Boonstra, Lexview No. 720. 'Does the Charter Excuse the Government from Accommodating Religious Belief' May 18, 2011 ('The Court placed insufficient weight on the rights and dignity of the Marriage Commissioner') <www.cardus.ca>.

16 We have seen much litigation to determine where the line exists in this area and one need only think of such issues as 'blood transfusions', 'Sunday closing', 'turbans in the R.C.M.P.', 'kirpans in schools' 'the conscience of physicians and pharmacists in relation to abortion' to recall how these matters have forced, and are forcing, Canadians to come to terms with divergence in our plural society.

Article 18 (3) of the 1948 *Universal Declaration of Human Rights,* to which Canada is a signatory, states that:

> Freedom to manifest one's religion or beliefs, may be subject only 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.

This limitation formulation was incorporated in the key passage to date in Canadian Charter jurisprudence dealing with the freedom of conscience and religion in Section 2(a). In an attack on the constitutionality of the *Lord's Day Act* by several retailers who were convicted for opening their businesses on Sunday, Chief Justice Dickson, in agreeing that the Act was unconstitutional because it compelled religious observance, held that the essence of the freedom of religion is:

> Freedom [of religion] in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to be forced to act in a way contrary to his beliefs or his conscience.[17]

The focus on the public dimension of the freedom of religion as articulated in the earliest, and still centrally cited, decision of then Chief Justice shows that religion cannot properly be read merely into the private realm with no relevance for public policy. Its public dimension requires public consideration *and* accommodation.

The recognition that all positions, including atheism and agnosticism, are positions of 'faith,' even though not of religious faith, can prompt a re-understanding of the public sphere in a more accurate manner. How this happens depends on the definition of the public sphere as this determines how we eventually accommodate or fail to accommodate differing beliefs, regardless of whether these beliefs are religious or non-religious in nature. The principles of accommodation and diversity, both well established and recognized in the law, are of practical importance in terms of how they work out in culture and politics.

Much of the language that is used to characterize the public sphere virtually insulates it from religion and insulates religion from its proper public influence. Thus, if 'secular' is equivalent to 'non-religious' and 'secular' means all those public things like government, law, medical ethics, public education and so on, then these major aspects of culture are outside religion and religion is outside them. This important aspect of the foundational language is rarely commented upon and shows the dominance of the exclusivist (religion excluded from the 'secular' as public) position.

But what about the beliefs of the citizens who are in government, law, medicine and public education? When the 'secular' is read as 'non-religious' in its exclusivist position, then the beliefs of atheists and agnostics, who define themselves as 'non-religious,' are accorded representation, but those who define themselves as 'religious' are not. This is neither representative nor fair, yet it is the dominant and largely unexamined result of assuming the 'public' as 'secular,' and the 'secular' as 'non-religious.'

This article is a counter-reading to this common and, I have argued, erroneous construction

17 *R. v. Big M Drug Mart, Ltd.*, [1985] 1 S.C.R. 295, 336 (Can.) at 353 – 54.

of the public sphere. If 'secular' means 'the opposite of religious' or 'non-religious,' and if the public realm is defined in terms of the 'secular,' then the public sphere has only one kind of believer removed from it - -the religious believers. I suggest that this way of using 'secular' is deeply flawed and will tend to lead us in the direction of religious exclusivism. An express meaning to 'secular' or 'public' that rules out religion without arguments based on fairness and justice leaves those realms distorted in relation to principles of accommodation. If we start off with an implicit idea that the public is secular, thus 'non-religious,' then it is difficult to balance or reconcile the various interests held by religious claimants and others in a public setting.

In contrast to this exclusivist position, this article suggests a different approach, that of 'religious inclusivism.' Only within an inclusive approach can accommodation and diversity have their proper application and meanings. Proper understanding of the public sphere requires a more explicit acknowledgment of the beliefs of those within it, whether these beliefs come from religion or not[18]

The Constitutional Court of South Africa has also recognized different spheres but, in common with general usage and the all too common judicial dicta, placed 'sacred' and 'secular' in unhelpful opposition. Despite this, Fourie, in understanding the public realm as an area of 'co-existence' between different spheres, moved towards a richer and more nuanced understanding. In the words of Justice Sachs:

> In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other […]. The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. *The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.* […] It is clear from the above that acknowledgment by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity (Paragraphs 94-98, emphasis added).[19]

In line with the argument above, however, it would have been better to describe the relationship between the state (law and politics) and religious believers as part of a relationship in which, despite the jurisdictional separation, there is co-operation within 'the same public

18 See: Iain Benson, 'The Case for Religious Inclusivism and the Judicial Recognition of Associational Rights: A Response to Lenta. Case Comment.' *Constitutional Court Review*, 1, pp. 297- 312 (2008).

19 *Minister of Home Affairs and Another v. Fourie and Another (with Doctors For Life International & Others, Amici Curiae) and Lesbian & Gay Equality Project & Eighteen Others v. Minister of Home Affairs* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) ('*Fourie*') In *Fourie*, Justice Sach's conception of differing beliefs co-existing within the public realm is of signal importance and sets the stage, along with the approach of Justice Gonthier in the *Chamberlain* case, for a redefinition or, better yet, *re-understanding* of what might be termed central public terminology.

realm' without reference to the 'secular' and the 'sacred.'

The need to move away from 'religion and the secular'

For many people, including politicians and religious leaders, the phrase 'religion *and* the secular' contains the implicit assumption that whatever the 'secular' is, it is somehow completely separate from religion. Yet, if religion (religious persons and their communities) are to have a role in the public sphere (that includes, at the very least, public education, medical ethics, politics and law themselves), then a bifurcation of this sort is destructive to the idea of a interpenetration between religion and the wider culture that we have seen in the legal decisions just referred to, that the law has begun to recognize.

Prior to *Chamberlain,* it was not uncommon (and still is not in general usage) to see comments from the judiciary that drew a sharp line between the 'secular' and the sacred and between intellect and faith. Consider the following passage from a leading decision on Catholic denominational rights from 1999:

> A non-believer would necessarily teach the subject *from an intellectual rather than a faith-based perspective.* Separate [religious] schools do not aim to teach their students about these matters from a neutral or objective point of view. Separate schools explicitly reject that secular approach…[20]

Note how faith here is viewed as distinct from 'intellectual' and the secular is insulated from the religious perspective. *Chamberlain,* if its implications are worked out consistently therefore, will mark a revolutionary paradigm shift with major legal and cultural implications.[21]

Religion not just a private right; The public place of religion in both South Africa and Canada; 'Separation of church and state' and laicism rejected; Co-operation of religions and the state affirmed in both Canada and South Africa:

It had been commonly understood, at least since the *Big M Drug Mart* decision of the Supreme Court of Canada (1985), that the essence of the freedom of religion was not just the right to have a religion in private but '… the right to declare religion openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by

20 *Ontario (A.G.) v. Daly* (1999) 38 O.R. (3d) 37 at para. 65 per Sharpe J emphasis added.; upheld by [1999] 172 DLR (4th) 241 (Ont. C.A.), leave to appeal to refused 21, Oct. 1999, S.C.C.A. No. 321.

21 A good example of a learned exchange that fails to show any appreciation of even the possibility of the religiously inclusive secular is one between Professors Sajó and Zucca (though many other authors could provide illustrations of the point): See, András Sajó 'Preliminaries to a concept of constitutional secularism' I•CON, Vol. 6, Number 3 & 4, 2008 pp. 605-629 and Lorenzo Zucca 'The crisis of the secular state-A reply to Professor Sajó' I•CON, Vol. 7, Number 3, 2009, pp. 494 – 514. Professor Zucca's generally strong rejoinder to Professor Sajó would have been much more effective had he not accepted the former's (and most people's) discussion of '..conflicts between religion and the secular state…' (at 514). We do need, as Professor Zucca suggests '…to modify the attitude with which the secular states respond to diversity and the fact of pluralism' (at 514) but, ironically, the most likely way of doing this is to stop characterizing the public spheres and states as 'secular' when they are very much something else -- *states made up of competing belief systems* that can and should expressly include the *public* dimensions of religions. Until these deeper epistemological waters are navigated we shall never properly deal with the relationships between law and religion or the state and beliefs including the religious.

teaching in dissemination'.[22]

Note that the words employed are active, public words – 'declare', 'manifest', 'practice', 'teaching', 'dissemination'.

Further insight about the public nature of religious freedom may be found in South African jurisprudence. There it has been recognized that religion is not always merely a matter of private individual conscience or communal sectarian practice. Thus, Justice Sachs has stated that:

> Certain religious sects do turn their back on the world, but major religions regard it as part of their spiritual vocation to be active in the broader society. Not only do they proselytize through the media and in the public square, religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution.[23]

In another decision, the same judge stated:

> One cannot imagine in South Africa today any legislative authority passing or sustaining laws which suppressed central beliefs and practices of Christianity, Judaism, Islam or Hinduism. These are well-organised religions, capable of mounting strong lobbies and in a position materially to affect the outcome of elections[24]

Neither country accepts the American conception of 'separation' (as that has come to be defined) nor the French conception of *läicité*. This does not mean, however, that arguments based in whole or in part on these concepts are not made in courts or heard in political or popular rhetoric; they, and comments regarding the equally misunderstood concepts of 'secularism', are as ubiquitous as they are confused and confusing.

Neither South Africa nor Canada has been subject to the kind of inter-religious battles that one observes in other countries. This is not to say, however, that religious persons and their communities are sanguine about their position within contemporary Canadian or South African culture. The litigation examples, upon which I shall draw, below, show that here, as in other areas eternal vigilance (and litigation) have often been the price of religious liberty.

Religion is recognized as being important to society more in South African case-law than Canadian

The legal judgments in South Africa have recognized the importance of religion to South African society. They have done so in a language far more encouraging of the importance of religion than one would find in legal judgements elsewhere in the world, such as Canada. A judgment exemplifying a positive conception of the role of religion to South African society is a decade-old decision from the Constitutional Court of South Africa in the case of *Christian*

22 *R. v Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 336 (SCC).
23 *Christian Education*, 2000 (10) BCLR 1068.
24 *Prince v. President of the Law Society of the Cape of Good Hope and Others*, 2002 (3) BCLR, 289.

Education v. The Minister of Education. Though it was referred to more recently in a Supreme Court of Canada decision touching on religious rights, the following critical passage was not referred to by the Canadian judges:

> For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong.[25]

Note here that religion is recognized as having a social dimension as well as a personal or individual dimension. This is important as some commentators (and a few Canadian legal decisions) have suggested that the right of religion is essentially individualistic. The passage above shows a greater awareness of the social importance of religion.

Nowhere can a passage be found in a Canadian Supreme Court decision, or any other Canadian decision with which the author is familiar, that says the sort of thing referred to above from the *Christian Education*-decision in South Africa. Canadian judges, and those in other countries, are much less confident about the important cultural role of religion or, alternatively, do not speak in such encouraging terms about it. This hesitance does not assist the public respect for religions or a richer conception of pluralism including religious pluralism.

Quebec compulsory course on ethics and religious culture and refusal to grant exemptions to students of objecting parents

A recent controversy in the Canadian Province of Quebec, a province known for its particular concerns about religion during and since 'the quiet revolution,' a mandatory course entitled 'Ethics and Religious Culture' (ERC) has been created for all schools, public and private, confessional and non-confessional. Despite many hundred (some have said as many as two thousand) requests for exemptions from parents and from at least one Catholic High School, the Province has refused to grant exemptions.

The Supreme Court of Canada, in a surprisingly short decision (it had been reserved for almost a year and had a very large number of interveners when the matter was argued) ruled in favour of the Province holding that the parents had failed to satisfy the preliminary test that their religion had been harmed. The court held that the parents must show that their ability to pass on their religion to their children had been proven 'on a balance of probabilities' and this the parents had not done. The decision has caused considerable concern as the court seemed to depart from earlier decisions in which 'sincerity' of the belief, not anything as invasive as showing the very harm the parents wished to avoid – was the test.[26]

25 *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757 (CC), paragraph 36; referred to in the judgment in Canada on the case *Bruker v. Marcovitz* 2007 SCC 54. For the scope of freedom of religion in South Africa, much of which was based on Canadian decisions, see Iain Currie and Johan de Waal *The Bill of Rights Handbook* (Cape Town: *Juta, 5th ed.* 2005) at 336-357.

26 *S.L. and D.J. v. Commission scolaire des Chênes and Attorney General of Quebec*, *S.L. et al, v. Commission Scolaire des* Chênes 2012 S.C.C. 7 (February 17, 2012). I declare an interest. I was counsel in that case for two intervener associations, the Canadian Council of Christian Charities and the Canadian Catholic School Trustees Association. Prior to this it was settled law in Quebec that no child could be

Failure to grant exemptions from mandatory ERC course to Catholic High School overturned: decision in the appeal courts.

In parallel proceedings a Catholic High School has successfully overturned the Province's failure to grant it an exemption from the course when the Minister failed to consider a Catholic course on world religions and ethics 'equivalent' to the required course.[27] In various statements, the Assembly of Quebec Bishops adopted a conciliatory 'wait and see' approach and said that it had 'some concerns' about the curriculum. The Assembly, however, failed to make any statements about the importance of exemptions or alternative delivery of valid program goals and, in so doing, was taken by the trial judge to have endorsed the matter from a Catholic perspective. Statements by a Catholic theologian (also not referring to parental exemptions) bolstered the judge's view that the Catholic Church endorsed the program. A much stronger statement citing the importance of parents as primary educators and the Province's duty to consider exemptions or acceptable compromises (i.e. alternative delivery to valid Provincial goals) was in order but was not forthcoming.

Directives that religious day-care schools cease teaching religion or having religious observances

Recently a Directive from the Quebec minister de la Famille Mme. Yolande James, instructed all subsidized religious day-cares in the Province to cease giving any religious instructions in religious day-cares. The Minister indicated that for reasons of socialization those between 0 and 5 years of age would no longer be permitted to be exposed to any religious activities '… par exemple, la récitation répétée de prières, la mémorization de chants religieux ou l'apprentisasage de gestuelles religieuses.'[28] The justification rests upon the claim that there is a difference between teaching religion and celebrating a cultural tradition. Christmas trees and the songs of Bing Crosby may be allowed to remain as long as the songs are of a non-religious sort.

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forced to attend religious instruction contrary to the wishes of his or her parents. See: *Chabot c. School Commissioners of Lamorandière* (1957), 12 D.L.R. (2d) 796 (Que. C.A.). See, for a South African comparison respecting the denominational nature of religious schooling and a rejection of three leading Canadian cases (a rejection the author believes is justifiable) *Wittmann v. Deutscher Schulverein, Pretoria and Others* 1998 (4 SA 423 (T) (Transvaal Provincial Division) per. van Dijkhorst J. who distinguished *Adler v. Ontario* (1996) 3 SCR 609, *Canadian Civil Liberties Association v. Ontario* (1990) 46 CRR 316 and *Zylberberg v. Sudbury Board of Education* (1988) 34 CRR 1 all of which rejected exemptions as satisfactory in the face of religious education and opening exercises.

27 *Loyola High School v. Courchesne*, Superior Court (S.C.) Montreal, QC, Canada, 500 – 17 – 045278-085, Justice Gérard Dugré (June 18, 2010) Reported at 2010 QCCS 2631. This matter has been argued before the Quebec Court of Appeal but at the time of writing no decision has been released.

28 Centre de presse. Quebec Met fin A L'Enseignement Religieux Dans Les Services de Garde Subventionees, Monreal le 17 decembre 2010 see: http://www.mfa.gouv.qc.ca/fr/ministere/centre-presse/communiques-famille Press reports have pointed out the public concerns about the government's new Regulations and noted the irony that manger scenes may still be allowed but that those who run the schools may not name the figures. In addition the Minister explained that while Imams, rabbis or ministers may visit the religious day-cares they may not speak about religion. See: Lysiane Gagnon, 'Lose Religion or the Subsidy' *Globe and Mail*, Tuesday December 28, 2010 p. A17; Editorial, 'Religion in Retreat' *The National Post*, Thursday December 30, 2010 p. A10; Ingrid Peritz, 'Quebec Curbs Religion in daycare; Policy triggers emotional debate over how inspectors will differentiate between religious conviction and cultural values' *The Globe and Mail*, Wednesday, December 22, 2010 page A4.

The breadth and depth of this concern is not something that any citizen should take lightly given the important role that religious beliefs play in society. It remains to see what the Assembly of Bishops of Quebec, or any individual Ordinary will say publicly in relation to this most recent over-reach by the Province of Quebec.

We are at a stage of development in the jurisprudence of both Canada and South Africa (and the same holds true for other countries) where, as we have seen in the decisions referred to above, from time to time, the courts under either the South African or Canadian constitutions have had to wrestle with the appropriate line between judicial interpretation and the lives of those persons living under a religious order.

In a decision from 2006, the Chief Justice, giving the reasons for the majority of the Supreme Court of Canada, noted that both the state and the law should be reticent to delve into personal matters that are related to the nature of religious belief, because:

> The state is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, 'obligation', 'precept', 'commandment', custom or ritual. *Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.'*[29]

This is exactly correct but one wonders if the recent decision in the Drummondville parents' case or the actions of the Quebec government are consistent with the respectful approach set out in the earlier decisions and approaches; it would seem not.

The frame, therefore, is established between religion as having a necessarily but limited 'outside' public dimension (the Big M Drug Mart decision of the Supreme Court of Canada, above) and the same court's reticence to get 'inside' religions and their dogmatic 'private' determinations (Amselem). A similar insight has emerged from the Constitutional Court of South Africa. This court has also recognized different spheres but, in common with general usage and the all too common judicial dicta, place 'sacred' and 'secular' in unhelpful opposition. Despite this, the Fourie decision, in understanding the public realm as a sphere of 'co-existence' between different spheres moves or should move us towards a richer and more nuanced understanding in line with the comments set out above.[30]

This paper, has examined the framework language used to discuss religion and law and suggested that many of the key terms are deeply confused, misleading and that they create what is, in effect, an illusion. Thus, a re-thinking which recognizes that all persons are believers (it is not whether they believe but what they believe in that is the proper description of things) and that all are in some kinds of communities of faith and belief goes some way to identifying the all too common (and implicit) dominance of atheism and agnosticism in the current age.

The re-configuration of the meaning of the 'secular' (which marks a kind of shift of the usual paradigm of separation and exclusion that has been in place for a very long time) may be said

29 *Syndicat Northcrest v. Amselem* [2004] 2 SCR 551 at para. 50 (emphasis added)

30 *Fourie above, note #19,* at para s.94-98 (emphasis added). Justice Sachs' conception of differing beliefs co-existing within the public realm is of single importance and sets the stage, along with the approach of Justice Gonthier in the Supreme Court of Canada Decision in *Chamberlain*, for a redefinition or better yet a 're-understanding' of what might be termed central public terminology.

to have most clearly begun in the Canadian Supreme Court decision in *Chamberlain.* Since the fuller implications of that decision are poorly understood even in Canada, it is no surprise that it is not getting noticed elsewhere. The decision and its central holding about the nature of the inclusive public sphere needs to be more widely understood and applied.

Law has its public role but so does religion – yet they are different. Speaking truth to power is influenced by the means chosen to do the speaking. Theocracy seems to corrupt religious proposition by using the instruments of coercion that are essential to law in service of religions which should be about witness not coercion. On the other hand, when law extends beyond its proper boundaries into the areas that should be reserved for families and associations in relation to religious liberty, it too is corrupted.

The current phase in constitutional democracies is one of a kind of tug-of-war between convergence and accommodation of difference, between subsidiarity and statism. For this reason there is a co-operation that is both practical and principled. Practical because the concerns of any threatened *subsidium* is a concern of all, and principled because the affirmation of freedom and conscience demands respect for others. Learning to live together with disagreement and respect is an achievement that will require better frameworks than we are employing currently.

KEYWORDS
Definitions of 'secular' 'secularism' and 'secularization'
Freedom of association
Freedom of religion
Nature of public sphere
Constitutional law and freedom of religion

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The Dutch Reformed Church

1. Law and religion in south africa before 1994

Many scholars have tried to define the relationship between church and state in South Africa between 1652 and 1994.

Gerald Pillay divides the period in two parts. During the first 150 years, he says "that despite the presence of other Christian denominations and, indeed, other religions, there existed a state church" Round about 1800 a period started in which religious pluralism was allowed to develop... The apartheid period was a disruption of this process towards pluralism. The DRC again gained influence in 'Ceasar's' household'". By 1980 the African Independent Churches overtook all the established churches in size and growth rate (Pillay 1995:86). As will be seen, I think Pillay's description of the DRC as a state church between 1652 and 1800 can be challenged. Speaking of the "influence in 'Ceasar's household " after 1948 is true in a sense but must surely not be understood in the sense of a theocracy.

Tracy Kuperus views the relationship between church and state/ Law and Religion in South Africa primarily in terms of race relations. She is of opinion that the Dutch Reformed Church's entanglement with race issues "began soon after the first white settlers arrived in South Africa" (Kuperus 1996:2). She argues that "the NGK's heavy political involvement with the state began in the early 1900's when it advanced a Neo-Calvinist, ideological justification of apartheid."(Kuperus 1996:3). Between 1948 and 1978 the state and the DRC was virtually identical according to her. "After 1961 the two entities became socially indistinguishable with the NGK following the state's lead" (Kuperus 1996:3). From 1979 up until 1994, the DRC and the State agreed on key issues like sanctions and violence. "The overlap in membership and white interests allowed both institutions to support one another. But by the 1980's the NGK had lost its influence as a dominant political player. The state fostered reform while the NGK could not offer full support, whether the issue was constitutional restructuring or educational reform." (Kuperus 1996:15). She argues that the reason why the DRC fell behind was because it "deferred to its conservative faction." (Kuperus 1996:19).

For the purposes of this paper the two concepts of Theocracy and Constantinianism are important. Both the Constantinian and Theocratic models for the relationship between religion and the state are positive about the role that religion should play in society – according to Christian thinkers in this regard, society should serve the Triune God and Christianity should provide direction to society. The two models differ on who should be the guide or the leader in the role that religion plays in society. According to the *Constantinian model* the political authorities, often with their own understanding of what Christianity means, are dominant over church authorities. This means that the political authorities assist, influence and sometimes fully control and use the church. It also means that the state has a role to play in the advancement and support of the "true religion" even to the extent that it uses its coercive power. It is important to understand that this means Christianity or whatever religion, as it is understood by the political authorities or the state. According to the *Theocratic model* the control over the role of religion in society resides with the church authorities and how they

understand Christianity or the concerned religion – the church (or religion) should dominate the political authorities as well as the rest of society (Hiemstra 2005:28-29).

This paper wants to argue that it was not a theocratic model of the relationship between church and state that determined the place of religion in the South African society from 1652 to 1994 but much rather a Constantinian model where the state, in various degrees, determined the position of church and religion in society without denying freedom of religion, or perhaps better said, without denying freedom of conscience which cannot be equated with freedom of religion in the true sense of the word (see Berkhof,1975,200). This already started in the Netherlands and was continued at the Cape after 1652 and later in the rest of South Africa until 1994.

In the Netherlands the Reformed Churches confessed the Dutch/Belgic Confession of Faith[1]. This Confession also became part of the Dutch Reformed Church that came to South Africa in 1652 as was also the case in the Dutch Reformed Churches in the other colonies of the Dutch Republic. Article 36 of the Dutch Confession states that " --- the government's task is not limited to caring for and watching over the public domain but extends also to upholding the sacred ministry, to remove and destroy all idolatry and false worship of the Antichrist; to promote the kingdom of Jesus Christ and to see that the Word of God is preached everywhere so that God might be honored and served by everyone, as He commands in His Word (Belgic Confession,2000,Harare). For the churches the intention of this article was that it was the governments task to enable churches to do their work. However it soon became clear in the Netherlands that the government not only saw it as their concern to enable the church but also to control ecclesiastical matters. In those early years after 1571 the government wanted churches to avoid constraint of conscience, they wanted to retain authority to call Reformed ministers. They wanted a regulation by which elders would be chosen from among and by the city administration and they even wanted a decisive vote in matters of doctrinal difference (Blei,2006,23-24). At the 1578 National Synod of Dordrecht the church underscored it's independence in the calling of ministers and the election of elders and deacons. However the government would not agree to this, fearful that the church would interfere in matters of state. (Blei,2006,24). In 1586 at the National Synod of The Hague church and state came to an agreement. In a revised church order the desires of government were more or less met. The church retained the right to elect elders and deacons but the city administration could appoint one or two of its members as additional members on the church council. In the synod meetings the authorities were represented by political commissioners who had to assure that the church meetings would never make decisions on governmental matters. They often intervened forcefully. In the calling of ministers the government maintained its influence and they often supported ministers with divergent opinions. As a "public church" (i.e. an officially recognized church for the whole nation) absolute freedom from state interference (Constantinianism) was and remained an unattainable ideal for the Reformed Church. The church could not emphasize its own identity in an unlimited way (Blei,2006,25). In South Africa between 1652 and 1994 the situation was no different. A few examples from history proofs the argument.

From 1652-1665 religion and the spiritual care for the people at the Cape resided with the Political Council under the leadership of the Commander. (Vorster,1956,38). From 1665 onward

1 At the Synod of Emden, held in German East Friesland from 4-13 October 1571, the confessing character of the Reformed Church was underscored. The participants signed the Dutch Confession of Faith 'to prove the unity in doctrine among the churches of the Netherlands'.

when the Cape got its first permanent minister and church council the spiritual care and ecclesiastical matters were their responsibility. However all decisions that the church council took first had to be submitted to the Political Council before they could be implemented. The Political Council did the election of elders and deacons from a pair of names that the church council submitted to them. Political Commissionars represented the Political Council at all the meetings of the different church councils. In the documents (Vorster,1956,39) there are ample evidence of the authority that the Political Council had in church matters: they appointed sick comforters and readers , placed ministers and church wardens, decided on the baptism of heathen children, the time and place of worship services, the care for widows and orphans, the founding of congregations and the building of churches. In 1689 the Political Council refused the request of the French Refugees to install their own Church Council in Drakenstein (Resolutie Pol. Raad,28 Nov 1689)

About the situation in the eighteenth century McCall Theal, as quoted by Vorster writes: "The Church was in one sense merely an engine of the State, and was always and in every sense subordinate to the Council of Polity." (Vorster,1956,39). Apart from the matters mentioned above many more examples can be added of the Council of Polity controlling ecclesiastical matters (Vorster,1956,39 – 43). In 1759 they even refused the churches at the Cape permission to continue meeting in a local major assembly thus putting back the ecclesiastical development of the church in South Africa for many years.

All of the above attests to the fact that between the years 1652 –1795 the Council of Policy had a typical Constantinian approach towards the church in South Africa. One of not merely protecting the church but also controlling it, just as it was the case in the Netherlands.

In 1795 the British took over the Cape for the first time, the occupation lasted until 1803. In the official Act of Surrender it was stated that the colonists would retain their existing privileges, also those pertaining to religious privileges. Very soon it appeared that the authorities would lay claim to their patronage rights such as that the political commissioner maintained his position in church meetings; the custom pertaining to the election of elders and deacons continued; the authorities saw it as their legal right to remove a minister from a congregation without consulting the church council. Church councils had to make an oath of allegiance to the British monarch and in 1802 British troop were quartered in a church building in Graaff-Reinet during military actions in the region (Van der Watt, 1976,69).

During the time of the Batavian Rule at the Cape 1804 - 1806 the ideas of equality and tolerance were very prominent. Commissioner De Mist wanted a separation of church and state which meant that there was no longer a privileged church. However in practice the government still controlled the church. Government appointed ministers in congregations, moved them to other congregations, paid their salaries, the election of elders and deacons were subject to the approval of the authorities, In new congregations the magistrate appointed the new church council, the salary of ministers was determined by government as well as baptisimal-, membership-, marriage- and burial fees. The financial statements of a congregation had to be approved by the magistrate. In some cases even the time of worship services was determined by government. While there was no longer an established or public church in South Africa, churches in fact became not much more than a department of government (Van der Watt,1976,70)..

In 1806 the British once again occupied the Cape. Once again there was a guarantee that that

no exceptional changes would be made to church-state relations. The Church Ordinance of de Mist was to be maintained and government was determined to apply the Ordinance. The church was controlled in more than one way. The Political Commissionair continued to have a seat in the church council of Cape Town congregation and in 1814 the practice was expanded to include all the congregations; the names of chosen elders and deacons still had to be submitted to government for their approval. At a certain stage the governor required that he make the choice for deacons from two names that had to be submitted to him; the official functions of a church minister was completely controlled by the government; government appointed, placed and dismissed ministers and in some cases even disciplined them. Under the rule of Lord Charles Somerset it was an intentional goal of the government to anglicise the Dutch Reformed Church – for this purpose it used the Scots ministers which it appointed to congregations. (Van der Watt 1976:70-71).

In 1843 the Church Ordinance of De Mist was replaced by the Ordinance no 7 of 1843. This Ordinance apparently made the church more free from control by the government such as that Political Commissioners no longer took a seat in church meetings, and the church received the power to regulate it's own internal affairs. The Ordinance was presented under the heading of "The Separation of Church and State Petition". Yet in practice the church remained subject to government in as far as the government controlled the church through the so called power of the purse and the privilege of presenting ministers to congregations. Furthermore the Ordinance restricted the church with regard to its faith character, its organization, it's competence and its geographical limits (Kleynhans 1973:80-84). It was generally accepted that Ordinance nr 7 of 1843 severely restricted the freedom of the church (Van der Watt 1980:44 – 46).

The Dutch Reformed Church in South Africa (The Cape Province) eventually decided on 21 October 1957 to ask the Government to revoke Ordinance nr 7 of 1843.

> "The Dutch Reformed Church in South Africa declares and confirms its historical view that this Church as a organized body had an independent existence in own competence even though always subjected to the articles of law applicable to the church. Since the existence of the church is not dependent on the articles of law, Synod, given the legal advice which was obtained, mandates the Moderature to approach the authorities to revoke Ordinance nr 7 of 1843"

In 1948 the Nationalist Party came into power and very soon it started to enforce its policy of "apartheid" on the whole of the country – including the churches in South Africa. It cannot be said that there was no tolerance of different faith convictions in the country but all along the government was controlling the churches through it's policies. In many cases Afrikaans speaking churches not only subscribed to the policies of the government but also encouraged them. Examples of this is Act 55 of 1949 which prohibited marriages between couples from different race groups; 1950 the Immorality act; 1957 – the Consolidation act on immorality; 1957 The Act on Group areas; 1957 the Amendment Act on Native affairs with the so called church-article (article 29(c)). According to this article non-whites could be prohibited to attend church services in white areas. Later it was explained that the intention was not to prohibit bona fide church meetings as long as these meetings were not used to disturb the public order (Van der Watt 1987:84-86). Fact remains that religion and elements of freedom of religion were controlled by the policies of the government.

In December 1960 the Cottesloe deliberation took place between delegates from different churches in South Africa as well as members of the World Council of Churches. The Dutch Reformed Church was part of the deliberation. At the end of the deliberation a statement was issued with decisions which was seen as very contentious by some. The most contentious of these regarded the following: (1) all race groups in South Africa were seen as living permanently in the country, sharing in all privileges and responsibilities. (2) The natural diversity amongst people is not eradicated by the unity of the body of Christ – yet the unity must also be expressed. This meant that nobody could be excluded form a church on the grounds of race or colour. (3) There is no Scriptural grounds to prohibit mixed marriages. (4) It is the responsibility of the authorities to look after matters such as insufficient salaries, job reservation, the negative effects of migratory labor on families; the planning of urban areas for people of color in which ownership was to be taken into account and the poor standard of communication between the different race groups and their leaders in the country..

After the delegates of the Dutch Reformed Church in Africa (Nederduitsch Hervormde Kerk van Afrika) issued a statement in which they rejected any form of integration in South Africa. The delegates of the Dutch Reformed Church also issued a statement in which they confirmed that the policy of differentiation was the only realistic solution for the problems of the country. However they also stated that it was the task of the church to be the conscience of the government – in other words it was the task of the church to test the whole of reality against the principles of Scripture.

The fact that the deliberation made some negative sounds towards the policy of the government caused reaction – some positive, some negative. The Prime Minister dr H F Verwoerd reacted very negatively in his annual New Years' radio address stating that the decisions were not the official viewpoint of the Dutch Reformed Church. The official viewpoint would be stated by the Synods. In the press and in different congregations of the DRC there were heated reaction by members of the Church. In 1961 the Federal Council of Dutch Reformed Churches, the Synodical Commission of the Orange free State as well as the synod meetings of Natal, South West Africa, the Transvaal and the Cape rejected the decisions of Cottesloe (Van der Watt,1987,105-112).

Although the DRC delegates to Cottesloe made it clear that they saw it as the task of the church to be the conscience of the government and to measure the whole of life against the principles of Scripture, the fact remains that the church in its major assemblies made a roundabout turn when it became clear that the decisions of Cottesloe criticized the policy of the government. Once again the government succeeded in controlling the church, once again a Constininian relationship between Church and State prevailed.

Contrary to the argument of Kuperus that the DRC did not develop in its view on the relationship between church and state and that it actually only deferred to its conservative members, while the state continued with its reform efforts after 1979, this paper would like to argue that after Cottesloe there was serious reflection within the DRC on various matters regarding its relationship to the state. The argument is substantiated by the fact that the General Synod of the DRC came into being in October 1962. The Church developed in its view on freedom of religion. In this regard it is very interesting to compare the formulation on freedom of religion in the first Church Order of the General Synod in 1962 where it was said

> "The Church accepts with gratefulness the protection by the authorities as well as the recognition of it's undeniable right to freedom of religion in confession and assembly

with the proviso that these freedoms will not be misused to undermine the foundations of state authority or to cause chaos in the public sphere" (Church Order 1962: art 65 c).

and the formulation in *Church and Society* of 1990

"The principle of religious freedom must be maintained at all times. This means that the government must be impartial to all churches and religions, that scope must be given in which the church may continue with its work without government interference and that no one will be discriminated against on account of their religious convictions." (Church and Society 1990: paragraph 301).

It is also significant how the DRC grew in its view on the relationship between church and state. In 1962 the Church Order reads:

"The Church accepts with gratefulness the protection by the authorities (Church Order 1962: art 65).

In the same art 65 (Church Order 1962) the church claims that it is independent in own competency which means that the church has an inalienable right to freedom of religion in terms of its confession of faith and right of association. It also claims that it is the church's sacred calling to address the state and the world in a prophetic manner according to the gospel. The 1962 Church Order also makes no pronouncement on the state's duty towards the church as it is found in art 36 of the Belgic Confession of Faith. The article does declare that the church is subject to the laws of the country in as far as they are not in conflict with the Word of God. (see also: Strauss 2003:253).

In 1990 we read the following in paragraph 290 of Church and Society

"This implies inter alia that the government will create a climate in which it is possible for the true church of Christ to withstand all idolatry and false worship, by means of the proclamation of the Word of God, to oppose the kingdom of the antichrist and to promote the kingdom of Christ." (Church and Society,1990:par. 290)

In conclusion to this part of the paper it can be said that from 1652 until 1994 it was a predominantly a Constantinian model of the relationship between church and state that to a lesser or larger degree controlled the relationship between church and state in South Africa. This meant that the church was subjected, nearly always with its own consent, to control by the authorities. After 1948 it can be said that the control by government was largely inspired by the political policies of the National Party. During these times one cannot really speak of freedom of religion that churches and religions had in South Africa – it was much rather a case of denominations and religions being tolerated. But it was also a toleration that went just as far as the policy of the government in power. Many examples from history right up until 1994 can be called as witness to this fact. At the same time it must be admitted that from 1961 onwards serious thinking on the relationship between church and state took place within the Dutch Reformed Church although to a large extent a Constantinian relationship between church and state continued to exist up until 1994.

After 1994 with the new Constitution a new era with regard to freedom of religion came into existence in South Africa. Freedom of religion became a constitutionally guaranteed right. The question is what does that mean and how must freedom of religion be understood and managed in the New South Africa.

In conclusion to this part of the paper it can be said that from 1652 until 1994 it was a predominantly a Constantinian model of the relationship between church and state that to a lesser or larger degree controlled the relationship between church/religion and state in South Africa. This meant that the church was subjected, nearly always with its own consent, to control by the authorities. From 1948 it can be said that the control by government was largely inspired by the political policies of the National Party. During these times one cannot speak of freedom of religion that churches and religions had in South Africa – it was much rather a case of denominations and religions being tolerated. But it was also a toleration that went just as far as the policy of the government in power. Many examples from history, especially after 1781 when the Lutheran Church was admitted to South Africa, right up until 1994 can be called as witness to this fact. At the same time it must be admitted that from 1961 onwards serious thinking on the relationship between church and state took place within the Dutch Reformed Church although to a large extent a Constantinian relationship between church and state continued to exist up until 1994.

2. A NEW RELATIONSHIP BETWEEN CHURCH AND STATE/LAW AND RELIGION 1994 - 2011

2.1 A new era

In 1994 and 1996 with the new Constitution a new era with regard to freedom of religion and the relationship between church and state and state and religions came into existence in South Africa. The relationship between law and religion took on new dimensions after 1994/1996 when the new Constitution was approved. Freedom of religion became a constitutionally guaranteed right. The question is what does that mean for the relationship between law and religion and how must freedom of religion be understood and managed in the New South Africa.

