Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today's South Africa

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Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today’s South Africa

I. INTRODUCTION

In 1996, the Republic of South Africa formally left a long and bitter history of apartheid by approving its final Constitution: a constitution which has been touted by scholars in South Africa and elsewhere as “one of the best constitutions in the world.”¹ The 1996 Constitution is the result of several years of negotiations between dominant black, white, and Afrikaans parties. The Constitution attempts to reconcile the concerns of the old Afrikaans order with the new African National Congress’ (ANC) commitment to fundamental rights.² Given South Africa’s history of intense discrimination during the “apartheid” regime, the new Constitution understandably focuses on human rights concerns and grants broad protection to individuals. South Africa’s Bill of Rights, which is part of its Constitution, is considered among the most comprehensive of all Bills of Rights to date.³ It firmly establishes a policy of non-racialism and non-sexism.⁴ In this paper, I seek to address some of the issues that arise in South Africa given both its constitutional commitment to principles of equality and its historical and constitutional commitment to group cultural and religious rights, which at times conflict with principles of non-racialism and non-sexism.

While South Africa’s Constitution and Bill of Rights can certainly be described as “truly modern,”⁵ the reality is that the majority of South African individuals are not so “modern” in their political values. Many of the rights embraced by the Constitution and Bill of Rights do not reflect

² HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION 76 (Cambridge Univ. Press 2000).
⁴ Id. at 296.
majoritarian sentiments; instead, they are based on international human rights norms. Indeed, some scholars argue that despite the official refusal to consult with international bodies during the drafting of the Constitution, international actors and norms had a “subtle” and “pervasive” influence on the values enshrined in the South African Constitution. The Constitution itself provides that courts interpreting the Bill of Rights “must consider international law.” As a result, some of the rights guaranteed (and particularly some of South African courts’ subsequent decisions in enforcing and defining those rights) run contrary to public concerns and desires.

Prominent examples of the tension between court rulings and public opinion include rulings on the death penalty, abortion, and homosexuality. Researchers estimate that about eighty percent of South Africans favor capital punishment, but the Constitutional Court, South Africa’s highest court, interpreted the Constitution’s guarantee of a right to life to outlaw the death penalty. Additionally, estimates hold that the same percentage (eighty percent) of the population opposes abortion on demand, but the Constitution guarantees the right to everyone to “make decisions concerning reproduction” and to “security in and control over their body.” Finally, the vast majority of South Africans condemn homosexuality, but the Constitution proscribes discrimination based on sexual orientation by the State and by individuals. Most recently, on December 1, 2005, the Constitutional Court held that the Constitution demanded recognition of same-sex marriages and ordered Parliament to amend marriage laws to include same-sex couples. While these specific issues are beyond the scope of this paper, they highlight the potential disconnect between the courts and the South African people. That disconnect can be troublesome as it may encourage a disrespect for the rule of law in South Africa’s relatively new democracy.

The idea that the courts exist to protect minority rights in the face of the majority’s opposition is not new. However, the existence of majority-minority conflicts can prove particularly troublesome in the South African context. In addition to granting extensive individual rights, the Constitution also protects group cultural and religious rights: it

7. KLUG, supra note 2, at 70.
9. Van der Vyver, supra note 6, at 815.
10. Id. (quoting S. Afr. Const. § 12(2)(a)).
11. Id. at 816.
12. See Minister of Home Affairs v Fourie 2005 (1) SA 1 (CC) at ¶¶ 114–19 (S. Afr.).
recognizes eleven official South African languages;\(^{13}\) it permits individuals to establish educational institutions on the basis of a common culture, language or religion;\(^{14}\) it recognizes the right to self-determination by communities sharing a cultural or linguistic heritage;\(^{15}\) and it supports “a notion of collective rights on the basis of cultural identity and even cultural self-determination.”\(^{16}\)

Another important site of conflict between constitutional guarantees of individual rights and cultural or religious autonomy is in the area of gender discrimination. The Bill of Rights formally recognizes gender equality; issues of equality form a basis for the new Constitution. Some argue, though, that this conflicts with the Constitution’s recognition of indigenous law which includes certain cultural practices that some feminists oppose, particularly those related to marital property rights, traditional polygynous marriages, and intestate succession.\(^{17}\) The emphasis on gender equality may also conflict with some other constitutional provisions that recognize the possibility that legislation could validate religious marriages, such as Islamic or Hindu marriages.\(^{18}\)

Even more fundamentally, some scholars argue that the very concept of “individual rights” is not a natural concept for some South African cultures, which emphasize the group over the individual and focus on community, mediation, and consensus in order to express their commitment to human worth.\(^{19}\) However, that is not to say that there is no basis for individual or human rights in South African culture. Indeed, I suggest that courts and lawmakers would be well-served to examine sources of social justice in customary law and to combine human rights’ aims with traditional modes of thinking. This would help to make human rights a concept that better resonates with the South African people.

In this paper I address problems raised by the dichotomy of South Africa’s dual constitutional commitment to principles of equality and to respect for cultural and religious rights. The question is, what does a court do when a group’s cultural or religious practice conflicts with one of the other rights listed in the Constitution? For example, as mentioned above, many indigenous cultures and religious groups oppose homosexuality. Will a court permit a religious or cultural group the

\(^{13}\) Klug, supra note 2, at 113.

\(^{14}\) Id.

\(^{15}\) Id.

\(^{16}\) Id.

\(^{17}\) Id. at 110–11.

\(^{18}\) Some oppose recognition of such religious marriages on the basis that they are in fact or at least potentially polygamous.

\(^{19}\) See Siril Gloppen, South Africa: The Battle over the Constitution 131 (Dartmouth Publ’g Co. 1997).
autonomy to discriminate on the basis on sexual orientation, or will the court’s commitment to individual equality trump those cultural and religious practices? At stake in this issue is not just the continued existence of traditional culture and religion. It is the very legitimacy of South Africa’s legal system. In South Africa’s new democracy, the rule of law is precarious; in many other African countries, the rule of law has given way to corruption and dictatorships. If South Africa wants to foster respect for the rule of law among its people, questions of individual rights and traditional culture must be dealt with appropriately.

Part II addresses the cultural, ethnic and religious diversity in South Africa to provide a context for the pluralism in South Africa today. Given this great diversity and a history of conflict, it is especially important that the South African government properly negotiate between competing value systems and world-views, whether religious or customary.

Part III briefly discusses the history of apartheid in South Africa. It highlights religious participation in and opposition to the National Party regime in order to understand the continuing role that churches play in South African today. It also focuses on the effects that colonial rule and apartheid had on the development of customary law—a term which refers to the local laws and traditions that have developed over time in specific South African cultural groups. Examining the effects of Colonialism and apartheid on customary law helps to explain why customary law seems discriminatory and outdated today. Understanding the function of customary law also helps indicate what South Africans can do to solve the problem of outdated and discriminatory customary law.

Part IV outlines specific provisions in the 1996 South African Constitution related to customary and religious rights, as well as guidelines for constitutional interpretation, and suggests some of the potential conflicts and issues those provisions present, particularly with respect to different opinions regarding the applicability of the Bill of Rights to customary law.

Part V briefly traces the development of the jurisprudence in major South African cases dealing with cultural and religious rights in order to see how the Court has interpreted the Constitution and Bill of Rights so far, and to make predictions for the future. Generally, the South African Constitutional Court has granted broad religious freedom. However, its decisions tend to be based on principles of non-discrimination and equality, rather than liberty, which could prove troubling for religious or customary law that appears to discriminate on the basis of sex.

Part VI suggests approaches the South African courts can take to
balance a commitment to individual human rights with a commitment to group cultural and religious rights. It proposes that South African courts should restrain themselves from casually invalidating customary law, and should instead leave provincial legislatures, which have constitutional authority over customary and indigenous law, the opportunity to introduce reforms. It also proposes that religious law can be negotiated similarly on a grass-roots level, rather than in the high courts, and argues that there already exists in South African culture an indigenous commitment to human rights and dignity.

II. CULTURAL, ETHNIC, AND RELIGIOUS DIVERSITY IN SOUTH AFRICA

The Republic of South Africa is an extremely diverse and pluralistic state. Alarmingly, South Africa’s population is also generally intolerant of other groups: social scientists have documented high levels of intense political intolerance in South Africa. While most people surveyed chose political factions (pitting themselves against either right-wing Afrikaaner parties, the ANC, or the Zulu Inkatha Freedom party) as their “least-liked group,” a small percentage (.9%) chose Muslims as their least-liked group. South Africa’s diverse ethnic and religious makeup (which also contributes to a diverse cultural makeup) highlights the

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20. I have chosen to discuss both cultural or customary rights and religious rights in this paper for several reasons. First, the South African Constitution itself often groups cultural and religious rights in the same section, and provides for the same protection. Thus, a court’s interpretation of the limits of a cultural right or religious autonomy is likely to be similar.

Second, many argue that cultural or customary law is inextricably connected to traditional African religions, which saw little separation of religion and society and thus shaped and were shaped by customary law. In that sense, then, the right to practice customary law can be seen as related to the right to practice a traditional religion. This is especially likely given a recent court’s definition of “religion” in South Africa: “a system of faith and worship [as] the human recognition of superhuman controlling power and especially of a personal God or gods entitled to obedience or worship.” Wittman v Deutscher Schulverein 1998 (4) SA 423 (T) at 449 (S. Afr.), quoted in van der Vyver, supra note 8, at 651. Under this definition, it is certainly arguable that a traditional system of belief such as one that emphasizes paying homage to ancestors and pleasing the spirit of “ubuntu” through obedient and peaceful living is a “religion” and the laws associated with such a system somewhat “religious.”

Third, many of the issues arising in customary and religious law are similar, such as customary polygynous marriages and Islamic or Hindu polygamous marriages. Thus, an examination of courts’ treatment of polygyny (the term used for traditional African marriages with more than one wife) and polygamy (the term used for religious marriages involving more than one wife) would serve to explore aspects of both cultural and religious freedom.

21. The surveys used in a study on intolerance found that, for example, 65.3% of respondents agree that their least liked group should be officially banned, 61.8% thought that a member of their least liked group should not stand as a candidate in an election, and 74.3% agreed that their least liked group should not be allowed to hold a street demonstration. Amanda Gouws & Lourens M. du Plessis, The Relationship Between Political Tolerance and Religion: The Case of South Africa, 14 EMORY INT’L L. REV. 657, 661 (2000).

22. Id. at 671.
potential divisions at stake in the administration of individual and group rights.

Ethnically, South Africa consists of various groups of black South Africans, white South Africans, mixed-race South Africans, Indians, and Asians. Black South Africans are estimated to comprise about seventy-nine percent of South Africa’s forty-four million residents. Among black South Africans, there are further divisions among different traditional groups. Among the largest of these ethnic groups are the Zulu, the Xhosa, the Ndebele, and the Khoisan. Historically, these groups have had conflicts over land and resources; additionally, during apartheid, they were assigned to “homelands” and developed different systems of customary law (albeit with some general similarities). They speak different languages and have distinguishable physical features. An additional divide among black South Africans is the difference between urban and rural blacks. Many urban blacks, despite being of a particular cultural heritage, are quite Westernized in appearance and culture. Rural blacks, on the other hand, tend to exhibit closer ties to traditional culture. These divisions, along with economic and class differences, highlight the diversity that exists even among black South Africans.