2.2 Under the new Constitution

1. The South African State can be defined as a Constitutional State which means that the State makes use of a written Constitution and a Bill of Rights (Chapter 2 of the Constitution) to obtain unity among the diversity of legal groups and legal interests in the country.
2. The Constitution is the highest authority in the country (Constitution a.2).
3. The Constitution distinguishes between organs of the State (a.239) and organs of civil society [a.31(1)(b)]
4. According to the Constitution, persons from a certain language, cultural and, religious group cannot be prohibited to enjoy, together with other members of their group, their culture, use their language and practice their religion [a.31(1) (a)];
5. The Constitution also provides for the possibility that the citizens of South Africa may form cultural, language and religious associations or other organs of civil society, maintain such associations and also join such associations [31(1) (b)].
6. The Constitution also guarantees the right to freedom of conscience, religion, thought, conviction and opinion [a15 (1)]. Under certain conditions religion may also be practiced at certain state or state aided institutions [a 15 (2)] while marriages may i.a.

be conducted according to a religious system as long as it can exist in accordance with other articles of the Constitution [a 15 (3) (a (i) and (b)].

7. The Bill of Rights in the Constitution is prescriptive for the State and organs of the State [a.8(1)] as well as for natural and legal persons, such as churches and religious communities [a.8(2)].

8. Article 36 of the Constitution makes it possible for the State as well as for organs of civil society to limit certain rights of the Bill of Rights [a.36].

    - (a) The State can limit rights either by way of an internal limitation article within an article [a.9(2), 15 (2) (a), 25 (2) and 29 (2)] or by means of an external law which is acceptable within the context of a just democratic society.

    - (b) Institutions of civil society can use the limitations clause [a.36] of the Constitution to limit certain articles of the Bill of Rights in their own internal constitutions and regulations, given the provisions and conditions made for such a limitation in article 36 (Landman,2006,6-8).

    - (c) Article 234 of the South African Constitution allows for charters of rights "In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.

According to statistics there is a majority religion in South Africa – the Christian religion. However within the Christian religion there is no majority denomination - all are minority denominations. At the same time none of the other religions in South Africa can claim to be a majority religion – rather to the contrary! With regard to religions and religious denominations there are no majorities in South Africa – all are minorities (South African Christian Handbook,2005-2006,28-34).

South Africa is indeed a country of pluralties. The total population of about 50 million is made up of 80% black people, 9.1% whites, 8.9% Brown People and 2.5:% Indians. The plurality of cultures within the different cultural groups is reflected in the fact of eleven official languages which are here below reflected in the percentage of speakers of each language in comparison with the total population: The languages with their percentage of speakers are Isizulu 23.8%; IsiXhosa 17.6%, Afrikaans 13.3%, Sepedi 9.4%, SeTswana 8.2%, English 8.2%, SeSotho 7.9%, Xitsonga 4.4 %, SiSwati 2.7%, Thsivenda 2.3%, siNdebele 1.6%. Other 0.5%.

As far as religion is concerned 79.8% of the population profess that they are followers of a form of Christianity. Of this 79.8% of Christians, Reformed churches make up 7.2%, Anglicans 3.8%, Methodists 7.4%, Lutherans 2.5%, Presbyterians 1.9%, Congregational churches 1.4%, Roman Catholics 8.9%, Pentacostal churches 7.3%, other churches 12%. African Independent Churches have a membership of 40.8% of the total Christian population. Apart from Christian followers in SA there are also 0.2% followers of the Jewish religion, 1.1% Islam followers, 1,3% Hindu followers, and 0.1% Buddist believers. There is also a large segment of African Traditional Religion in SA. It is estimated that 12% of the total of African Traditional Religion followers are in SA.(SouthAfrica.info The Official Gateway. http://www.southafrica.-info/pls/procs/iac.page?p_tl=2779&p_t27372&p_t3=0&p_t.: 13/4/2011; South African Christian Handbook 2007-2008: 69,74.)

Not only is there a plurality of cultures as is shown by the fact that the country has eleven official languages, there is also a plurality of religions which all claim their legitimate share of the public space.

Very soon after 1996 the question was asked what the implications of article 15 are for the religions of the land as well as for the whole of society. These questions lead to the formulation of a *South African Charter of Religious Rights and Freedoms.* Already in 1990 Judge Albie Sachs wrote *"Ideally in South Africa, all religious organizations and persons concerned with the study of religion would get together and draft a charter of religious rights and responsibilities. ...it would be up to the participants themselves to define what they considerto be their fundamental rights."* (Sachs 1990: 46-47).

Without being aware of what Judge Sachs had written a *South African Charter of Religious Rights and Freedoms* was drafted over a period of several years by a Continuation Committee of academics, religious leaders, government commissioners and international legal experts in consultation with all the major religions in South Africa, human rights groups and media bodies. The Charter was publically endorsed at a ceremony on 21 October 2010 in the presence of the Honourable Mr Dikgang Moseneke, Deputy Chief Justice of South Africa. At that occasion 91 leaders representing religious, academic, legal, human rights and media organisations in South Africa as well a international advisors endorsed the Charter. The signatories included the Jewish Religion, 24 Christian denominations, the Muslim Judicial Council, The Ismaeli Community, The Jami'atul 'Ulama (The Council of Muslim Theologians), the Hindu Faith (The Arya Samay SA, The Hindu Co-ordinating Council, the Sri Sathya Sai Baba Council, the Tamil Federation), The National Spiritual Council of the Baha'is of South Africa, African Traditional Religion, African Independent Churhes, The National Commision for Culture, Language and Religion, Women's organisations, Youth Movements, The Education Desk of the Dutch Reformed Church, The Griqua National Council, The Griqua Independent Church, The Commission for Religious Freedom of the Evangelical Alliance of South Africa, the Evangelical Alliance of Southern Africa, Trans World Radio, Media Production Houses, The Christian Network, the Jesuit Institute, The Elected School of Amadlosi and the Interdenominational Ministries.

The total of practising religious believers represented by the signatories is estimated to be aproximately 10.5 million of the total South African population.

The Charter defines the freedoms, rights, responsibilities and relationship between the state of South Africa and her citizens of religious belief. The Bill of Rights in the Constitution regocnizes that everyone has the right to freedom of religion while article 234 of the Constitution makes allowance for charters of rights to be drawn up by civil organisations which may then be enacted by parliament. The Charter of Religious Rights and Freedoms is the first such charter to be developed in South Africa. Apart from addressing the freedoms and rights of religion over and against the state the Charter is also very useful for organizing the relationship between the different religions of the land. It helps them to understand that the charter is not trying to bring about one religion in the country, or that each religion can be seen as one of many routes that can be followed. The charter defines the rights and freedoms that each religion in the country can claim while working together with other religions in the public sphere for the common good of the country. The Charter is also a very useful tool for religions to determine their own identity in terms of the rights and freedoms that they can legitimately claim. If religions do not use this tool they will find that their rights and freedoms

will be determined by the courts of the country. Even if parliament does not enact the Charter religions can always make it part of their own body of rules and regulations which will have to be taken into account by the courts.

The Charter consists of a preamble of 8 articles which expresses the needs for a charter. This is then followed by the 12 articles with subdivisions of the Charter itself in which the religious rights and freedoms of religious people and communities in South Africa is stated. The Charter expresses what freedom of religion means to those of religious believe and of religious organizations within a South African context, as well as the daily rights, responsibilities and freedoms that are associated with this right. These include:

- The right to gather to observe religious belief,
- Freedom of expression regarding religion,
- The right of citizens to make choices according to their convictions,
- The right of citizens to change their faith,
- The right of persons to be educated in their faith,
- The right of citizens to educate their children in accordance with their philosophical and religious convictions ,
- The right to refuse to perform certain duties or assist in activities that violate their religious belief.

Currently the Charter is available is Afrikaans, English, Zulu, Xhosa, Suthu, Tswanwa and also in German.

After the public endorsement of the Charter a *South African Council for the Promotion and Protection of Religious Rights and Freedoms* was established to oversee the process of the Charter being formally enacted into South African law. The passing of the Charter into law will mean that every religious believer and organization will have legal impartiality and protection to practice all elements of religious belief under the Constitution.

Currently the Council for the Promotion and Protection of Religious Rights and Freedoms are engaging with various financial, academic and cultural bodies in society as well as with various trade and labor unions for their support in taking the Charter to Parliament. Eventually political parties will also be engaged to inform them about the Charter and the effort to have it enacted by Parliament.

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Corrie, Sarel
Dutch Reformed Church in Africa

"Dei enim minister est tibi" – God's servant for your good The Dutch Reformed Church in Africa and the law

1. Introduction

According to Romans 13:4 the authorities are servants of God for the good of the people. This article want's to look at the relationship between the Dutch Reformed Church in Africa and the authorities or the laws of South Africa

The Dutch Reformed Church in Africa or properly called, Kereke ya NG (hereafter called the DRCA) takes it's base from the Holy Bible. This scriptural base determines our reformed confessional framework and the church order we are using in the church. After a short history of the DRCA, I will address our dealings with the state in two parts, pre-1994 and post-1994. I will conclude my presentation with a short word or two about our future.

2. Selected bibliography

Our best resources are the Agenda and Acts of our General Synod's meetings held every 4 years from 1963 onwards, as well as Yearbook of the Dutch Reformed Churches issued annually. Then we just opened our own website: www.ngka.co.za where we have a lot of material available. Otherwise, there isn't much articles and books available on the DRCA.

3. Scripture

The main scriptural references we find in Romans 13 and 1 Timothy 2.

3.1 Romans 13

Romans 13:4 makes it clear that the state is the minister (diakono) of God to rule the people of God. Calvin (1960b:1489) even stated that they were called "gods", so that nobody would think they are of lesser importance. It basically means they have a mandate from God and have been given divine authority as they are acting as God's representatives. Therefore Calvin (1960:282) says that the magistrates or the rulers cannot rule for their own sake, but for the good of the people. They do not have unrestrained power, "but power restricted to the welfare of their subjects". They are accountable to God and to men in their way of ruling. Because it is God who has chosen them to do his work, they are answerable to Him. Therefore, we as citizens of this country should choose our political leaders with the same sincerity and seriousness before God as we chose our spiritual leaders!

3.2 1 Timothy 2:1-4

This passage shows the importance of prayer for the authorities so that we, as the people of God, may be able to live religious and reverent lives in peace and quiet (verse 2, JB). By ruling the country in a rightful way, the authorities create a tranquil environment for its people in their entirety so that they can worship God in peace. Calvin, in his commentary on this

passage, also refers us to Jeremiah 29:7. Here Jeremiah advises the exiles to pray for the city of Babylon and to seek its welfare (šālôm). Likewise, we should pray for the authorities to uphold law and order so that the fruit of their efforts can help us to live and spread the gospel.

4. Reformed confessions

As a reformed church we are very proud of our reformed identity and our name. In the Reformed Forms of Unity we have an almost complete formulation of our beliefs. Our perception and understanding of God, his plan of salvation and our response, can all be found in our confessions of faith. In 1987, at the general synod's meeting where we discussed the Belhar confession, we decided we don't need any other confession to complement our existing confessions A decision we fully adhere to, even today.

In the court case in 1996 (case number 799/1996), where URCSA challenged our validity and even put our name in inverted commas (Die Ligdraer 19 August 1996), the Highest Court of Appeal (Case number 536/96), upheld our legitimacy and we celebrated that outcome festively. We are therefore very proud of our reformed heritage, our reformed identity and we like to show it even in the manner we dress ourselves.

The Belgic confession is the only reformed confession of the DRCA that addresses the relationship between the church and the state (article 36). This article is in full accordance with Romans 13. The authorities are there for the advancement of a society that is pleasing to God. They are also there to advance the spreading of the Word of God and the preaching of the Gospel. They do not have absolute power to exercise to exercise their authority but are granted but are granted certain means to exercise their authority. It is their responsibility not to succumb to power-hunger, but to use those power to the best of their abilities to the benefit their people. If they do that, we as a church, will support them in all their efforts to rule the country. But if and where they fail to do so, we will be actively involved with all the prophetic powers given to us by the Word of God, to expose them in a peaceful, orderly way to our fellow citizens. Our purpose is that they can correct their mistakes and govern us in a proper manner. If they make laws not in accordance to our biblical understanding, we will firstly engage in discussions with them. If they continue to implement a statute, we will not obey it. We fought against apartheid, not that individuals may prosper out of it, but so that all the people may benefit!

We would further like to state that there is a notion that respect for the authorities also applies to political parties. The church is apolitical in its nature, as its members represent the different political parties. Therefore, we will not serve, nor support, any political party in its official capacity. That doesn't mean that we can't support projects and initiatives of individual parties. Our members are free to support the political party of their choice. We see to it that there is no discrimination against a member who supports a particular political party. In the past we oversaw fair elections, without intimidation, and we will continue to do so in the future.

5. Church order

The church order we use, is based on the reformed principles from the reformation. The particular form of our original church order probably originated in 1961, from the DR church as we were still under it's direct influence. Several practical problems and situations necessitated

changes, throughout the years. During the meetings of the synod held in 1990 and 1991, several radical changes were made to the articles concerning the changing of the confessions as well as the dissolving of the church. Its purpose was to give the general synod the power to do so unilaterally, without the authority of the synods, but as it later was found to be ultra vires, in 1996 it was changed back to its original wording of 1987.

6. Short history of the DRCA

Some congregations in the Free State were constituted in the 1870's with nearly 23 older than one hundred years, with the first synod meeting in 1910. However, the current DRCA is the result of the unification of 4 independent black churches in the then four provinces of South Africa: Transvaal, Orange Free State, Natal and Western Province on the 7th May 1963 in Kroonstad. In 1994, prior to the breakaway of more than two thirds of the synods to form the Uniting Reformed church in Southern Africa (shortened to URCSA) along with the Dutch Reformed Mission Church, we had 7 regional synods and nearly 380,000 full members.

After the breakaway of the 5 regional synods, we were left with about 120,000 members. At the Synod of the Northern Cape (the Phororo synod), we were still a functional synod (only 9 of the 34 congregations and 4 ministers left). Even after the formation of URCSA, the synod held several extraordinary meetings to determine our future. Ironically, URCSA sent us an invitation (dated 21 February 1995) to their first synod meeting scheduled for 22 to 26 March 1995 at Barkly-West. This was sent by the reverend Abels on behalf of the commission of Order of that synod (a synod that still had to be constituted)! They also named their synod Phororo.

However, the synod of the Free State had split into two groups. When the DRCA group of congregations in the Free State met on 27 September 1995 at Parys to reorganize their synod, the General Synod of URCSA weren't very happy about it. They started legal procedures to stop them from functioning as the DRCA. In the meantime, the Synod of Phororo decided unanimously to apply for membership at the DRC Northern Cape synod. Unfortunately, the Moderamen of the DRC General Synod advised the Northern Cape synod not to jeopardize talks with URCSA by allowing the DRCA congregations into their midst. With that decision of the Moderamen of the DRC, an uncertain future awaited us, also costing us more than a million Rand in legal fees that could have been saved! So when URCSA took legal action, the synod of Phororo also asked to join the proceedings. That was granted by all the parties (URCSA and the DRCA Synod of the Free State).

In the meantime, in 1996, the two Moderatures of Phororo and The Orange Free state met and called the General Synod together on 25 September 1996 at Bloemfontein. At that meeting we recalled the unlawful changes made to the Church order in 1991. We also had meetings in 1999 in Barkly-West, 2003 in Kroonstad (where we also celebrated the 50th year of a united DRCA), 2007 again in Barkly-West and in August 2011 in Bloemfontein. Although we have lesser congregations and members than in 1994, we are still fully functional as a church. We had ecumenical ties with the Reformed Ecumenical Council and attended all their meetings up to their amalgamation with the World Alliances of Reformed Churches, thus forming the World Communion of Reformed Churches on 26 February 2010. We had a lot of discussions with the Dutch Reformed Church family and URCSA. Our discussions with URCSA were very tense and usually ended with talks about our properties, still illegally held by the URCSA, although the appeal court in Bloemfontein adjudged us the lawful owners. We also had a local case (the Koppie's case) where the judge, after a careful survey of the facts, adjudged us the lawful

owners of the properties. Even after all URCSA's efforts to keep the properties illegally, we still utilise opportunities to talk to them as brothers and sisters of the Lord. However URCSA must understand that their actions on the property issue are going to have serious consequences on their credibility as a church and on the further relationship between us and them as well as the other members of the Dutch Reformed family.

I want to conclude this part with a remark that even up till now, congregations and members from URCSA, all over the country, are coming back to the DRCA because of various reasons. We have grown to nearly 200 congregations and 3 regional synods with about 200,000 mebers.

7. The DRCA and the state

7.1 Before 1994

At our commencement in 1963, we as a church did not have a problematic relationship with the apartheid-government on any official level. Certain individuals did raise a lot of opposition against the government on the general synodical level, but that was not entertained by the majority of representatives. During the 1975 meeting, more critical voices against the government were heard in the reports and in discussions at the general synod. Certain issues were identified to be taken up in discussions with them. In arn ad hoc report on the Bible, race and nation relationships (Agenda en Handelinge 1975, 175-205), synod was concerned with the current state of affairs in the country and took a cautious stand on it. In 1979, for instance, the homeland governments and relationships between the different language groups (1.1.3 p 225); housing (13.1 p 251); Mozambique immigrants and local relationships (13.3 p 251) were discussed. This was done through a permanent commission for meeting with government. During the 1980's, when the DRMC (NG Sendingkerk) started the process of adopting the Belhar confession, we still had not reached the point where we felt that it gave rise for a status confessiones. Reverend Mochudi Lebone, the moderator of the general synod's meeting of 1983, told me it is still a mystery why the DRMC did not ask the DRCA to participate in the process for a unified confession against the apartheid-government of the time as we were in the same position as they! In 1986, the DRMC adopted the Belhar confession as a fourth confession at their synod meeting (several authors claim that it happened at a general synod level, but the DRMC did not have a general synod at the time). In 1987, the General Synod of the DRCA decided against the acceptance of another confession than the 3 confessions of the church (Agenda en Handelinge 1987:376). At the 1991 synod meeting, several radical changes were made to the church order in preparation for the unification of the DRCA with the DRMC. It seems that the moderature went against legal advice opting for a shortcut approach. Initially, the moderature gave the assurance that every congregation would have a say in their future. In the moderature and joint commission's report before URCSA's first meeting in 1994 (Agenda and Acts, 8) they said they consulted the congregations and that 131 said yes, 13 said no and 12 said they weren't sure. But that is only 150 congregations out of a total of 265 (DRMC) and 485 (DRCA)! They completely ignored the remainder of the congregations. In the same report (page 20, pt 3) there is a copy of the letter sent to all the congregations assuring them that church unity will not be forced upon them from above. Unfortunately, that was exactly what happened. It was forced upon them by the general synod.

To come back to the meeting of 1991, the synod forced through several radical church orderly decisions without consulting with the church order commission. Some of the controversial decisions were taken on a Saturday afternoon at a time the members of the synod were informed that no meeting would take place. The moderature then came to the remaining

representatives to meet and took decisions without a roll call or the knowledge of all the representatives.

But what is the most astonishing fact of the 1991 synod, is the expulsion of the Swaziland circuit. They just wanted to form a separate synod but in the end were expelled! It is so ironically that in a synod that was positioned for church unity, another part of the church were disunitized and sacrificed for that sake.

For the 1994 meeting, a special general synod was called together by the moderature (not the general synodical commission as the church order article 33.2 stated) for the 14th of April. All the expenses were paid by the moderature and we arrived by SAA planes in Cape Town. Then we were taken with busses to the hotel and on arrival, we were handed the Agenda of the Foundational meeting (=Stigtingsvergadering) of the First General Synod of the Uniting Reformed Church in Southern Africa. That wasn't the reason we were called together. The moderature then called a preliminary meeting together that evening to have a roll call of the members of the DRCA special synod. It was a chaotic meeting because of all the questions that were raised about the validity of the meeting. In the end the moderature referred all the outstanding matters to the next day when synod was scheduled to start. But the next day the synod started with all the delegates of the DRMC already there and seated so that the opening was held and constituted and a new church, URCSA, was constituted. The Uniting Reformed Church of Southern Africa was formed without even one complaint or question answered!

7.2 After 1994

When the ANC-controlled government came into power in April 1994, they did not make a lot of changes to our position as a church. Our biggest problem since 1994 was not the state or the law, but URCSA. URCSA was not formed according to reformed principles whereby it is firstly had to be constituted by the local congregations and thereafter formed into regional synods which then constitutes a general synod. In this case the child gave birth to its mother!

Our reformed identity was crushed by the formation URCSA and therefore we could not participate with them anymore. They decided to take us to court to use state law to force us into an unification with them (in contradiction to the Belhar confession that confesses a unity out of love and freedom and not under constraint – Afrikaans 'dwang'!). I remember at our first meeting with our advocates, advocate Hans de Bruin asked us, what is your purpose for making this case. Our answer was, not to destroy URCSA. If they wanted to be a church aware or unaware of the unreformed procedures they had performed, let it be. But, we still wanted to be that DRCA for who our reformed name and reformed history and reformed church order were important.

When the final appeal verdict was given on the 27th of November 1998, judge Harms and the 4 other judges involved, said that a new church, URCSA was formed and the congregations and synods that didn't want to be involved, would stay the DRCA. Therefore none of their properties, liabilities and goods went over to URCSA. URCSA had asked for that to happen and when it was repudiated by the court, they didn't want to return our properties. What kind of justice is URCSA then confessing in the Belhar confession? In the first instance they went to the court of law to ask for clarity on this issue and when the highest court of law gave them their answer, they didn't want to abide by it. Therefore, and I want to state this clearly, the DRCA, will not accept the Belhar confession because we are of opinion that we cannot trust them on this issue!

Our biggest challenge since 1994 was the new labour legislation the state introduced. This challenged the DRCA to have a good look at the position of our ministers in the church. We decided to uphold the reformed principle that a minister is a servant of the Lord and that the church council only oversee and support the minister in his or her duty.

8. Our future

From lessons learned in the past, we will decide our own way forward. Each DRCA congregation will have a say in the decisions about unity. The process we went through with URCSA and the court cases thereafter, taught us a lot of valuable lessons. There are no short cuts for the process of reunification. We long for our Dutch Reformed church family to be one, but we are willing to start with a minimal solution without the threat of court cases and decisions forced onto us from the top. When all our congregations are ready to move ahead, we will move forward!

9. Conclusion

As a reformed church in South Africa, we honour the state as a *Dei enim minister est tibi in bonum*, the state is a minister of God for our good (Romans 13:4). Therefore we will also honour all its laws if it is not in conflict with the Bible and our beliefs. We also want assure the state that if there is a conflict of interests, we will first engage in discussions with them and not unilaterally stand by our beliefs. But, as a church we also ask the state to be there for our good, thus to be there for all its citizens, especially those who are poor and vulnerable. In the theological dictionary to the New Testament the word "good" is defined: "As an adjective ἀγαθός expressing the significance or excellence of a thing or person".

God sees the church and state as partners in his kingdom? He sees them both as partners and even better, as co-workers, each in their own sphere, in his kingdom! We as a church will acknowledge that.

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Roman Catholic Church

Law as an enabling principle in the Catholic Church

Introduction

The Catholic Church is an ancient institution, which at the present moment has a membership of well over 1,2 billion people or three quarters of all Christians on the globe. It is well known that the Church is presided over by the bishop of Rome, who is elected by the college of cardinals, and who is currently Pope Benedict XVI. He is not only the head of the Church, he is also the legislator for the Church.

Although in some ways he is an absolute monarch, in many ways he cannot and does not rule alone. He is the head of the college of bishops, some 4 500 of them, who head dioceses throughout the world. Collectively they are the successors of the twelve apostles and together they also have legislative power. Thus, over its 2000 year history the Church has held many regional councils and twenty ecumenical councils, which acted as policy making bodies and enacted laws valid either for the region under the council's jurisdiction or for the universal Church, in the case of the ecumenical councils.

It is clear that a body of people, constitutive of the universal Church and comprised of every nation on earth, is extremely diverse and needs a strong centralised authority to ensure that good order is maintained within the Body of Christ. At the same time, it is necessary to devolve authority to the local level, so that universal norms may be particularised and made relevant to the ordinary Christian at the parish level.

What is Law?

A Church with a 2000 year history has a whole library of decisions made for general and particular situations. However, laws do not exist for their own sake. Just as theology can be described as *faith seeking understanding,* so can canon law be described as *faith seeking action.* In other words, theology is the theoretical foundation upon which canon law must build to propose a practical course of action.[1]

After 1900 years of history, and a vast body of rules and regulations enacted over 19 centuries, Pope Pius X decided that the laws should be codified within the covers of one book.[2] It took Cardinal Gasparri and his team of jurists only four years to do this, and the very first Code of Canon Law for the Catholic Church was promulgated in 1917 and coming into effect in 1918. This Code was based on Roman law, and it was divided in five sections: General Norms, Regarding persons, Regarding things, Penalties and Procedures.

In the mind of the Pope, this was the end of the matter, and the Church was well served with

1 For a succinct exposition of the role of law in the Church and the relationship between theology and canon law, see LM ÖRSY, "Theology and Canon Law", in BEAL, JP, JA CORIDEN & TJ GREEN (eds), *New Commentary on the Code of Canon Law,* New York, Paulist Press, 2000, 1-8.

2 See JA ALESANDRO, "General Introduction", in JA CORIDEN *et al* (eds), *The Code of Canon Law: A Text and Commentary,* 1982, New York, Paulist Press, for a short history of the development of canon law (pp 1-4), the revision of the 1917 Code (pp 5-14) and a short overview of the 1983 Code (pp 14-22).

a book which was cast in concrete for all time. This, of course, did not happen, and barely 40 years later Pope John XXIII realised that the Code was hopelessly outdated and was not able to address the problems of the modern world. So in 1959 he decreed that the Code should be thoroughly revised to make it more relevant and user-friendly. At the same time he called together an ecumenical council with the express purpose of effecting a renewal in church life. During the theological debates at the council it soon became apparent that, since theology is the foundation of law, the revision of the Code would have to be postponed until the council had completed its work.

The council changed the way the Church saw itself, its perception changing from the Church as a perfect society to the Church as a pilgrim people of God, a community of believers, helping each other on their pilgrim way to God. Thus the under-lying principle for the revision of the Code that followed the decisions of the council was that the Code should be an instrument helping believers achieve union with God.

The Purpose of Law

Pope Paul VI, the successor of John XXIII, was an incomparable jurist and he personally guided the revision of the Code.[3] He kept on insisting that canon law is derived from the essence of the Church and not from any civil system of legislation. As such it could not just continue using the definitions and categories of Roman law. Among his many *dictae,* he also said "the law of the Church must express and foster the life of the Spirit and be an instrument of grace and a bond of unity [...] to limit the law to the rigid order of injunctions would be to violate the Spirit who guides us towards perfect charity in the unity of the Church."[4] For the Pope, the Church had to develop an entirely new mentality with regard to the law and its interpretation.

In the light of this, in 1967 the newly established synod of bishops adopted ten principles for the revision of the Code,[5] the most important of which are the fact that the Code should be both *juridical and pastoral,* and therefore just, equitable, humane, temperate and moderate. In this way it would allow for maximum discretion and freedom of action on the local level, and keep a balance between prescribed duties and their application according to local circumstances. The Code should also determine the *authority of the bishops* and yet allow for subsidiarity, the principle by which decisions are taken at the most appropriate level. Since every-body is equal before the law, the Code should protect *individual rights* and streamline *procedures,* making recourse possible where rights have been violated. And the Code should be *integrally restructured* to reflect the ecclesiology of the Vatican Council.

The revision of the Code lasted 16 years, largely due to the process of extensive consultation which was followed. By 1977 all the first drafts of the various parts of the Code had been

3 For a short history of the revision of the 1917 Code of Canon Law, see JA ALESANDRO, "The Revision of the *Code of Canon Law:* A Background Study", in *Studia Canonica* 24(1990), 91-146. Also the Preface to E CAPARROS, M THERIAULT & J THORN (eds) *Code of Canon Law Annotated,* Montréal, Wilson & Lafleur, 1993, 59-79.

4 PAUL VI, 17.09.1973, Allocution to the Second International Congress of Canon Law, "Shaping Canon Law", in *Origins* 3(1973-1974), 272, emphasis added.

5 The ten principles underlying the revision of the Code have been discussed in many journals. For a discussion underlying their establishment, see FX MURPHY & G MacEOIN, *Synod '67: A New Sound in Rome,* Milwaukee, Bruce, 1968, 52-72. For more information on the principles themselves, see, among others, *Communicationes* 1(1969), 77-85, the two articles by JA Alesandro mentioned *supra* and RC CUNNINGHAM, "The Principles Guiding the Revision of the Code of Canon Law", in *The Jurist* 30(1970), 447-455.

submitted for scrutiny by experts in every part of the world. Their comments were incorporated into a further draft, published in 1980, which elicited new comments incorporated into the 1982 draft. This was personally scrutinised canon by canon by Pope John Paul II, the successor of Paul VI, because he wanted to ensure that the Code should contain nothing repugnant to other Christians, especially the Orthodox, which might adversely affect reunification with them.[6]

As supreme legislator, in 1983 Pope John Paul II promulgated the new Code of Canon Law, which he called "a great effort to translate the conciliar ecclesiological teaching into canonical terms," which meant that "the Code must always be related to that image as its primary pattern."[7] Besides thus establishing the most important principle for the interpretation of the Code, he also summed up the role of the Code of Canon Law in the life of the Church as follows:

> Since the Church is established in the form of a social and visible unit, it needs rules, so that its *hierarchical and organic structure* may be visible; that its exercise of the function divinely entrusted to it, particularly of *sacred power* and of the *administration of the sacraments,* is properly ordered; that the *mutual relationships* of Christ's faithful are reconciled in justice based on charity, with the *rights of each* safeguarded and defined; and lastly, that the *common initiatives* which are under-taken so that Christian life may be ever more perfectly carried out, are sup-ported, strengthened and promoted by canonical laws.[8]

Law as an Enabling Principle in the Church

The 1983 Code of Canon Law is thus not a product of the Pope alone, but the fruit of a massive ecclesiological effort, involving all bishops dispersed throughout the world and their canonical advisors. True to the last principle for the revision, the Code reflects the nature of the Church and its mission in the world as defined by Vatican II. It is an instrument geared to the establishment and maintenance of good order within the Church; it defines what is constitutive of various institutions and offices in the Church, and clearly delineates the parameters of authority at various levels. Since its purpose is the eternal salvation of its members, it should not and cannot be misused by anyone endowed with a conscience.[9]

The Code is divided into seven books. Book I deals with what are called *General Norms.*[10] It which explains the meaning of various terms and establishes some very important principles, viz. the nature of laws themselves; the manner of interpreting them; the need for and the manner of seeking advice or consent; the way to conduct elections; the difference between

6 The Catholic Church is not a monolithic body: There is the so-called Western or Latin Church, which comprises about 95% of Catholicism, and the Oriental Churches, which make up the remaining 5%. The 1983 *Code of Canon Law* (CIC), which is the subject of this paper, applies only to the Latin Church. A later *Code of Canons for the Eastern Churches* (CICO) was promulgated in October 1990. For an overview of CICO, see JD FARIS, "An Overview of the Code of Canons of the Eastern Churches", in BEAL, JP, JA CORIDEN & TJ GREEN (eds), *New Commentary on the Code of Canon Law,* New York, Paulist Press, 2000, 27-44.

7 JOHN PAUL II, Apostolic Constitution: *Sacrae disciplinae leges,* in *The Code of Canon Law,* New Revised English Translation, London, HarperCollins, 1997, xiv.

8 *Ibid.,* xv, emphasis added.

9 The final canon of the Code deliberately demands "[the] observing [of] canonical equity and [the] keeping in mind [of] the salvation of souls, which in the Church must always be the supreme law."

10 Book I on *General Norms* contains 203 canons and needs to be thoroughly understood if the rest of the Code is not to be misinterpreted.

legislative, executive and judicial power; those who can exercise these powers; those who can obtain ecclesiastical offices and the manner by which these can be conferred, etc.

Book II deals with *The People of God.*[11] Since it describes the nature of the Church and the way it functions, this book can almost be called the constitution of the Catholic Church. It describes who are the members, the *christifideles,* and contains a Charter of the obligations and rights of all Christians. It lays down the manner of formation for the clergy, the way they become clerics, their obligations and rights, and the way they can lose the clerical state.

Then this book deals with the constitution of both the universal church and the local churches, and circumscribes the authority of those who exercise leadership in the Church. It deals with the person of the Roman pontiff and the college of bishops. It then indicates how dioceses are erected, how they are grouped together into provinces, how bishops are created and which procedure must be followed in the event of a vacancy in a diocese. It indicates the various institutes and officers that must exist within a diocese, and how the diocese is to be subdivided into parishes. It determines how a parish is constituted and how its personnel is to be appointed or elected.

This book finally deals with Institutes of Consecrated Life (the various kinds of religious life) and every aspect of the way they are constituted and governed, how and where they may establish themselves and the manner in which people can become members. It indicates the kind of apostolic work they can engage in and also deals with the way individuals can either leave the convent or monastery voluntarily or what offenses will make them lose membership statutorily.

Having dealt with the nature and constitution of the Church at all levels, Book III deals with the work that the Church accomplishes, namely *The Teaching Office of the Church.*[12] It identifies the proclamation of the Word of God as the most important function of the Church. There are two main ways in which the Church fulfils its prophetic function: by preaching and by catechising, and the Code identifies the people responsible for this. It emphasises the missionary nature of the church and indicates how it should fulfil its evangelising function. It deals with Catholic education at all levels, and identifies how the Church should use the means of social communication in the pursuit of its mission.

Book IV describes *The Sanctifying Office of the Church,*[13] the second most important function of the Church, and deals with liturgy, i.e. public worship, in all its aspects, especially the celebration of the sacraments: baptism, confirmation, Eucharist, penance, the anointing of the sick, ordination, and marriage. It lays down rules as to who should officiate in the name of the Church, the role of all the participants, and establishes the faithful's rights and obligations in this regard. It also determines the minimum requirements for the valid celebration of the sacraments and calls for the proper registration of those sacraments that cannot be repeated. It lays down rules regarding other acts of divine worship, including funerals, and the minimum requirements in the establishment of places of worship

11 Book II on *The People of God* is by far the longest and the most important part of the Code. It contains 543 canons and, since it deals with the nature of the Church and its constitution, it can be called the heart of the Code.

12 Book III on *The Teaching Office of the Church* contains 87 canons. Its main characteristic is that it emphasises that all the faithful share the responsibility for evangelising.

13 Book IV on *The Sanctifying Office of the Church* contains 420 canons and regulates all matters pertaining to divine worship. Here, too, the emphasis lies in the participation of the laity.

Book V deals with *The Temporal Goods of the Church.*[14] It details the purposes for which the Church can acquire temporal goods, determines who is responsible for the stewardship of these goods, and lays down the requirements for transparency and accountability. It deals with the patrimony of the Church, and establishes rules for the acquisition, the administration, the retention and the alienation of goods, as well as the rules applicable to pious foundations or Trusts which can be set up to safeguard this patrimony.

The sixth book deals with *Penalties,*[15] and the way they are to be applied to those who offend against the community of the Church. This is meant to avoid arbitrariness in the application of sanctions. And the seventh book deals with *Procedures*[16] which are to be applied to deal with contentious issues in the Church, as a means of protecting both the rights of the community and those of the individual. This represents the judicial arm of the Church, which has its own system of Tribunals and the rules which govern them. One of the strongest principles in this book is the right of defence, which may never be disregarded or harmed in any way.

Different Kinds of Laws

It will readily be seen that there must be many different kind of laws in the Code of Canon Law if all those matters are to be adequately dealt with. There are seven different kinds of canons: *statements of belief,* which are basic tenets of faith and are interpreted on the theological rather than the juridical level; *theological statements,* which are historically conditioned and therefore subject to change; *issues of morality,* which should be interpreted within the larger field of moral theology; *exhortations,* which express the wish of the legislator and are not strictly imposed as an obligation; *metaphysical statements,* which use philosophy to solve canonical problems; *scientific statements* which should be interpreted according to the latest scientific insights and *right-and-duty canons,* which are the only truly legislative texts.[17]

Besides these distinctions, the Code includes canons which are of divine origin and others which are human norms. It also has a built-in system of dispensations, which should promote the spiritual well-being of the applicant and are possible only in particular cases. Norms of divine origin are not subject to dispensations.

Some Special Principles in the Application of the Law

It is clear that in a universal Church, it is quite impossible to foresee every kind of situation which can arise. For this reason there are three principles which are often called upon in the

14 Book V on *The Temporal Goods of the Church* contains only 57 canons and regulates all matters financial, once again empowering the laity to contribute to this aspect of the Church's life according to their own competence. Books two to five are the most practical and touch on every aspect of the life of the average church member.

15 Book VI on *Penalties* contains 89 canons and is mostly meant for those in authority, enabling them to maintain church order without fear or favour. It stresses that penalties should be limited to as few people as possible and be applied with moderation.

16 Book VII on *Procedures* contains 353 canons and is intended for those with executive and/or judicial authority, enabling them to remain objective in the exercise of their office.

17 For this and the section that follows I am indebted to LM ÖRSY's commentary on the first part of Book I of the Code, in JA CORIDEN *et al* (eds), *The Code of Canon Law: A Text and Commentary,* 1982, New York, Paulist Press, 41-44.

application of the law, or to supply for any vacuum that might exist in the law.