White South Africans, making up about ten percent of the population, also come from different heritages. Some descend from Dutch peoples, who settled in Cape Town in the 1650’s. They speak Afrikaans and often consider themselves “native” South Africans because of their deep historical roots in South Africa. Other white South Africans are descended from British settlers, who arrived in the late 1800’s and early 1900’s. They are English speaking. Politically, Afrikaans and English-speakers have often, but certainly not always, shared similar interests.

Mixed-race South Africans constitute about nine percent of South Africa’s population. Finally, South Africans of Indian, Middle Eastern, and Asian descent account for about two and a half percent of the population.

Oftentimes falling along ethnic lines, religious diversity is also very abundant in South Africa, which as a whole is a very religious country. About eighty percent of South Africans identify themselves as

24. Id.
25. Id.
26. Id.
27. Only about two percent of the population claimed no religious affiliation. Gouws & du Plessis, supra note 21, at 661.
Christian, but those Christians are divided up among a variety of denominations. In the white Afrikaaner community, the dominant church is the Dutch Reformed Church, which is divided into three splinter groups. Another dominant Christian group among Afrikaaner South Africans is the Apostolic Faith Group, transplanted from the United States. White English speakers in South Africa primarily belong either to Anglican, Methodist, or Roman Catholic churches. About twenty-five percent of the mix-raced South African population supports either the Anglican or the Roman Catholic Church. About ten percent of the Asian community is Christian. Twenty percent of black Africans belong to one of about six thousand varieties of black separatist or indigenous Christian movements, often referred to as “syncretistic” churches because of their combination of African traditional elements with mission Christianity. Twelve percent of blacks are Methodist.

African traditionalists make up the second largest religious group, accounting for nearly fifteen percent of the South African population. Despite the fact that the idea of the “traditional” has historically been used by colonial powers to “lock Africans into a particular way of life,” African traditional religion is actually fluid and adaptive, having “transform[ed] itself into a map for the negotiation of life in a colonial and postcolonial context.” Thus, it remains a considerable force in South Africa’s religious geography.

Hinduism, Islam, and Judaism constitute the next largest groups. While they are minority religions (Hinduism with 1.75% of the total population, Islam with 1.09%, and Judaism (primarily orthodox) with .41%), they have “established an enduring presence in South African

28. Van der Vyver, supra note 6, at 802.
29. There are more than thirty-four religious groupings and several thousand denominations of Christianity alone. Gouws & du Plessis, supra note 21, at 659.
30. Van der Vyver, supra note 6, at 802. The three splinter groups are the NGK, the NHK, and the GK (abbreviating their Afrikaans names). The largest (both during and after apartheid) is by far the NGK. Id.
31. Id.
32. Id.
33. Id.
34. Id. at 803.
36. Van der Vyver, supra note 6, at 803.
37. Gouws & Du Plessis, supra note 21, at 660.
38. Cochrane, de Gruchy & Martin, supra note 35, at 22.
40. Id.
41. Id.
history and society.”42 Each of the three, because of their association with certain ethnicities, “had to struggle with discriminatory legislation and anti-alien restrictions.”43 Islam, especially, has been subject to restrictions and discrimination. Under the rule of the Dutch East India Company in the 1600’s, the public practice of Islam was illegal.44 In the nineteenth century, public health restrictions aimed at Muslims infringed on their burial and food-preparation practices, prompting a series of protests by the Islamic community.45 Later, in 1913, both Hindu and Muslim marriages were stripped of legal recognition, which was given only to Christian or civil marriages.46 The historical discrimination against minority religions such as Hinduism and Islam is important to an understanding of the contemporary treatment of these religions, particularly in regards to the recognition of Hindu and Muslim marriages.

Other religious groups, such as Jainism, Rastafarianism, Buddhism, and Bahai, make up miniscule portions of the population but have in some cases proven significant in the realm of religious litigation.47 This combination of ethnic and religious diversity may sow the seeds of conflict in the future. Given the high levels of intolerance among many South Africans and South Africa’s ethnic and religious diversity, it is especially important that the courts and the legislature act reasonably, to both protect minorities and placate the majority to prevent political conflict from fomenting, as has happened in so many other post-colonial African nations. This is especially true considering ethnic and religious participation in the conflict over apartheid, which I will now discuss.

III. APARTHEID: RELIGIOUS PARTICIPATION AND CULTURAL CHANGE

An appreciation of the events leading up to South Africa’s 1996 Constitution is helpful in understanding and predicting how courts will interpret that very new document. Accordingly, I will briefly discuss the history of apartheid and then highlight religious participation in and opposition to apartheid, as well as the changes that took place in customary law during the National Party regime. This will lay the

43. Id. at 2.
44. Id. at 3.
45. Id. at 6–7.
46. Id. at 7.
47. For example, see infra Part V, discussing Prince v President of the Law Society of the Cape of Good Hope 2002 (1) SA 1 (CC) (S. Afr.), in which a Rastafarian challenged laws prohibiting the use of marijuana.
groundwork for a discussion of the state of religious and customary law in contemporary South Africa.

A. The Political History of Apartheid

South Africa has been the goal of many successive invaders, with early conflicts between indigenous groups such as the Khoisan and the Bantu speaking peoples. The first foreign occupants arrived in 1652 with the Dutch occupation of the area now known as Cape Town. Later, the British seized the area and began colonizing in 1815. After some years of conflict between the Dutch (Boers) and British, the British declared the Union of South Africa a colony in 1910. While the marginalization of indigenous African cultures and peoples began with the first European settlers and colonization, “apartheid” officially came into play with the 1948 victory of the Nationalist Party, which ran on a platform of ethnic separation. The party initiated a series of laws and regulations that enforced apartheid, perhaps most notoriously the Group Areas Act of 1950, which officially segregated whites, blacks, Indians, and coloreds in urban areas into four distinct residential areas.

In 1961, South Africa withdrew from the British Commonwealth and became a republic. The African National Congress (ANC), which had been banned in 1960, formed a military wing under the leadership of Nelson Mandela; shortly thereafter, the party’s leaders were imprisoned. Apartheid only continued to intensify, under the rationale that territorial segregation was appropriate in order to give “Native Reserves” as the historic homelands of Africans. As the government’s

49. Id.
50. Id. at 698.
51. See id.
52. See id. at n.11. Other laws included the Population Registration Act, which provided for the classification of the entire South African population on the basis of race; the Immorality Act, which banned sexual relations between whites and blacks and later whites and coloreds; laws forbidding interracial marriages; the Separate Amenities Act, which authorized widespread segregation in public places and provided that separate facilities need not be equal; the Bantu Education Act which removed black education from the Education Ministry and placed it in the hands of Native Affairs; the University Education Act which prevented non-white students from attending previously-available universities; and the Suppression of Communism Act, which banned the South African Communist Party and subjected persons deemed to be communists to a wide range of restrictions. Id.
53. Id. at 699.
interest in reducing the population of blacks in white areas grew, a massive campaign resulted to force Africans into “homelands.” Over three million black South Africans were ultimately forcibly “settled.” Such drastic measures required the enforcement of an ever-more ruthless and totalitarian state.

During the 1980’s, pressure mounted for change in South Africa on domestic and international fronts. Domestically, violence between the black majority and white minority persisted, and the government declared a state of emergency. Internationally, South Africa became something of a “pariah” as international groups and other countries attempted to influence change through economic boycotts and diplomatic measures. Then, in 1989, F.W. de Klerk assumed the presidency and soon took dramatic steps toward the dismantling of apartheid. In 1990, the ANC and other banned political organizations were legalized and leaders such as Nelson Mandela were released from prison. The government began to negotiate with black leaders and established an independent judiciary to guarantee racial equality. In 1991, all legislation enshrining apartheid was repealed. In 1992, white voters approved a referendum to end apartheid and party conferences began to prepare an interim constitution and set up multi-racial elections.

Following those elections, the Interim Constitution went into effect in 1994. The Interim Constitution was intended to guide South Africa through a transition period while black and white South Africans drafted a new constitution. Despite conflicts between political parties, the new Constitution was negotiated and approved at a remarkable speed, finally receiving endorsement from Parliament and voters and going into effect in December of 1996.

B. Religious Participation in and Resistance to Apartheid

The 1996 Constitution’s provisions relating to religious liberty, government interaction with religious groups, and discrimination against (and by) religious groups can be traced to the history of religious participation or opposition during apartheid and the relationship between

55. See Kult, supra note 48, at 700.
56. Id.
57. See id. at 701.
58. Id.
59. Id. at 702.
60. Cavanaugh, supra note 3, at 294.
61. Id.
63. See infra IV.B.
church and state that existed during the National Party’s rule. Perhaps the most notorious participant in apartheid was the Dutch Reformed Church, which “provided theological and biblical sanction for apartheid” until 1986. Indeed, the official mouthpiece of the Church proclaimed in 1948:

Basic to our overall attitude is without doubt the strongest aversion to not only all instances of miscegenation between white and non-white but also of placing the non-whites on an equal footing with the European population on the social level. As a church we have as a rule . . . always deliberately aimed at separation of these two population groups. In this respect apartheid can rightfully be called the church policy.

In addition to this legitimization through an “apartheid theology,” the Dutch Reformed Church also actively promoted specific governmental policies of apartheid. Other white Christian denominations, while not giving official sanction to apartheid as the Dutch Reformed Church did, still often acquiesced to apartheid’s injustices.

The Dutch Reformed Church’s support of apartheid resulted, reciprocally, in great state support for the Church. Scholars describe the pre-1994 South African political regime as one “fraught with all kinds of manifestations of what in American usage has come to be depicted as ‘the establishment of religion.’” In return for the Church’s support of apartheid policies and laws, it “received favored treatment from the government” in a “political union of church and state.” This in turn led to a strong Christian bias in pre-1994 South African law. In addition to involvement with the Dutch Reformed Church, the South African government attempted to enforce segregation on other religious congregations, involving itself then in very detailed aspects of church policy during the years of apartheid. Even the Dutch Reformed Church