- The first of these is *epieikeia:* this is an act of justice to be applied when, in a particular case, the application of the law would result in imperfect justice or no justice at all. It is an *ad hoc* corrective, originating in the same source as the law itself, i.e. the virtue of justice. Justice for all can often only be achieved through the subtle interaction of imposing the law in most cases and letting *epieikeia* prevail in some cases. Thus legalism or pharisaism, which places greater value on the observation of formalities than on the granting of true justice, is avoided.
- The second is *equity:* this is applied when the law is unable to uphold a value important for the community, forcing it to turn to another, non-legal, system of ideas to justify a departure from the legal system. It leaves the value intact and brings the law into the service of that value. The person who must see to it that justice is done invokes a higher principle of morality and suspends the operation of the law itself.
- The third is called *oikonomia:* this principle is frequently used in the Eastern Church but not so often in the Latin Church. It is a principle which can only be applied by a sacramentally ordained bishop, since it is rooted in the power of the Risen Christ. It allows the bishop first to determine how Christ would heal a wound, heal an injustice or bring peace when it is needed and then to act likewise. The rationale behind this principle is that laws can never adequately define Christ's power, and only a successor of the apostles can bring Christ's healing to those who need it.

Some Specific Examples of Empowerment through the Law

We will recall that Pope John Paul II said that the law should have rules to explain its hierarchical structure, and to regulate the exercise of authority, the celebration of the sacraments, the mutual relationships between the faithful and the common initiatives undertaken by them. In other words, the Code is meant to give a clear job description to all the faithful, and the various institutions and functionaries in the Church.[18] Now is the time to see how the law can empower, or enable the various members of the Church to pursue their Christian vocation in a proper and harmonious manner, by taking random examples from the Code with regard to various individuals and institutions.

The Christian faithful

Ordinary members of the Church may well wonder what their function is within the body of the Church.[19] In the Code the answer is loud and clear: members of the Church enjoy a radical

18 It is my considered opinion that most of the problems encountered within the Church are caused by an ignorance of the law, which leads to a misunderstanding of the parameters within which each member of the Church is meant to operate. This easily leads to an abuse of power and, if not checked, the perpetration of injustices within the Christian community. Thus the reason for a Code of law given in the Apostolic Constitution *Sacrae disciplinae leges* establishing it, is well justified: "that the *mutual relationships* of Christ's faithful are reconciled in justice based on charity, with the *rights of each* safeguarded and defined" – see footnote 8. If only those in authority and indeed every member of the Church would familiarise themselves with the dispositions of the Code of Canon Law, many unfortunate situations could be avoided and many hurts prevented.

19 The beginning of Book two contains what many have come to call the Church's "Bill of Rights", in that it makes various lists of the responsibilities of various categories of the faithful. However, the Code never speaks of rights per se. It rather speaks of the obligations and rights: of all the faithful (cc 208-223) the

equality before God and the community. All are obliged to maintain the bonds of communion among themselves, to pursue a holy way of life, and to share in the evangelising mission of the Church. To achieve this they are obliged to make known their needs to those in authority and have the right to spiritual assistance from their pastors. They have the right of association, enabling them to follow their own form of spiritual life and to engage in apostolic action.

Besides this generic list of obligations and rights common to all the faithful, *the laity* are specifically entitled to take an active part in civil affairs and in the evangelising of their economic and political environment. They are also empowered to become involved in ecclesiastical affairs, especially where their expertise is most needed, viz. the social and financial aspects of the life of the Christian community. Conversely, pastors are obliged to make use of the expertise of the faithful. The Church can thus never again be thought to be the sole preserve of ecclesiastics.

The bishops

Bishops, who are the successors of the apostles, have a major role to play in the life of the Christian community.[20] The Code is very specific that the bishop takes possession of the office that he holds, not the diocese for which he is responsible. He can never again consider the diocese as a personal fief in the medieval manner. On the contrary, the diocesan bishop is enjoined to be concerned with all the faithful in the diocese, the active members, the lapsed and the marginalised. He is to show specific concern for the priests, who are described as his helpers and counsellors, see to it that they fulfil their duties responsibly, and that all their needs, spiritual and material, are catered for. His teaching and sanctifying functions are clearly delineated, as are his obligation to maintain the purity of faith and ecclesiastical discipline. He is also told to make use of the skills of the clergy, the religious and the laity as he promotes the Christian life within the diocese.

In fact, the Code of Canon Law can almost be described as the *vade mecum* of the bishop, since his role as leader of the local Church must be visible at all levels. He is the moderator of the ministry of the Word in the diocese, the moderator of the liturgy and the celebration of the sacraments, and he is the person legally responsible for the patrimony of the Church within the diocese. [21]

In his person the diocesan bishop combines the three different kinds of power: legislative, executive and judicial, but he may not go beyond the parameters assigned to him.[22] He is

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laity (cc 224-231), and the clerics (cc 273-289). However, these lists are not exhaustive and many more obligations and rights can be found dispersed among the various sections of the Code.

The reason for placing responsibilities ahead of rights is theological: believers begin their life of faith with an obligation to answer the call of Christ. This leads to other obligations with regard to the kind of life to be led. However, most of the obligations have a concomitant right, without which the faithful would not be able to fulfil them. Indeed, very often the right of one member of the Church (e.g. a lay person) becomes the obligation of another (a cleric).

What follows is a very short indication of what is contained in the obligations and rights of the laity.

20 Bishops are members of the clergy. Thus their obligations and rights are to be found, first of all among those of all the faithful and then of the clerics in general. However, what follows is a very short summary of the list of obligations that every diocesan bishop needs to fulfil as found in cc 381-398. This is not an exhaustive list, and should be supplemented by the many references to the obligations of diocesan bishops found *passim* in the Code.

21 See cc 763, 771, 775, 777,

22 See cc 134-135, 492-494; 1419-1421.

told that he may not share his legislative power with anyone, although he does in fact have to consult a wide variety of people before enacting laws applicable to the diocese; moreover, these laws may never be contrary to the universal laws of the Church. In the executive area he must appoint a vicar general, responsible with him for the entire diocese, and other episcopal vicars, responsible for one or other aspect of pastoral endeavour or of the diocesan administration. In the judicial arena he must appoint a judicial vicar who acts as a judge whenever a matter is taken to the ecclesiastical Tribunal. Most of such cases deal with the declaration of nullity of marriages.

With regard to the temporal goods of the Church, the bishop is obliged to appoint a finance committee, comprised of lay people, experts in the legal and financial field, and he cannot alienate Church property without their consent. Should he disregard this, he could personally be held responsible to make good the loss to the community.[23]The law thus both empowers the bishop to fulfil the expectations of his office, but at the same time it restricts the arbitrary exercise of his authority. Indeed, on a number of occasions those who felt their rights violated by the bishop appealed to the Supreme Tribunal in Rome and were vindicated.[24]

The clergy, specifically parish priests

Since the abuse of spiritual power can be utterly devastating to the victim, the clergy also have a clear job description and the limits of their authority are equally clearly spelt out. Parish priests especially, who are the only functionaries most of the faithful ever come into contact with, cannot claim not to know the parameters within which they are to function.[25] Thus, as helpers of the bishop and under his authority, they are placed in charge of a specific community. Like bishops for the diocese, they also are teachers of the faith and dispenser of the sacraments. Moreover, they are obliged to involve the laity in both the pastoral endeavours and the administration of the parish. Like the bishop, they are the moderators of the ministry of the word and the dispensers of the sacraments, which must be celebrated together with the faithful at a time suitable to them. The faithful may not be denied funerals, except under the most stringent conditions. Parish priests are obliged to appoint both a parish pastoral council with which they are to work closely, and a parish finance committee to ensure that they exercise proper, transparent and accountable stewardship of the goods of the community.

Redressing Grievances According to the Law

Although one wished it were not so, every society suffers from people who abuse their authority, and the Church is no exception. To use a glaring example: we have all heard of the paedophilia scandals in the Church that caught world-wide head-lines. Such things should not happen, and when they do they diminish not only the perpetrators but all those who are linked to them in people's minds. Initially the Church authorities neither understood the

23 See cc 475-476, 1261-126 6, 1274-1284, 1290-1296.

24 On a number of occasions I was asked to intervene in an unhappy situation where the local bishop had gone beyond the parameters of his competence. In every instance, when the case was appealed to Rome, he was told to rescind his previous decision in favour of the appellant.

25 Every student for the priesthood is taught the obligations and rights of parish priests, which, besides the general obligations and rights of all the faithful and those of clerics, can also be found in cc 526-537. This list is not exhaustive, and many other obligations are to be found in Books III-V, *passim*. However, many parish priests, who may have their own agenda and are therefore not concerned with the good of the people, choose to ignore these injunctions to the detriment of their parishioners. The Church is truly made up of both saints and sinners!

true nature nor the extent of the problem, nor did they know how to handle the situation, especially with regards to the care that should be given to the victims.[26] Much has since been learnt about paedophilia, especially via the human sciences, which have demonstrated conclusively that one deals here with a deep psychosis, since it often happens that the abused later become abusers.

The Church has tried to learn from its mistakes and is stringently applying screening methods for future candidates for the priesthood.[27] It has also developed a zero tolerance policy towards perpetrators without, however, losing sight of their fallibility as human beings who also need pastoral care wherever possible. In the process it was discovered that the Penal section of the Code of Canon Law, which was promulgated before the first whispers of this scandal reached the legislator, was inadequate to deal thoroughly with the issues involved, the adequate protection of possible victims, and the proportionate punishment of the perpetrators. At this moment, a new version of the Penal Code has reached every episcopal conference around the world, waiting for comments.[28] Rome is thus once again engaging in a worldwide consultation to try and promulgate adequate measures to meet the crisis.

Of course, this is not the only example where human weakness or human malice undermines the sanctity of the Church community. The Code identifies ways and means by which our rights can be vindicated, both on the administrative and on the judicial level. Under the principle of subsidiarity, problems should first be solved on the local level but, where this is not possible, one may always resort to hierarchical recourse. The only person from whose decision there is no recourse is the pope himself.

The Need for Constant Revision

The Penal section is not the only part of the Code that needs revision. We live in a time where societal change is accelerating at an alarming rate, and the electronic revolution is no exception. The Code, which has a section on how to use the social means of communication in its evangelising mission, is hopelessly outdated with regard to the electronic means of communication.[29] The internet did not yet exist when it was promulgated. Now one has to deal with the world-wide-web, with face book and twitter and many other such applications. How does one use these in the service of the gospel? How does one respect people's right to privacy when so many cheerfully abdicate this right for the privilege of becoming 'notorious'? Even civil lawmakers cannot keep up with these developments, nor have they answers to these questions.

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26 The earliest canonical studies of the problem date from the mid-1980s, and these increased steadily over the next decades. But many bishops were not aware of these scholarly works and tried to deal with the matter on a purely pastoral level, with disastrous consequences.

27 Since 1999 the Southern African Catholic Bishops' Conference has been engaged in creating and refining a policy to deal with clerics and other church personnel accused of sexual crimes or mis-demeanours. It dovetails with civil law requirements to report even the suspicion of an offence.

28 *Schema recognitionis libri VI Codis Iuris Canonici (reservatum),* 2011 3-40p,

29 Book III, contains Title IV on *The Means of Social Communication and Books in Particular,* cc 822-832, eleven canons which seem positively medieval by comparison to the IT explosion, and urgently need revision and expansion to encompass and confront the whole gamut of new instant means of communication and the influence they exert over the mindset of today's youth and young adults who see the internet as the new and infallible source of knowledge.

Applying the Code of Canon Law to Civil Society

I believe that many aspects of canon law could profitably be adopted by civil law in favour of our country's citizens. I would like to see a built-in system of dispensation, especially in civil litigation, allowing magistrates a greater discretion when applying the law, giving individuals a respite where their personal circumstances can be better served by leniency.[30] This would also be of great help in coping with the backlog of more serious cases which currently cannot be heard in the courts within a reasonable time. The old adage still holds true: justice delayed is justice denied. Perhaps it could be administered in the same way as the small claims courts, provided that arbitrariness and/or corruption are avoided.

Applying the principles of *epieikeia* and equity would also be of great help, tempering the severity of the law with the quality of mercy. Within the Church it represents the goodness of God and his Christ, who came to effect reconciliation between God and man, and between people themselves. Did Christ not say that he came not for the just but to call sinners to repentance? In the civil forum it could represent the benevolence of the lawmaker, for whom the good of the community needs to be weighed up against the good of the individual.

Conclusion

We live in an era of human rights, but in many societies these are often served in their proclamation rather than in their observance. A system of law, whether in the Church or in civil society, must promote human rights for all; however, this must be done out of conviction, not convenience.

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30 In canon law the concept of 'dispensation' is an important corrective: it strives to ensure justice for a particular individual or for several people in a particular instance when the written law would not promote this. It is used where the law as it stands would not achieve justice for the individual due to the peculiar circumstances of the case. In essence it means that a competent person ignores or sets aside the law in order to achieve a greater good in a particular situation. Dispensations can only be used in favour of individual persons or cases, and only if they will bring about the greater spiritual good of the people concerned, see cc 85-93. This gives considerable latitude of discretion to those who must administer the law and leads to a quicker administration of justice, according to the adage: justice delayed is justice denied.

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Religion, Christianity and Civil Society

1. Civil society

Civil society is a relatively modern concept. It was born at the end of the XVIII century and it is employed to define a sphere of human activities that presents peculiar features (Edwards 2009). Philosophers and lawyers make recourse to this concept to explain that every individual spends his life within a network of social relations that can be classified in four areas: the family, the State, the market and, finally, the civil society. Free and voluntary are the adjectives characterizing the relations that take place within civil society: associations, trade unions, political parties, non-profit organizations, religiously oriented schools, social movements, and so on, are the actors that populate this area of human life. They offer individuals the opportunity to develop together projects of life and social organization that can be reproduced on a larger scale as a model for organization of the broader social community. In other words, civil society is the space where, through particular experiences, the common good is pursued, and the institutions of civil society are the places where individuals develop and test the principles and convictions that guide their actions as citizens. This process can occur only in a context of freedom, where associations that have different aims, schools that are inspired to different value systems, political parties with different programs can coexist and interact. This explains why civil society tends to flourish more fully in democratic than in authoritarian or totalitarian States. As a matter of fact, civil society movements like Solidarnosc in Poland and the anti-apartheid movement in South Africa played a decisive role in the fall of the Communist or racist regimes that were in power in those countries.

2. The significance of civil society

Civil society therefore requires liberty, with all the advantages and at the same time with all the risks that liberty always entails: it is an open space, that can be filled with good experiences as well as bad ones. Why then does civil society deserve to be defended and expanded? What does it deliver in exchange of the dangers it involves? Basically, civil society can generate a social capital constituted by three fundamental civic virtues: it teaches individuals to live in a committed, responsible and trustful way (Putnam, Leonardi, Nanetti, 1994. Obviously it is possible that some associations, social movements, political parties foster intolerance and extremism instead of trust and responsibility: on this point see infra, par. 4). Each of us is ready to volunteer time and effort to the associations of which he is a member, to the political projects in which he believes, to the schools his children attend: each of us feels responsible for those ventures in which he is involved and, in order to make them flourish, is ready to establish relations of trust and cooperation with other individuals who share the same ideals. This education to responsibility, commitment and trust that takes place in the institutions of civil society is indispensable to form good citizens, who are able to reproduce these same civic virtues when they act as members of the larger State community: therefore, the existence of a vital civil society can offer a decisive contribution to the common good of

the State by providing both values and attitudes that foster social commitment and cohesion without giving up plurality and differences.

To sum up what I have said, I shall refer to an American lawyer, Robert Cover. According to him, any society is based on balance between two forces: the force that creates the world and the force that maintains it. Cover says we live in a space inhabited by many normative worlds, each of them characterized by its own set of values and rules. These normative worlds are the social groups (religious, cultural, political groups and so on) that are capable of generating new legal values and meanings through the personal commitment of their members: by applying their will to transform the extant state of affairs according to their visions of alternative futures, they create worlds governed by a new law. But these normative worlds, if are left to themselves, can become sectarian, violent and dissociative. Therefore the coexistence of different legal worlds requires a system-maintaining force. The modern State can offer it, provided it understands that it has not the task to create new legal values but to foster the birth and development of the normative worlds where these values take shape (Cover 1983, 4-68).

In conclusion the institutions of civil society play a generative role both for the values that support the State's laws and for the civic virtues that support the State's political activity. A State based on principles of freedom and democracy cannot properly claim to generate the values that citizens are called to share nor the attitudes that should support their participation in the life of the polis: for both of them the State can rely on civil society. Therefore the State's contribution to the common good is not in the field of creation but in that of conservation and it performs this task by providing a legal framework where different projects of common good can peacefully coexist.

3. Religions and civil society

Religions offer a peculiar element to the civil society debate, that is, the conviction that man is repository of a truth given by God. This conviction is highly significant to the development of a sound civil society. It has already been said that civil society can create commitment, personal responsibility and mutual trust: but what is the foundation of these virtues, what persuades men to behave in a responsible and committed way? Religions –or at least those religions that are founded on divine revelation- answer that this attitude is ultimately rooted in man's responsibility towards God: the commitment to build the common good, through personal responsibility and a relation of trust with other persons, is generated by recognition of the truth that has been given by God to human beings.

This approach to civil society, typical of the monotheistic religions, gives a sound and stable basis to the research of the common good and connects it to some non negotiable principles that, being rooted in divine revelation, transcend social consensus and political expediency. At the same time this approach raises the problem of harmonizing truth and liberty. If the central feature of civil society is the free research of the common good through a committed participation in particular experiences, how can this research be shared by those who know they possess the truth?

There are two answers to this question. The first is a theological answer that goes beyond the scope of my presentation. Therefore I shall deal with it very briefly. In a religious perspective, man is not the master of the truth he proclaims nor the craftsman of its success among men. Being in the service of truth and affirming it without hesitation is all that can be expected by

man: on the contrary, trying to impose the truth denies that its recognition, although in need of human cooperation, depends on God's will. In this perspective I can profess unconditionally the truth of my faith and publicly witness the events that changed my life and my world view without the need to affirm the supremacy of my religion and the obligation of everybody to accept it. It seems to me that this answer has a sound foundation in the theological and legal tradition of different monotheistic religions (Williams 2008, 249-54).

The second answer is too complex to be considered in relation to every religion. Therefore I shall give it in relation to just one of them, Christianity.

4. Christianity and civil society

Religion is first of all a personal relationship between God and man: this is the starting point for analyzing the relationship between Christianity and civil society. This principle is the novelty brought by Christianity into the Greco-Roman world, where religion had more a national and family dimension than a personal one: and this is also what makes Christianity different from Judaism, which conceives religion as a covenant between God and one people. In the Jewish and Roman societies, where in different forms the collective dimension of religion prevailed, Christianity affirms a new principle: religion is the choice of conscience of a person who, questioned by Jesus Christ's message, decides to answer yes. Obviously in Christianity too there is a communitarian dimension, that manifests the solidarity –more exactly, the communion- of the faithful who share faith in the same God. But this dimension is based on a personal assent that questions the responsibility of each individual. In other words, persons are not born Christian but become Christian: and they become so not because they are members of a community, a people or a family, but because of a personal choice.

The accent placed on the personal dimension of the religious experience paved the way for the birth of a new right, that was unknown in the ancient world: the right of religious liberty. According to Christian doctrine nobody –the State, the community and even the family- can take the place of the individual in deciding a matter of conscience: therefore every person must be completely free to choose his religion (and also to change or abandon it), because an authentic religious experience cannot exist outside a state of liberty. This right to religious freedom is absolute, that is it is due to every person (not only to Christians) by virtue of his being a person. Moreover, it is unlimited, that is no human power can restrict the right of an individual to choose the religion he deems to be the true one. Sadly, this right is infringed in many parts of the world and the faithful of many religions –Christianity included- are subjected to persecution or, because of their religion, do not enjoy civil and political rights on equal footing with other citizens.

Religious freedom has not always been respected in the history of the Christian countries nor in the teachings and actions of some representatives of the Church itself: John Paul II publicly asked forgiveness for these sins. But the principle that the religious faith requires liberty was never forgotten in the Christian tradition and it was fully reinstated on the occasion of the Vatican II Council by affirming that religious liberty is a right that "has its foundation in the very dignity of the human person" (*Dignitatis Humanae,* n. 2). The significance of this statement is evident: as a German lawyer, Ernst Wolfgang Böckenförde, put it, religious freedom "that previously was a concession, now becomes a commandment, an obligation that is rooted in the Christian faith itself and in its correlated image of man". In this way truth and freedom can be reconciled: if "religious freedom is inherent to the truth itself of Christianity", affirming

that the Gospel is the truth for every man implies affirming "the religious freedom of every man, including those who do not have any faith or have and practice a faith that is different from mine or, simply, have given up their faith" (Böckenförde, 2004, 722). At this point the contradiction between truth and liberty reveals that it is only an apparent contradiction: it is possible to fully participate in the free and open debate of civil society without giving up or marginalizing the claim that Christianity is the true religion, as the freedom of non-Christians is coessential with this claim.

Once it is clear that taking part in the civil society debate does not imply a relativisation of truth, it is possible to underline two other reasons for looking to civil society with sympathy.

First of all, the recognition that a sound State requires a sound civil society strengthens the subsidiarity principle, according to which the State does not have to take on those tasks that can be performed equally well by the institutions of civil society, for example by associations or social movements. From the perspective of the subsidiarity principle , the State has basically the task of providing the legal context and the economic support for developing the civil society initiatives. Only when the needs to be faced are so huge that civil society alone cannot cope with them (one can think, for example, of the need to put in place a national health service), is the State entitled to act on its own. In this way State power is maintained within its proper dimensions, avoiding its hypertrophic and potentially dangerous over-development.

Second, the central role recognized to civil society engages the Christian faithful to take on its responsibilities in the social and political fields. The distinction between religion and politics, Church and State, that is traditional in Christian thought, has sometimes been misunderstood and interpreted as something that limits the responsibility of Christians to the spiritual affairs, leaving the temporal and political world outside the area of concern of the faithful. I think the opposite is true. For centuries the Christian community has sought security in the confessional character of the State: State laws supporting Christianity and affirming the Christian character of the State were misunderstood as the guarantee of the Christian character of society as well. This mistake had a negative impact on the vitality of the Christian community, as the responsibility of transforming society according to Christian values was regarded more as a duty of the State than the mission of each Christian. The decline of State confessionism and the principle that State institutions cannot become the instruments of any religion –including the one professed by the majority of the citizens- has encouraged Christians to take on the responsibility to witness the values they uphold in the places where people live, in schools, families, workplaces, that is in civil society.

5. Civil society, state, and religion: a delicate balance

One last and problematic feature of civil society still has to be taken into consideration before concluding my presentation. It would be naïve to believe that civil society, simply by virtue of its being a free and open society, is always conducive to the common good. The projects and initiatives that are generated by civil society can pursue the interest of the few instead of justice, create divisions instead of solidarity, intolerance instead of mutual understanding. Faced with this ambiguity that is inherent in civil society, the question is how to sort its products so that what is helpful for common good can be separated from what is harmful. But who can perform this job and what are the criteria that can guide this selection?

This problem can be summarized in the following terms: on the one hand there is civil society, that is the place where projects and proposals for the organization of social coexistence are

freely elaborated; on the other hand there is the State, that is the entity that selects some of these projects and puts them at the foundation of its laws. How the State can perform this task of filtering and selecting without destroying liberty, which is essential for the sound development of civil society and, on the other hand, without falling into an anarchy of competing values that is incompatible with the idea of common good?

Some think that this dilemma has no solution. Böckenförde for example wrote that "the liberal and secular State lives on the base of presuppositions whose truth it is unable to guarantee" (Böckenförde 1991, 112). I think that this statement is correct only in part. First of all, civil society is not totally free, does not live in a vacuum, but operates within a framework defined by rules that grant respect for some fundamental and non negotiable principles upon which every State is based (nobody could appeal to the liberty of civil society to support, for example, slavery or human sacrifices). Second, within this large framework there are further rules that are rooted in the tradition and culture of each national community. They reflect the identity of every community and shape accordingly its relations and institutions, from the family to the work place, from the relations between man and woman to those between citizen and State. They provide a more narrow framework within which the civil society is contained, a framework that exists in all the civilizations of our world but that has different characteristics in each of them as it is the outcome of different histories and cultures. In other words, the State is not an empty container that can be filled with whatever content: on the contrary it has a memory and a history that provide guidance in selecting the inputs coming from civil society. This State framework is far from being immutable, as it is continuously in transformation under the inputs of civil society; but at the same time it is far from being neutral, as it is made by people with a culture and an identity that has taken shape in history and that inevitably influence court decisions, Parliament laws and their application by public administration[1].

From history we have learnt that the balanced development of any social community requires that two equally grave dangers be avoided: the revolutionary utopian effort to get rid of tradition and the conservative one to crystallize it, irrespective of the changes that continuously take place within any social group. Both approaches have proven to be wrong. The identity of a social community is not an immutable genetic code, that is given once for all and cannot be changed for eternity, but an inheritance that should be enlarged through exchange with the other identities, old and new, that inhabit the world: understanding this fact is the way to approach in a correct way the relation between civil society and State or, to make use once more of Cover's language, between the forces that create and those that maintain the world.

In this perspective a State that is attentive to the common good cannot but recognize religion's full liberty to take part, within civil society, in the formation of the public ethos that is indispensible to the life of the State itself. For many decades, particularly in Europe, religions have been confined to private space and basically excluded from public debate. Today things are different and religions have to face new responsibilities and new opportunities: both the first and the second require a sound relation between religion and civil society in contemporary world.

1 Neutrality, if intended as the absence of any distinctive quality or characteristic of the State, is a chimera: State institutions cannot be severed from society and their activity is inevitably influenced by the history, culture, belief of the people they represent. State neutrality makes sense only if it is intended as the conscious effort of State institutions to pursue an impartial and well balanced policy towards the different groups and organization that constitute the civil society.

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Anglican Church

Law and religion in South Africa – an Anglican perspective

The development of Canon Law in the Anglican Church in South Africa, the Common Principles of Canon law in the Anglican Communion and the involvement of Anglican Archbishops in the writing of the South African Constitution

The beginning of the 21st Century found the Anglican Communion in a crisis. The crisis came about because the Episcopal Church of the United States had elected an openly 'gay' bishop, Gene Robinson, as one of its Diocesan bishops. Parts of the Church in the US joined parts of the Anglican Church in Nigeria, Uganda and Canada (to mention a few) and protested to one of the 'institutional instruments of unity' also known as 'bonds of affection' in the Communion. The Archbishop of Canterbury, one of the 'bonds of affection' was requested to not invite Gene Robinson to participate in another, 'institutional instrument of unity', namely the Lambeth Conference. "The tensions within the Communion stimulated discussion of the meaning and limits of the bonds of affection leading to exploration of ways which the laws of the churches may contribute to more visible global ecclesial communion in Anglicanism"[1]

The challenge to the Archbishop of Canterbury at the dawn of the 21st century has a parallel in South Africa in the 1867. The 1867 challenge came at the start of the pioneering work of the first bishop of Cape Town, Robert Gray. "It arose out of a moment of doctrinal controversy."[2] John William Colenso, the bishop of Natal, was accused of being "a traitor to the promises made at his ordination and consecration, a rebel against the laws of the English Church, an apostate from the faith of the Church Catholic and from Christianity". The Colenso affair got "the Canadian bishops to petition the then Archbishop of Canterbury, Charles Longley, to call together all the bishops of the Anglican Church throughout the world to discuss this (Colenso doctrinal controversy) and other matters".[3] This was the first meeting of the bishops of the Communion and the inaugural Lambeth Conference.

The birth of Canon Law in Anglican Church in South Africa came about when Robert Gray – the first bishop of Cape Town set about establishing a church not by law established. And in the process of doing so was confronted by the Colenso doctrinal controversy and the doctrine of Canonical Obedience, in the Long v Bishop of Cape Town matter.

This paper briefly traces the development of Canon Law in the Anglican Church in Southern Africa, and the contributions that the church in South Africa made to the Anglican Communion, thus putting itself in a key position to support Religion and Law in South Africa post 1994..

A short Legal Historical background

The Province of the ACSA was legislatively formed in 1870 at the first Provincial Synod. The Preliminary Resolutions taken at that Provincial Synod states;

> That inasmuch as the Dioceses of Cape Town, of Grahamstown, of Maritzburg (embracing the Diocese of Natal), of St. Helen, and of the Orange Free State, which originally were

comprehended as one Diocese of Cape Town, have been constituted an Ecclesiastical Province, of which Cape Town is the Metropolitan See; such constitution having been determined for them in accordance with the decision of authorities of the English Church, through the intention or the effect of Acts of the Crown, under which the said Diocese was sub-divided,[4]

This resolution continues to set the legal parameters for the new Province of South Africa.

And being further confirmed by the oaths of Canonical obedience taken by the other Bishops of those Diocese to the Bishop of Cape Town as their first Metropolitan, and by express acceptance of these relations by all the aforesaid Dioceses, either in acts of the Synods, or in the action of their Clergy and Laity, as well as by the recognition of such Dioceses as a Province by the Archbishops, Primates and other Bishops of the Anglican Communion: We do therefore claim for this Province the Ecclesiastical status, rights, powers, and relations of a Province of the Anglican Communion[5]

This latter part of the resolution was a response to a number of challenges which Robert Gray as the first Bishop of Cape Town had to face:

Firstly, Gray found that the 'English Church' was a combination of the governor's church and a Diocese of the Church of England. In fact the 'English Church' in Cape Town was an extension of the Diocese of London. However because of the political nature of the Colony the 'English Church' could not function as a part of the English Establishment. What was required was for the 'English Church' to be become a Church "not by Law established". Hence the preamble to the Constitution of the Church states;

Whereas it is expedient that the members of a Church, not by Law established, should, for the purpose of its due government, as well as for the management of its property and the ordering of its affairs, formerly set forth the terms of the compact under which it is associated.[6]

The first challenge to Gray was the need of legal structures according to Canon Law, the church needed a Constitution.

However before Gray could have a church not by "Law established" he had to bring the members of the 'English Church' in the huge Diocese of Cape Town together in a Synod which is the Church's highest decision making body, the body which had to adopt and confirm a Constitution. The second challenge which Gray had to confront was that of **Canonical Obedience.** Both challenges to Gray are adequately covered in Long v Bishop Gray[7]

Canonical Obedience is the authority which Priests and Deacons receive to minister in a diocese and in turn they owe canonical obedience to the bishop of the diocese.[8] It was destined for a tough passage in the ACSA, when in January 1857, Gray, set about the creation of;

"an organisation which in law would bind together the isolated and independent congregations and communities which then existed"[9]

Gray discovered that certain legal judgements made in 1841;

"owing to the novelty of the situation, that there was an imperfect apprehension of the true constitutional position of Colonial Churches, and no doubt those who took part in

passing these resolutions believed that the Churches of the Colonies were a part of the Church of England as by law established."[10]

Gray made three unsuccessful attempts;

"in the House of Commons (in London) to secure the passage of a Bill"

which would provide for a;

"general Act of Parliament which might be applicable to all Colonial Churches."

His unsuccessful attempts;

"indicated that only by means of a voluntary association could the whole Church be bound together in a recognised legal organisation."

To remedy the situation, Gray, summoned a Synod first in 1856 and then again in 1861. The Synod discussed Rules and Regulations which would help with the organisation of a local church. The summons to the clergy and laity of the Diocese met with resistance. The 1856 session was not attended by Clergy and Lay delegates of five parishes.

"They protested against the holding of the said Synod on the grounds that it constituted an infraction of the law governing the Church of England."

The protestors claimed that the holding of a Synod for Clergy and Laity was in contradiction of the Canons and Constitution of the Church in England and that it had for its object the separation of the Church of England in South Africa from the Mother Church in England.

The Reverend W. Long, the incumbent at St. Peter's Church, Mowbray, strongly objected to this name change and he made his feelings known to Gray.

"I do not my Lord; belong to any religious body in union and communion with the United Church of England and Ireland in the Diocese of Cape Town. I am a minister of the United Church of England and Ireland in the Diocese of Cape Town, and belong to no other religious body."[11]

Long took issue with a declaration changing the name of the Anglican Church in South Africa, and said,

"I feel that were I as Minister, to carry out this Act by demanding it of my people, I should be as much to blame for asking them as any of the Laity who should sign it."

In 1861 Gray summoned the second Synod and the five churches and Long refused again to participate. Gray then disciplined Long, and removed him from his benefice. Long sought relief from the Supreme Court in Cape Town and when that failed he applied to the Privy Council in London for protection. The Privy Council found in his favour, and held that the sentence by Gray of suspension and deprivation were not warranted by law. The dispute had appeal to the doctrine of Canonical Obedience

The Doctrine of Canonical Obedience

> "Anglican churches are not confessional denominations possessing formal and definitive legal statements of their beliefs. Laws are employed simply to point to doctrinal documents, extrinsic to the law, which are accepted by the church as normative in matters of faith"[12].

Bishops, priests, deacons and laity are required by the Canons of ACSA to make declarations of Assent as well as Oaths of Obedience as the case may be. The oath of canonical obedience to the Bishop is obedience, "in all things lawful and honest". In *Long v Bishop of Cape Town,* Justice Watermeyer made the following remarks;

> "The origin of the differences which have led to this litigation was a direction by a Bishop to the plaintiff (Long) to give a certain notice, which was disobeyed. Now this presbyter or incumbent is bound to the Bishop in canonical obedience, in all things lawful and honest."[13]

The judge pointed out that should the notice for the Synod have been an illegal act, *Long,* would have been justified in refusing to follow the instructions of the Bishop based on its illegality. But this was not the case.

The interpretation of Canonical Obedience by Clergy has been a recurring theme in the life of the ACSA. The matter *Diocese of False Bay v C. Felix* in the CCMA Cape Town is the latest case. The commissioner found that;

> "His (*Felix*) submissions regarding to be an employee are fraught with his confusion to distinguish the laws of the land with the laws of the church. He maintained that God called him to the church to His fulltime ministry within the shelter of the church and that he is subject to Canonical Obedience'.[14]

However Felix sought relief from the CCMA despite his own understanding that "he is subject to Canonical Obedience". The Laws of ACSA provide for "Ecclesiastical Tribunals and the Discipline of Ministers of the Church." Canons 36 – 41 "relate to licensed clergy" meaning those who have taken the Oath of Canonical Obedience. Other ministers, meaning; "any person who engages in any public or private ministry in the church, whether formally authorised by ordination or licensing, or elected as a lay official, or formally recognised as having authority or influence over others in the Christian community. It naturally includes bishops, priests deacons, lay officers, all licensed lay ministers, Parish Councillors, Sunday school teachers, side's persons, councillors, music leaders, youth leaders and office holders in church guilds and organisation" enjoy the protection of Ecclesiastical Tribunals.

Canon Law in the Anglican Communion

In their quest to deal with the crisis which emanated from the consecration of Gene Robinson, the Primates (Archbishops) of the Anglican Communion met in March 2001 in the USA. The Archbishops were keen to find a way of showing to the world that there was much more which held the Communion together than the response to the consecration of an openly 'gay' bishop. They considered the role of Canon Law in the Communion.

Norman Doe[15] discussed with the Archbishops three things concerning Canon Law and the Communion;

1. A "reflection on Anglican experiences of church order and law
2. identify the role which the legal system of each Anglican church plays in the context of the global Anglican Communion – especially how collectively these systems point to unwritten common law of the Anglican Communion
3. some practical ideas about how the law of each church might be developed to enhance global communion."[16]

Doe provides a meaning of Canon Law which is the "title given to the legal system which churches of the catholic and apostolic tradition create to regulate their internal life – their government, ministry, doctrine, liturgy, rites and property."[17] It has three meanings for Anglicans. In its narrow sense "canon law implies simply the code of canons of an Anglican church. Canon law is one category amongst several bodies of law within a particular church"[18] The second meaning gives canon law a wider sense. The particular Anglican church has a "formal collection of several bodies of law" which "embraces all formal laws, and includes the constitution, the code of canons, and other formal legal instruments"[19] This is the case in ACSA. The third meaning of Canon Law is seen in its widest sense and canon law can be "understood as the entire system of ecclesiastical regulation in a particular Anglican church."[20] This shows a range of regulatory experiences: humanly created entities which are used to regulate church life – such as unwritten custom, pastoral regulations or directions of bishops, and even decisions of church tribunals. "These entities may or may not appear in the formal, written law of the church (constitution or canons). But they are used to regulate conduct; they are equivalent to canon law."[21]

In his concluding remarks to the Primates meeting in March 2001, Doe said; "Acknowledging the existence of the **ius commune** (Latin for "common law") would make more evident what Anglicans share. A declaration of the principles of Anglican canon law would be rooted in theology and based on the best practice of churches, the Anglican common law, and canonical tradition."[22]

The Archbishops commissioned the production of the 'Principles of Canon Law common to the Anglican Communion' and in the forward to the publication the Archbishop of Canterbury made the following comment about Canon Law.

> "Although lawyers are the victims of almost as many unkind jokes as clergy, the truth is that law, properly understood, is not an alien imposition on a grumbling public but a way of securing two things for the common good. The first is consistency: law promises that we shall be treated with equity, not according to someone's arbitrary feelings or according to our own individual status and power. It gives to all of us the assurance that we can be heard. The second is clarity about responsibility: we need ways of knowing who is supposed to do this or that and who is entitled to do this or that, so that we can act economically and purposefully, instead of being frustrated by a chaotic variety of expectations and recriminations."[23]

Archbishop Rowan Williams recognised the protection of the membership of the body of Christ, when he said;

> "Canon Law begins from that **basic affirmation of equity which is the fact of membership in the Body of Christ**[24] - a status deeper and stronger than any civil contract or philosophical argument. And it seeks clarity about who may do what and who is

answerable to whom, because every Christian has to know how to work out their responsibility to God within the context of the various relationships and obligations they are involved in. Understanding and knowing how to work with Canon Law is a necessary aspect of exercising authority and holding responsibility in the Church;"[25]

Principles of Commonality in the Anglican Communion

Principles of Canon Law which are common in the Anglican Communion, the work of Anglican Communion Legal Advisors, who met in Canterbury in March 2002. They produced a report based on "six conclusions:

1. There are principals of canon law common to the churches of the Anglican Communion;
2. Their existence can be factually established;
3. Each province or church contributes through its own legal system to the principles of canon law common within the Communion;
4. These principles have strong persuasive authority and are fundamental to the self-understanding of each of the member churches;
5. These principles have a living force, and contain within themselves the possibility for further development; and
6. The existence of the principles both demonstrates and promotes unity in the Communion."[26]

When the Primates met for their meeting in April 2002 the report on the Legal Advisors Consultation was discussed. The Archbishops passed a resolution which "recognised the unwritten law common to the Churches of the Communion and expressed as shared principles of canon law may be understood to constitute a fifth "instrument of unity"[27] They further endorsed the suggestion to establish a network of lawyers to work on draft statement and the eventual final statement of principles of commonality. The ACSA was well represented at the Legal Advisors Consultation as well as at the meetings of the Archbishops. At the Primates' meetings ACSAs Archbishop Ndungane was a key participant.