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64. COCHRANE, DE GRUCHY & MARTIN, supra note 35, at 36.
65. Van der Vyver, supra note 6, at 804.
66. TRACY KUPERUS, STATE, CIVIL SOCIETY AND APARTHEID IN SOUTH AFRICA XI (St. Martin’s Press, Inc. 1999).
67. COCHRANE, DE GRUCHY & MARTIN, supra note 35, at 37.
68. Id.
69. Van der Vyver, supra note 6, at 781.
71. Such laws included Sunday observance laws, Christian oaths in criminal proceedings, education laws mandating a Christian education, and laws against blasphemy. See van der Vyver, supra note 6, at 783–88. Some of these laws are still on the books in South Africa.
eventually took issue with this type of meddling in church affairs.  
While the state supported the Dutch Reformed Church during the years of apartheid, the few religious groups that opposed apartheid were unfavorably treated. This unfavorable treatment was generally conducted under legislation such as the Internal Security Act, which authorized the banning of organizations that were judged to endanger the security of the state. Another act used to control the activities of religious groups was the Affected Organizations Act, which authorized the executive branch to withhold all foreign financial support for an organization that was “under the influence” of a person or organization abroad. Additionally, individual religious leaders were persecuted as the government sought to enforce its racial policy; this led Justice Sachs of the Constitutional Court to observe that “[r]eligious marginalization in the past coincided strongly in our country with racial discrimination, social exclusion and political disempowerment.” Because of the widespread repression of religious leaders and institutions that openly opposed apartheid, most religious groups were complacent or only mild in their criticism of apartheid, if not supportive. 

One strong exception to religious complacency in the face of apartheid is the Kairos Document, signed in 1985 by many theologians and lay persons. The document called on Christians to “participate in the struggle for liberation and for a just society” and upon church leaders to “further the liberation mission of God” and to be involved in acts of civil disobedience. It characterized the South African government as “[a] tyrant. A totalitarian regime. A reign of terror.” Other churches, such as the Methodist Church and the World Council of Churches, spoke out against apartheid as “a contradiction of the Gospel,” turning the Dutch Reformed Church’s rhetoric on its head. Ultimately, though, acts of religious activism against apartheid were far outnumbered by instances of religious respect for or acquiescence to apartheid. 

Religions, then, played a significant role in the battle over apartheid—whether through facilitation, acquiescence, or opposition.

72. See id.
73. Id. at 789.
74. Id.
75. Id. at 790.
76. See id. at 798.
77. Id. (quoting KAIROS DOCUMENT: CHALLENGE TO THE CHURCH: A THEOLOGICAL COMMENT ON THE POLITICAL CRISIS IN SOUTH AFRICA 48–49 (1985)).
78. Id. at 799 (quoting KAIROS DOCUMENT: CHALLENGE TO THE CHURCH: A THEOLOGICAL COMMENT ON THE POLITICAL CRISIS IN SOUTH AFRICA 43 (1985)).
79. Id. at 800.
80. See id. at 801.
They later played a role in South Africa’s Truth and Reconciliation Commission (a commission that has explored injustices committed during apartheid and held individuals accountable for those injustices), and continue to play an important role in South Africa’s highly religious civil society. Seeing the relationship between churches and government during and after apartheid, we can better understand the Constitution’s emphasis on freedom of religion and especially its prohibitions against any sort of government favoritism for, or discrimination against, religious groups. However, given South Africa’s historical model of government cooperation with religious groups, it is also understandable that the Constitution allows for government support for religious organizations—as long as that support is administered fairly and neutrally. What remains to be seen is whether courts will stay true to the Constitution’s emphasis on the freedom of religious groups, or whether they will begin to punish groups that have counter-majoritarian or anti-egalitarian values. Ironically, this could lead to the same judicial favoritism that existed during apartheid; this time, groups that oppose apartheid may not be marginalized, but groups that do not appear to favor individual rights may be.

C. Apartheid and Customary Law

Not only did apartheid curtail the individual freedom of South Africans, it also continued colonialism’s marginalization of “traditional” African society and customary law. This helps to explain why the Constitution places special emphasis on customary and cultural rights, but is also unfortunately a cause of the current controversies over customary law, which has failed to adapt over time. This failure to adapt was partly due to the colonial power’s and the National Party’s treatment of customary law. Customary law was unwritten before European settlement; this allowed it to adapt to changing socioeconomic conditions. After colonization, though, in the late nineteenth century, the colonial Board of Native Administration required African people to write down their laws. While not intended to become binding law, eventually this codification became so. The unfortunate effect of this codification was that it “tended to ossify indigenous law.” While customary law was once responsive, it has now become outdated and can

81. See infra Part IV.
83. See id.
84. Id. at 6A-23.
serve to perpetuate discrimination and oppression, especially of women. Justice Mokgoro of the Constitutional Court explained that customary law is supposed to respond to society’s needs, but that, “[f]or reasons now well-documented in the colonial history of South Africa, which include self-serving political ideals of successive colonial governments, traditional institutions were largely formalized through legislation and infused with the typical conservatism of positive law, thus substantially reducing their inherent responsive potential.”85 Colonial powers, and then the apartheid regime, used customary law in order to control indigenous leaders and law. In 1985, under apartheid leadership, the “official” codes were again modified in writing. Thus, many have explained the origins of “official,” written customary law as “at best of dubious authority and at worst ‘invented tradition.’”86

Because of its ossification during colonial and National Party rule, “official” customary law often contradicts current human rights norms. There is, however, great potential for “living” customary law to embrace those norms and better articulate them in traditional African society. Because of customary law’s potential to “Africanize” human rights norms (and thus help to cement democracy in South African society), the courts and the legislature ought to carefully weigh how best to preserve “living” customary law in a modernizing society. The Constitution recognizes the importance of custom and attempts to provide a framework for its continuation in today’s South Africa. How exactly that will happen remains to be decided.

IV. CONSTITUTIONAL PROVISIONS RELEVANT TO RELIGIOUS AND CULTURAL RIGHTS

The 1996 South African Constitution expressly recognizes the injustices of apartheid and has as its overarching goal the promotion of unity, social justice, and equality in a torn nation.87 many of its

87. See S. AFR. CONST. 1996, Preamble. The Preamble states that the Constitution’s purpose is to “Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.” Immediately following the Preamble, its opening paragraphs read: “The Republic of South African is one, sovereign, democratic state founded on the following values: (a) Human dignity; the achievement of equality and the advancement of human rights and freedoms; (b) Non-racialism and
provisions can be understood in that light. However, the Constitution’s own attempt to balance a commitment to individual rights rests uneasily with other provisions that purport to protect group cultural, traditional, and religious rights. I will now focus on some of the specific language of the Constitution and highlight potential problems and contradictions therein. Because the document is so new, there are many contours left to be defined in the coming years, but after presenting the Constitution’s key provisions relating to religious freedom and individual rights, I will look at the limited case law that has emerged as South African courts have applied it.

A. The Preamble and Civil Religion

The Preamble of the Constitution immediately recognizes a role for religion in civil society in its references to God, stating in four different languages: “May God protect our people.”88 Shortly following the Preamble, Section 6 of the Constitution emphasizes cultural and religious concerns as they relate to language. In addition to recognizing eleven official languages, Section 6(2) states that “[r]ecognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.”89 Furthermore, the section calls for a Pan African Language Board that must “promote and ensure respect for . . . Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.”90 In this provision, then, we see two important principles: first, a commitment to use government resources and support to promote religious and cultural development; and second, the grouping of “cultural” and “religious” considerations into similar provisions with similar protection, something that will become increasingly relevant in later provisions.

88. Id. at Preamble.
89. Id. at 1:6(2).
90. Id. at 1:6(5).
The next major chapter in the Constitution is the Bill of Rights, which grants extensive rights focused on “human dignity, equality and freedom.” The first important consideration in understanding the Bill of Rights is determining to whom it applies. As in the Interim Constitution, the Bill of Rights first and foremost “applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.” Then, the document states that the provisions of the Bill of Rights “bind[] a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” It then clarifies that, when applying the Bill of Rights to a “natural or juristic person” in those circumstances, a court “in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right.”

Those provisions are important, and controversial, for two reasons. First, the provision that the Bill of Rights binds “natural or juristic” persons in addition to the government suggests that it may be used to enforce, for example, equality provisions against individuals (or private institutions such as churches) that discriminate on some basis (e.g., failure to ordain women as priests). There is still much controversy over whether the Bill of Rights applies in such cases, but courts tend to interpret it to do so and many scholars assume that it does. Second, here the Constitution provides that the courts should “develop” or “change” the common law in order to accord with rights granted in the Constitution, should controversy arise. While this section may explicitly limit the courts’ ability to “develop” law to the common law, this provision may also be an authorization or invitation for the courts to reform other sources of law, such as customary or religious law, to bring them in harmony with the provisions of the Bill of Rights. This will be particularly relevant in a later discussion of the court’s potential role as it adjudicates disputes in which religious or customary law conflicts with constitutional law.

91. Id. at 2:7(1).
92. Id. at 2:8(1).
93. Id. at 2:8(2).
94. Id. at 2:8(3).
95. See Blake & Litchfield, supra note 70, at 528.
2. Equality and non-discrimination

The next part of the Bill of Rights deals with equality. Specifically, the Bill of Rights provides that “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . ethnic or social origin . . . religion, conscience, belief, culture, [or] language.” Thus, the state is barred from discriminating unfairly on the basis of religious belief or culture. The next section extends that prohibition against discrimination on any of those grounds to natural or juristic persons, similar to the application of other equality provisions to natural persons. Since the provision against discrimination also prohibits discrimination based on gender and sexual orientation, religious or cultural practices that are discriminatory may be considered unconstitutional.

Another important fact to note is that the provision prevents “unfair” discrimination. This may be because, due to apartheid’s history and the many people who have been unfairly disadvantaged due to the National Party’s oppressive regime, the Constitution wants to ensure that “affirmative action” programs or other remedial programs attempting to establish substantive economic and political equality are not considered unconstitutional. Indeed, another part of the equality provision states that “[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.” Benign discrimination is not unconstitutional; only “unfair” discrimination is unconstitutional. Not only is this relevant to state action, but it may also be relevant to private parties affected by this provision of the Bill of Rights. For example, in the event that a court were to find this provision applicable to a private institution such as a church, the church may be able to argue that, although it may discriminate (as in the example above, the failure to ordain female ministers or priests on the basis of gender), this discrimination is not “unfair” according to the terms of the Constitution because it has a legitimate purpose for the institution’s goals. Such an argument has not yet been tested in the courts, but it is a viable option that will be considered further later.

97. Id. at 2:9(4).
98. See Blake & Litchfield, supra note 70, at 528.
99. This particular clause—“categories of persons”—also provides evidence for the Bill of Right’s commitment to collective or group rights, which will be discussed later.
101. See Blake & Litchfield, supra note 70, at 529.
102. The burden of proof that discrimination is “fair” would be on the institution, especially in
3. The free exercise of religion

The next provisions relevant to religious and customary rights are in Section 15, which deals specifically with the free exercise of religion. Section 15(1) provides that “[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion.” This is similar to norms given in international documents on religious freedom and protects, apparently absolutely, freedom of conscience and belief. The next provision concerns the relationship of churches and the state, and provides that “[r]eligious observances may be conducted at state or state-aided institutions, provided that (a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary.” This provision is important because it suggests that, unlike the United States, but like many European countries, South Africa has no “establishment clause” limitation on freedom of religion. There are “compelling reasons for holding that [this section] of the Constitution does not entail an ‘establishment clause.’” Other scholars have commented that “[i]t was clear that the multi-party negotiators had no intention whatsoever of using the Constitution or the Bill of Rights to erect a wall of separation between church and state.” Thus, the South African government can be described as “accommodationist” in its approach to religious groups: it may support such groups, as long as it is fair and even-handed and it has a valid reason for doing so.