The published final statement have 100 Principles are divided into eight parts or sections.

Part I deals with Nine Principles of **Church Order,** 'Law in ecclesial society, Law as servant, limits of Law, sources and forms of Law, the rule of Law, the requirement of authority, applicability of Law, interpretation of Law and Juridical presumptions.

> "In this section, the Principles are introduced by reference to their wider context, considering the nature of, and necessity for, law in a world made by a God who has embedded concepts of justice in His creation, and who has made Himself known in His Son Jesus Christ."[28]

The second part deals with the **Anglican Communion,** fellowship of the Communion, instruments of Communion, Autonomy and interdependence, Mutual respect and hospitality.

Ecclesiastical Government is found in Part III with Principles 15 to 24. This section covers **Ecclesiastical polity:** Leadership and authority: Administration: Representative government:

Legislative competence and subsidiarity: The diocese and diocesan legislation: The parish and parochial administration: Lay participation in government: Visitation and Due judicial process.

> "The(se) Principles confirm that the exercise of ecclesiastical governance is to be characterised by Christian virtues, transparency and the rule of law, which is to be applied with justice and equity within the institutions of a church and by those persons exercising authority. (It) include accountability, appropriate representation, legislative authority, natural justice, due process and the appropriate participation of each of the orders of bishops, clergy and laity."[29]

The section that deal with **Ministry** looks at the role of the Laity, the Ecclesiastical office, the threefold ordained ministry, Diocesan episcopal ministry and the termination of clerical ministry. Part IV is the largest in that;

> "In spite the diversity in culture and language in different parts in the Communion, there is a shared commitment of clergy and laity alike, to support public and individual ministry, through ordained officials and lay members, the threefold ordained ministry of bishops, priests and deacons, and archiepiscopal and metropolitical authority. There are underlying principles of pastoral care, issues of professional and personal relationships, issues of confidentiality, and above all, recognition that all who minister should do so "with respect and compassion".[30]

In Part V we find **Doctrine and Liturgy.** The section starts with the presentation of doctrine followed by the sources of doctrine: development of doctrinal formularies: Preaching, teaching and outreach: Legitimate theological diversity: Doctrinal discipline: Liturgy and public worship: Liturgical revision: forms of service: Liturgical administration: provision of public worship: Liturgical choice: alternative forms of service: Responsible public worship and Liturgical discipline.

> "In the Anglican tradition, neither doctrine nor liturgy is "free-floating". Each is bound by authority, doctrine being derived from Scripture and affirmed by the Catholic creeds and historic Anglican formularies; and liturgy has Scripture and the historic deposit of the Book of Common Prayer 1662 as its touchstones."[31]

Ecclesiastical Rites such as Baptism; Baptismal discipline; Confirmation; Holy Communion: admission and exclusion; Marriage its nature, purposes and responsibilities; requirements for ecclesiastical marriage and the nullity of marriage; Confession and absolution: The seal of the confessional: Deliverance or exorcism: Death and burial rites are covered in Part VI.

> "From the lawyer's point of view, marriage law presents a particularly interesting study in the overlap between church law and the law of the state. The interplay between the exercise of civil legal rights in relation to divorce and remarriage, and the teaching of the churches, has resulted in the development of very diverse approaches to these issues within the churches of the Anglican Communion[32].

Church property addresses a wide variety of issues relating to the ownership, use, and care of church property, real and personal, by ecclesiastical authorities at all levels of a church. The recurrent theme is the church's interest in ensuring that property be set aside, used, and maintained with reverence and integrity to further the mission of the church.[33]

The last part of the 'Common Principles of Canon Law' deals with **Ecumenical Relations** certainly an age old tradition in Anglicanism.

> "Anglican commitment to ecumenism was first articulated by the 1888 Lambeth Conference (Resolution 11). "The Anglican Communion has never seen itself as a complete and self-sufficient entity, but as an expression of Communion within the One Holy Catholic and Apostolic Church which takes seriously its vocation to reach out beyond its own life to the greater unity of the Church."[34]

A glance at the Canons and Constitution of the ACSA will provide a view of most if not all of the Common Principles of Canon Law, it is however the principles relating to ecumenical relations which have assisted succeeding Archbishops of Cape Town to play a role with the religious community in South Africa, from the dark days of *apartheid* to the Constitutional democratic state which is current in the country. Later Archbishops became involved in interfaith work and were prominent in the World Conference of Religion and Peace worldwide as well as in the South African Chapter of WCRP.

It was at a National Inter – Faith Conference arranged by the WCRP-SA in 1992 where a "Declaration on Religious Rights and Responsibilities"[35] was adopted, which many believe was the for-runner of Section 15, Freedom of religion, belief and opinion; the Commission for the Promotion and Protection of the Rights of Culture, Religious and Linguistic Communities, Section 184; and section 234, Charters of Rights, in the Constitution of the Republic of South Africa, 1996. In fact the WCRP-SA claims that the declaration was one of the documents consulted during the constitution writing process.

Those who signed and subscribed to the declaration described their understanding of a religious community "to mean a group of people who follow a particular system of belief, morality and worship, either in recognition of a divine being, or in the pursuit of spiritual development, or in expression of a sense of belonging through social custom and ritual". They further recognised "that the people of our continent, Africa, belong to diverse religious communities; and regret that in South Africa, religion has sometimes been used to justify injustice, sow conflict and contribute to the oppression, exploitation and suffering of people."[36]

"The courageous role played by many members of religious communities" was acknowledged. These were praised for "upholding human dignity, justice and peace in the face of repression and division", and the signatories were convinced of the role that the religious communities could play in "redressing past injustice and the construction of a just society."[37]

The declaration then affirmed that;

- People shall enjoy freedom of conscience
- Religious communities shall be equal before the law
- Religious communities have moral responsibilities to society
- People have the right to religious education
- People in state institutions shall enjoy religious rights
- Religions have the right to propagate their teachings

- Religious communities shall have access to the public media
- The state shall recognise systems of family and customary law
- The holy days of religious communities shall be respected
- Religious institutions may own property and be exempt from taxes.[38]

The Interfaith Conference of 1992 committed themselves to the implementation of the declaration and appealed to all religious communities to promote the principles, "convinced that there is an urgent need for all religious communities and the state to accept and implement the principles of (their) declaration; trusting that this will contribute to better relations between the state and religious communities and between religious communities themselves; recognising that these principles will function within the framework of the Bill of Rights.

The values and principles enshrined in the Constitution of South Africa is evidence of the role that religious leaders and particularly Anglican leaders played in the writing of the Constitution of the country. This is in no small part due to their involvement with the development and experience gained over time in Canon Law in the ACSA and in their involvement with the Archbishop of Canterbury, the Primates Meeting, the Lambeth Conference, the Anglican Consultative Councils and with the fifth' instrument of unity' the principles of Canon Law common to the Anglican Communion.

(Endnotes)

1 Doe, N, 'The Contribution of Common Principles of Canon Law to Ecclesial Communion in Anglicanism' (2008) 10 Ecc LJ 71-91

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3 Ibid p 264

4 Constitution and Canons of the Anglican Church of Southern Africa, ACSA, Publishing Committee, 2011

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6 ibid

7 Day, Hermitage, E. The Legal Development of the Church of the Province of South Africa 1934- 1936, English Church Bookshop, Cape Town.

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12 Doe, N. 1998:197

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14 Brummer, C. Felix v Diocese of False Bay, IN LIMINE RULING, WE 61251, 9 September 2011

15 Professor Doe is a professor at the Law School of Cardiff University, Wales and Director of its Centre for Law and Religion.

16 Norman Doe. *Canon Law and Communion.* Address to the Primates meeting Kanuga Episcopal Center, USA March 8, 2001 p 1

17 ibid

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20 ibid

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23 The Principles of Canon Law common to the Churches in the Anglican Communion 2008

24 My emphasis

25 ibid

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27 ibid

28 ibid

29 ibid

30 ibid

31 ibid

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33 ibid

34 ibid

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38 ibid

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Law and religion in South Africa: An African traditional perspective

1. Introduction

The discussion on the relationship between the law and religion in the South African context by somebody whose background and point of reference are based on the indigenous customary law of the land needs a special and honest approach. For the right approach, it is important that one has to be first honest to the inner self, to the religious community s/he serves and then to the nation as a whole. I find it very difficult to compromise my inner self because I am expected to be politically correct even if I find flaws in the law of the land or I find some aspects of deliberate negligence in the implementation of the policies that are supposed to liberate all.

This paper will therefore be straight to the point and will not be subjected to any blind loyalty either to the Constitution as the supreme law of the country or to the government programs and their attitude towards indigenous religion. It must be noted that there is a wide gap between what is said in the Constitution and the implementation of the theories documented. The Constitution of the country as the supreme law of the land is, on some very important issues too superficial and accommodating at the expense of the previously and in-fact still disadvantaged religious communities.

Before engaging my topic on the response of African Traditional Religion regarding religion and the law in South Africa, there is a lot of unpacking that needs to be done with some terms and issues relating to religion as a discourse. It must be understood here that I will be talking about something that first still needs to be explained, as the religion had been characterized by distortions and misinterpretations. The history of what we now call African traditional religion itself still needs to be explained so that we can see how it fits in what is called religion and why in the past there were distortions and marginalization.

In the past, that is pre-1994, the year in which South Africa got independence from colonialism and apartheid; South Africa was incorrectly declared a mono-religious state. The indigenous religion of the country, African traditional religion (ATR) was then not even in the margin, it was relegated to a barbaric and outdated African culture with a secular spirituality. It was neither in state schools nor in any other government literature. Its practitioners had to perform the religion underground; hence even today some people regard it as a religion that is practiced by illiterate people of the rural areas. As a result up to this moment in time, to justify the religion's existence before any deliberations about it, one has to first explain what the religion is all about so as to convince the audience that it is in-fact a religion and not just an exclusive African culture or some form of African indigenous church or traditional healing.

Justice has never been fully done on the content of the religion as it had in most cases been written by scholars of religion who belonged to other faiths. These scholars who were in-fact Christian clergy (Mbiti, Idowu, Magesa, Parrinder, Olupona) to mention a few had an

opportunity to be employed in the Departments of Religious Studies as Christian Theologians or as anthropologists. Because they felt the guilt of a displaced identity, they started to be sympathetic towards African traditional religion and started to write about it. In most cases they would be very apologetic as they were writing from a third person perspective. Their approach would either be from a western perspective or from a Judeo Christian perspective in definition of African concepts and practices. To appease their new spirituality which of course was also their source of income, they would make sure that they write in the past tense as if the religion is no longer practiced.

It will therefore be important for me in this debate to first briefly summarize which religious community embraces this African traditional religion I am talking about. This is also because some people include the Zionist churches or the Shembe (Nazareth Baptist) church or traditional healers under the umbrella of ATR.

2. African Traditional Religion: Definition and Scope

As stated earlier, when one talks about African traditional religion; a synopsis of what the religion is all about is necessary. Below is a brief explanation of ATR so that when discussing its relationship with the contemporary law one is at least knowledgeable of what is it all about.

2.1 Definition

As the religion had to be part of the academic discourse, it had to be given an English name by those who were its early writers. The practitioners did not bother about the name because it was their way of life. This naming of the religion by outsiders could be noticed in the subjective nature of how it is portrayed; some calling it African Religion, or African Religion/s; some calling it African traditional religion or African traditional religion/s. Some call it Ancestor worship or Traditional African Religions or any name that had to suite their subjective interpretation in the study of the other. Because of what has been explained above, the name, content, and scope of the religion had been a matter of scrutiny by those whose wishes are to see it under the armpits of missionary religions. In this paper I will use the term that I myself find fitting my inner perspective which is African traditional religion.

There is a common definition by many scholars but below I have specifically cited Awolalu because he connects it with what is also done at this present moment. Awolalu explains African traditional religion as follows:

> When we speak of African traditional religion we mean the indigenous religion of the Africans. It is the religion that has been handed down from generation to generation by the forebears of the present generation of Africans. It is not a fossil religion (a thing of the past) but a religion that Africans today have made theirs by living it and practicing it (cited by Dopamu 1991:21)

Idowu (1973) is very specific as he always includes the geographical area where the religion is practiced, which is Sub- Saharan.

2.1.1 The use of "Traditional"

Many practitioners of today are not sure whether to use 'traditional' or not. To them the use of the term may imply that it is the religion of the past, it is outdated and perhaps not capable of growing in comparison with the globalized world. The word "Traditional" may connote something that came into being a long time ago, something that could be interpreted as belonging to the era of 'primitivity'. I always advise the practitioners of African traditional religion that they should never be apologetic about their beliefs and practices. If to an outsider the term 'Traditional' connotes out-dated or whatever of the past, that should not be an issue because all these religions that boast of being progressive started centuries ago.

Idowu explains his use of 'traditional' by arguing as follows:

> We have used this word to mean 'native', 'indigenous', that which is aboriginal or foundational, handed down from generation to generation, that which continues to be practiced by living men and women of today as religion of the forebears, not only as a heritage from the past, but also that which peoples of today have made theirs by living it and practicing it, that which for them connects the past with the present and upon which they base the connection between now and eternity with all that, spiritually, they hope or fear (Idowu, 1973:104)

Dopamu agrees with Idowu as he also argues as follows:

> But African traditional religion is 'traditional' not because it is fossil, static and incapable of adaptation to new situations and changes, but because it is a religion that originated from the people's environment and on their soil. It is neither preached to them nor imported by them. Africans are not converted into it. Each person is born into it, lives it, practices it, and is proud to make it his own. Thus the word 'traditional' serves the purpose of distinguishing African religion from any other religion that has been brought to the people through missionary zeal and by propaganda (Dopamu, 1991:22)

2.1.2 Is it a unified religion?

The use of a plural (African traditional religions) is common in the writings of some scholars of the religion (Mbiti 1969, Okot 1970, Ferguson 1978, Westerlund 1991); but the majority of writers believes that there are many similarities between all the religious practices of the sub-Saharan Africa, something that makes the religion to be unified (Idowu 1973, Parrinder 1976, Dopamu 1991, Oladimeji 1980).

Despite the differences, there is an underlying identity in the indigenous religion of the sub-Saharan Africans which enables them to firmly argue with conviction that African traditional religion is a unified religion. There is a distinct regular rhythm in the general pattern of the people's beliefs and practices, and this is the common belief in the Creator. Though it is not necessary to justify whether the religion is singular or plural to those who are curious as it does not affect what the practitioners of the religion do, I will try to cite some scholars who agree that the religion is singular.

Idowu agrees with the use of singular in the religion as he argues:

> We find in Africa, the real cohesive factor of religion is the living God and that without this

one factor; all things would fall to pieces. And it is this ground especially – this identical concept that we can speak of the religion of Africa in the singular (Idowu, 1973:104)

3. Basic beliefs

It is always important as explained earlier that, until the religion gets its full recognition and understanding that before engaging in any debate; one has to exercise some patience and explain the basic beliefs as if it is for the first time. Practitioners of the religion believe that their religion consists of spiritual beliefs and practices that are in their blood from birth. ATR practitioners believe that these beliefs and practices were handed down by their forebears and have survived over years, despite many changes that the continent had experienced. African traditional religion has no founder; it is believed that it was revealed to the first generation by the Creator. The first generation was given all the laws of how to live in harmony with the Creator, other human beings and with nature.

The story goes on to say that when the first generation died, they joined the spiritual world where the Creator lives. In other words, the death of the first generation marked the beginning of ancestors. Ancestors then, became the messengers of the Creator and also the supervisors of the physical world. The ancestors look at the welfare of the living, mainly through the elderly who in turn teaches the youth orally and through ritual performances. This is how the religion gets passed on from generation to generation.

There are therefore three basic beliefs and these are a belief in:

3.1 The Creator

People who practice African traditional religion believe in the existence of the Supernatural Power who created life and the earth. Neither science nor humans can explain the powers of this Creator. This Creator is the Spirit and is neither male nor female. Although the Spiritual Power is believed to be everywhere in creation, it is also believed that creation began in the Spiritual world. The Spiritual World is holy and it is where the laws, rituals and taboos that control the welfare of the physical world originated.

Africa is made up of many nations and each nation has a name or names for the Creator depending on the attributes that these communities believe are associated with the Creator. Some groups may share a common name

3.2 Ancestors

Ndlovu summarizes the concept of ancestors very concise when he says the following:

The ways of referring to ancestors in African languages point to five fundamental beliefs and principles which he explains as follows:

- A recognition that each human being is made up not only of flesh, bones and blood, but also has a spirit or soul.
- A belief that whereas the human body dies and decomposes, the spirit (soul) does not perish.
- An understanding that human relations, especially within the family circle, do not die,

but their relationship, once established, goes on for ever.

- A recognition of the unique relationship that exists between the "creator Spirit" and the human; and
- The fact that in the light of the above, the spirits of the departed play the vital role of intermediaries (Ndlovu, 1991:34)

The spirits of those who have departed link the world of those who are alive with the world of the Creator. That is why they are believed to be playing the vital role of intermediaries.

3.3 Communal life through ritual performances and social upbringing

Rituals are extra-ordinary practices performed by the living for the spiritual world. Rituals are special gatherings of the clans aimed at communal religious practices. These are communal religious practices for some special purposes like the rites of passage, thanksgiving, divination rituals, and sometimes special rituals as requested by ancestors, like the bringing back of the spirit of some family member who died far away from home. In these religious gatherings the community acts out its various forms of worship. Through these rituals, unity and healing are achieved.

4. Nature of African communities

The basic unit constituting African communities is the family. Depending on the nature of the society, the family may be patrilineal or matrilineal.

Mbiti (1969) refers to this basic structure as one of as he claims that:

> …kinship is reckoned through blood and betrothal (engagement and marriage). It is kinship which controls social relationships between people in a given community, it governs marital customs and regulations, it determines the behaviours of one individual towards another (Mbiti 1969:104).

During ritual performances the members of the clan come together and perform the ritual as a collective. An African community is understood as comprising of both the living and the departed members of the family- the ancestors. Mbiti, again explains this entity as follows:

> The kinship system also extends vertically to include the departed and those yet to be born. It is part of traditional education for children in many African societies to learn the genealogies of their descent. The genealogy gives a sense of depth, historical belongingness, a feeling of deep rootedness and a sense of sacred obligation to extend the genealogical line (Mbiti, 1969:105)

Ancestors are believed to be intermediaries between the living members of the clan and their Creator/God. Every transformation in the development of the living individual must be announced publicly in order to officially inform both the living and the deceased members of the community.

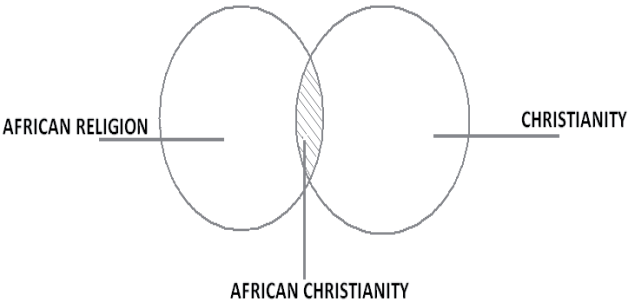
5. Conflict of laws in South Africa: Foreign versus Indigenous

In this document few sections of the Constitution will be cited and then a comparative analysis will be done so as to find out if these sections are implemented in an unprejudiced manner or not. It was earlier explained that the Constitution speaks well about all 'South Africans' but one thing it never thought about was the affirmative action in religion. In the Bill of Rights in the Constitution of South Africa Section 9 speaks of 'equality for all', Section 15 speaks of 'Freedom of Religion, belief and opinion', and Section 31 speaks of the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

The question that needs to be asked is to check if there is really equality of all religions in South Africa, if there is freedom of religion and also to check if there is promotion and protection of the disadvantaged religion and culture. What I find interesting with the implementation of Section 31 of the Constitution for instance is that in two consecutive terms of office the chairpersons of the Commission for the Protection and Promotion of the rights of Cultural, Religious and Linguistic Communities are always Christians Reverends. That mentality on its own shows which religion is regarded as superior hence I still believe that South Africa has not shifted from the past. What is happening is just a replacement of white Christianity by a syncretistic form of Ibramic spirituality in Black cultural and apologetic skins.

5.1 Violation of human/group rights

In practice there is a lot of the violation of the rights of African traditional religion. ATR practitioners are denied the right to be independent. They are only accepted if they accept to be appendages of the Ibramic faiths, or if they accept to be labelled as 'Traditional healers', or if they accept that their form of spirituality is secular and is not at par with Ibramic faiths.



African traditional religion is always represented by people who belong to African Christianity or amagqirha/ngaka/sangomas (diviners) who practice syncretism as that is reflected in their regalia which depicts Christian symbols like crosses and stars but claiming to be messengers of the ancestors. The government is very biased towards the African converts and very oppressive, none caring and insensitive regarding the status of the practitioners of traditional spirituality. The government pretends as if these people do not exist anymore.

The above explanation clearly indicates that although the Constitution speaks of equality, there are still lots of inequalities. In-fact it would practically be impossible to achieve equality when the ratio is enforced to be 9:1.

5.2 Municipal by-laws

There is an ongoing outcry by municipalities in big towns like Johannesburg, Cape Town and Durban where they say that there is lack of land for burial places in the cities. They claim that there no more burial land so South Africans must come up with solutions on how to bury their deceased. South Africans are then advised to *tshisa* (burn) their bodies after death as a solution to this lack of land in the cities. Strange enough in the very cities businesses are being built on a daily basis.

This cremation has not been communicated to the adherents of African traditional religion who invoke amathambo alele ukuthula (the Bones that are sleeping peacefully). The indigenous people who practice ATR hear about these policies on the electronic media when the powerful and the rich are convincing the listenership at home about their ludicrous decisions. Now they are forced to import this Far East tradition, which is cremation. I wonder if this is another form of encouraging them to do away with their belief systems and to invoke 'the ashes' (banqule ethuthwini)? According to ATR, a corpse cannot be kept in the homestead, whether it is in the form of bones or ashes, that is regarded as isimnyama (being under dark cloud). Cremation is out, no one can keep ashes at home, neither to sprinkle it in the sea or river; that is out of question. A deceased individual should be in a grave.

Graves in ATR are treated with great respect because it is believed that those whose remains are inside the graves are not dead but asleep. It is important for people to know where their dead relatives are buried because the bones of the deceased symbolize life. By knowing where the bones of the deceased relative are buried, one knows where the ancestor is 'lying'.

Another suggestion by the government is to bury one person over the other, like a wife over her husband, or a sun over his father. That is also ridiculous because when people speak over the grave, who will answer first?

When it comes to graves of African ancestors, even government officials are very careless, arrogant and are too subjective. What has been done in the sign post showing King Phalo's grave of AmaXhosa in Butterworth in the Eastern Cape for instance is ludicrous and could never been done to other religious leaders' grave. King Phalo died in 1775 before the arrival of Christianity in the Eastern Cape as the first missionary from the London Missionary society, Rev. Van der Kemp arrived in 1799. The sign post showing his grave is a complete distortion as it shows the cross of Jesus and those of the two criminals.

One would wonder if the same could ever be done in the sign post showing a Muslim grave or a Jewish grave, Never!

5.3 Present South African calendar

Though South Africa is declared a secular state, in reality it is still a Christian country. Having a closer look at the national calendar, only Christian holidays have remained public holidays, like Easter holidays and Christmas. The argument by the Government that there are two Christian holidays (Good Friday and Christmas) that are officially recognized in the country is incorrect and misleading. Historical reality points to five holidays as Easter Monday (a day which follows Easter Sunday) and Boxing Day, (a day which follows Christmas) are always official national holidays and these days had in-fact both originated from Christianity. What happened to blindfolded people is to keep these Christian holidays (Easter Monday and Boxing Day) in the calendar as it happened before liberation but change their names to appear as if they were initiatives after 1994. They have just been transformed so as to appear as if they are inclusive yet they are extensions of Christianity.

The International Religious Freedom Report of 2004 also states that in South Africa:

> Only Christian holidays, such as Christmas and Good Friday, are recognized as national religious holidays; however, members of other religious groups are allowed to celebrate their religious holidays without government interference.

Though the first statement is right when it says that 'members of other religious groups are allowed to celebrate their holidays without government interference' it is not true for ATR or perhaps they refer to other recognized religions like the Bahai, Buddhism, Hindu, Islam, and Judaism. No African Traditional holiday is recognized and government does not even cater for the practitioners of this religion when they want to be away from work, and ATR children are not excused from school as it is done with other religions. So this is misinformation and it needs to be corrected.

5.4 Meat Safety Act, 2000 (Act No. 40 of 2000) and Act No. 19 of 2002 on the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 2002).

Though Act No.19 of 2002 speaks of the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities the municipal By-laws dictate that animals should not be kept within the home for a period that exceeds twenty four hours. Section 147 of the Johannesburg Metropolitan's Public Health by-law, No. 180 of 2004 for instance states that an animal should be slaughtered in a position where the slaughtering cannot be observed by any person on neighbouring premises or any member of the public (Section 2b).

This is impossible for any ATR ritual because members of the public must come and witness that a particular ritual was performed.

To conclude, the laws regarding religion in South Africa is still biased, in-fact what has happened now is the replacement of a white oppressor by an African dictatorship and religious coercion. The content of the missionaries is now heavier and is channelled through fundamental capitalist churches which have mushroomed in thousands in the country. The main sermon of these churches is the demonization of ancestors and ATR. There is no protection of ATR; Sections 9, 15, and 31 do not apply when it comes to ATR. ATR is left to swim alone or to sink. It seems that a colonial heritage is still dictating the relationship between law and religion as far as African traditional religion is concerned.

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Rhema Movement

The evolving role of the Rhema Movement in the South African public square

ABSTRACT

The position of the Rhema Movement on law and religion in South Africa, and religious freedom in particular, can be understood by assessing their changing role in the public square. Underlying their role is the view that, public engagement and social justice are forms of religious expression, embarked upon within the robust religious freedom of contemporary South Africa.

The impetus for involvement in the political landscape of South Africa, by the Rhema Bible Church, a Charismatic Pentecostal Christian Church, and its' leader, Pastor Ray McCauley, has been widely speculated over in the media. It is the premise of this paper that by assessing the Rhema Movement's changing role in the public square in recent decades, as well as the theological and philosophical basis for such engagement, the position of the Rhema Movement on law and religion, and religious freedom in particular, can be understood. Underlying their actions, Marius Oosthuizen argues herein, is their stance that public engagement and social justice are forms of religious expression, upon which they seek to embark within the robust religious freedom afforded them by the constitutional dispensation of contemporary South Africa.

1. Introduction

The Oxford Advanced Learner's Dictionary (1998) describes the word 'evolve' as: 'to develop gradually' … or 'to develop … into forms that are better adapted to survive changes in their environment.' This is perhaps a suitable description of the position of the Rhema Movement on the relationship between law and religion in South Africa. This evolution has caused Rhema's role in the public square to change profoundly from its inception in the 70's. Its' role has grown to include various nuances and dimensions as it has adapted to the South African context. It is this evolution that we hope to explore. When we refer to the *Rhema Movement*, we are broadly referring to the Rhema Bible Church, its affiliated ministries and the *fellowship*[1] of Churches, associated with Rhema through the International Federation of Christian Churches (IFCC), under the leadership of Pastor Ray McCauley.

This paper is not a critical analysis of their position, but seeks to explain their position; introductory remarks about the field of law and religion, the changing relationship of law and religion in South Africa and Rhema's resultant participation in the public square. We refer to Rhema's position as the *Paradigm*[2] of the Rhema Movement, and focus on the engagement of this religious community with the state, since we are of the view that Rhema's engagement best embodies their position.

1 *Fellowship:* by 'fellowship' we refer to a loose association of autonomous local churches that associate based on shared beliefs, practices and a common vision for their expression of the Christian faith.

2 *Paradigm:* by 'paradigm' we refer to the general point of view and frame of reference, including assumptions and parameters of thought from which the position of the Rhema Movement is formulated.

2. The field of law and religion

In the field of law, religion as a consideration is not irrelevant as is often proposed by a secularist approach. In addition, Friedrich Nietzsche was clearly mistaken when proclaiming that 'God is dead'. (Wikipedia, 2011) Instead, scholars now argue that predictions of increasing secularization seem to have been misplaced and surprisingly, religious faith has strengthened worldwide. (Balcomb 2010:414) Growth in the Charismatic Pentecostal sphere of Christianity amounts to over 500 million in the last hundred years alone with tens of millions of adherents in Africa (Balcomb 2010:414, Maxwell, 2005:5). We can therefore assume that this group within society will increasingly play a prominent role in the public discourse. Furthermore, the sociological effects of this escalation in religion are staggering, resulting in the rejection of a 'compartmentalization' of religious faith into so-called 'spiritual' and 'secular' realms…' and instead: 'God' is now seen to be significant to 'the whole of life…' This has proven to be particularly true of 'fervently religious youngsters under the age of thirty… across the religious spectrum' (Balcomb 2010:417) alluding to further future implications for lawmakers and public officials.

While attempts and even strides have been made in the secularization of the law, law and religion seem, for the moment, to be intertwined and inseparable. Diane Winston pointed out that this was evident in a senator's response to a statement by President Barak Obama where he warned religious progressives that their secular counterparts would have to '…stop disdaining people of faith if they wanted to have an impact…' The senator responded by observing that 'some of the problem here is rhetorical,' and that 'if we scrub language of all religious content, we forfeit the imagery and terminology through which millions of Americans understand both their personal morality and social justice' (Winston, 2007:985). Moreover, the same can be said of South Africans; religion is still part of their rhetoric and will continue to permeate public discourse, informing their sense of identity and remain vital to how they express their values. The perspective of the Rhema Movement is therefore that religion continues to be an elusive, *hidden hand* in public matters.

Therefore the question arises as to what the relationship between law and religion ought to be? As the religious community seeks to preserve 'religious freedom' while allowing the law to run its full course, it must aspire to prevent the law from stunting the capacity of religion. Religion must thus co-exist freely with the law, but how?

Smith (2000:61) alludes to possible answers in his discussion of the legacy of 'religious freedom' in the United States, identifying two principles that form a framework wherein religious freedom is possible amid secular laws: 'religious equality' and 'religious pluralism'. While highlighting some of the problems that arise when applying these principles to jurisprudence, Smith (2000:75) concludes that they do afford useful mechanisms as long as 'equality' does not overwhelm 'pluralism'. Smith reaches the conclusion that the pursuit of equality, when taken to the extreme, may erode the pluralistic tolerance required to accommodate the religious diversity inherent in society. In South Africa specifically, where equality functions as the cornerstone of the constitutional dispensation, it is Rhema's view that this is a danger we would do well to recognize.

2.1 Law and religion in South Africa

As a 'Constitutional Democracy', the relationship between law and religion and 'religious

freedom' in South Africa is determined by the specific nature of the South African Constitution and its disposition towards religion. It is said to be '…one of the most luxuriously democratic instruments in the world" (Balcomb, 2005:485).

Balcomb (2005:485) observes:

> a democratic constitution, democratic institutions and substantially democratic practice have replaced the racial dictatorship of apartheid…South Africa's system of parliamentary government, if it works correctly, entrenches an advanced array of political, social and economic rights, is controlled by an extensive separation of powers (between legislature, executive and judiciary and between different levels of government), and is buttressed by an array of democracy-supporting institutions such as a Human Rights Commission, a Gender Commission, an Ombudsperson, and an Auditor-General's office.

Furthermore, South Africa has been a participant in the International Covenant on Civil and Political Rights since October 1994. South Africa has ratified the treaty without reservation and is thus mandated to ensure that her citizens enjoy 'freedom of Religion' as set out in Article 18 of the treaty. As such, the Rhema Movement is of the view that South Africans are legally assured of freedom of religion. The nature of that freedom, in Rhema's view, should consist of the three dimensions contemplated by Paul Taylor (1979):

- freedom of religious choice
- the right of conscience (or so-called *forum internum*), and
- the right to manifest religious beliefs (or so-called *forum externum*)

Rhema acknowledges that these freedoms exist in a dynamic tension within the '…permissible limitations on such manifestations' (Gunn 2008:763) by the state as it seeks to protect the freedoms of all citizens.

Since these three dimensions of religious freedom are interrelated, it follows in Rhema's view that, religious expression ought to be permitted in the public as well as private sphere. Furthermore, the 'right of conscience objection' should be afforded to religious adherents and as such the State may at no point inhibit such freedom through the coercion of any citizen to participate in activities that are deemed to be contrary to conscience on religious grounds. What is more, while the liberal nature of the South African Constitution assures the secular nature of the law, the role of religion and religious argument ought not be excluded from public debate. As such, it would be presumptuous, as is often the case, to expect religious arguments to be couched in secular terms as a pre-requisite to be afforded consideration in the public square. To clarify, Rhema does not propose a return to a theocratic dispensation, where secularists have to contend with the imposition of religion, but suggest the need for a new paradigm for the relationship between law and religion.

This view is contemplated by Mark C. Modak-Truran who in *Beyond Theocracy and Secularism. Toward a New Paradigm of Law and Religion',* observes that a new post-modern paradigm is evident. He argues:

> [d]espite the secularization of the text of the law, this new paradigm results in a legitimate plurality of religious convictions implicitly legitimating the law and thereby *desecularizing the law.* The trajectory for this new constructive postmodern paradigm of law and religion

> has been shown to embrace legal indeterminacy as a necessary structural characteristic of law to provide for a pluralistic religious legitimation of law … maintaining the secularization of law in the sense that the text of the law makes no explicit recognition of any official religious foundation. The plurality of religious foundations are only implied by the law. (Mark C. Modak-Truran 2008:233)

The implications are that diverse forms of religious vigour is freely engaged in the public domain without the encroachment of extreme secularism, while not subverting the needed secular neutrality of the law. Furthermore, religiously orientated political participation is permitted and members of the legislature, executive and judiciary are allowed to express their own particular religious disposition in the course of their public role. Rhema is of the view that this new paradigm is operative in South Africa. Yet in many instances it is the progressive and liberal segment of the South African society that has made use of the aforementioned avenues of public discourse to a greater degree than the religious community. *Equality* is thus potentially *overwhelming pluralism*. The issue then for the religious community is not the absence of freedom, but the failure to adequately mobilize itself to make use of the freedom enjoyed.

2.2 Prophetic theology in South Africa

Religion has historical significance in the national transformation of South Africa. For instance, Liberation Theology has more recently contributed to the demise of Apartheid as is widely documented. Yet, the contemporary role of theology in South Africa's public discourse does not appear to parallel the prominence of religion in society in general. Balcolmb (2010:424-425) notes that Liberation Theology, while being thoroughly *prophetic*, amounted to a brief influence only, having been '…shaped by a particular political agenda…' and as a result of the dramatic political transformation… 'is hardly discernible', this ís due to the fact that '…most of its erstwhile advocates are now sitting in political office'. Balcomb reflects on what he calls the 'seismic' shift in the political landscape in South Africa, observing that:

> [f]orces that were on the left of the spectrum are now to be found in the centre, those that were in the centre now find themselves on the right and those that were on the right have fallen off the edge into oblivion. (Balcomb, 2005:484)

and:

> [t]he 'magna carta' of prophetic theology in the early eighties was the Kairos document ... There was a left, a right, and a centre in theological alignment. 'Prophetic' theology was on the left, 'state' theology on the right, and 'church' theology in the middle. The signs of the times were clear: To be prophetic you needed to be aligned with the forces of the revolution on the left. To occupy any other position was to 'sell out' to the regime. (Balcomb, 2005:486)

Balcomb (2010:424-425) identifies the reason for this regression and failure of Liberation Theology to foresee the inevitable demise of Apartheid and the failure to craft a theology that would have significance long after Apartheid ended. The result, in Rhema's view, has been the creation of a theological vacuum and a loss of direction in public theology, amounting to the religious community losing its voice. When heard today, the Church represents more of a *murmuring in the promised land* than a *cry in the wilderness*. This has produced an action of *retreat* rather than *advance* and a disposition of pietism. The religious community is at risk

of forming a 'reactionary' (Balcomb, 2005:488) and protectionist agenda as opposed to a proactive, constructionist one. A r*eactionary* response places religion at the risk of taking on a *fort* instead of a *force* mentality. This has resulted in the missional essence of the Gospel, which seeks to be the *light* and the *salt* of the world, turning inward upon the faith-community itself, at the expense of its prophetic relevance. While the use of the word 'oblivion' might be too strong to describe the role of religious right, there appears to be the danger of an *irrelevant* theology in the new context. What emerges is a reactionary theology which fails to engage the broadest issues in the most meaningful way: merely 'objecting to the liberalization of society' (Balcomb, 2005:485) at the expense of seeing the proverbial *elephant in the room,* namely the ongoing injustice of gross deprivation, poverty and inequality that undermines not only the dignity of their victims but brings to mind the question of the complicity of all bystanders.