The final provision of the “religious freedom” section has been the subject of much controversy in interpretation. It provides that “[t]his section does not prevent legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law; or systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.” The section qualifies, however, that recognition of religious or traditional marriages “must be
consistent with this section and the other provisions of the Constitution."**110** Notably, the section can be generally understood to contemplate customary indigenous law systems and religious personal law systems (most obviously Muslim personal law). African customary law is “largely unwritten and originated from the customary practices of the black people in a particular context.”**111** It can also be codified customary law such as the KwaZulu-Natal Code, codified during the colonial period and modified from time to time during apartheid.**112** Some aspects of African customary law that may be most relevant in this provision are customary marriages and the processes inherent in that tradition, inheritance law, and intestate succession traditions. Muslim personal law is “religiously based private law which pertains to, inter alia, marriage, divorce, inheritance, polygamy, custody and guardianship, and which falls under the category of family law.”**113** The most litigated issue in both customary law and personal religious law is the validity of marriage, particularly when polygyny or polygamy is involved.

Much of the controversy over the extent of the right granted by this section is that, although the section is part of the Bill of Rights, it does not itself recognize a fundamental right to the recognition of religious and customary marriages or personal laws. It merely provides that legislation can be established to recognize such systems, and then it is up to the legislative branch to do so. That much is generally agreed upon by scholars. Whether and to what extent such legislation would be subject to constitutional scrutiny is, however, debated. Some authors suggest that this section immunizes legislation recognizing religious or customary personal law from constitutional attack.**114** The implication of this is that Section 15 trumps the equality clause of the Bill of Rights.**115** For instance, if legislation recognizing Muslim family law is passed, it would

110. Id.
111. Dlamini, supra note 82, at 6A-3.
112. Id.
113. Najma Moosa, *Muslim Personal Laws Affecting Children: Diversity, Practice and Implications for a New Children’s Code for South Africa*, 115 S. Afr. L. J. 479, 479 (1998). Moosa is careful to point out that Muslim personal law is not the same as “Islamic law.” Muslim personal law has its origin in the Qur’an and is limited in scope, as only a limited number of verses in the Qur’an deal with legal matters and none deal with commercial and criminal law. Islamic law, on the other hand, is “the conservative interpretation and application of the primary sources by early Muslim jurists.” Id. at 480. It is this Islamic law, and not Muslim personal law, that is generally the source of conflict in countries (e.g. Nigeria) with Muslim populations who want to enforce “Sharia” law.

114. See Gouws & du Plessis, supra note 21, at 685: “Section 15(3)(a) of the Constitution authorizes legislation recognizing marriages concluded under systems of religious personal or family law and safeguards such legislation against constitutional challenges.” The authors note, however, that no right is “entrenched.” Id.

be immune from constitutional attack even if aspects of it are unfairly discriminatory based on sex.\textsuperscript{116} Other authors, including at least one justice of the South African Constitutional Court, maintain that even legislation authorized by the section would still have to meet constitutional muster because of the qualification that the legislation cannot be inconsistent with other provisions of the Constitution.\textsuperscript{117} They suggest that the Bill of Rights applies to all law, including customary law.\textsuperscript{118} Customary and religious law would then have to be consistent with other rights, such as equality rights.

If that is true, provisions recognizing customary rights may be effectively “rendered nugatory, as it does not protect this type of legislation from any constitutional provision which is likely to threaten it.”\textsuperscript{119} In other words, even though legislation recognizing customary law will be immune from constitutional attacks based on Section 15, it will be subject to attacks based on any other section. This is significant because legislation recognizing customary marriages, for example, “[i]s more likely . . . to face challenges in terms of the equality provision. Some may argue, for instance, that polygamy constitutes unfair discrimination.”\textsuperscript{120} In Part V, I will address how this interpretive problem has played out so far in Parliament and in the courts.

4. Other rights relevant to religious expression

Several rights following the religious freedom clause are relevant to the expression and practice of religion. The Bill of Rights protects freedom of expression,\textsuperscript{121} freedom of assembly,\textsuperscript{122} freedom of association,\textsuperscript{123} and the right to education.\textsuperscript{124} One aspect of the right to education that is particularly relevant to religious and cultural rights is the right to “receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable.”\textsuperscript{125} Additionally, “[e]veryone has the right to establish and maintain, at their own expense, independent educational

\begin{itemize}
\item 116. See \textit{id.}
\item 117. See Mokgoro, supra note 85, at 1287.
\item 118. \textit{Id.}
\item 119. \textit{Id.}
\item 121. S. Afr. Const. 1996, 2:16(1).
\item 122. \textit{Id.} at 2:17.
\item 123. \textit{Id.} at 2:18.
\item 124. \textit{Id.} at 2:29.
\item 125. \textit{Id.}
\end{itemize}
institutions” provided that they do not discriminate on the basis of race and maintain appropriate standards. State subsidies are permissible for independent institutions.