In Rhema's view, South Africa today represents an entirely new context. This requires an equally dramatic evolution in the prophetic role of the church and therefore the theology that undergirds the Church's actions. In the new dispensation the Church's role entails not simply the dismantling of unjust structures, but the construction of a new, 'just society' (Balcomb, 2005:488). The action towards creating a *new* South Africa is simply not complete. This is supported by a member from the Institute for Security Studies, van Vuuren (2006:17). He quotes a statement made by Zenzile Khoisan, a Truth and Reconciliation Commission (TRC) researcher, concerning the contribution of the TRC:

> [a]s a start it was good, it was auspicious and audacious. It held open the door of promise to those who have been harmed by history. But it is up to us who live in the aftermath of the nightmare to wake gently and work tirelessly to realise the substance of that promise.

Should Christian movements or churches fail to make the required transition, the implications for the Church include an ideological 'drift' to the right or centre of society, providing a construct of escapism for the marginalized or a mere'… legitimation of the status quo for those in the centre' (Balcomb, 2005:493). The practical implications include the Church perpetually playing second-fiddle to the State, inept in shaping the nation's moral and spiritual landscape. The question that arises therefore is - how ought the Church to become more responsive to the newfound context of South Africa and express itself fully within the freedom afforded it? To answer this question, we turn to the power of Charismatic Christianity to bring about Social Change and thus the *Paradigm of the Rhema Movement*, outlining its background and theological development in order to interpret its current position.

3. Charismatic christianity and social change

Charismatic Pentecostal groups appear to have a notable sociological impact on the formation of norms and values, profoundly impacting the fabric of society wherein they operate. Pentecostalism has the '…capacity to redeem, restore and re-pattern the family…' and even provide a '… moral map …' for those who find prosperity, assisting them in the navigation of the unique *temptations* that the contemporary society offers (Maxwell, 2005:15 – 16, 29). Maxwell continues to describe what he calls a '… inner … ' transformation brought about by the Gospel message in '… believers …' who are participants in this religious movement. Despite prior feelings of;'… low self- esteem, feeling wretched, despised and abused…' the Pentecostal community instils the conviction that adherents are '… not a nobody but a somebody', and '…are no longer just citizens of a state … they have new royal identity as members of the Kingdom of God' Maxwell (2005:4). He further notes that Pentecostalism appears to both to

satisfy a '…deep existential passion…' and '…aids those struggling to survive…', instilling the acquisitiveness and flexibility into its adherents, providing 'security', 'capriciousness' and 'hope'.

Moreover David Martin (1996: 45) reinforces this view in explaining that *evangelical language* is able to address the person in their condition, confirming their dignity, worth and significance. Furthermore, Garner suggests that religion has '…immense power to bring about social change', often highlighted 'in Pentecostalism' and having particular bearing on the financial, social and cultural behaviour of its adherents (Garner, 2000:310). It follows that Charismatic Pentecostal Christianity, of which the Rhema Movement is an example, would naturally result in public social engagement since this is, in effect, inherent in the belief-system.

While Pentecostal leaders may seek to engage political players, Pentecostalism is therefore not about Politics *per se* but about social change. Pentecostalism challenges the political perceptions of social scientists as it is related to culture due to the profound effect it has on its adherents and how the effect translates into their participation in the socio-political dimension of their context (Hastings, 1979: 265). David Martin is quoted by Maxwell (2005:28) as saying:

> Pentecostal religion offers hope and lived solutions to combat intensifying poverty, marginalization and insecurity, problems that arise out of structural conditions which are beyond the power of individuals to alter and which their political leaders are unable or unwilling to alter. Pentecostalism … offers adherents the chance of changing their responses to the limiting conditions its macro-structures create.

While the Rhema Movement has not historically been the forerunner in the prophetic dimension of religion in South Africa, the current view of the movement as to its mandate as a community of faith within the broader South African *oikoumene,* is to take a stand and be a voice furthering the establishment of a just society. The Rhema Movement therefore does not seek to employ religion as a mere instrument for social change, but instead envisions social change as a vital outcome, central to its very essence and purpose.

4. The paradigm of the rhema movement

It is in the *vacuum* of prophetic theology that the Rhema Movement, as one among various religious communities, tries to achieve relevance in addressing the real, spiritual and material needs of South Africans. Balcomb observes two dimensions of this endeavour with the following analysis of contextual theology in South Africa:

> there are two kinds of contextual theology that have been operating in South Africa – theologies of bread and theologies of being (Balcomb 1998:54–73). Theologies of bread are those theologies that are concerned with material issues – including political and economic liberation. Theologies of being are concerned with the human issues of identity, dignity, and what Tillich termed 'the power to be'. Both are profoundly important. …If the truth be told, it appears to be Pentecostalism that offers both bread and being, as well as God. (Balcomb 2010:425)

A shift has taken place in the theology of the Rhema Movement in response to South Africa's changing context. Rhema's view stems from the understanding that Christian truth always stands on the side of justice. As such, a failure to take note of the social, political and economic challenges of South Africa today, would imply that the democratic dispensation has resolved all forms of injustice in the nation. It goes without saying that this is simply not the case and calls for strong, long-term intervention.

4.1 Background of the Rhema Movement

The Rhema Movement forms part of the Charismatic segment of Pentecostal Christianity and is described as one of the 'fastest growing streams of Christianity worldwide' (Asamoah-Gyadu, 2005:118). The movement includes The International Federation of Christian Churches (IFCC), a voluntary association of Churches represented by an *umbrella* organization that seeks to facilitate the co-operation of churches with corresponding belief systems. A strong emphasis of *voluntary association* has been evident from the inception of the IFCC where *fellowship*, *loose cooperation* and *autonomy* were emphasized. (IFCC n.d., About) IFCC is led by an executive consisting of; a President, Deputy President, National and International Overseer, 11 regional coordinators nationwide, and four additional members. IFCC seeks to assist fellow membership churches with legal compliance and other forms of contextual support, including the provision of *covering*. This assures that self-governance is possible allowing the principles of *submission* and *accountability* to be facilitated without encroaching upon the *sovereignty* of the local congregation (IFCC n.d., National Overseers Report).

Significantly, IFCC endeavours to maintain a culture of diversity that is representative of the South African population. It is believed that the accommodation of the complexity of cultural diversity contributes actively to the *healing* of the South African nation. As such, values such as communication, respect and understanding are propagated while attempts are made to foster forgiveness, acceptance and reconciliation. Finally, IFCC seeks to facilitate the *prophetic voice* of the Church, formulating the views of the Church through the application of Biblical principles to everyday life situations wherever possible, and expressing these in public discourse in South Africa. (IFCC n.d., National Overseers Report)

4.2 Legal status of Rhema Bible Church

Relating to the law and regulatory bodies, the Rhema Movement endeavours to remain compliant to the legislation and regulations governing religious institutions (SAPA, 2009). An annual financial *commitment* of more than R100 million is made by the members of Rhema Bible Church alone. This places a high value on the importance of the legislative and regulatory framework, affording the movement the freedom to pursue their religious objectives.

As per the Constitution of Rhema Bible Church (2008) it therefore operates as a Public Benefit Organisation[3], qualifying for tax exemption by virtue of conducting a Public Benefit Activity. This is a benefit that Rhema welcomes and recognizes as an accommodation of religious freedom. Rhema therefore, according to Constitution of Rhema Bible Church (2008) seeks to comply with the provisions of the aforementioned Act as far as: Public Benefit Activity, Fiduciary Responsibility, Use of Funds, Trading Activities, Donations Received, Financial Matters, and the Dissolution of the Church is concerned.

4.3 Public engagement of the Rhema Movement

Due to the Rhema Movement's engagement in the public sphere at a critical point during South Africa's transition to democracy, Balcomb contends that IFCC, Rhema Bible Church and its leader, Pastor Ray McCauley, became representative, though not exclusively so, of South Africa's Charismatic Evangelicals (Balcomb 2004:10). As a result, within the context of the Rhema Movement and IFCC, Pastor Ray McCauley embodied and represented the movement's position on law and religion, as Anderson (2005:72) aptly describes:

3 Public Benefit Organization, explained under Section 10(1)(cN) of the Income Tax Act.

> within SA, McCauley is President … IFCC, the largest association of Charismatic and new Pentecostal churches in the country, and as such he is a significant Christian leader, very much a pragmatist in his approach to socio-political issues … involved in high profile discussions with political leaders and was part of the 'Rustenburg Declaration' of 1990, a broad church-based document that confessed complicity in apartheid, called for political change, the creation of a democratic society and the end of apartheid.

While largely influenced by the *faith message* of American preacher, Kenneth Hagin, McCauley - a *born-again* Christian preacher - having initially emphasized the *prosperity gospel* of material wellbeing, became sensitized to the socio-political realities of South Africa in the late eighties. This exposure drastically changed the perspective of the movement on prophetic theology and the political dimension of the Gospel. Pastor McCauley's intervention in the socio-political arena began after he experienced a turning point at the aforementioned Rustenburg Conference. During this event, a large number of church leaders from various denominations acknowledged that Apartheid was a sinful process, they confessed their guilt in relation to it, and pledged themselves to the struggle for justice and equity. Pastor McCauley acknowledged that he had been *apathetic* to the political situation in South Africa and only then began to take an active role in shaping change in South Africa. As Anderson accounts:

> Ray McCauley, representing the IFCC, confessed the shortcomings of white Charismatics who 'hid behind their so-called spirituality while closing their eyes to the dark events of the apartheid years. (Anderson 2005:73)

He thus embarked on political interventions which included working with Dr Johan Heyns of the Dutch Reformed Church and the Rev. Frank Chikane of the South African Council of Churches. In addition, Pastor McCauley participated in the steering committee for the formation of the National Peace Accord, an advocacy initiative working towards peace through negotiation.

The newfound political engagement by the Rhema Movement called for the clarification of their views on issues such as: abortion, pornography, freedom of expression, gay rights, interfaith dialogue, Christian political involvement and social transformation. These issues were addressed through a publication called *Power and Passion: Fulfilling God's Destiny for the Nation*. The position of the Rhema Movement, amounted to a support structure for the new government and the active promotion of democracy. While Balcomb amongst others conclude that McCauley represented a category of *pragmatists* that simply responded to the changing political landscape of South Africa, there was in fact a profound theological shift taking place within the Rhema Movement, bringing about an acute moral awareness of the socio-political and economic realities facing the nation. This has resulted in Rhema's view today which proposes that these realities, more so than any historic event, will shape the future of South Africa.

Furthermore strategic changes in the activities of the Rhema Churches which include initiatives aimed at economic and social upliftment of the poor, followed closely on aforementioned development. A paradigm-shift had taken place in the outlook and priorities of the Rhema Movement and its leadership in particular. One result of this the movement's expanded theological perspective is the Rhema Bible Church's social outreach program which consists primarily of a ministry called the *Hands of Compassion*. This organization runs soup kitchens and helps AIDS victims, alcoholics and drug addicts, among others. What is more, this transformation extended to the general political theology of the Rhema Movement

and resulted in a drive to encourage members to become involved in the transformation of society as well as racial integration of church services at all levels. While Balcomb (2004:15-19) concluded in 2004 that Rhema had little impact on the black community, this certainly cannot be said today: the majority of the thousands of congregants are black and the same change is evident in the staff contingent of the Rhema Bible Church in Randburg of which McCauley is the leading figure.

4.4 Theological Development of the Rhema Movement

It is vital to note that the theology of the Rhema Movement is not dogmatic and static, but it can be understood to be fluid and adaptive to new contexts - Asamoah-Gyadu observes that it cannot be neatly categorized as is often done by western scholars in particular (Asamoah-Gyadu, 2005:119). Since it is understood to be a theology of *response* to the *living impressions* of God by His Spirit, it necessarily results in a variety of expressions. For this reason, the initial disconnect between the *white pentecostals* and their *black compatriots* has evaporated as the movement progressed (Anderson 2005:88). For instance, racial integration at Rhema has progressed, even promoting reconciliation. While the leadership of the movement was largely comprised of *whites* in the past, proactive steps have been taken toward integration and transformation, recognized by Ganiel as proof of '…cognitive identity shifts…' among whites who voluntarily and proactively seek to '…level the playing field…' in the social dimension of religion (Ganiel 2007:8).

4.5 The Rhema Movement and 'morality'

Historically the Rhema Movement stems from groupings often categorized as *fundamentalist.* The challenge in the new dispensation has been to stay true to the fundamentals of what constitute Rhema's beliefs, while being open to additional perspectives on spirituality previously neglected. As such, an evolution has occurred in the Practical Theology of the Rhema Movement, especially where morality is concerned. This is embodied in a statement by Pastor Ray McCauley on the controversial subject of abortion:

> [y]ou can't tell people not to have an abortion unless you have an alternative, so we work very hard at having these homes for unwed mothers … The *church* is good at casting stones and they are very good at telling everybody what the problems are, [but] you can never deal with problems unless you have a solution. (Tolsi, 2009)

Rhema's goal has been to take a *merciful* approach to the issue of morality, understanding that immorality occurs in a context, and unless the context is understood and reshaped, a change of behaviour is unlikely if not impossible. This does not imply that the Rhema Movement takes no position on contentious issues, but suggests that *solutions* are sought as opposed to conflict and alienation. Yet, while the Rhema Movement seeks to be *Inclusive*[4] it is not without conviction as far as doctrine and morality is concerned. For instance, the Statement of Faith of the International Federation of Christian Churches reads:

> the essentials of Church membership are the new birth and personal confession of faith in Christ. It is not merely the attending of Church services or having a name on the membership ... Only the transforming work of the Holy Spirit in the heart of the

4 Inclusive: used here to refer to an approach to religious practice, that affords non-adherents to our beliefs access to our liturgy in order to encounter our belief systems, as opposed to excluding them outright based on a predisposed bias.

> repentant sinner qualifies one for membership in the Body of Christ …The Bible teaches the principal of being in submission to authority. As such, it is understood that Church membership shall be subject to submission to authority in matters pertaining to Church governance, doctrine and personal behaviour. ... The Bible teaches heterosexual relationships between a natural man and a natural woman within the confines of matrimony. Adherence to this stated principal of sexual behaviour is an inherent requirement for membership in this local Church. (IFCC, n.d., About)

In applying these principles practically, it is Rhema's view that issues of morality ought to be addressed from within a relationship of tolerance and patience while not undermining Rhema's right to address immorality from its' own perspective. Practically then, Church Membership for instance may be afforded to a person of any sexual orientation, provided that they recognize Rhema's moral view thereof and are submitted to the counsel and guidance of the church. In this regard Rhema's position could be argued to be discriminatory. However, Rhema's view is that as long as they do not pursue the non-conformer with the intent of coercion at the expense of their freedom, it is within Rhema's right to protect Rhema's own freedom by refusing them association or participation in the religious community.

The Rhema Movement has at times taken a 'remarkably liberal' position on some issues (Balcomb 2004:15-19). Therein again is indicated a profound shift away from a *fundamentalist* approach to religion, supporting the freedom of non-adherents who differ from that of the Rhema Movement.

This approach to remain true to Rhema's fundamental beliefs without becoming *fundamentalist*, is embodied in another tenant of the Statement of Faith of Rhema Church concerning homosexuality and how the beliefs are practically applied. It thus reads in the Constitution of Rhema Bible Church (2008) that, '…we believe in heterosexual relationships between a natural man and a natural woman within the confines of lawful matrimony.' In this instance, comments by Pastor Ray McCauley on the topic are enlightening as far as the application of this belief is concerned, using a *pastoral approach* he says:

> Gays are welcome in church: 'I just love them [rather than condemn them] … So we, in our church, we embrace them, and do not try to make them something that they are not ... (Tolsi, 2009)

It is in this context that Rhema Church therefore reserves the right to refuse, or revoke membership, as expressed in the Constitution of Rhema Bible Church (2008:5), requiring members to be *subject* to the church's stance on matters of '… governance, doctrine and personal behaviour …' and as such may withdraw membership on the basis of misconduct.

Importantly, the Rhema Movement's position on the issue of morality ought not to be seen in isolation, but rather within the context of the greater beliefs captured in what is called the *ethos* or *four pillars* of the Rhema Movement. In summary, the Rhema Movement's ethos is captured in what it terms, *four pillars* which is being: Spiritually Vibrant, Evangelically Potent, Socially Significant and Prophetically Relevant. These pillars are clarified in the Constitution of Rhema Bible Church (2008):

1. The belief that the core of the Christian life is an inner attentiveness to the living God, attuned to His Spirit. This is called being 'spiritually vibrant' and it is from this core that all religious practice ought to be motivated and empowered.

2. The belief that evangelism or missions as it may be called, or giving people an opportunity to receive Christ as Savoir is a key imperative, recognizing the *Great Commission* of Jesus while emphasizing the need to *live* the Gospel, as embodied by the truism, 'We are all required to preach the gospel and where necessary to use words…'

3. The belief in social justice expressed by the Hands of Compassion ministry of Rhema Bible Church which is responsible for the church's social ministry or ministry of mercy. The question is often asked at Rhema, 'If your Church closed down, would the community notice?'. (Mona, 2009)

4. The view that Prophetic relevance is not about politics, but about morality and godliness. The goal of the Church's prophetic voice remains *justice*, the redressing and addressing of the most pressing needs of the most vulnerable in society, often through *speaking truth to power.* (Mona, 2009)

5. Public engagement by the rhema movement

the development of this socio-political dimension of the theology of the Rhema Movement described above, has resulted in the expression of new forms of engagement in the public square. When one considers the future of this dynamic, it presents potential opportunities for conflict and cooperation within the relationship between the charismatic church and the law in a liberal democratic South Africa.

Religious freedom being legally guaranteed by the constitution, as Dreyer (2007:7) argues, is at the centre of the consideration of the relation between religion and the law. Thus Rhema perceives their role and engagement in the South African public square as taking place within the context of the secular constitution and the religious freedom it affords. Therefore Rhema seeks to engage the state and participate in the public domain. The essential disposition of the Rhema Movement's approach to public engagement can be found in Pastor Ray McCauley's remarks about the role of the National Interfaith Leaders Counsel (NILK), which '… aims to ensure that religious leaders are proactive in offering interventions on policy issues … bearing in mind the moral dimension' (Tolsi, 2009).

This approach to engagement is illustrated by the recent 'Police Appreciation Service' held by Churches in the Rhema Movement. Contact with the particular Police commander from the local Police Station was made by churches with the view to invite officers to attend the service in uniform, the purpose of which was to increase awareness of the importance of support, through prayer, appreciation and encouragement of police officers (IFCC, n.d., News). Beyond such initiatives, Rhema has long been open to engaging representatives from the political sphere and welcoming them to participate in services as illustrated by the much debated visit to Rhema Bible Church by the then presidential candidate, Jacob Zuma.

It is the view of the Rhema Movement that such visits provide the Church with an opportunity to '… minister …' to decision-makers in the South African society (SAPA, 2011). Such visits have proved effective in bridging the gap between voiceless members of society and those who represent them at government level. This was illustrated by the residents of Zandspruit (a squatter settlement in Honeydew, Johannesburg) who had the opportunity to engage with Mr. Zuma on this occasion, and presented Mr. Zuma with a written plea for assistance for the 13 000 families living in the area in abject poverty, without houses, toilets, running water or medical care. They stated, '[i]t is not enough that we only see him on TV. We want him to come

to Zandspruit and witness for himself the conditions in which we are living. Our children are sick' (Ndaba, 2009).

Only two years later the situation in Zandspruit erupted into fully fledged riots; stones were thrown at motorists and roads were blockaded with trees and burning tyres. These protests were sparked by '… poor service delivery …' as protesters '… hurled rocks at the police, who retaliated by firing rubber bullets.' (Symonds, 2011). This begs the question, had Mr. Zuma and the ANC heeded the plight of the Zandspruit residents in 2009 when the visit to Rhema Church facilitated a grassroots interaction, would these unfortunate riots not have been averted? The point here is not to defame a particular political party, but to illustrate the manner in which the religious community can be integral to the healthy functioning of the democratic state in a critical partnership of mutual benefit. It is therefore ironic that Mr. Zuma himself echoed the need for partnership during his speech at the Rhema Church that day, stating that prayer and cooperation were needed (Ndaba, 2009), regardless of ethnic, cultural or religious persuasion.

Moreover, this outreach of Rhema Bible Church has not been limited to politicians, and has included representatives of Sport and Entertainment industries as well as Businesses. It is Rhema's view that prominent individuals have the same spiritual needs as the rest of society. Thus, when empowered spiritually, they can make a contribution to beyond their field of expertise and be instrumental in society's betterment. Mr. Zuma's suggested the same in his comment during the same visit: 'churches have played a key role in the development of South Africa and ought to continue to do so' (SAPA, 2011). Thus engagement therefore goes beyond the moral dimension of critical engagement of Government, and implies active participation in the development agenda of South Africa.

The unpublished Human Resources Development Strategy of 2009 by the Departments of Labour and Education identified 5 key development challenges facing South Africa in the period until 2030: 'Poverty, Income inequality, Threats to social cohesion, Ongoing demographic (race, gender, age, class and geographic) inequities, and the impact of globalisation' (CHET, 2009). Prinsloo (2007:155) in addition, in her discussion of the implementation of Life Orientation Programmes in South African schools outlines the impact on the children of South Africa in particular, stating that they are '…at risk because of inadequate opportunities for harmonious socialisation in their communities ...'. The moral implications of these issues arise out of the extent of the absence of justice that they imply in South Africa. As such, the *status quo* is not sustainable and these issues are therefore crucial to the stability of South Africa and all the freedoms enjoyed, even the freedoms enjoyed by those only affected indirectly by these challenges.

In exploring solutions for these challenge Prinsloo (2007:168) concludes with a remark about the contribution religious communities need to make to combat 'rapid moral decline', recommending that the '…value of religion' be 'acknowledged' and 'focused on' since the 'internalization of a personal value system against the background of religious knowledge is a strong deterrent to moral decline'. This view was echoed by President Zuma, stating that the ruling party itself owes its founding moral vision largely to the Church. This statement was again followed by a call for partnership between government and faith-based organizations to 'release South African people from poverty…' (SAPA, 2011)

This is precisely the role that the Rhema Movement has envisioned for itself and the religious community in South Africa. Pastor Ray McCauley's participation in the National Church Leaders

Consultation held in Stellenbosch in 2009 confirmed this vision. At this consultation the Rhema Movement sought to improve the engagement of the Christian Church, challenging leaders to unite, partner and address the tangible issues South Africa faces today, as reported by the IFCC (n.d, News):

> [t]he common thread in their presentations was the need for a proper reading of the times ….Ps Ray lamented the division that exists among Church leaders on a number of socio-political issues and urged the Church to speak with one voice, of course informed by the commonality of her faith. … Ps Ray also called for an assertion of the Church's prophetic voice in the nation. (stating) The prophetic role of the Church in our society has diminished dramatically in the last few years. Whereas in the past we all knew what we stood against, today we [as Church leaders] don't know what we stand for, … spoke about the need for a fresh vision; among South African Church leaders, a vision that will encourage action for the highest good and promote the prophetic voice/mission of the Church in our nation. He concluded his presentation by referring to the story of Jonah and his calling to Nineveh. In the face of the challenges we face as a country, the story of the reluctant prophet Jonah is relevant. Nineveh was a terrible and wicked city. However, the problem was not with Nineveh but with Jonah. He was afraid to fulfil his prophetic role in the city. It was not until Jonah obeyed God and cried out against the city … that Nineveh was saved.

The vision statement formulated during that event indicated that there is intent on the part of the Christian Church to be united in their engagement on issues. The statement read as follows:

> [a] new vision for Church leadership: We covenant to be a clear and fearless prophetic voice, giving moral direction to the nation and beyond; We undertake to build and promote a caring society which protects, honours and enhances life in all its forms as a gift from God; We will do this by following Jesus Christ, who through His incarnation, gave His own life to save life (John 10:10). (IFCC, n.d., News)

Engagement therefore implies partnership with other faith-based organizations and Government in particular: Pastor McCauley said of President Zuma upon his election, that 'partisanship' should not 'blunt our national consciousness', recognizing with approval the willingness of Mr. Zuma to enter into 'dialogue' (SAPA, 2011).

As an expression of the aforementioned theological and socio-political perspectives on contemporary South Africa, the Rhema Movement, largely through the work of Pastor Ray McCauley, is therefore currently engaged with the government of South Africa through various initiatives. One such initiative is the aforementioned National Interfaith Leadership Council (NILC), formed by Mr. Zuma to '…advise and aid the government on the delivery of social services' (Tolsi, 2009). It is important though to note that a close working relationship with Government does not preclude the role of the church to hold the state accountable. This is illustrated in Pastor Ray McCauley's response to the much publicized comments by President Jacob Zuma in which he suggests that voting for the ANC equates 'going to heaven', to which he responded: 'literal comparison' between political parties and religious notions such as 'heaven' are unacceptable and that an audience with the president would be sought in this regard (Vena, 2011).

Thus Rhema's view of the state subscribes to the notion that the state should be separate from

all religious institutions. This does in Rhema's view enable the state to see to the needs of the population in an unbiased fashion, irrespective of religious persuasion. However, as Schuppert (2011:14) argues, the State cannot operate existentially apart from the various institutions that constitute the society over which it seeks to exercise power. Schuppert goes further to touch on the ontological contribution of religion to the very existence of the state, saying:

> … I depart from the notion that statehood is provided solely by the state. Instead, I suggest that we think of statehood as a product which is produced by the state in association with other actors.

Separation then is a starting point from which public issues are contemplated but *participation* becomes the only viable approach when solutions are sought. In this regard Dreyer (2007:10-11) quotes Hackett as saying, '… democracy and the global emphasis on human rights and religious freedom are among the factors that create space for the new phase of inter-religious and religion-state tensions taking shape across Africa'. Dreyer further observes the extent to which this partnership is a practical reality, where religious institutions in some instances 'take over' some basic functions of the state and thus require a re-imagining of the true nature between the two. He concludes with an admission of the irrelevance of the 'strict' 'dogma' of secularism in postcolonial Africa (Dreyer, 2007:10-11).

The Rhema Movement importantly does not view itself as a lone actor in this context, but a partner of government and of other religious groupings. Tolsi (2009) quotes Pastor Ray McCauley's comment concerning NILK:

> as a multi-faith organisation, intervening on government policy is to concentrate on those basic ethical principles that are universal to all religions. These include issues such as the promotion of the rights of the poor; protection of human dignity; the sanctity of human life; and the support of anti-corruption and crime initiatives of the government.

The Rhema Movement's role is therefore understood as an attempt to promote universal values that are typical of the vast majority of religious groupings and compatible with the basic advent of Human Rights. It is therefore the role of NILC to facilitate dialogue about the position of faith-based organizations and their members on the moral issues in the South African society. The practical implication for the South African legal system, is evident in Nthabiseng Khunou's (an ANC MP) statement, that the council would be involved in revisiting legislation, legalising abortion and gay marriage, based on the premise that '…laws were very unpopular in South African churches' (Rossouw, 2011). It is our view therefore, that while it is the right of the *progressive*s to agitate for the accommodation of an agenda that would include such laws, it is the right of the *conservatives* to do the same, ensuring that the minority does not infringe upon the religious freedom of the majority in the name of equality and liberality at the expense of pluralism and diversity.

6. Conclusion

There are obvious implications to the current forms of engagement of the Rhema Movement. There are the contending political agendas of participants from both within and outside the religious community and the legal implications within the constitutional framework of South Africa. The relationship between church and state is of particular significance, and ought to be separate. However, in Rhema's view since church membership and state citizenship coincide

within the individual, we ought to re-imagine the understanding of the relationship as one of *dual-citizenship,* whereby the individual has the responsibility of being a good citizen both in their religious practice (the *Kingdom of God*) as well as in the national sense.

The response to Rhema's engagement by civil society and popular media has been illustrated in their reaction to the establishment and activities of the National Interfaith Leaders Council and their description of the council as an occasion of 'intimate relationship' that 'blurs' the sphere of the Church and that of the State, supposedly causing '…increasing consternation among civil liberties and gay rights organizations…' who imagine the '…repealing of abortion and same-sex marriages laws, and a return of the death penalty' (Tolsi, 2009). Rhema's position is that these responses are both to be expected and welcomed in a public discourse that is tolerant and affording of religious freedom.

In Rhema's case, the development of the socio-political dimension of the charismatic Church's theology has brought about new forms of engagement in the public sphere and will continue to do so. Increasing political engagement by the charismatic church appears to be a trend that continues unabated, not only in South Africa but worldwide. Projecting this reality into the future suggests potential opportunities for conflict as well as cooperation in the relationship between the charismatic church and other interest groups who would seek to mould the law to align with their disposition. As Bush contemplates:

> [t]hese developments in the sociology of religion do not require that we deny the existence of an expanding, rationalist world culture. But they do suggest that claims about world culture's relationship to secularism are over-determined, and that the capacity of religion to thrive in rationalized environments is underestimated. If so, rather than decline, we could expect either no relationship or even an increase in religious mobilization accompanying the rationalization of the world polity. (Bush, 2007:1649)

In recognizing the *transformative* power of religion, Rhema reflects critically on the manner in which they engage society, seeking both to *liberate* South Africans through empowerment by just means, while maintaining a consciousness of the need for justice for the most vulnerable in society. As long as justice in the South African society remains elusive, the need will exist to engage various social institutions. As such, we would agree with the observation of the World Council of Churches concerning the new dispensation in South Africa:

> [h]owever miraculous, such sweeping change does not yet constitute justice. The deep-seated economic and social problems created by apartheid's multi- layered, highly structured system of exploitation, oppression and social fragmentation are even more resistant to change than the formal political structures. (World Council of Churches, 1994)

We do caution though that justice can only be sought through just means. The danger though, of the perpetual disappointment of the expectations of South Africans who hope for a better future is that hopelessness leads to an attitude that says, '…let us eat, drink and be merry for tomorrow we die…' as is thought to have been the pervading idea about the dying remnants of the Apartheid apparatus (van Vuuren, 2006:43). Along the hasted journey towards justice then, ruling powers in South African will be tempted, as the oppressive former regime was, to be influenced by outside parties in the hope of securing funds, notes and support through illegitimate means. This implies a vital role of the religious community to act as a safeguard against the easy, *broad road*[5] to reconstruction.

5 A Biblical reference to Matthew 7:13 wherein the choice between morality and immorality is depicted as a broad and narrow road, leading to destruction or life respectively.

It is therefore essential that civil society, and the religious community in particular, serve as both the memory and conscience of the nation, bringing to the fore lessons to be learned from the nation's collective national past.

The Rhema Movement acknowledges that the relationship between law and religion is problematic and complex, fraught with pitfalls and opposing extremes. It is our view however that shrinking back from engagement to avoid the difficulty is not an option. Where difficulties or even mistakes cannot be avoided or eluded our view is that they ought to be cautiously navigated as we embark on the pursuit of a just and equitable society. For South Africans, having survived our past we cannot afford to jeopardize our future by neglecting our responsibility to stand for truth, speak for the vulnerable and the voiceless and leave a legacy that embodies the best of our deeply held religious persuasions.

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The Uniting Reformed Church in Southern Africa's enactment on church judicial and legal issues

ABSTRACT

In this article, I explore the enactment of the Uniting Reformed Church in Southern Africa on church judicial and legal issues. Part I of this article recounts the history of the Uniting Reformed Church in Southern Africa. The second part of the article focuses on the legal framework and sources of the Uniting Reformed Church in Southern Africa, the legal Status of the Uniting Reformed Church in Southern Africa, the fundamental rights of the major and minor assemblies of the Uniting Reformed Church in Southern Africa, Judicial procedures with regard to discipline , the scope of the application of Labour Law in Uniting Reformed Church in Southern Africa, The Uniting Reformed Church in Southern Africa and the protection of individual, the Uniting Reformed Church in Southern Africa and financing. The third part of the article focuses on the Uniting Reformed Church in Southern Africa enactment in the public discourse. Part IV presents two implications of my analysis, namely as a general rule that a church should dissolved properly by taking the steps required by their respective church orders or constitution. Secondly, that provision should be made in the Church Order of the Uniting Reformed Church in Southern Africa on the application of Labour Law on employment relations in the Uniting Reformed Church in Southern Africa.

1. Historical background of the Uniting Reformed Church in Southern Africa

The meaning and implications of the Uniting Reformed Church in Southern Africa's (URCSA) engagement in legal matters cannot be fully appreciated without an insight in and due consideration of the country's past history. Until the end of the eighteenth century converts from indigenous people, slaves and members of the Dutch Reformed Church (DRC) jointly attended services and their collectively received the sacraments (Kriel 1963:54; *Nederduitse Gereformeerde Kerk Acta* 1829:79, VI, 6). On 12th November 1880, the Synod of the DRC decided to establish a separate Nederduitsche Reformed Zendingkerk for people of mixed decent (*NGK Acta* 1880:57). The DRC Synod 1881 adopted a set of regulations to govern the mission church for people of mixed decent (*Acta NGK* 1880: 54-57). The *Dutch Reformed Mission Church was* constituted in 1881 in Wellington as the first of these churches (*Acta NGSK* 1881:6). Consequently the Dutch Reformed Mission Church (DRMC), the Dutch Reformed Church in Africa (DRCA) and the Reformed Church in Africa (RCA) emerged during the 19th century and 20th as an effort by Dutch Reformed Church (DRC) to develop churches along the racial lines. On the 9th March 1910 the Dutch Reformed Zendingkerk in Orange Free State for black people was established (*Acta Gereformeerde Zendingkerk in the Orange Rivier Kolonie* 1910:3). Shortly afterwards a racial segregated churches for blacks was constituted in Transvaal, Natal and in the Cape Province. It was later followed during 1968 with the constitution of a racial

segregated reformed church for Indians, namely, the Reformed Church of Africa (RCA) (*Acta NGK OVS* 1906:94; *Acta Indian Reformed Church* 1968:21). On the 7th May 1963 at Kroonstad, the Dutch Reformed Mission Church in Orange Free State, the Dutch Reformed Mission Church in Transvaal, the Dutch Reformed Bantoekerk of South Africa and the Reformed Mission Church in Natal unified and consequently the Dutch Reformed Church in Africa (DRCA) was constituted. The autonomy of these mission churches was not acknowledged by the DRC. Since their inception these mission churches strived to full church judicial autonomy which found its culmination in the constitution of the Uniting Reformed Church in Southern Africa (URCSA) during 1994 (Plaatjies Van Huffel 2008:252). The General Synod of the DRCA (1974) decided to work towards the re unification of the DRC, DRMC and the RCA (*Skema NGKA* 1974:253). Both the DRMC and the RCA made similar decisions during the seventies. The RCA Synod (1976) decided as follows: "The family of NG Churches should become one Reformed Church Synod empowers the Synodical Committee to initiate discussions towards church union with other churches of the NG Family and that the church councils should be informed accordingly" (*Acta RCA* 1976:76-77 en 172). On the 14th April 1994, union between the DRMC and the DRCA was consummated and the Uniting Reformed Church in Southern Africa (URCSA) was constituted (*Acta General Synod URCSA* 1994:282). The URCSA represents over 500 000 church members in South-Africa, Lesotho and Namibia the URCSA consists of one General Synod, 7 regional synods, 85 Presbyteries and 763 congregations.

2. Legal framework and sources of the Uniting Reformed Church in Southern Africa

The legal sources in URCSA consist of the confessional basis and the *Church Order*. Amendments to the *Church Order* and the confessional basis of URCSA, which are the Belgic Confession of Faith, the Heidelberg Catechism, the Canons of the Synod of Dort and the Confession of Belhar, can only be made upon adoption by the General Synod at a stated meeting, with recommendation to the regional synods and church councils for approval. During 1986 the DRMC accept the Confession of Belhar as critique on the theological justification of apartheid. The Belhar Confession became part of the confessional basis of the URCSA. Amendments to the confessional basis should be proposed by the General Synod of URCSA to the regional synods and must be approved by two-thirds of all those voting in the regional synods. The General Synod would only be able to ratify the vote at its next meeting (*Church Order General Synod URCSA* 2011 art.11). The amendment of the Church Order or the confessional basis of the URCSA can take place by the enactment of a General Synod upon overtures from two-thirds of the delegates at General Synod. The *Church Order of URCSA* does not address every situation of the church. Nor does it presume to be exhaustive or to cover everything. Ordinarily, however, when something is not mentioned in the *Church Order of URCSA the* omission is deliberate and intentional.

3. Legal status of the Uniting Reformed Church in Southern Africa

The Constitution of the Republic of South Africa Act 108 of 1996 guarantees everyone the right to freedom of association. South Africa's legal framework for civil society organizations enables URCSA to establish them as legal structure. URCSA is a voluntary association with legal personality (*universitas*). The URCSA is an autonomy body and has its own constitution. In order for a voluntary association to have body corporate status, the founding document must provide that it: *firstly,* has perpetual succession, *secondly,* the capacity to acquire certain rights

apart from the rights of the members forming it and no member has any rights by reason of his membership to the property of the association, and *thirdly,* the right to hold property in its own name. The URCSA generally meet the three requirements to be deemed as a *universitas:*

α. It is structured to continue as an entity notwithstanding a change in membership;

β. It is able to hold property distinct from its members; and

χ. No member can have any rights, based on membership, to the property of the association (Geldenhuys 195:340-368).

Once a church has been established it is presumed to continue as an entity notwithstanding a change in membership. The URCSA is perpetual. The URCSA is governed by the common law which requires that the URCSA's objectives must be lawful and not primarily for gain or profit for its members.

3.1 Fundamental rights of the major and minor assemblies in URCSA

The URCSA has a Presbyterian-Synodical system of church governance. According to Van Drimmelen (2007:41). The Presbyterian-Synodical system of church governance is anti-hierarchical, anti-Episcopal, anti-independent as well as anti-congregational. URCSA is against a hierarchical church governance system and affirms that the church authority is vested not in individuals but is rather vested in representative assemblies. The Church Order of the URCSA provides for four grades of administrative courts, namely, the Church Council, which governs the congregation; the Presbytery, which governs a number of congregations in a demarcated area; the regional synods, which governs the congregations within approved region; and a General Synod (*Acta General Synod URCSA* 1994:290). These assemblies exercise all ecclesiastical functions in accordance with the *Church Order of URCSA.* There are stated responsibilities for each governing body in URCSA. These assemblies transact ecclesiastical matters only and deal with them in an ecclesiastical manner. The above mentioned assemblies exercise judicial as well as legislative powers. The assemblies may delegate to committees the execution of their decisions or the preparation of reports for future consideration. They give every committee a well-defined mandate and require of them regular and complete reports of their work. The report of a Committee, when received or accepted by the minor or major assembly, is the property of the said assembly, and should be handed to the clerk, with all accompanying- papers (Stephens 1907:137). Each assembly exercises, in keeping with its own character and domain, the ecclesiastical authority entrusted to the church by Christ. The Church is a theocracy, of which Christ is the Head. The only King and Head of the Church is the Lord Jesus Christ. All the power which Christ has bestowed upon His Church is conferred upon the local congregation. It resides not in the offices alone (*General Synod Church Order* 2011 art.1).

A major assembly of URCSA deals only with those matters which concern it commonly or which could not be finished in the minor assemblies. The major assemblies are composed of office bearers who are delegated by their constituent minor assemblies. Voting rights are limited to the delegates. The minor assemblies provide their delegates with proper credentials which authorize them to deliberate and vote on matters brought before the major assemblies. A delegate cannot vote on any matter in which the delegate or the church of which the delegate is a member is particularly involved (*Regional Synod Church Order* 2011 art.103.3; Stephens 1907:139). Members ought not, without weighty reasons, to decline voting, as this practice might leave the decision of issues to a small proportion of the judicatory. Silent members,

unless excused from voting, must be considered as acquiescing with the majority (Stephens 1907:130).

The Church Council is a permanent, continuing body which functions between stated sessions through commissions. The authority of church councils is original and that of major assemblies are delegated. In every congregation of URCSA there should be a council composed of the minister(s), the elders and the deacons. Those tasks which belong to the common administration of the church, such as the calling of a pastor, the approval of nominations for church office, mutual censure et cetera are the responsibility of the Church Council (*Regional Synod Church Order* 2011 art.44). The pastor has power to convene the Church Council. The pastor of the congregation shall always be the chair person of the Church Council except when, it may appear advisable that some other minister in the resort of the presbytery should be invited to preside (Stephens 1907:32). When a church is vacant, the presbytery appoints one of its ministers to act as chairperson of the Church Council of the vacant congregation (*Regional Synod Church Order* 2011art 28; Stephens 1907:33).

The presbytery is an assembly and judicatory consisting of all the ministers and the Church Council delegates who represent all the congregations within its bounds. There is a balance between the discretion of the Church Council and the authority of the presbytery. The presbytery has the same authority over the Church Council as the Synod has over the presbytery. The presbytery exercises a general superintendence over the church councils and over the interests and concerns of the congregations within its bounds. There are many areas in which the presbytery has stated responsibilities for being involved in the life of the local congregation —call of minister, preaching. The Church Council of each congregation should delegate a minister and a church council member to the presbytery If a church is without a minister, or the minister is prevented from attending, due to church discipline two church council members shall be delegated (*Regional Synod Church Order 2011* art.49.3). Voting rights are limited to the delegates. The presbytery functions between stated sessions through commissions,

The presbytery has power to enforce the rulings of the major assemblies, to receive, hear, resolve, and decide references, appeals, and complaints according to church order procedures or discipline, to advise and to adjudicate on matters from church councils, to unite, divide, organize, and dissolve congregations (*Regional Synod Church Order* 2011 art.50). The presbytery refers all questions of doctrine to the General Synod. The Presbytery exercises appellate supervisory power over the acts, proceedings and decisions of the church councils in its resort. The presbytery has also the authority to ordain, install, suspend, declare demitted and declare retired ministers (*Regional Synod Church Order 2011* art.*136).* According to Stephens (1907:77-79) the Presbytery has power to remove ministers. By removing ministers is meant "releasing them from the charge of a church. This may be done (1) at the pastor's request; (2) on the petition of the congregation Stephens 1907:79). The presbytery also approves the disbanding or dissolution of a congregation. When two or more congregations decide to merge, the approval of Presbytery is required.

The regional synods of URCSA is judicatories consisting of ministers and elders delegated by each of the local congregation within the bounds determined for it by the General Synod. Voting rights in the Regional Synod is limited to the delegates. The regional synods of URCSA functions between stated sessions through commissions. The regional synods determines the boundaries of the presbyteries (*General Synod Church Order* 2011 art.10). The regional synods

exercises an appellate supervisory power over the acts, proceedings, and decisions of its several presbyteries. Therefore the presbyteries cannot unilaterally decide to chance their boundaries, unify with other reformed churches or dissolve. The decisions of the assemblies of URCSA are considered settled and binding; unless it is proved that they conflict with the Word of God or the Church Order. Assemblies and church members may appeal to the assembly next in order if they believe that injustice has been done or that a decision conflicts with the Word of God or the Church Order (*Regional Synod Church Order* 2011 art.38.7). A request for revision of a decision shall be submitted to the assembly which made the decision. The regional synods of URCSA receive and issue all appeals, complaints and references that affect decisions of the minor assemblies in their resort. The grounds of appeal may be irregularity in the proceedings of an inferior judicatory; refusal to entertain an appeal or a complaint; refusal of reasonable indulgence to a party on trial; receiving improper or declining to receive important testimony; hastening to a decision before the testimony is fully taken; manifestation of prejudice in the conduct of the case; and mistake or injustice in the decision (Bittinger 1888:72).

A complaint is a written statement alleging that an action or a decision of an assembly or officer of the church has violated or failed to comply with the Church Order of the URCSA. An appeal is the transfer to a higher judicatory of a complaint, a charge, or an appeal on which judgment has been rendered in a lower judicatory. The right of appeal belongs to either of the original parties in a case. That right may be exercised when a party considers itself to be aggrieved or injured by a judgment of a judicatory. The grounds of appeal include: irregularity in the proceedings of the lower judicatory; bias or prejudice in the case and manifest injustice in the judgment. All proceedings of the Church Council, the Presbytery, and the Synods of URCSA are subject to review by, and may be taken to, a superior judicatory, by general review and control, reference, complaint or appeal Church Council (*Regional Synod Church Order* 2011 art.38.1; Stephens 1907:3) The judicatory may confirm or reverse, in whole or in part, the decision of the lower judicatory or assembly, or remand the case to it with instructions. Persons who have voted on the matter in a lower judicatory or assembly, or who have a conflict of interest, shall not vote upon the appeal in a higher judicatory.

The representatives of regional synods, consisting of the four members of the Moderamen of each regional synod and one minister of the Word and one church council member from every presbytery within the boundaries of each Regional Synod, meets as General Synod. The General Synod of the URCSA constitutes the bond of union, and correspondence among minor and major assemblies of URCSA. The General Synod is the highest judicatory of the URCSA. The General Synod has authority over all matters pertaining to doctrine and denominational polity. The General Synod determines the denominational policy of URCSA (*Church Order General Synod* 2011 art.4). To the General Synod belongs the power of bearing testimony against error in doctrine in the URCSA. The General Synod has no right to refer the final decision of any matter affecting the doctrine of the Church to an inferior judicatory. The General Synod's judicial decisions are final and obligatory in all similar cases. The General Synod of URCSA determines on submission by the relevant regional synods the boundaries of the said regional synod. The General Synod assists the regional synods in the fulfilment of their tasks provided that such assistance does not infringe upon the authority of the regional synods. To the General Synod belongs the power of erecting new synods when it may be judged necessary. The General Synod is the legal custodian of the funds, devises, bequests and other property which is given, devised, or bequeathed directly to the General Synod of the URCSA. The General Synod of URCSA, however, does not have the authority to exercise an appellate supervisory power over the acts, proceedings, and decisions of the lower

assemblies. Any member of URCSA has the right to redress against any act or decision of a minor or major assembly by appeal or complaint. The General Synod receives and issues all appeals, complaints, and references that affect the doctrine or Church Order of the URCSA. To the General Synod belongs the power of corresponding with foreign Churches, on such terms as may be agreed upon by the General Synod and the corresponding body (*General Synod Church Order* 2011 art.12). The General Synod functions between stated sessions through various commissions and ministries.

3.2 Judicial procedures with regard to discipline

In disciplinary matters, the *URCSA's Church Order provisions* in effect at the time of the alleged offense are authoritative. This principle ensures that a person accused of an offense is not tried on the basis of statutes approved subsequent to the time of the alleged offense. Therefore matters referred by minor assemblies to major assemblies with regard to discipline should be presented in harmony with the procedure entailed in the *Church Order of URCSA.* The exercise of discipline in URCSA may take the form of admonition, rebuke, and suspension from the privileges of membership in the church or from office, deposition from office, or excommunication. Admonition and rebuke are pastoral in nature and are exercised by an assembly in the ordinary course of its proceedings. All further steps of discipline – suspension, deposition and excommunication – are judicial in nature and require the formal presentation of charges to a judicatory. The trial must be conducted in a fair and impartial manner. A member who has been suspended or excommunicated may be restored to the privileges of membership in the church upon repentance expressed before the judicatory which suspended or excommunicated the member. Public notice of the verdict of the major assembly shall be given the congregation (*Regional Synod Church Order* 2011 art.129). The purpose of admonition and discipline is to restore those who err to faithful obedience to God and full fellowship with the congregation, to maintain the holiness of the church, and thus to uphold God's honour (Bittinger 1888:25). The suspension of a minister of the Word is imposed by a major assembly. The deposition of a minister shall not be effected without the approval of major assembly (*Regional Synod Church Order* 2011 art. 127). A person who has been suspended or deposed from office may be restored to office upon repentance and renewal of vows before the curatorium, provided that the major assembly is satisfied that the honour of the office will not be impaired and that the welfare of the church will be served by such a restoration. Restoration after deposition includes re ordination to office.

Both the appellant and the respondent have the right to appeal the decision of Presbytery to synod (Bittinger 1888:62). A complaint is a written representation by one or more persons, subject and submitting to the jurisdiction of an inferior judicatory, to the next superior judicatory against a particular delinquency, action, or decision of such inferior judicatory in a non-judicial or administrative case." (Bittinger 1888:63). An appeal is the removal of a judicial case, by a written representation, from an inferior to a superior judicatory (*Regional Synod Church Order* 2011 art.134; Bittinger 1888:64). When the judgment directs admonition or rebuke, notice of appeal shall suspend all further proceedings; but in other cases the judgments shall be in force until the appeal is decided. When a person is restored after suspension from the church by a Presbytery, the notice of appeal by the appellant continues the person under suspension until the appeal is issued which means until the next meeting of the regional synod or synodical commission. The appellant and the respondent do not have the right to be present during the presentation of the case at synod. Appeals of decisions of assemblies of the church and such other matters requiring formal adjudication is referred

to the Judicial Committee. The Judicial Committee provides the synod appropriate written advice on procedure for handling the matter. The synod may dispose of a judicial matter in one of the following ways: by deciding the matter; by deferring it to one of its committees for settlement or reconciliation; by remanding it with advice to the appropriate assembly (*Regional Synod Church Order* 2011 art.135). The members of the Judicial Committee are entitled, notwithstanding their performance of digesting and arranging all the papers, and prescribing the whole order of proceedings to sit and vote in the cause, as members of the judicatory (Stephens 1907:133).

3.3 Scope of the application of Labour Law in URCSA

The period in South Africa since 1994 has been characterized by policy and legislative reforms. Literally hundreds of policies and laws were developed since 1994. *The Employment Equity Act 1998* constitutes one of the interventions government has made to redress the imbalances of the past. The *Employment Equity Act 1998* contains a number of provisions providing for affirmative action and protection against, amongst other things, unfair discrimination and sexual harassment. The Act provides for the elimination of unfair discrimination by requiring that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Employment policy or practice refers to recruitment, job classification, remuneration, employment benefits and terms and conditions, promotion and dismissal. The General Synod of URCSA 2005 called upon all church members who can be defined according to the *Employment Equity Act 1998* as designated employers to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice, to ensure the implementation of employment equity to redress the effects of discrimination in order to achieve a diverse workforce broadly representative of the population The URCSA emphasizes the elimination of unfair discrimination in employment. The URCSA urges local congregation as well as church members, who are designated employers, to adhere to this act.

The URCSA thus far did not align the *Church Order of URCSA* with the Labour Law. Currently ministers in URCSA forfeiture their status when they avail themselves as candidates for political election for example rev CAT Smith, rev H Mbatha, Dr SK Mbambo, dr AA Boesak et cetera. Due to the acceptance of the ambassadorship to Russia on behalf of the Namibian government rev Dr SK Mbambo forfeited his status as a minister in the church During March 2004 rev Mbatha, the scribe of the General Synod avail himself as a candidate for political election as premier candidate for the ACDP in Kwa-Zulu Natal (*Agenda General Synod* 2005:26). Dr AA Boesak forfeiture his status during 2009 due to the fact that he avail him as political candidate for COPE. In all above case rule 3.1 Rule 3.2 of the Regulations regarding the Status of Ministers of the Word was implemented. It reads as follows:

> 3.1. In the following events a minister of the Word or a legitimated candidate or somebody who received status as candidate for the ministry shall forfeits his/her status and the secretary of the Judicial Commission of the General Synod will give notice through the official communication channels of the church: 3.2 If he/she serves on a political governing body or if he/she makes him-/herself available as candidate in a nomination or election contest.

The General Synodical Commission 2003 mandated the Permanent Judicial Commission to table a report on the nature of the relationship between a minister/evangelist and a church

council (and the implications of this for the functioning of the URCSA) in terms of the Labour Legislation (*Agenda General Synod URCSA* 2005;36). This report was never tabled.

3.4 The URCSA and the protection of the individual

No decisions concerning the protection of privacy, freedom to marry, the Religious Family Law, freedom of expression, professional secrecy, medical deontology, culture religious freedom, individual religious, freedom collective, religious freedom, organizational religious freedom had been made by URCSA thus far. The URCSA will table the endorsement of the South African Charter of Religious Rights and Freedoms only at the upcoming General Synod 2011. The URCSA embraces a diversity of languages and cultures and strives to overcome inequalities in terms of generation, 'race', class and gender. At the first General Synod 1994 URCSA accepted a gender policy (*General Synod URCSA* 1994:15). However at the General Synod 2008 recommendations that the same ethical directives that apply for heterosexual living in all its facets should also apply for homosexual living were not approved. At this point of time confessing homosexual members of URCSA have not access to all the offices of the church (*Agenda General Synod URCSA* 2008:115).

3.5 URCSA and financing

The URCSA is a large property holder. Ecclesiastical property of URCSA is held by minor or major assemblies in trust, explicit or implied, for ecclesiastical uses. The legal title to property of the minor and major assemblies of the URCSA vested in the respective assemblies who have power to assign them, to bring a suit for their recovery if lost and to prosecute in case of theft. The congregation, Presbytery or synod accepts and executes deeds for the furtherance of the purposes of the congregation, Presbytery or synod. Presbyteries or synods may buy, sell, lease or mortgage property. The church councils of URCSA hold the ecclesiastical property subjected to denominational uses. The church councils have the authority to bargain, sell, convey, mortgage, lease, or release any real estate belonging to the congregation; to erect and repair church buildings, parsonages and other buildings for the direct and legitimate use of the congregation. However, no purchase, sale or conveyance, mortgage, lease, can occur unless the affirmative vote of a majority of the members of the church shall be first obtained (*Regional Synod Church Order* 2011 Regulation 8.6.4). The members of a local congregation of the URCSA have a voice in the acquisition, management and disposal of ecclesiastical property. No sale, mortgage, or transportation shall be made which would be inconsistent with the express terms or plain intent of the grant, donation, gift, transportation or bequest.

On 14th April 1994 and the ensuing foundation synod, the DRMC and the DRCA dissolved and the two churches consolidated to form one church organization with full corporate power. Decisions were taken on DRCA Synod 1991 and the foundation synod on ecclesiastical property. At the foundation synod it was decided that the DRMC and the DRCA ceased to exist and *inter alia* that all the regional synods, presbyteries, congregations of the DRCA and the DRMC ceded with the implementation of the Church order of the URCSA all its assets, liabilities, privileges, properties, rights and obligations, nothing excluded, to the regional synods, presbyteries, congregations of the URCSA (*Agenda General Synod* 1994:39; *Acta NGKA* 1991:393). The established URCSA stepped in as the successor in right and title of the dissolved regional synods, presbyteries, congregations of the DRCA and the DRMC and took control of all the ecclesiastical property of both churches. The Synod decided that the management of the ecclesiastical property shall be vested in the respective General Synod, regional synods,

Presbyteries and/or congregations of the URCSA. The URCSA was granted authority to take all legal actions to give effect to the cession and transfer of property (*Agenda General Synod* 1994:42, 131, 3340, 341, 313).

However, these decisions led ultimately to church schism and court cases between the regional synods of the DRCA in the Orange Free State and the DRCA Phororo on the one hand and the URCSA on the other hand. These court cases had a horrendous impact on URCSA's cash strapped budget. On the 27th November 1998, after a lengthy court case, the Highest Court of Appeal ruled that decisions of the General Synod of the DRCA 1990 to amend the *Church Order* of the DRCA as *ultra vires.* Amongst other, the General Synod of the DRCA had no right to transfer of property rights of the congregations and regional synods of the DRCA to the new judicial entity named the URCSA (*Acta General Synod* 2001:134; Nederduitse Gereformeerde Kerk (OVS), Nederduitse Gereformeerde Kerk in Afrika (Phororo) en die Verenigende Gereformeerde Kerk in Suider-Afrika 536/96:11). No provision was made in the constitutions of the respective two churches for the proper dissolution of their constituencies and the transfer of assets to the new church organization. No dissolution decisions was made according to appeal judge Vivier by the regional synods of the DRCA in the Orange Free State and the DRCA Phororo (*supra* 536/96:11). The verdict of the Supreme Court in 1998 affirmed that the DRCA as a legal corporate entity remains.

No provision is made in the *Church Order* of the URCSA that if members of a congregation do not comply with the *Church Order* procedures, then those members should forfeit all its right, title, and interest in and to its property to the Presbytery within which it is located. No provision is also made when a congregation becomes so reduced in its membership and strength as to be unable to maintain the ordinances of religious worship, or when for other reasons the interests of the members in particular and of the Church in general would be, in the judgment of the Presbytery, best served by dissolving the congregation, the Presbytery shall formally declare it dissolved, and shall direct the scribe of the Presbytery to issue certificates of transfer for the remaining members to other congregations in the resort of the Presbytery.

4. URCSA AND POLITICS

The URCSA did not thus far express their opposition to legislation and policy affecting what some will seen as Judeo-Christian ethos for example the National Gambling Act 1996, The Lotteries Act 1997, The Film and Publications Act, 1996, Capital Punishment and the Criminal Law Amendment Act, 1997, Choice of termination of pregnancy Act, 1996, Education Laws Amendment Act, 1999, South African Schools Act, 1996, Broadcasting Act, 1999. The URCSA made no official comments on the legal position of religious marriages and/or popular culture thus far. The URCSA sees herself as part of a society, in which, as an institution among other institutions and social structures such as the state, the school, industry and others, it lives and works. In as far as the reigning legal order of society does not conflict with the Word of God, the URCSA lives accordingly (*Church Order URCSA General Synod* 2011 art.12). The URCSA works with the presumption that it is necessary to abide by the laws of the state. In that sense, the state confines the operation of the church. The state and its laws do not define what the church is, however, or what it believes to be its calling in Jesus Christ. At the same time the URCSA demands recognition by the governing authorities of its inalienable right to freedom of ministry, worship and the organization of its institution by virtue of its own profession. The URCSA sees it as its task to pray and intercede for the government and society and to intervene

on behalf of the suffering, the poor, the wronged and the oppressed within this society, also by way of organized service. (*Church Order General Synod URCSA* 2011 art.12).

URCSA prophetically criticises economic injustices and works towards the building of a just, participatory and sustainable global political-economic systems that serve life for all. Therefore they embarked jointly with the Evangelical Reformed Church in Germany (ERC) on a project on globalization. The objective of the project was to interrogate the issues emanating from the Accra Confession 2004, share their experiences from within their different historical, social, economic, political and theological contexts and to seek common understanding of the complexities of the challenges confronting the church and society. (*Dreaming of a different world* 2010:41).

The URCSA identifies herself with the poor and encourage church members to make and implement pro-poor commitments and explain to church members why pro-poor commitments are important (*Acta UCRSA General Synod* 2005:149). The URCSA emphasizes, amongst others, that the congregation's service to humankind and the world. The congregation therefore serves God, who in a particular way is the God of the suffering, the poor and those who are wronged (victimised), by supporting people in whatever form of suffering and need they may experience, by witnessing and fighting against all forms of injustice; by calling upon the government and the authorities to serve all the inhabitants of the country by allowing justice to prevail and by fighting against injustice (*Church Order General Synod URCSA* 2011 art.3, Confession of Belhar 1986 art.4). The congregation serves God by witnessing against the state and the powerful in the society at large. During 2009 the URCSA called on all its members to strengthen the democratic gains made over the past 17 years; to promote of human security - such as access to basic services - as means toward just and peaceful society; to secure economic justice in order to eradicate poverty and inequality; to advance a culture of moral and spiritual transformation based on care and dignity. The following challenges in post apartheid South Africa had been addressed by the General Synods of URCSA, namely:

Xenophobia

The URCSA encourages the protection of religious freedom and promotes religious tolerance for all groups and individuals. The General synod of URCSA 2005 noted the resurgence of incidents of xenophobia and tribalism; the growing exploitation of immigrants for cheap labour; and the conflicts that arise between unemployed nationals and immigrants who compete for scarce resources and job opportunities. The URCSA affirmed to render pastoral care and support to the refugees and foreign nationals (*Acta General Synod URCSA* 2005:106).

HIV/AIDS pandemic including orphans and vulnerable children

The General Synodical Commission of URCSA 2003 accepted the principle of creating facilities for the debriefing or counselling for the care-givers who in the process of caring for the HIV/AIDS infected and affected people suffer from post traumatic stress disorder such as depression and burn-out. The URCSA welcomes the roll out of the anti-retroviral medication and urges the Department of Health to accelerate the process within the context of proper treatment (General *Synod Agenda* 2005:105). The URCSA noted the disastrous reality of women's death rate because of lack of healthcare and prenatal care calls us to work for government policies that acknowledge women's sexual and reproductive health and rights. Policies should confirm women's bodily integrity and autonomy and assure access to healthcare for girls and women, and transform state hospitals and clinics into spaces that uphold women's human rights (*Dreaming of a different world* 2010:68).

Domestic violence

The URCSA noted the recurrence of domestic violence requested the government to transform the criminal justice systems in order to protect the rights of women and children. The URCSA also noted the horror of human trafficking and human slavery and called members to seek governmental action to criminalize human trafficking and to enforce criminal codes which make slavery a crime (*Dreaming of a different world* 2010:67).

Genetically modified products and the bio-safety protocol

The General Synod 2005 urged government to see to it that genetically modified products (GM) reaching the market has been adequately tested and that these products are being monitored to ensure safety and to identify problems as soon as they emerge. The General Synod also requested government to comply with the Bio-safety Protocol and bring its bio-safety legislation in line at a minimum, with the international safety standards established by the Bio-safety Protocol and implement its Precautionary Principle. The General Synod appealed to the government to radically restrict the experimentation with GM organisms (GMO) until the ecological and social viability of these experiments have been proven beyond all doubt. In this approach the cautionary principle must be upheld at all times. The URCSA demanded that all foodstuffs and other organic matter exposed to these GMO experiments be prominently labelled so that the public can decide if they want to utilize the products. The URCSA adopted the precautionary principle and proposed the prohibition of the introduction of GMO until their safety for future generations is certain, emphasize that the monopolistic control of seed reproduction and distribution by trans-national biotech companies should be prevented (*General Synod Agenda* 2005:106).

Climate change

The General Synod 2008 accepted a resolution on climate change (*General Synod Acts* 2008:100) Amongst other they called upon the government to introduce regulatory legislation that will sufficiently reduce CO^2 emissions to ensure that global warming remains below a 2^o C rise; to end all subsidies to fossil fuel and nuclear energy generation; to subsidize and promote at all levels – community, city, provincial and national – the development and building of renewable energy generation.

Economic justice

The General Synod approved the publishing of a booklet with an easily accessible content on economic policies and practices for the purpose of educating and training the members, church councils and ministers as well as presbyteries of URCSA on these matters. The booklet should also address the problem of consumerism and encourage members to lead simple lifestyle. The General Synod 2005 encouraged its ministers and members to actively join and participate in community and development structures in their fight against poverty or any other form of economic injustice. The General Synod 2005 mandated the executive to engage with government on social justice issues through the National Religious Leaders Forum and/or other relevant structures which strive for the creation of a caring society and alternative economic policies which is compassionate towards the poor. The General Synod 2005 called on regional synods and the URCSA congregations to, in addition to their attention to the ACCRA declaration on the economic order, also reflect on John Calvin's focus on the poor, the

marginalized and the downtrodden in society (Agenda General Synod 2005 decision 8).

5. Conclusion

This interaction between URCSA and the state on a political and legal level in post-apartheid South Africa needs to be understood in terms of URCSA's history. Part I of this article recounts the troubled background of the formation of the URCSA. The article emphasized that the legal framework of the URCSA consists of the *Church Order* and the confessions, All members as well as the major and minor assemblies of the URCSA should adhere to the Church Order and the confessions. URCSA is a voluntary association with legal personality (*universitas*). The major and minor assemblies of the URCSA exercise both judicial and legislative powers. Ample provision is made in the Church Order of URCSA with regard to judicial procedures in order to exercise discipline in URCSA on a equitable and fair basis, With regard to the scope of the application of Labour Law in URCSA it seems as if the URCSA thus far did not align the *Church Order* of URCSA with the Labour Law. The URCSA does not make ample provision for the protection of individual, The URCSA, at large, are legally organized to be capable of holding property in any form. Since their inception the URCSA demonstrated a deep commitment to social justice issues. I deduce two implications of my analysis of the URCSA's engagement in, namely as a general rule that a church should dissolved properly by taking the steps required by their respective church orders or constitution. Secondly, that provision should be made in the Church Order of the URCSA on the application of Labour Law on employment relations in the URCSA.

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Freedom of religion and religious coercion
The challenge posed by the prohibition of coercion as a condition of religious freedom

ABSTRACT

The challenge posed by the prohibition of coercion as a condition of religious freedom

Religious freedom opened up a world for religious diversity. The drafters of the right to freedom of religion were well aware of the atrocities committed in the name of religion and therefore include an important fundamental of religious freedom. Belonging to and participating in the practises of religion must be a voluntary act. Unfortunately, as a result of the susceptibility of people and the nature of religion some new religious groups feel entitled to ignore the condition believing that their belief system supersedes any earthly convention. Addressing this issue pose a challenge to governments. Restricted by the right to religious freedom no political or legal measure can be introduced to regulate or prescribe the internal functioning of religion. The solution is needed on another level. The South African charter for religious rights and freedoms not only provides an ideal platform to engage in a fruitful interaction with other religions but also to guard and assist in the adherence to the fundamentals of religious freedom.

1. Introduction

As a result of the susceptibility of people in a religious context, cruelties have been perpetrated over the centuries, in the name of religion. People have endured persecution for their beliefs by those who hold different beliefs and others have been forced to join certain religions. The intention of the right to freedom of religion is to ensure peaceful existence amongst all world citizens. Well aware of the cruelties perpetrated in the name of religion the drafters of the International Human Rights instruments and in particular, the right to freedom of religion, have included the condition that participation in religion must be a free and voluntary act. The fact that governments are constitutionally bound to ensure that the conditions of religious freedom are applied brought about its own challenges. Some religions view the provisions of the constitution subjective to their own belief system. As a result some new religious movements use techniques and apply certain dynamics befitting their belief system to proselyte and maintain individuals. It is believed that these techniques and dynamics are coercive and in conflict with the conditions of religious freedom. Constitutionalised religion thus in this sense pose a challenge to the state but also to the believer. The application of this condition of religious freedom is particularly complicated by the nature and dynamics of religion. This article will point out the challenges posed by this provision and also propose measures that could ensure a dialogue in order to establish a better understanding of the diversity of religion and minimise the harm caused by the coercion that takes place in some new religious movements.

2. Religious freedom

In a state ruled by law (such as South Africa since 1994), the Bill of Rights forms part of the constitutional law. The Bill of Rights is constitutionally protected against arbitrary change by government. All rights are universally acknowledged and more are taken up in the South African Bill of Rights. The idea that human beings are valuable and, in their original natural state, possess unlimited, but unprotected rights in need of the protection of government justifies the litigation and the limitations of government action (Venter 1999:15-16).

2.1 Some important elements of religious freedom

The South African Constitution's provisions on religious freedom are founded on a number of International Human Rights instruments. These include the Universal Declaration on Human Rights (UDHR, 1948, art.18), the European Convention on Human Rights (ECHR, 1950, art 9), and the International Covenant on Political and Civil Rights (ICCPR, art 18) which, in essence, proclaims that: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

An important condition to religious freedom is pertained in article 18, section 2 of the ICCPR, namely; that: "No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice". The provisions of the ECHR bind all state members and they are furthermore bound by the decisions of the European Court of Human Rights (ECtHR) (Amicarreli, 2009:6).The South African Constitution (chapter 2, section 15), in line with international standards affords everyone the right to choose a religion, as well as the freedom to practise that religion through the participation in the rituals and abiding by the tenets of that particular religion (section 31(1)(a)). Section 15 section (2),[c] further stipulates that participation in religion must be free and voluntary and in no manner should anyone be forced to participate in or attend any religious practice.

The South African Charter of Religious Rights and Freedoms article 2, endorsed on 21 October 2010 by different religions and religious organizations, elaborates on the provision of the Constitution by stating that "no person *may be forced* to believe, what to believe or what not to believe, *or to act against their convictions".*

The right to freedom of religion has two dimensions that can be distinguished namely; *forum internum* and the *forum externum.* The *forum iternum* - internal aspect, refers to the freedom to believe, which embraces the freedom to choose one's religion – religious or non-religious. The internal dimension of religious freedom is *absolute.* No limitations are linked to this dimension of religious freedom (Martinez-Torron, 2003:3). This was also confirmed by the present special rapporteur on religious freedom or belief of the United Nations, Mr Reiner Bielefeldt, when he stated "This component *forum internum* of freedom of religion or belief enjoys particularly strong protection under international human rights law as an absolute guarantee which under no circumstances may be infringed upon" (United Nations General Assembly Human Rights Council, 2010).

The other dimension, *forum externum,* - external aspect, refers to the expression or the manifestation of personal religious thoughts. The external dimension, by its nature, is *relative* and can therefore be limited by the public authorities according to article 9(2) ECHR (Martinez-Torron, 2003:3). The limitation is understood to mean that public authorities can act in cases identified where individuals are impelled by direct action to believe or not to believe in something, or subtly influenced in a matter such as religion or belief, which is considered to be "the exclusive competence of individuals". Such actions are viewed identical to the invasion of the individual's internal autonomy (Martinez-Torron, 2003:4). The limitations are clearly defined by article 9(2) (ECHR) as those that apply to the "freedom to manifest one's religion or belief", which are deemed necessary and prescribed by law and in a democratic society in the interests of public safety for the protection of public order, health or morals or for the protection of the rights and freedoms of others" (Amicarelli, 2009:5).

The *forum externum* dimension contrary to the *forum internum* dimension is not absolute and the practices and rituals of religion, whether physical or emotional, need to be exercised in such a way that they are not inconsistent with the specific provisions of religious freedom or with the other basic human rights contained in the Bill of Rights. Coercion may occur in the *forum internum* dimension – that is when coercion is used to proselyte potential members and also in the forum *externum dimension* – that is when coercion is used to maintain and control members.

2.2 The aspect of force or coercion in religious freedom

Globalisation dictated a new approach that would address the inequality and combat between competing religions. This new approach is embodied in the right to freedom of religion that aims at organising a peaceful coexistence amongst all world citizens (Engel 2011:2). The right to freedom of religion has a fundamental condition as pointed out above namely; that belonging to and participating in religion must be an act of free will.

A free and voluntary act is primarily understood in the sense that no physical force is applied in order to ensure that a particular activity is performed. The word *force* defined by dictionaries denotes power to influence, affect, or control, to compel, constrain, or oblige (oneself or someone) to do something, to bring about or effect by force (Dictionary.com n.d).

Force in the most general sense usually implies the exertion of physical power or the operation of circumstances that permit no options. "The pressure or necessity can be applied through physical means that can bring about bodily harm (e.g. when tear gas is used to force fugitives out of their hiding place" [American Heritage Dictionary n.d.]). It means to overpower a person using measurable influence to incline a person to motion; make a person act or do something prematurely or unwillingly (Pocket Oxford Dictionary 1970:319).

Contrary to the above popular definition, physical force is not the only means to coerce someone into performing an activity. A person can also be forced through intellectual or emotional pressure. This kind of coercion is particularly successful in a conducive environment such as religious groups where people tend to be more vulnerable for coercion because of the authoritative nature of religion and since acting along with the rest of the group is subconsciously accepted as the norm. This does not mean that people in these groups cannot act for themselves, but that such a decision requires more willpower as a result of the pressure to conform in the group.

In this sense coercion means the applying of emotional or spiritual force in order to ensure that a particular activity is performed. The action is sanctioned by the threat that disobedience will result in some form of punishment, in the case of religion, eternal punishment. Natural forces a person cannot resist are often used with emotional force to *compel* persons to oblige. These natural forces involve the survival of any human being, such as hunger, sleep deprivation or other adverse circumstances (Singer & Lalich 1995:132). The difference between the two dimensions of coercion is that physical force precedes and stimulates action, whereas with intellectual or emotional force the threat of an anticipated consequence for disobedience or non-conformity motivates action.

2.3 Coercion in religion, specifically new religious movements

The nature and dynamics of religion make individuals more susceptible to coercion. Although coercion or a subtle influence process is present in all spheres of life, the focus of this article is on certain religious groups known as new religious movements, new religions, alternative religions, sects or cults. Scholars when referring in general to religious groups that are not part of the mainstream religion more generally use the term "New Religious Movements"[1] (NRMs). Opponents of NRMs, also generally referred to as the anti-sect/cult movement, refer to these groups as "cults" or "sects".

In some NRMs the process of proselytising new members normally commences with an appealing emotional experience (or experiences) known as "love bombing" that gives the perception of real interest in the wellbeing of the person. The affectionate attention relaxes and makes the person more susceptible to the new ideas of the group (Singer & Lalich 1995:114). This opportunity is utilised by the religious group to point out the defects in the potential member's value system, worldview, view of God, educational, religious and political structures, in order to create doubt in the person's own mind. Progressively through doubt about the person's current world, an emotional and spiritual need for change is established. But what is more important is the establishment of a subconscious emotional pressure to change the inadequate circumstances. The solution is presented in the lifestyle and doctrine of the NRM (Pretorius 2007:206). Emotional pressure is applied mainly through making potential followers believe that their world is inadequate in ensuring salvation. They are left with two choices: either to join the group that claims to have the solution or reject the fact that their world is inadequate. If the followers accept it, the degree of commitment to the particular group is normally demonstrated by confessing to the insufficiencies of the person's own world followed by a radical break with this insufficient world and lifestyle. Such radical action, although it can be justified as the result of conviction, is obtained through emotional force. To facilitate the solution and therefore the new members' adaptation to the world or the NRM, their own worldview, frame of reference, belief system and identification structures are replaced by the particular group's culture, doctrines, prescriptions and belief system (Pretorius2007:208). A redefining of the "self" occurs (Venter 2002). Adaption to the NRM further requires obedience to the commands of the group, which is equalled to pleasing God and systematically enforces behavioural change. This change is best achieved in a more

1 This term was adopted by scholars to replace the word "cult" that was subsequently used indiscriminately by lay critics to disparage faiths whose doctrines were believed to be unusual and heretical (Introvinge 2001:1). In everyday life religions or religious groups regarded by the majority culture as spurious or unorthodox are referred to as "new religious movements" or "minority religions". The term New Religious Movements is thus used by sociologists to describe non-mainstream religions. Others use the term to describe benign alternative religious groups and reserve "cult" for groups – whether religious, psychotherapeutic or commercial – they believe to be extremely manipulative and exploitive.

isolated environment, which alienates and separates members from the outside world. Membership to the particular group signifies not only true salvation, but also to be specially "chosen". This belief motivates followers to be obedient to all the commands of the group at whatever cost; even if they at times may question some of the commands, the fear of missing the ultimate goal of salvation motivates them to obey. In this sense the belief portrayed by the NRM about salvation and the requirements for that salvation serve as a motivation for followers to obey and follow instructions. The intellectual or emotional pressure at work is fear of losing salvation. Salvation, according to the NRM, can only be obtained through membership of the particular group followed by meticulous obedience to all the commands of the group. To ensure that new members follow these commands a system of continuous reprimanding, even punishment, if rules are broken, is established. Punishment includes – being ignored, shunned or overlooked or by aggressive legalism, being questioned, openly censured or asked to leave the group (Johnson & Van Vonderen, 1991:67-68).

Members, as a result of the culture they are subjected to, realise that the best way to overcome their own inability, to stay on track and to please God is to surrender totally to the instructions and guidance of the leader. The dynamics of the group succeeds in establishing intellectual and emotional pressure to conform without analysing. Systematically, the ambitions, critical thinking faculties and personal viewpoints of members become a lower priority. Instead the emotion of fear functions strongly in directing the followers in these groups. The main fear is imbedded in the belief that leaving the group will result in divine judgement, eventually losing salvation (Zukeran 2006:4). Followers have thus become physically, emotionally and spiritually dependent on the instructions and directions of the group since that will ensure salvation. Another form of fear is instilled by the measures taken by some NRMs to punish or correct straying cult members. The harshest form of punishment entails being ignored or rejected by the other members until the victim confesses. It can also include doing the dirty work in the group and can even include placing curses on members and informing them that they or their family will become sick and die if they leave the group or disobey orders. Internal spying among cult members is another way of obtaining information about straying members (Singer & Lalich 1995:77).

In one new religious group in South Africa known as Emmaneul Fellowship a male member of the group was excommunicated when he asked to be excused from one Friday night youth meeting because he was very tired. The leader reacted furiously, accusing him of being lazy and not committed and stating that he would never be allowed in any meeting again. This particular member went back to the leader after a while, begging him for forgiveness and a second chance in an attempt to break the excommunication and to be accepted by the group again (Van Niekerk 2004).

It is clear from the above that emotional pressure can be used to get followers to proselytise members, but also to ensure conformity to the commands of NRMs. Without preceding physical punishment or force, followers are emotionally moved to adhere to the commands of the group, founded in the belief that total obedience is essential for obtaining the ultimate eternal goal. It can be argued that members of these groups, although they might have been forced through emotional pressure, still acted on their own conviction. Emotion is an integral part of religion, but emotional pressure used to create a dependency or control over members that in turn can lead to the violations of the follower's rights, raises a concern. These rights include the right to freedom of association, freedom of movement and freedom of expression, to mention a few. In another group in Limpopo followers are not allowed to come and go

as they see fit. Although the gate at the farm is not guarded, guards are set up in the minds of the followers through the unspoken rules. Proper permission is needed to leave the farm. Followers of this particular group always go to town in a group to ensure better control over their doings. One member compared the underlying emotional and psychological control and pre-planned lifestyle to a prison (Brooke-Smith 2008:6).

2.4 Different approaches to the study of coercion in new religious movement

The alarm was sounded on unethical influencing techniques in so called new religious movements in the late 1970s that later resulted in the birth of the "counter-cult and cult-awareness groups". The incidents that have triggered reaction and maintained the interest in this field were the mass suicide in Jonestown (Giyane), by Jim Jones and his followers in 1979, where more than 900 people died. Jones was the leader of the Peoples Temple. Other sensational events followed that stressed the seriousness of the dynamics of some religious groups and the need for measures. There was the massacre of the Branch Davidians of David Koresh in Waco Texas in 1993 who has been accused of alleged child abuse and statutory rape; the Aum Shinrikyo's use of sarin gas in the Tokyo subway in 1995; the Solar temple suicides in Quebec, France and Switzerland; the Heaven's Gate suicides in Los Angeles 1997 and the mass suicide-murders in 2000 of 788 members of the Movement for the Restoration of the Ten Commandments of God in Uganda.

As a result of these horrors, the anti-cult movement was birthed. The anti-cult movement is founded on the belief that cults make use of excessive psychological techniques in order to proselyte and to maintain the loyalty of their followers. These excessive psychological techniques are also known as: mind control, behaviour modification, unethical influence, behaviour control and brainwashing. Not all scholars working is this field agreed on the impact that new religious movements (cults) have on its members and society and as a result different approaches to the study of new religions have developed over time. Barker (2001) identifies five types of cult-watching groups[2]. Two main approaches or viewpoints can be distinguished from these different cult watching groups. The first group of scholars (see Singer& Lalich 1995, Hassan 1988, Zimbardo 2002, Zamblocki 1997, and McManus & Cooper 1984) believes that some new religious movements, also referred to as "cults", make use of excessive psychological techniques to proselyte and retain existing members (Possamaï & Lee 2004:337). It is further argued that the subliminal coercion used by some of these groups leads those affected to believe that they are acting out of free will and to deny that they are in any way coerced. In simple terms, subliminal coercion means getting people to do what you want them to do without them realising it, so that they believe that they are acting of their own free will. Hassan (1998) adds another aspect namely; that cult indoctrination superimposes a new cult identity that suppresses and controls the individual's authentic identity. Another aspect of cult leaders is that they rule by exploiting guilt and fear. This was confirmed by the hearings at the Vermont Senate Committee for the Investigation of Alleged, Deceptive, Fraudulent and Criminal Practices of Various Organisations in the US in 1976. Psychologists and psychiatrists testified regarding the mental impairment of cult members and pointed out that cult members' indoctrination is characterised by a subtly enforced belief that the past is bad and need to be rejected and replaced with the offerings of the group that ensures true life. The cult member's reality consisted of a struggle between good – the offering of the cult, and evil – the outside world (Lucksted & Martell 1982:6).

2 These different cult watching groups include anti-cult, counter-cult, human-rights, research orientated and cult defender groups (Barker 2001).

A second viewpoint held by another school pleads for a more comprehensive approach to the study of NRM's (see Introvinge 2001, Richardson 1985, Baker 1995,). The following statement signals the essence of this approach:

> The tragedies recorded of some of these cults "... would not have occurred had the movements [anti/counter-cult movements] not existed and carried out the actions that they did, but the actions did not take place in a vacuum. All of them, and even the Heaven's Gate suicides, were part of a "cult scene" that includes other members of the wider society - and among the key players in "the cult scene" are the cult-watching groups (CWGs). These are organizations and networks of people who, for personal or professional reasons, contribute to the complex of relationships between new religious movements (NRMs) and the rest of society" (Barker 2001:1).

They further believe that the concept of brainwashing used by cults, which scholars cite as a reason to introduce regulative measures, is based on "moral panic", a concept developed by Jenkins (1998). Moral panics are defined as "socially constructed social problems characterised by a reaction, in the media and political forums, out of proportion to the actual threat". They are often circulated in the media, and may "ultimately inspire political involvement". In this light sects [and Cults] are viewed as a common enemy, a 'dangerous outsider' against which mainstream religion must muster in order to protect their standards and beliefs. Mainstream religion's reaction to cults may result in active persecution, ostracism and negative stereotyping (Jenkins 1996:158). This school of thought generally believes that a balanced approach is needed in the study of NRM's that will indicate that the danger portrayed by some scholars are over exaggerated and that only a few cults are posing a threat (Richardson and Introvinge 2001:144).

Whatever viewpoint is taken, no one denies the fact that some religious groups may use excessive psychological techniques that not only can lead to abuse, but also the infringement on the human rights of their members. Nor can it be denied that some members can be enticed into criminal actions, such as illegal weapon trade, holy wars, and that some groups may be guilty of child abuse or statutory rape.

Another important aspect however that must be considered when dealing with religion is that religion dictates its own viewpoint on different aspects of life, reality and the existence of man, now and in the life hereafter. What is viewed as coercion from a political, social or psychological point of view may be viewed by a religious person as a necessary sacrifice in order to obtain eternity. For the exact believer the methods utilised by religion to ensure compliance are not necessarily viewed as undue force or coercion, but as measures needed to ensure salvation. These measures are needed to mobilise the true believer for duty, and this is regarded as far more important than rights.

2.5 Dynamics of religion

Different approaches can be taken in the study of religion, such as (1) a historical approach, (2) the phenomenological approach, and (3) the social scientific approach. For this article the phenomenological approach is used, which is directed at discovering the nature or essence of religion – the fundamental characteristics that lie behind the historical manifestations (Cronk n.d 3). It is believed that these dynamics function even more strongly in more radical religions such as cults.

One of the characteristics of religion is the belief in the existence of forces that cannot be seen with the natural eyes. More so these forces cannot even be made visible through science. These forces according to religious people play an important role in their lives today but also after their physical existence on this earth seeing that it commands goods and evils. Earthly goods, the value of money and whatever political force can impose is of lesser value that these forces (Engel 2011:2).

The transcendental nature of religion and the correctness of religious belief defy proof. It defies discription and understanding by human abilities. The transcendental nature of religion carries the most weight for the believer seeing that it is the means of connecting the believer with eternity and render meaning to the here-and-now. The commands of their religion therefore have infinite value and surpass earthly goods. A believer is thus not entitled nor willing to compromise whatever non-religious reasons the state presents for limiting any aspect of his or her religious expression (Engel 2011:10).

Religious people are willing to even endure much for the sake of their religions possibly because they feel better if they live a religious life, but more so to ensure that they are living in line with the commands of their religion (Leiter 2008:7). Religions further offer what might be called "side benefits", such as "social solidarity, psychological comfort, and a better way of coping with the unknown and death itself" (Raday 2009:2776).

In the light of the above, it is clear that religious freedom is not an ordinary good. Three reasons for this are given by Engel (2011:6): firstly; for a believer; leading a religious life has extreme value. Believers are aware that not everything is known about their religion or belief and in these cases faith provides a substitute that navigates uncertainty where certainty would be of the utmost importance. Secondly; the leap of faith taken by a believer ensures continued commitment to their choice. Finally; to ensure that followers do not deviate from the commands of their religion they are in many cases threatened with worldly sanctions, such as illness, and misfortune, to be expelled from a religious office, excommunicated or even to be lost for eternity. This kind of faith unfortunately also increases people's vulnerability – for two reasons. The first reason is the belief that eternity is at stake and therefore potentially, mistakes are fatal (Leiter 2008:15). Secondly; the leap of faith is not in need of proof.

Phillips (2007:115) observes that religions are not fundamentally functioning on the concept of rights. Religions are focussed on duties, duties of the individual to God and duties of man to man. It is also true that certain rights are deferred from such duties, but duty is, nevertheless, prior to rights.

A difference can be distinguished between a human rights culture and a religious culture. A human rights culture believes that law is required to protect people from each other. Most religious cultures believe that everybody enjoys equal and absolute worth, not equal rights (Phillips 2007:117).

In the light of the above regarding the dinamics and fundamental beliefs of religion it is extremely unlikely that any government will be able to convince the believer that the risk of compromising on a command of his or her religion is a minor matter. On the other hand it provides a better understanding for the vulnerability of believers that can fall prey and be exploited by some NRMs through the use of excessive psychological techniques. The realisation of this occurrence in Europe has led to different measures and investigations being undertaken.

2.6 Legal and other measures taken to address the alleged coercion in some new religious movements in Europe

The anti-cult movement has also helped to draw up measures taken in Europe and the USA directed to addressing the alleged dangers posed by some alternative religious groups. Some European parliamentary and other official reports generated in the wake of the Solar Temple incidents have adopted an interpretive model, which indicates the threat posed by sects and cults. These reports include the French reports (Assemblée Nationale 1996 and 1999); the Belgian report (Chambre des Répresentants de Belgique 1997); large parts of the Canton of Geneva report (*Audit sur les dérives sectaries* 1997) and of the same report's on brainwashing (Commission pénale sur les dérives sectaries 1999); the deliberations of the French Prime Minister's "Observatory of Sects" (Observatoire Interministériel sur les Sectes 1998); and of its successor, the Mission to Fight Against Sects (MILS 2000).

Concerns about cults were addressed in two main types of regulatory campaigns in Europe. The first type was involved in specific laws that were implemented to ban and dissolve NRMs. One example is the French law known as the "About-Picard Law". This law is designed to repress cults and prosecute their leaders. The second type of legal action taken against NRMs consisted of establishing governmental bureaucracies with an expansive mandate devoted to identifying and combating the influence of sects and cults.[3]

Not many cases have been decided by the European Court of Human Rights (ECtHR) under the limitations clause of Article 9(2) of the European Convention on Human Rights (ECHR). Since the human rights regime in Europe came to power in 1953. There has been an increase in the Court's jurisprudence in the last few years and since 1993 the Court has decided more than 10 cases under Article 9(2). The cases decided included addressing "the areas of state regulation of religious leadership, state recognition of religious groups, proselytism and state restriction of ostensible religious symbols" (Kamal 2005:669).

Despite all the legal and other measures taken to curb the harmful effects of cults, the ECtHR has not adopted general measures either to adress violations or to protect NRMs within Western Europe on the basis of these drastic domestic measures. In the two cases under its review, the ECtHR did not lay down a substantive holding on monitoring NRMs. In the one case, the admissibility of complaints by Jehovah's Witnesses against the French law banning dangerous sects was rejected, with a finding that the law had not been directly invoked against them (ECtHR 2001). The petition by a Jehovah's Witness against surveillance by Greek authorities ended in an out-of-court settlement (ECtHR 1999) (Laviatan 2011:73).

The few cases reviewed by the ECHR and the ECtHR where allegations of breaches of Article 9's freedom of religion clause were made against so-called NRMs or "cults" the court decided on other articles in conjunction with Article 9. In the first case, "the Court found that there had been a violation of Article 9, and assumed any apparent supremacy of articles in conjunction (namely Article 10, freedom of expression and Article 14, freedom from discrimination), in

3 Examples of these establishments in Europe are the French Interministerial Mission of Vigilance and Combat Against Sectarian Aberrations (MIVILUDES); Belgian agencies that have collected information and monitoring the harmful activities of NRMs (USDS 2009a); Germany's Office for the Protection of the Constitution (OPC) (USDS 2009b); and the Austrian Society against Sect and Cult Dangers (GSK) (USDS 2009c). The activities of these bureaucracies involve NRM surveillance, advising authorities and the general public of the potential risks of NRMs, coordinating the appropriate responses to NRM activities, and helping victims of cult abuse.

the Kokkinakis v. Greece case. The ECHR declared the case admissible, stating that there had been a violation of Article 9" (Romocea 2010:92). Whatever activities members perform are generally believed to be voluntary, while in fact they may be the result of subliminal coercion. To proof this abstract reality is problematic.

The success of these types of court cases is demonstrated by the classical case of *Schuppin v. Unification Church*[4]*;* in this case, parents of a member of the Unification Church alleged that their daughter was forced to work in "compulsory service." The parents alleged that constant threats and fear were used by the leadership to coerce their daughter into selling merchandise for the cult. The suit failed based on the fact that the parents could only allege mental constraint, without proving that physical force was used on the part of the cult to compel the member to stay within the cult (Lucksted & Martell 1982:6).

3. Challenge posed by the prohibition of coercion

Instilling controlling measures to ensure that coercion does not occur in religion as prescribed in the various conventions, poses a challenge to governments. Governments are not only limited by the right to freedom of religion to interfere in internal religious matters but are also faced with the imbedded dynamics grounded in transcendental forces based in eternity. In this sense the constitutional protection of religion is a threat for religions and a challenge for the state.

3.1 The challenge of constitutionalised religion for the state

The constitutionalising of religion can be compared to the marriage of unequal partners. It is an attempt to regulate what many people believe is a spiritual, conceptual reality grounded in eternity with political and legal concrete measures. Religions based on realities outside the physical world are to be regulated by laws, measures and proof founded in the physical world. This situation poses a challenge to the state for the following reasons:

- How can the state prove that religious commands are inconsistent with legal requirements, given that religion defies scientific proof (Leiter 2008:15, 25)? The numerous definitions of religion and the struggle to define NRMs or cults further complicate the regulation of religion.
- Religion and its practices must be assessed against an abstract definition of religiosity. No concrete criteria can be used in determining if a religion is a religion or if a religion's expressions are indeed religious.
- The state lacks jurisdiction for the modification of religious doctrines. Nor can it alter or prescribe the dynamics and nature of religion (Engel 2011).
- A legal approach view religion as a historical contingent phenomenon (Hart 1961), for true believers religion originates from a transcendental dimension.
- The state's authority is to guard over civil life whilst religion guards over spiritual life that is unlimited and encompasses not only earthly, but also eternal life.
- Any action from the state to prevent believers from a specific course of action will provoke religious resistance (Engel 2011).

4 *Schuppin v. Unification Church,* U.S district Court of Vermont, 435 F. Supp. 603, 606, Civil No 76-67 (D. Vt., 1977).

- The right to freedom of religion grants a protected sphere to individuals and organizations. Unfortunately, the sentiment is not returned by being tolerant themselves with competing religions or with the state itself. Potentially, religious freedom challenges the authority of the law especially when it comes to "strong religions" such as fundamentalist movements, and cults (Rosenfeld 2009, Richardson 2004).

- The right to religious freedom can even be utilised negatively to serve as a conversation stopper when the practices and expression of religion are debated (Rorty 1994). The right to religious freedom and the application thereof has also caused divisiveness in politics (Breyer 2006). It can even be used by some religions to involve the legislator in fighting their actual competitors in the free marketplace of religions, which itself is guaranteed by the freedom of religion (Holcombe &Holcombe 1986).

Religious freedom is also a threat to democracy. The internal doctrines of religions are often not individualistic and therefore the ultimate goal of religion is not the individual's autonomy, but his/her fate in eternity (Engel 2011:11).

3.2 The threat of constitutionalised religion for religions

Once the freedom of religion is constitutionally protected, believers are legally obliged to accept a plurality of eternities all functioning in the religious arena and government is prevented from openly siding with one religion. Examples of the impact of a constitutionalised religion are the prohibition of prayer as in US schools and the hanging of the crucifix in German classrooms (Engel 2011:8). Constitutionalised religion can be viewed as a threat to the free expression of religion in general but even more so by new religious movements that show a higher level of commitment to the belief system for the following reasons:

- Religious goods are transcendental and confirmation is taken from a higher power.

- The correctness of religion is not based on what can be scientifically proven, given that an essential principle of religion is the belief in the unseen.

- Salvation – in whatever form is the crux of religion. For true believers, worldly goods and laws have no priority if they violate religious commands.

- Constitutionalised guarantees of freedom of religion imply a secular system that takes priority over religion. Any measures to limit the expression of religion will therefore result in a stronger attachment to, and belief in, their own specific religious system.

- For a religious individual adherence to legal measures can imply disobedience to moral duties and will result in transcendental sanctions.

- Liberties afforded by the constitution are viewed differently by the believer and means the removal of all obstacles in order to live out his/her religion.

- The meaning of "human dignity" prescribed by the constitution is in the first instance not viewed as the fair and worthy treatment of each individual but rather respect for the true believer's relationship with the transcendent.

Religion emphasises duty rather than rights. A secular human rights culture aims to guarantee earthly life and liberty but at the same time threatens the free participation in religious duties (Phillips 2007:115-117).

True believers generally view constitunalised religion as a subtle attempt to regulate religion and in so doing diminishes religious freedom.

3.3 Solution

It stand to reason that a legal approach to maintaining religious freedom is only applicable in the prosecution of criminal activities performed by religions; this approach is unable to protect individuals against undue coercion that may incur harmfull practices that infringe on other basic human rights as previously pointed out.

The Council of Europe (COE) has expressed concern regarding influences that may arise from sectarian phenomena in its Recommendations No. 1178 (1992) on sects (cults) and religious movements and No. 1412 (1999) on illegal activities and sects (cults). The council has found that minors are especially at risk from sectarian and cultic phenomena that can cause human rights violations, particularly in the spheres of health, education and respect for personal freedoms. A child exposed to sectarian influence is likely to be restricted in its fundamental rights and in future access to become a free and enlightened citizen. Children and minors are particularly vulnerable to both physical and psychological ill-treatment. Minors drawn in by cults are often withdrawn from their protective family environment, and their parents are thrown into disarray. The Assembly therefore resolved to study the question of sectarian and cultic influence on minors (COE 2011).

Important pointers can be taken from Europe, which has dealt with the issue of sect and cults intensively. The following guidelines were proposed to European countries by the Council of Europe in dealing with alternative religions (COE 1992):

1. The solution of the problem of NRMs (cults) that are accused of alleged coercion does not lie in legislation but in research and dialogue with these groups in order to obtain an understanding of their functioning and dynamics.

It is clear from the above discussion on the dynamics of religion and in particular NRMs that a dim view is taken of a secular and political system prescribing the conditions of freedom of religion. Not only does it portray a secular system less important than the religious commands, but it is also viewed as a system to limit or restrict freedom of religion. An absolute freedom is envisaged and in any society this view spells danger. Freedom must also not be limited by governmental interference and therefore a solution must first be obtained through sound information about these groups. This must occur in consultation with these groups. A religious platform rather than a political or legal platform should be used.

2. Information gained through research and dialogue must be made available to the public in order to create a greater awareness about NRMs and the differences they portray compared to other religions.

3. Greater vigilance through school education is necessary, especially for young people. The diversity in religion must be pointed out also the possible exploitation by some religions under the banner of religious freedom.

4. An Information or consultation service – preferably by independent non-governmental organizations where alleged violations of religious freedom can be reported and investigated must be in place. The role of this centre is not only to investigate alleged harmful practices in the case of some religious groups, but also the careful investigation

of these allegations by professionals in consultation with the particular group and other affected role-players with the aim of obtaining solutions.

5. Another possibility to address conflicts within religions that is better than government regulations is voluntary codes of conduct. Self-regulation in general is more flexible and effective than government regulation. The advantage of self-regulation is that it can bring "to bear the accumulated judgment and experience of all stakeholders on an issue that is difficult to be defined by the government" (Richards, Svendsen and Bless 2010:71).

In South Africa new religious movements must be formally included in the religious scenery. The South African Council for Religious Rights and Freedoms provides an ideal platform not only to include NRMs in South Africa, but also to facilitate critical debate and to guard over the integrity of religious practice.

4. Conclusion

Since 1994, with the passing into law of the new Constitution, South Africa started on a "new track" as far as religion is concerned. The Constitution treated all religions equally, and South Africans now have freedom to follow any religion. However, it is also important to note that some may abuse this freedom for their own selfish goals and, in the process, inflict harm on the members of religious groups. It is therefore necessary that the followers of all religions commit themselves to ensuring that harm is not caused by their actions or beliefs.

Constitutionalised religion holds its own challenges for government, as discussed above. The main challenge is that governments can neither prescribe doctrine nor alter beliefs and cannot judge whether the practices of a religion are indeed religious. Fortunately, South Africa is in the position to learn valuable lessons from other countries which, over the last few decades, have looked for solutions in cases where certain religions were believed or known to have caused harm.

South Africa is not exempted from the perception that a number of harmful religious groups are functional within its borders. This is clearly demonstrated by the number of reports in newspapers, magazines and on television[5] over the last decade or more. This media coverage indicates to a specific perception about some religious groups but more so to a need for proper education and information on this topic in the interest of the public.

Instead of "reinventing the wheel", South Africa must take note of the trials and errors of other countries and learn from them. The South African Charter of Religious Rights and Freedoms provides an ideal platform to assist in a process of dialogue. The establishment of a non-governmental organization that can cooperate with the Charter of Religious Rights and Freedoms will not only provide an opportunity to educate and inform the public about the diversity of religion, but will also help to create an understanding of the dynamics of religion.

5 *Profeet van Hertzogville* – "Profeet" kryt kerk uit, maar swyg oor oom Paul se opstaan. Beeld, 13 Augustus 2004; Die "Profeet" word in eie dorp gevrees. Rapport: 5 Maart, 2004. *Mission Church of Christ* – Goddank ons kinders lewe. Huisgenoot: 20 Oktober 1994. *Emmanuel Fellowship,* South African Broadcasting Corporation. "Special Assignment: SABC3, 11 May,2004. Erasmus, JJJ. 2004. Die Houy groep: kerk of kulte? Potchefstroom: Skripsie MTh; *Ark Sekte* – Ark sektekinders 'wil op eindtyd voorberei' Beeld, 3 Mei 2000; Ark-sektelede draai in hof, Die Burger, 27 Junie, p 5, 2000; *Grace Gospel Church,* M-Net, Carte Blanche. Broadcast on 7 February, 2010;

It will also open a channel by which to address alleged abuse and misunderstanding.

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TREFWOORDE
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Nuwe godsdienstige bewegings
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The Reformed Churches in South Africa – a perspective on church's view of the state

ABSTRACT

In this paper it is argued that the Reformed Churches in South Africa has a positive view of state government in the light of the Belgic Confession article 36 and Church Order Article 29. However, the separation of church and state should be maintained because church and state have different callings in society. Preferably church and state should be able to work together regarding issues of mutual interest. The precondition is that the separation of church and state may not be compromised. For the churches it is about freedom in the state, to exercise their mandate according sound Scriptural conduct. It means the exercise of church's mandate without compromising the basic principles of justice and equity. Just is just in church and state, but the way it is exercised may differ in church and state because of the difference in foundation, nature and focus.

1. Contextualization

What are the Reformed Churches in South Africa's (RCSA) view of the state? Embedded in South African history of the last hundred and fifty years it may be possible to analyse the RCSA's attitude towards some of the great social political questions of the last century and a half. Some issues that may be tabled are for example the RCSA's attitude towards the development of Afrikaner nationalism after the Anglo Boer War at the start of the 20th century, the up building of the country after the war, the question of white poverty in the previous century and in contemporary society, the churches view of Apartheid etc. However, the limit on time and space makes it impossible to address all these issues. I purposefully contain myself in context of this conference to aspects which determine the Reformed Churches in South Africa's view of the state. *First,* the focus is on an aspect that is generally overlooked by historiography outside the RCSA, namely the quest for freedom by the founding fathers of the RCSA. *Second,* the focus is on the interpretation of article 36 by the RCSA. *Third,* a few remarks are made about the practical embodiment of the RCSA's view of the state in terms of article 28 of the church order.

2. A "free" church

2.1 Founding of the Reformed Churches in South Africa

The Reformed Churches in South Africa came into being on February 11, 1859. Historiography (outside the Reformed Churches) tends to view the founding of this church community as a result of the Nederduitsch Hervormde Kerk (NHK) acceptance of "Gesange" (free hymns) in public worship (Theon & De Wit, 2010:154; Scholtz, 1956:149 e.v., 161). The "Gereformeerdes" were strongly opposed to the use of these hymns. The schism however was the result of other

frustrations and the use of the hymns in public worship the culmination thereof. In summary the main reasons for the schism were the influence of theological liberalism of the church in the Netherlands, inadequate preaching of the gospel, secular education, and state control of the church (cf. Giliomee, 2003:178). The latter is of importance for this article. On January 12, 1859, fifteen of the "Gereformeerdes" wrote a letter to the "Algemene Kerkvergadering" (General Assembly) of the NHK to declare that they want to exist as a "Free Reformed Church" (Vrije Gereformeerde Kerk) according to the doctrine, discipline and liturgy accepted by the Synod of Dordrecht 1618/19 (Spoelstra, 1915:197). In that context at least two different levels of application can be ascribe to the word "free".

- "Free" indicates a rejection of the state-church model endorsed by the constitution of the Zuid-Afrikaansche Republik. The objection was not only against the fact that ministers were remunerated by the state, but inter alia against the practice to ask the "Volksraad" to adjudicate cases with a distinct internal church nature. The state church (the NHK) also became in time more dependent of support by the state. For the Gereformeerdes it was unacceptable for the church to transfer the responsibility of church government to the state as if Christ did not give an order for the church that should be maintained by the church.
- "Free" also indicates a way of church governance free of internal hierarchical structure and freedom of conscience. The first minister of the reformed churches in South Africa, rev. Dirk Postma, noted in his diary that God calls him to position himself against the principle of hierarchy (Dagboek van Dirk Postma, 10 Jaunuarie, 1859). The background of this remark is the rejection of Postma's suggestion by the general assembly of the NHK that the singing of free hymns should be left to the conscience of every minister serving in a local church.

Instead, the general meeting of the in NHK decided that the free hymns together with the Psalms should be sung in public worship. The "Gereformeerdes" viewed this decision as a binding of the conscience and a yoke of human ordinances on the believers (Spoelstra, 1963:197 e.v.; Jooste, 1958:55).

2.2 Difference between church and state government

According the Gereformeerdes it did not matter how positive the state's attitude towards the church may be, it is imperative that the church should function independent of the state. At a personal meeting Postma explained to reverend Van der Hoff, minister of the NHK, that the church is a religious body that should not be dependent on the state for its functioning and for the development of both church and state. The point of difference between the church and the state, according to Postma, is that the kingdom of God is pneumatological determined and not by civil authority (Dagboek van Dirk Postma, 24 Januarie, 1859). The principal distinction made is that church government should clearly be distinguished from civil government on the basis that church government is not of the same nature. The focus of church government is on the spiritual dimension, while the state is responsible for governance of the mundane.

However, it became clear that it was incomprehensible for the leadership of the state government (in context of the state church) and the NHK to accept that the majority (in favour of the singing of the free hymns) should account for the opinion of the minority. This position of the latter increased the tension between those in favour of the singing of free hymns and those against it. The Gereformeerdes viewed the majority opinion as the incorporation of a

democratic principle in church government. As such the so-called liberal or democratic ideas of state government, well accepted by the Gereformeerdes in context of state government was rejected as normative for the government of the church (Spoelstra, 1963:140-141). For the Gereformeerdes the separation of church and state was imperative; it was about the true freedom of the church and how the state should act with regard to public worship.

2.3 Obedience to state government

The RCSA's emphasis on the separation of church and state did not translate into an antagonistic view of the state. The state is instituted by God. All believers should acknowledge the state as such and should be obedient to the state without compromising their belief. This point of view is directly linked to article 36 of the Belgic confession. The Belgic Confession states:

> Moreover everyone, regardless of status, condition, or rank, must be subject to the government, and pay taxes, and hold its representatives in honour and respect, and obey them in all things that are not in conflict with God's Word, praying for them that the Lord may be willing to lead them in all their ways and
> that we may live a peaceful and quiet life in all piety and decency.

John Calvin's commentary on Daniel 6:22 gives a perspective on how to understand the phrase …[to] obey them in all things that are not in conflict with God's Word … When king Darius came to Daniel while he was still in the lion's den, Daniel said to the King:

> My God hath sent his angel, and hath shut the lions' mouths, that they have not hurt me: forasmuch as before him innocency (sic) was found in me; and also before thee, O king, have I done no hurt.

According to Calvin Daniel did not transgress against the king by constantly persevering in the exercise of piety. The fear of God ought to precede, that kings may obtain the authority. The rational of the argument is that when God is feared in the first place earthly princes will obtain their authority. The Christian is therefore compelled to obey the command of God and should neglect what the government may order in opposition to it. Calvin concludes that earthly princes lay aside all their power when they rise up against God (Calvin, 6:22).

From Calvin's exposition it is clear that when a state government acts against Christians or against their belief it is a violation of the office bestowed upon them by God. It is true that some things belong to the Caesar, but it is also true that some things belong to God. In fact, everything belongs to God. The kingdom of God includes everything on earth and therefore also the kingdom of a Caesar. God governs in Christ over the entire cosmos (Van Wyk, 1991:111). Therefore the state may not govern over the church and the church not over the state. Both are subject to the kingdom of God. Both have a unique calling and mandate and both is in its own way and independent of the other focused on the kingdom of Jesus Christ (Du Plooy, 2008:244-245). If it happens that Caesar makes a claim on that which belongs to God it is the responsibility of the Christian to be more obedient to God than to the Caesar. It is not a choice between obedience to God and obedience to the Caesar, but obedience to God through the Caesar; the attitude of David towards Saul not to attack the king (Saul) because he was anointed by God (1 Sam. 24:7; Van Wyk, 1991:111).

3. Doctrinal developments

3.1 Problem posed by the Belgic Confession article 36

The main problem posed by article 36 of the Belgic confession, namely how the mandate of the state should be interpreted was in the first years after the Reformed Churches in South Africa came into being not viewed as problematic. Muller (2010:117-157) indicated that the Reformed Churches in South Africa until 1982 interpreted article 36 of the Belgic confession in the way that the state government should actively remove and destroy idolatry and false worship of the Antichrist. This interpretation of article 36 is in line with scholars like Polman, Vischer and others who accept that it was the intention of De Brés to ascribe such authority to state government. Accordingly state government was viewed to execute a twofold office. State government has to restrain civilians from dissoluteness and in the second place should actively remove and destroy idolatry and false worship of the Antichrist. This interpretation of article 36 is mainly based on the view that Calvin and his followers were in favour of a theocratic form of state government (cf. Coetzee, 2006:143-157).

The question is if it was the intention of De Brés, main author of the Belgic confession, that state government should actively remove and destroy idolatry and the false worship of the Antichrist, featured in the Reformed Churches in South Africa for the first time at the Synod of 1910.

3.2 RCSA synod decisions

In 1910 the Reformed Church Steynsburg asked the Synod to amend article 36 in the same way as the reformed churches in the Netherlands in 1905. The Synod decided, however, that it was not necessary to attend to the matter. For approximately 70 years the formulation and interpretation of article 36 featured at different Synods of the Reformed Churches in South Africa. In 1982 Synod made a small but significant change in the formulation of article 36. The Synod decided to include the Afrikaans word "sodoende" in paragraph 3. This inclusion was accepted as a better translation of the original text of article 36. However, the use of this word did not only give a better translation, but also a significant change to the meaning of article 36.

3.3. Interpretation of the Belgic Confession article 36

This change entails that some aspects of article 36 that were previously viewed as part of the mandate of state government is now part of the purpose of state government. Article 36, for example, does not state in the new formulation that the state government has the responsibility to actively remove and destroy idolatry and false worship of the Antichrist, but to carry out its mandate in such a way that in this process idolatry and false worship of the Antichrist would be destroyed. The significance of this change is that the new formulation is directly or indirectly based on the acknowledgement that De Brés did not intend to ascribe the responsibility to the state government to act against idolatry or false worship of the Antichrist. It is the task of state government to govern in such a way that it is possible for the church to destroy idolatry and false worship of the Antichrist by the proclamation of the gospel. It seems that the new formulation is not only a better translation of the passage, but also provide for a better understanding of the purpose of the original formulation. It also gives a better reflection of Scriptures revelation on the mandate and purpose of state government (Muller, 2010: 155 ff.).

3.4 View of the state

What then are the origin, mandate and purpose of state government viewed from a reformed perspective in context of the Reformed Churches in South Africa? I want to emphasize, however not extensively, some important aspects in context of article 36 of the Belgic confession.

First, the kingdom of God includes all forms of authority and governance; the differences in the government of different institutions, like church and state cannot be viewed in terms of article 36 of the Belgic as a dualism. Reality cannot be separated in different spheres of government. God's governance extends over the cosmos; it includes church and state and is directed against the power of Satan. Church and state government cannot be viewed in terms of a dualism, but should be described in terms of a duality. When the Bible speaks for example of the citizenship of the kingdom of God it does not situate the citizenship of the kingdom against worldly citizenship, but indicates in an eschatological way that believers are citizens of the perishing world and citizens of the new earth. The kingdom of God is a reality in this world as God's gracious gift for sinners. It starts to be realized where ever people submit in belief to the governance of Christ and live according his ordinances as the church. Again, the difference between church and state government is not found in a dualism, but therein that God does not govern everywhere in the same way. The consequence is that there is only one kingdom, but a lot of regiments. Therefore church and state is in service of the kingdom of God even if the state does not acknowledge the governance of God in Christ and their position as an institution of God (Van Wyk, 1991:234-235).

Second, the authority of state government does not evolve from government as such. No form of government is a purpose unto itself. All authority comes from God. From a reformed perspective the God does not transfer his authority to state government, but bestow authority on state government. It is a fundamental Scriptural principle that God does not transfer his of authority to a person, institute or to state government. Every authority bearer receives his authority from God and should in the final instance account for the exercise of its authority to God. It is therefore a question of how state government exercises authority in and towards the community. According to Van Wyk (1991:112) the responsibility of state government is not only to govern in an orderly way, but to account for its governance for justice and freedom. State government should govern in such a way that order, justice, freedom and responsibility become a feature of the community.

In a certain way church and state come close to each other in the execution of the separate mandates. Good state government and politics should realize something of the principles of the kingdom of God (cf. Van Wyk, 1991:112). They should act towards peace and reconciliation, freedom and justice. Realistically viewed there will be a difference in the nature and the way these principles realize in church and state. Spiritual salvation is after all not the same as political salvation. But the ethical demands of the kingdom of God should not be ignored by the state because it is also applicable to state government and politics.

Third, article 36 states:

> "And the government's task is not limited to caring for and watching over the public domain but extends also to upholding the sacred ministry, with a view to removing and destroying all idolatry and false worship of the Antichrist; to promoting the kingdom of Jesus Christ; and to furthering the preaching of the gospel everywhere; to the end that God may be honoured and served by everyone, as he requires in his Word."

In light of the controversy about article 36 it is important to notice that the mentioned four phrases are indicative of the purpose of state government and not a description of the mandate state government should execute. This is a clear limitation of the authority of state government. It is for example not the mandate of state government that the gospel is proclaimed, but that it can be proclaimed. The limitation of state authority in this way is supported by the principled view of the separation of church and state. State government does not have the calling or authority to interfere in the internal matters of a church community and the church should not interfere with state matters.

Reformed scholars from different disciplines describe the separation of church and state in terms of the philosophical doctrine of sovereignty in own circle. Van Wyk indicates that the idea of sovereignty may lead to confusion, because no area or sphere can be sovereign in its own circle. All areas and all authority are relative in light of the kingship of Jesus Christ. It is one of the problems with the Lutheran doctrine of the two kingdoms, and the division of reality in sovereign spheres that *Eigengeständichkeit* becomes all too soon *Eigengesetzlichkeit*. Regarding the different areas of governance it is a distinction between a difference in authority and function in the light of the one Word of God. Some scholars are of the opinion that article 36 of the Belgic confession is in favour of, in fact confesses a theocratic or even religious state model.

In my view it may be possible to deduce from the background, context and the text of article 36 the ideal of a state governed by Christians. But it is not possible to indicate from the text, also in relationship with article 37 that the confessions ascribe to a specific form of state government. It should be considered that article 36 developed in the context of the 16th and 17th centuries church state relationships and that the views of Calvin are important background material for the understanding of article 36. It was mentioned in this article that it is not possible to declare with certainty that Calvin was theocratic in his view of the state. What is certain is that article 36 states that the state and the authority bestowed upon the state as well as the authority of the church comes from God; that there are distinct differences, and that neither should claim authority over the other nor should they interfere with the execution of each other's mandates.

It should also be considered that it is not the purpose of the confessions to choose for a specific form of state government, may it be aristocratic, democratic etc. It is also possible that an autocracy governed with wisdom, compared with to a democracy that is governed badly may be able to give a better realization of Scripture values than the latter. Article 36 of the Belgic confession articulates the view (according to the new formulation) that state government irrespective of its acceptance of Christianity should allow the opportunity for the church to execute its mandate according Scriptures. Such an understanding of article 36 is in line with the New Testament revelation of the state. There is after all no indication in the New Testament that the church should establish a Christian state or that the existing state should be replaced by a Christian government. It may be a noble idea, but it is not part of article 36 of the Belgic confession.

4. Practical embodiment

4.1 Confession and church order

The first part of the first sentence of article 28 of the Church Order is a summary of what the churches confess about the state government in article 36 of the Belgic confession. It states:

> "Precisely as civil authorities, as institutions of God, are obliged to assist and protect the church and its office bearers …"

Most church order commentaries refer to Jansen (1952:130) who suggests that in the context of the Synod of Dordrecht 1618/19 article 28, was included to evoke a favourable attitude of the state towards the churches gathered in Synod. In that context (of a state church) it was important that the state government should confirm the church order. If the church order was confirmed by the state it would have the same authority as state legislation. Furthermore, it was mandatory for the Synod of Dordrecht 1618/19 to give a clear outline of the responsibilities of both church and state. The purpose was to give a perspective on the position of the church in relationship to the state and state government.

The influential views of the day were that of the Armenians (and the Erastians) and Roman Catholicism. The Armenians were of the opinion that the state government functions over the church, while for the Roman Catholic Church the state government functions under the supervision of the church. The importance of this short piece of history is twofold. Because of the church state relations in the Netherlands the ideal of a church independent of the state could not be realized at the Synod of Dordrecht 1618/19. Of even more importance is that the church did not position itself against the state. According the reformed view church and state are not two separate entities that are positioned over and against each other. The church functions in the state and is in this sense subject to state governance.

This perspective of the reformers is a fundamental break with the mediaeval view of the relationship between church and state. In mediaeval times church and state were not formally separated. They functioned as a spiritual-juridical unity that could be distinguished but not separated from each other. The juridical discipline, the state and state government were all in service of the truth of God (Smit, 2009:476). Article 36 of the Belgic confession does not only represent a break with the mediaeval views on church and state, but in the light of the kingdom of God indicates the way for the church's view of the state and the conduct in the state.

A principle idea of article 28 of the Church Order of Dordt mentioned above, namely that the church does not function over and against the state but in the state, this is supported by the first duty ascribe to the church in article 28. However, the emphasis is not on the church, but on the "… duty of all ministers, elders and deacons to impress upon church members, faithfully and diligently, the need to obey and honour the government." This formulation is against a Congregationalist or hierarchical concept of church. The Congregationalist concept of the church in most instances demands that a matter regarding church and state would be referred to the governing body/executive of the church. But reformed church polity view the local church as a complete church.

Church unity is not experienced and exercised on the basis of structural unity, but is religious by nature based on the attributes of the church, namely unity, sanctity, catholicity and apostolicity (Du Plooy, 1982). This few remarks on church community are sufficient for the purposes of this article. The focus of the church order is in the first instance on the offices

in the local church (congregation). In every local church the offices are responsible for the governance of the congregation. Their governance is a governance of service through the proclamation of the gospel (Smit, 1997, *A governing of the heart. Mainly as seen by John Calvin*). A concrete task of the offices is to call the congregation to obey and honour the state government. Church order commentaries are vague on why the emphasis is placed on the ministry of the offices. However, in context of article 36 of the Belgic confession the purpose can be indicated as "… [to] live a peaceful and quiet life in all piety and decency." Church order article 28, in relationship with article 36 of the Belgic confession does not call on believers to live in an ivory tower. To obey and honour the state government is after all not something that can be obtained through declarations by a church or church executive. It is something that should live in the hearts of the church (believers). Therefore the ministry of the gospel, the resuscitation of the believers to obey and honour state government is central to the confession and church order.

It is also the responsibility of the offices "… to arouse and retain the goodwill of the civil authorities towards the churches in the best interest of the churches." Article 28 also states that "… Church assemblies must communicate with the government in order to acquire the necessary cooperation from the government and, as the church of Christ, must bear testimony to the government in cases where the need to do so occurs." The point is that all church assemblies have the responsibility to correspond with state authorities on the level that is applicable. This should be viewed in correspondence with Article 30 of the church order. Article 30 states that "Church assemblies shall deal only with ecclesiastical matters and shall do so in an ecclesiastical manner. Major assemblies shall deal only with matters that cannot be finalized in minor assemblies or that concern all the churches in question collectively."

The Synod of 1970 (1970:63) decided that in the proclamation of the gospel the church ought to speak with courage and relevance about the issues presented in context of the day. By proclaiming the gospel the church should build up the believers, if necessary admonish them and if it is necessary criticize the actions and policy of the authorities and civil organizations. This approach is not without problems. The result may be that the churches are subdued to unbound subjectivism. It calls for a self-critical objectivism. Every issue should be adjudicated on its merits. The light of the Word should shine all aspects of life. In this way the church can be involved in all social issues, but then in an orderly church fashion (Van Wyk, 1991:344).

Vorster (1999:51) states that when the civil authorities govern in such a way that it promotes the basic values of Christian ethics the church Council (and churches in assembly) should impress upon the believers their responsibility to subject themselves to this authority; to establish and develop the goodwill of the authorities towards the church and seek their support for the work of the church; up correspondence with the civil authorities to gain the necessary support of the government in cases where this support is necessary; and bear testimony towards the government about the relevance of Biblical principles for social life. Vorster also states that the Bible and the confession do not expect blind and uncritical obedience from the believer towards the civil authority. He states that the civil authority should be obeyed and respected in all things: "which are not repugnant to the Word of God."

But what should be the preferred way for the churches if state government expresses itself hostile to the church, even reveal it as an enemy of the kingdom of God. Vorster (1999:51) suggests that in some circumstances obedience to the government may become difficult. He is of the opinion that in extreme cases civil disobedience or the violent overthrow of

the government may be justified. The suggestion is in line with the established view in the reformed tradition which in extreme cases allows for violence to obtain the goal of better governance. It is mainly based on John Calvin's exposition of Daniel 6:22 and Acts 5:29 (cf. Inst. IV.20.32).

Van Wyk (1991:71), however, indicated that Calvin's view is not based on sound exegesis. In both instances of superior obedience to God (Daniel 6:22 and Acts 5:29) there is no indication of violent action against the authorities. It is also clear that Calvin does not apply his mind to the way and method according which violent action against the authorities may be executed. Furthermore, religion and politics do not fulfil a determinative function in the mentioned passages. I agree with the conclusion of Van Wyk that there is no genuine alternative for peaceful resistance.

5. Remarks

In summary it could be stated that the Reformed Churches in South Africa have a positive attitude towards the state as a servant of God. Preferably church and state should be able to work together regarding issues of mutual interest. The precondition is that the separation of church and state may not be compromised. For the churches it is about freedom in the state, to exercise their mandate according sound Scriptural conduct. Therefore the freedom of the church in the state cannot be viewed without emphasis on the responsibility of the churches in context of state legislation.

For the church, however, it means the exercise of their mandate without compromising the basic principles of justice and equity. Just is just in church and state. The way it is exercised may differ in church and state because of the difference in foundation, nature and focus. But it is my belief that in most instances church and state is not, at least in theory that far apart in the execution of justice and equity. It is not necessary for the church to develop a formidable internal law based on the common law. As a religious community the church should act in terms of the basic principles of Scriptures. For example, what is the implication of the Scriptural principle that a believer should act against other people as you wish for them to act towards you in terms of the execution of church discipline. It is the responsibility of the church to develop its internal practices based on these principles of Scriptures to be able to execute its mandate.

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Law and religious freedom in South Africa: Challenges facing the Seventh-day Adventist Church

ABSTRACT

The Seventh-day Adventist church within the South African context faces a number of potential and real problems that relate to religious freedom and law. This article outlines the interaction between the state and the Seventh-day Adventist church in light of its development from late nineteenth century to the present. The Seventh-day Adventist church in South Africa does not operate with policies and a polity that is crafted and developed in a local context exclusively. As a global organization the Seventh-day Adventist church operates across many legal contexts. The discussion generated from this article will help in facilitating an open dialogue on issues that need to be taken into consideration in creating a healthy and working relationship between the church and state in the South African context. Cases discussed in this article serve as evidence of issues that need to be addressed by the church by clarifying a self-understanding of religious freedom within the South African context.

1. Introduction

This article gives a perspective on religious freedom in South Africa, by looking at the challenges facing the Seventh-day Adventist Church in the past, present and future. Understanding the Seventh-day Adventist church and how it functions within a socio-political context is very important in dealing with the challenges that the church faces. This study will therefore look closely at some aspects that make up the identity of the Seventh-day Adventist church. Attention will be given to challenges that its members face that relate to law and religious freedom particularly in South Africa. A Seventh-day Adventist historian, Makapela acknowledges personal freedom, personal choice and personal identity as values that had become important for the Church. He also claims that "these and many other ideas had democratised the Protestant churches and above all had also made it possible for the American Constitution and the Bill of Rights to be framed" (Makapela, 1995:36, 37). Therefore a historical overview and a description of the function of the church in both the global and particularly within the South African context will be given. The aim of this paper is to highlight potential and actual tension spots between the church and its socio political world.

2. Early Developments and Growth of the Seventh-day Adventist Church

After nearly 150 years the Seventh-day Adventist church has just started a process of reviewing its ecclesiology.[1] While the Seventh-day Adventist church traces its identity from Scripture and

1 In May 12, 1982 the Biblical Research Committee of the General Conference of Seventh-day Adventists took an action to embark on serious research in the area of ecclesiology. This project is still ongoing, see Ecclesiology Project retrieved June 20, 2011 from www.adventistbiblicalresearch.org/documentshtm#Ecclesiology

claims the entire Judeo-Christian heritage, there are Christian traditions that have contributed more in the shaping of the church such as the Free Church movements particularly from the radical reformation (Sokupa, 2011:109-111). There are common values between the Seventh-day Adventist Church and churches that claim this particular tradition and Cartwright enumerates a few: "voluntary membership, believer's baptism, separation from the world, mission and witness of all members, church discipline, and the rejection of the state-church alliance" (Cartwright, 1994: 26, 27). The mid-nineteenth century marks an important period of development for the Seventh-day Adventist church.

The early development of the Seventh-day Adventist church may be traced from the Millerite movement of the 1840s in the United States of America (Knight, 1999:13). William Miller's preaching drew people from different denominations, among others were Methodists and Baptists. The movement experienced a major disappointment in 1844, in hoping that Christ would come that year, based on their interpretation of Daniel 8:14. After studying this passage they concluded that the cleansing of the sanctuary referred to the second coming of Christ. After examining this passage later, they found that Christ was entering a new phase of his ministry in heaven. The fundamental beliefs of the Seventh-day Adventist Church outline the church's doctrinal teachings. These were developed from a rigorous study of the Scriptures (Knight, 1999:13-27). In 1860 the name "Seventh-day Adventist" was decided upon, and in 1863 the church was formally organized (Knight, 63). In 1874 the first missionary was sent to Europe. In 1896 the first Seventh-day Adventist conference structure was organized in South Africa. Today the Seventh-day Adventist Church consists of over 16 million members across the globe. The Southern Africa Union Conference as of June 2010 has over 122 231 members within its territory. The church world-wide is growing by one million members every year. See Adventist History, retrieved June 20, 2011 from http://www.adventist.org.za/index.php/about/adventist-history

Within the Seventh-day Adventist church, there is no doctrine that has tested its members on matters of religious liberty more than the Seventh-day Sabbath. The contribution of the Seventh-day Adventists on matters of religious liberty began with a response to Sunday laws. Therefore main the focus of the discussion in this article is on the response of the Seventh-day Adventist church to Sunday laws in the past present and future.

3. The influence of the Seventh-day Adventist church in politics.

Because of its apolitical stance the Seventh-day Adventist Church as a corporate body has not had much influence in politics. This position is based on the principle held by the church which separates state from religious affairs. However members of the Seventh-day Adventist Church as individuals have held political positions within the various political structures while they maintained their membership within the church. Many Seventh-day Adventists still make a contribution as individuals in the South African political scene.

Political influence however has not left the church unscathed. During the apartheid era the Seventh-day Adventist Church in South Africa reflected the political structures of the Apartheid government characterized by separate development, racial segregation and discrimination. The rest of the African continent separated South Africa during this period from its organization because of apartheid. South Africa became an isolated burden of the General Conference (the highest structure) for a number of years. However in the 1980s discussions were initiated by

the General Conference to end this anomaly. Much progress has been made to achieve this move toward unity. The political pressure in South Africa has definitely played a major role to bring a swift change of structures. Therefore political influence has played a major role in the church in South Africa.

The church operates within a political environment. Political interaction becomes an essential pre-requisite for this environment. There are a number of social activities that the church engages in within communities that require interaction with political structures.

4. Religious liberty and law in the history of the Seventh-day Adventist Church

During the fourth century the conversion of a Roman Emperor Constantine into Christianity brought some changes in the way the church was viewed and also placed the church in a favourable position (Davies, 1965:159). Sunday laws date back to the time of Constantine, who wrote the first Sunday observance act in the fourth century. In 321 Constantine raised Sunday to the level of other pagan holidays by "suspending the work of the courts and of the city population on that day (Coleman, 32, 33).

In tracing Sunday law history during the succeeding sixteen hundred years, we find that such laws were developed where governments recognized an established church, in other words where there was no separation of church and state.

Sunday laws were imported into America from Europe during the seventeenth century by the colonists, who believed that secular government could legislate both civil and religious conduct.

Since World War II, certain merchandising outlets operating mainly through suburban branches have discovered that some customers wish to shop on Sunday. Other retailers, in their endeavour to suppress Sunday selling competition, have sought to modernize the old Sunday blue laws, to secularize them and use them as an instrument of competitive control.

Religious intolerance is clearly portrayed in the way the Puritans of New England treated those who were deviant with particular reference to the blue laws of the seventeenth and eighteenth centuries. By means of "the whipping post, the ducking stool, the stocks, the pillory, fines, prisons, and gibbet", force was exercised against the will of individuals to obey these blue laws. ("The Blue Laws of New England," *Liberty* January-February 1963, pp 18, 19.)

> "A blue law is a type of law, typically found in the United States and, formerly in Canada, designed to enforce religious standards, particularly the observance of Sunday as a day of worship or rest, and a restriction on Sunday shopping. Most have been repealed, or have been declared unconstitutional, or are simply unenforced; though prohibitions on the sale of alcoholic beverages or prohibitions of almost all commerce on Sunday are still enforced in many areas. Blue laws often prohibit activity only during certain hours and there are usually exceptions to the prohibition of commerce, like grocery and drug stores. In some places blue laws may be enforced due to religious principles, but others are retained as a matter of tradition or out of convenience." Retrieved June 20, 2011 from En.wikipedia.org/wiki/Blue_law

Some incidences that illustrate the way these blue laws operated may be cited: in 1670 "two lovers, John Lewis and Sarah Chapman, were accused and tried for 'sitting together on the Lord's day under an apple tree in Goodman Chapman's orchard.'" "A Dunstable soldier, for 'wetting a piece of old hat to put in his shoe' to protect his foot – for doing his heavy work on the Lord's day, was fined, and paid forty shillings." "Captain Kemble, of Boston, was in 1656 set for two hours in the public stocks, for his 'lewd and unseemly behaviour, which consisted in kissing his wife 'publicquely' on the Sabbath day, upon the doorstep of his house," on his return from a three year's voyage. A man who had fallen into the water and absented himself from church to dry his only suit of clothes, was found guilty and 'publicly whipped.' (*Liberty* January-February 1963, pp 18, 19.)

4.1 Legal framework within the ecclesiological structure of the SDA Church

Every organization of the Seventh-day Adventist Church within a country has its own legal framework within the ambit of the legal requirements of that country. This means that the "General Conference, divisions, unions, and local conferences/missions have separate identities for their legal purposes…Unless local laws require otherwise, the local church operates under the legal structure of the local conference, mission, or union of churches and not as a separate legal entity." *GC Working Policy 2008-2009* BA 25 05 "Incorporating Organisations" p. 99.

Each organizational entity shall operate within a constitution, bylaws and operating policies which are "consistent with the Seventh-day Adventist concept of the church, its organization, and governance. The fruitage of that concept is a representative and constituency-based system….While the integrity of each entity is recognized (church, conference, union), each is seen to be a part of a sisterhood which cannot act without reference to the whole." *GC Working Policy 2008-2009* D 05 "Seventh-day Adventist Church Organization" p. 129.

The constitution of the General Conference of Seventh-day Adventists as revised at the 58th Session held in St Louis, United States of America, June 29 to July 9, 2005, is the highest level organization constitution of the Seventh-day Adventist church. *GC Working Policy 2008-2009* "Constitution of the General Conference of Seventh-day Adventists" pp. 1-25. There are model constitutions that are followed by Unions and Conferences provided as well. *GC Working Policy 2008-2009 "*Model Constitutions and Operating Policies" pp. 129-187.

Therefore the Seventh-day Adventist church in South Africa operates within a world-wide church organization. The structure however does recognize that each level operates within the scope of the laws of a particular country or countries in a region. Each level of church organization described above has to set its own policies to be in harmony with the legal framework under which it operates.

4.2 The Seventh-day Adventist view on individual religious freedom

Religious Freedom for Seventh-day Adventist individuals is expressed as:

> The fundamental human right to have , adopt, or change one's religion or religious belief according to conscience and to manifest and practice one's religion individually or in fellowship with other believers, in prayer, devotions, witness, and teaching, including the observance of a weekly day of rest and worship in harmony with the precepts of one's religion, subject to respect for the equivalent rights of others. *GC Working Policy 2008-2009* FL 05 p 309.

Within the South African legal framework the statement above would find relevance in the bill of rights. This statement also expresses the expectations and the provision made by the Seventh-day Adventist policies to meet such requirements of religious freedom for the individual. The Seventh-day Adventist church "not only works for the religious liberties of both individual church members and organized entities of the Church, but also supports the rightful religious liberties of all people." *GC Working Policy 2008-2009* FL 05 p 310.

4.3 Legal status of the Seventh-day Adventist Church

The Legal status of the Seventh-day Adventist church may be complex because of the global nature of its structure. However there are clear guidelines that allow the church entities to make reasonable adjustments where there are tensions between the legal framework of a country and the Seventh-day Adventist church policy.

> The General Conference, divisions, unions, and local conferences/missions have separate identities for their legal purposes. No church organization or entity assumes church organization simply because of its church affiliations. The incorporation or registration of legal entities of the Church, other than at the General Conference level, is subject to division policy which takes into consideration the principles of denominational organization and representation, laws of jurisdictions, and the specific needs of the Church in the geographic areas served. Unless local laws require otherwise, the local church operates under the legal structure of the local conference, mission, or union of churches and not as a separate legal entity. *GC Working Policy 2008-2009* BA 25 05 p 99.

The Seventh-day Adventist Church has its trademarks and trade names protected in its policies. There are often offshoots that want to misuse the name, therefore it is registered and protected by law. In the General Conference Policy it is stated: "The Seventh-day Adventist Church has an historical, evangelical, and proprietary interest in trademarks, service marks, and trade names (referred to collectively herein as 'trademarks') developed by the Church and its related organizations." *GC Working Policy 2008-2009* BA 40 05 p 100. Further provision for protection is made that "All legal rights in any trademark utilized by the General Conference, as defined, shall be vested in the General Conference Corporation with use by a related or subsidiary entity subject at all times to approval and review by the General Conference Corporation." *GC Working Policy 2008-2009* BA 40 05 p 101.

"The Seventh-day Adventist Church at all levels – General Conference, division, union, and local conference/mission/field – shall seek and use legal counsel to safeguard the Church in the fulfilment of its mission." *GC Working Policy 2008-2009* BA 30 05 p 99.

The policy of the General Conference of Seventh-day Adventist, does make provision for legal counsel and representation. There are principles that the church has set for such a relationship. The following statement outlines the values to keep in view:

> Lawyers advising and representing the Church and its institutions shall in all matters and at every opportunity give legal counsel consistent with the laws of the applicable jurisdiction. Above and beyond basic legal requirements, lawyers should advise the Church as to what appears to be fair, just, moral, and equitable, thereby seeking to direct the Church toward a position of moral and social leadership in harmony with scripture and reflective of Christian love. *GC Working Policy 2008-2009* BA 30 15 p 100.

4.4 Property holding within the Seventh-day Adventist Church

General Conference policy provides a system for holding property. In the early beginnings of the Seventh-day Adventist church there was resistance to organization. Properties were in the names of leading pioneers. This situation was one of the major factors that led to the organization of the church and choosing a name for the church. This led to a policy on holding property and handling legalities relating to property holding by the different entities of the Seventh-day Adventist Church.

> Property Ownership – Church properties and other assets shall be held in the name of an appropriate denominational corporate entity, not by individuals, trustees, or local congregations. Where this is not legally possible, divisions shall make alternative arrangements in consultation with the General Conference Office of General Counsel. *GC Working Policy 2008-2009* S 55 05

The Seventh-day Adventist Church in South Africa has a legal corporate entity that transacts the church's legal matters.

> Because SEDCOM is a legal entity, registered under the Company's Act and operating in harmony with the laws of the Republic of South Africa, it shall formulate its own actions and record them in its own minutes. Union committee actions cannot be taken for the legal body, but the union committee has the right to record recommendatory actions for the legal entity. With the customary overlapping of officers and other personnel serving both entities, it would be most unusual and unlikely for the corporate body to refuse or fail to concur with recommendations from its parent body. Thus when the legal entity receives recommendations, takes appropriate actions, records them in its minutes and carries out its legal function in compliance with such actions it performs its function as a legal service to the organisation and accepts legal responsibility in doing so. *SAU Supplement to GC Working Policy* SAHHH 05 05.

The way the Seventh-day Adventist Church manages its properties is very much centralized. It is very helpful for churches that do not have financial resources enough to handle all the legalities that come with owning property.

5. The response of the Seventh-day Adventist Church to the Sunday Laws

Sunday laws affected the Seventh-day Adventist church in its early stages of development in the USA around 1888. The church however responded to this crisis through active interaction with the government. Alonzo T. Jones, an editor of a Seventh-day Adventist Magazine, *American Sentinel,* challenged Senator Henry W. Blair with his national Sunday observance bill. Morgan observes that Jones saw the enforcement of Sunday as a worship day disadvantaging the observers of a Saturday Sabbath. The Seventh-day Adventists whom Jones was representing, had to choose between giving up one sixth of their work time or live against their consciences (Morgan, 2010:12). Morgan points out that even "a proposed exemption for 'Seventh-day believers' would solve nothing…. It would reflect mere toleration of difference, not recognition of human right" (Morgan, 12). In the light of the above observation it seems that the Sunday laws have had an impact around the world. This is evidenced by the fact that long after the laws were scrapped Sunday is still a day where most business activities particularly

in the public sector are closed. This means that even in South Africa where freedom of religion is protected, Seventh-day Adventists are limited in the amount of hours they can work per week in certain sectors. Therefore this does have an indirect impact on their livelihood and economic participation. This means that exemption from work on Saturday is not enough in some work situations, it takes away the right to work on Sunday because the place is basically closed on Sunday, when a Seventh-day Adventist can actually work.

The response of the Seventh-day Adventist church to the 1888 Sunday law crisis according to Morgan was not limited to individual work, there was also an effort towards grass roots organization. The church's International Tract Society solicited support from church members through signed petitions. The members were also urged to get their friends to sign the petition. Morgan summarizes the developments in Seventh-day Adventist response to the Sunday laws during this period:

> By March 1889 they had amassed 260,000 signatures in opposition to the national Sunday bill... In the meantime Senator Blair also brought before his committee his proposal for a constitutional amendment requiring the states to provide free public education that included instruction in 'the principles of Christian religion.' Jones returned to Washington in February 1889 to speak against this effort to 'Christianize' both the public schools and the U.S. Constitution with one stroke. In contrast to testimony in favour of the amendment from several Protestant clergymen, including members of the Evangelical Alliance, Jones contended it would establish Protestantism as the state religion. The public schools would become 'seminaries for the dissemination of Protestant ideas,' which would 'violate the equal rights of Catholics, Jews, and infidels (Morgan, 13).

Therefore the Seventh-day Adventist church in the USA responded to the Sunday laws by engaging in discussions with the government and also by soliciting support not only from its own members but from those who sympathize with them on matters of religious freedom. The American experience that is discussed above illustrated how Seventh-day Adventists respond to matters of religious freedom. In other parts of the world the issue may not be Sunday laws, it may be homosexuality and law and how the church responds to the rights offered to such individuals within the church community. The next section looks at a case of religious intolerance with reference to the Sabbath within the South African context.

6. Richard Moko – A case study in the pre-1994 South Africa (1903)

As a background and preamble to Moko's case, it is important to sketch the relationship between church and state within the Seventh-day Adventist church. In the late nineteenth century the Seventh-day Adventist church was growing through its missionary thrust. It was around this time that missionaries were sent to South Africa. The position of the church at this time on the matter of the relationship with the state was that there should be no relationship with governments. This included offers like tax exemption and donations from the government. It was during this time that the British South African Company under the leadership of John Cecil Rodes offered 6000 acres of land in Mashonaland Rhodesia, to P.J.D Wessels who was a prominent leader of the Seventh-day Adventist church. He attended the General Conference (a highest governance body within the Seventh-day Adventist church) in the USA. At this 1893 meeting of the General Conference Wessels reported to the committee about the land offer. He saw missionary possibilities and how this would help in the growth of mission work in Mashonaland. (See Costa, 2010:137)

Costa (2010: 137), further observes that Wessel's arguments were met with opposition from A.T. Jones referred to earlier in this paper as one of the champions of religious liberty. Jones advocated for a clear separation between church and state, that would not accommodate such relationships with the state. Ellen G. White one of the pioneers of the Seventh-day Adventist church opposed Jones and the leaders who supported his views of radical separation between church and state. (See "Nineteenth Meeting" *General Conference Daily Bulletin,* March 6, 1893; Costa, 2010: 138)

The background sketched above shows that there was a very positive relationship between the church and state in South Africa. There were no laws that were enforced against the Seventh-day Sabbath worship in South Africa. However even within such a context of a healthy relationship between church and state, there were problems that were faced by Seventh-day Adventist pioneers in South Africa. This section addresses a case particularly demonstrating elements of religious intolerance within the context of the pre-1994 South Africa.

Richard Moko was the first indigenous Seventh-day Adventist minister in South Africa (Cooks, 1986: 4). In 1903 Moko was working in East London preaching and establishing the Seventh-day Adventist church there (Mafani, 2010: 32, 33).

A petition was signed by members of Independent and Presbyterian churches in East London East Bank area in which Moko was accused of preaching heresy by teaching that Saturday was the Sabbath day and not Sunday. He was encouraging the younger sex to stay away from work on Saturdays. The pertitioners demanded that Moko be expelled from the township (Mafani, 33).

The location superintendent Lloyd gave way to the pertitioners by giving Moko one week's notice within which to leave the location. Lloyd was aware that he was acting outside the ambit of the law as there was no provision in location regulation for such action. Moko was a registered tenant in the East Bank Location. Therefore his expulsion had to be based on a contravention of the law.

"The Town Fathers, on the other hand decided to act with greater prudence because, they pointed out, such drastic action as expelling a person from the location merely because he was exercising religious freedom could have established a serious precedent."

"Lloyd was therefore instructed to serve notice upon Moko, calling upon him to "desist from causing discontent" amongst the township residents otherwise he would indeed be evicted in terms of Section 13 of Act 11 of 1895."

"The evidence would appear to be circumstantial and yet the Town Council took it seriously, acted upon it and expelled Moko from the Location. Probably the best explanation for the action appears in the Headman Minnie's report. He had been Headman in the Location for fourteen years, he stated, and during that time had seen very little trouble there. In November 1903, however, he had been called upon to investigate several cases of quarrelling between husbands and wives, and between parents and children. The problem, he said, was Reverend Moko's preaching his "Seventh-day Adventist religion which called upon people to refrain from working on a Saturday. He knew of at least nine people who no longer worked on Saturdays, regarding that day as the Sabbath. "This I can plainly see," Minnie concluded, ' is leading to people remaining from work on Saturday which will cause and is causing shortness of labour at East London." (Tankkard, retrieved July 4, 2011 from www.eastlondon-labyrinth.

com/townships/moko.jsp CA, 3/ELN 453. H Minie to Location Superintendent, 29.2. 1904.

"The seriousness in which Moko's preaching was viewed can be seen from a testimony which Superintendent Lloyd delivered before the Lagden Commission earlier that very year. He had testified that he believed the locations existed purely to supply labour and that wages to the Black people should be held at such levels as to force them to work. The East Londoners, he said, tended to pay 'extravagant wages' which enabled a man to work only a few days a week and 'to lie idle at home' for the rest of the time. He personally put a stop to that, he boasted, never allowing a man to absent himself from work for more than one or two days a week without serving an eviction order on him. His general view, he told the Commission, was that it was 'not reasonable' for an African to rest every Saturday." CL, SA Native Affairs (Lagden) Commission, 1903-5, II, 822-4. There are many other cases of intolerance wherein freedom of expression was deprived that were never documented.

Moko's case has demonstrated that even within a context where there is no enforcement of Sunday laws or legal restriction of worship on a Saturday Sabbath, there were elements of intolerance that are demonstrated by Moko's case. Therefore this case is important for the Seventh-day Adventist church in South Africa, to ensure that religious expression and freedom is afforded for those who worship on a day that is not popular in the business sector and the religious arena.

7. A structure of the Seventh-day Adventist Church in South Africa (Post-1994)

There have been some significant changes in the structure of the Seventh-day Adventist Church in South Africa. Because of Apartheid, South Africa was removed from the regional structure operating in Africa (Division) to be managed as a special case under a special South African Affairs Committee (SAAC) under the General Conference. This deprived South Africa the opportunities for growing and interacting with the church within the continent of Africa. The return of the Division office to South Africa after 1994 was very significant. It was an indication of the acknowledgment of the changes that have taken place to address structural defects that were caused by Apartheid.

The Seventh-day Adventist church in South Africa now is part of a global church family. Through the years of apartheid, which did not leave the church unscathed, yet the global vision of a world-wide united church was maintained. There is Seventh-day Adventist presence in almost every country around the world. With the headquarters in Washington USA, the church is administered through its 13 regional divisions across the globe. The Church in South Africa is part of this world-wide structure under the Southern Africa Indian Ocean Division. This division includes such countries as: Angola, Botswana, Comoros, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Reunion, Sao Tome and Principe, Seychelles, South Africa, Swaziland, Zambia, Zimbabwe, and Ascension, St. Helena, and Tristan da Cunha Islands. The headquarters of this Division is in South Africa, Pretoria. The church in South Africa is administered through the Southern Africa Union Conference, which includes Namibia, Lesotho, Swaziland and the entire South African territory. The headquarters for this union are in Bloemfontein. The union is administered through six conferences (Cape; KwazuluNatal-Free State; Lesotho Trans-Orange; Transvaal; Swaziland) and one field (Namibia) under which the local churches fall.

Globally "high concentrations of Adventists are found in Central and South America, throughout Africa, the Philippines and many other areas. In composition, 39 percent of Adventists are African, 30 percent Hispanic, 14 percent East Asian, and 11 percent Caucasian." With reference to its mission "the church places great emphasis on different aspects of human freedom and responsibility. These include: religious liberty and human rights, humanitarian aid and development, better lifestyles, health and wholeness, education and personal growth, as well as social issues and community involvement."[2]

8. Religious freedom and law for Seventh-day Adventists

In the post-1994 era of democracy the Seventh-day Adventist church in South Africa has been challenged to adjust some of its practices and policies to be in line with for example the Labour Laws. Other cases were relating to issues of restructuring and the rights of certain groups in the process of restructuring which has been a process that started in the 1980s and has not been concluded to date. The church in South Africa through its legal advisors has attempted to not only become reactionary but to put mechanisms in place that will help shape its relation with the South African Law. For example most institutions of the church have a human relations department that looks into policies vs labour law to ensure good labour practice within the church.

One of the challenges currently is to document the principles followed by the Seventh-day Adventist church on religious freedom as part of local church policy. So far these are found in the policy documents of the higher structures of church organization that focus on global and largely an American context. However the Seventh-day Adventist church policies do accommodate and respect local practices in so far as they are in harmony with the general principles that the church upholds.

Another challenge that could be mentioned is that there seems to be a bias against private service providers in education in South Africa. Most private service providers are Christian-based. The government is holding back on allowing institutions that qualify for university status to be given a university charter. Students who are in such private institutions do not have access to government aid as individuals.

9. The position of the Seventh-day Adventist Church on church and state

Seventh-day Adventists believe in separation of church and state. Seventh-day Adventists do not believe separation of church and state to be a moral principle taught in Scripture, but rather a philosophy of government under which a moral principle, religious liberty, is best achieved.

> "Seventh-day Adventists understand that, given the nature of society itself, an 'absolute wall' of separation between church and state is not possible... It may not be easy to trace the line of separation between the rights of religion and the civil authority with such distinctness as to avoid collisions and doubts on unessential points."
>
> "Some argue that the line must be drawn so that the government legislate morality, a

2 Retrieved July 4, 2011 from http://www.adventist.org/world-church/index.html

phrase that sounds great in the realm of ideas but in practical matters is useless. Morality is always legislated. What gets sticky, however, is that in most countries morality, which is reflected in its laws, often finds its roots in its religion" (Hofstrader, 2011: 6).

10. The religious freedom principles as held by the Seventh-day Adventist Church

The Seventh-day Adventist Church defines religious freedom with reference to worship. This gives one freedom to worship God without force and coercion. The Seventh-day Adventist church takes a position that "the union of church and state is a sure formula for discrimination and intolerance and offers a fertile soil for the spread of persecution." (*GC Working Policy 2008-2009* FL 05 p 309.) Further, "separation of church and state offers the best safeguard for religious liberty and is in harmony with Jesus' statement, "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's (Matt 22:21). This means that "civil government is entitled to respectful and willing obedience, to the extent that civil laws and regulations are not in conflict with God's requirements, for it is necessary 'to obey God rather than men' (Acts 5:29)." (*GC Working Policy 2008-2009* FL 05 p 309)

Seventh-day Adventists oppose all forms of discrimination based on race, ethnicity, nationality, colour, or gender. "We believe that every person was created in the image of God, who made all nations of one blood (Acts 17:26). We endeavour to carry on the reconciling ministry of Jesus Christ, who died for the whole world so that in Him 'there is neither Jew nor Greek' (Gal. 3:28). Any form of racism eats the heart out of the Christian gospel. One of the most troubling aspects of our times is the manifestation of racism and tribalism in many societies, sometimes with violence, always with the denigration of men and women. As a worldwide body in more than 200 nations, Seventh-day Adventists seek to manifest acceptance, love, and respect toward all, and to spread this healing message throughout society."

South Africa has experienced a wave of xenophobia in the past decade. This has to be included in the list of unacceptable ways of treating fellow human beings.

"The equality of all people is one of the tenets of our church. Our Fundamental Belief No. 13 states: "In Christ we are a new creation; distinctions of race, culture, learning and nationality, and differences between high and low, rich and poor, male and female, must not be divisive among us. We are all equal in Christ, who by one Spirit has bonded us into one fellowship with Him, and with one another, we are to serve and be served without partiality or reservation ."[3] Retrieved July 4, 2011 from http://adventist.org/beliefs/statements/main-stat14.html

11. Conclusion

The Seventh-day Adventist church has made strides globally and in America particularly to define, defend and promote religious freedom. This paper has highlighted a few challenges that the Seventh-day Adventist church faces in South Africa. While we enjoy the privilege of religious freedom and participate in defining that freedom for ourselves, we are aware that government systems are dynamic. It is the masses that make and influence law not the few that sit in parliament. Regarding the future the Seventh-day Adventist church has a view

3 This statement was approved and voted by the General Conference of Seventh-day Adventists Administrative Committee (ADCOM) and was released by the Office of the president, Robert S. Folkenberg, at the General Conference session in Utrecht, the Netherlands, June 29-July 8, 1995.

that is based on apocalyptic eschatology. This view provides a warning for us and those with whom we associate in the "struggle" for religious freedom in South Africa that there are no permanent guarantees for religious freedom. A continuous engagement, clustering, and collaboration should map our way forward. This paper has looked at the areas that are a potential tension between the Seventh-day Adventist church, its freedom and Law in South Africa. Labour relations, property holding, and Sabbath observance are among a few areas that have been highlighted in this paper that have this potential for conflict with the state laws. The purpose of this paper was to highlight these areas for purposes of defining how the Seventh-day Adventist church looks at law and religious freedom in South Africa. Future studies in this direction may deal with actual case studies and seek to improve the relations between the church and its local communities particularly harmony with state laws.

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