5. Cultural and linguistic rights

Following the presentation of educational rights are cultural and linguistic rights. Section 30 guarantees that “[e]veryone has the right to use the language and participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.” Section 31 further states that,

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practise their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. [These] rights . . . may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Both sections, like the sections found in the guarantees of religious freedom, seem to guarantee a level of cultural autonomy and self-determination. Significantly, Section 31 especially emphasizes communal or group rights. This was possibly a concession to African leaders who stressed a “consociational” constitutional model, which emphasizes community over the individual, as more in harmony with African culture. It may also have been a concession to Afrikaaners who wanted a degree of self-determination. However, despite the recognition of the importance of cultural group rights, the limitation—that such rights cannot be exercised inconsistently with other provisions in the Bill of Rights—suggests that this provision is little more than mere lip-service to group cultural and religious rights, and that “customary law will soon be no more than an insignificant aspect in what will effectively become a completely ‘Westernized’ South Africa.” Since many customary practices result in discrimination, it is unlikely that they will

126. Id.
127. Id.
128. Id. at 2:30.
129. Id. at 2:31(1–2).
130. See GLOPPEN, supra note 19, at 235.
131. See id.
132. Kult, supra note 48, at 697.
pass constitutional scrutiny. Professor A.J. Kerr estimates that applying the Bill of Rights to customary law would require a change in about eighty-five percent of customary law.

6. Interpreting the Bill of Rights

There is certainly disagreement among scholars about how to interpret certain provisions that grant (but then limit) cultural and religious rights. Section 39 provides the courts some guidance on interpreting the Bill of Rights. It provides that courts, tribunals, or forums interpreting the Bill of Rights “must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom; must consider international law; and may consider foreign law.” Each of these provisions has come into play for the court. First, courts, when interpreting customary and religious law and the Bill of Rights, often do look to the overall purpose of the Bill of Rights. Unfortunately for those favoring group autonomy, courts tend to rely almost exclusively on equality, at the expense of freedom.

Second, the provision that courts must consult with international law is one that is taken seriously, and South Africa generally strives to act in accordance with international treaties and documents relating to human rights. This becomes problematic when international human rights ideals, largely Western in conception, conflict with indigenous communal values. South African courts, thus far, defer to international rather than local norms.

Finally, pursuant to the last part of the interpretation clause, South African judges frequently consult foreign law, including case law. This is understandable, given the newness of the Constitution and lack of precedent interpreting provisions. South Africa has looked to Canadian courts because of the similarities between the Canadian and South African Bill of Rights. South African courts also frequently look at religious freedom jurisprudence in the United States. While this may be helpful, the following section will explain the problems that inhere in

133. Id. at 705–06.


136. In some ways, this is similar to religious freedom jurisprudence in the United States, which seems to have shifted from an emphasis on liberty and free exercise to a focus on equality. See generally, W. Cole Durham & Brett G. Scharffs, *State and Religious Communities in the United States: The Tension Between Freedom and Equality* (forthcoming).
South Africa’s reliance on U.S. law and precedent. It may be cause for concern if South Africa tends too much towards an American religious freedom jurisprudence or an American understanding of the value of indigenous culture. The political strife that erupts in the United States every time there is an establishment issue is more than South Africa needs right now as it attempts to build social cohesion and tolerance for other groups—in addition to the fact that the differences between the American and South African Constitutions would make South Africa’s adoption of American religious freedom jurisprudence unfounded. It is clearer still that the United States’ treatment of indigenous peoples and cultures is something of a disaster—a model South Africa would not want to follow.

Part 2 of Section 39 states that “[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” This may be significant for two reasons. First, it seems to place a limit on the applicability of customary law: it must promote the objectives of the Bill of Rights. This may lead to contradictions, though: is promoting cultural identity and self-determination in line with the spirit of the Bill of Rights? What if it conflicts with principles of equality? Such are not easy questions to answer, and require value judgments that courts might not be comfortable making. A second reason why the clause is important is that it suggests that courts have jurisdiction over customary law, giving them the ability to interpret and to “develop” customary law, as they do the common law. The question remains, though, whether the courts are the best instrument to interpret and develop customary law.

Finally, the instructions on constitutional interpretation clarify that the Bill of Rights “does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.” Again, like other provisions, this recognizes the existence and validity of customary law and rights and suggests that such may be enforceable in courts, but only to the extent that they are consistent with the Bill of Rights.

138. See infra Section VI.
C. Constitutional Recognition of Traditional Authority

Beyond the Bill of Rights, there are other sections of the Constitution that recognize cultural rights. Section 12 recognizes the “institution, status and role of traditional leadership, according to customary law.” It further stipulates that a traditional authority “may function subject to any applicable legislation and customs.” Finally, it mandates that the courts “apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.” The Constitution also defines the roles of traditional leaders by providing for national legislation recognizing a role for traditional leaders at a local level and for the establishment of national houses or councils of traditional leaders.

Part V outlines some of the main sources of controversy in the 1996 South African Constitution: debates over which constitutional provisions trump the others in the case of a conflict between the two; conflict over the meaning and limitations of the free exercise of religion and state involvement in religious affairs; and the underlying conflict between values of individual equality and group cultural and religious rights. Because the Constitution is less than ten years old, the Constitutional Court has not had the opportunity to develop a clear jurisprudence on all of these issues. This paper will now, however, look at some of the principal cases dealing with religious freedom and customary law to provide an understanding of the direction that courts are moving and make predictions and suggestions for the future.

V. LEGAL TRENDS

The 1996 Constitution gives the South African Constitutional Court extensive powers, and the Court has been an important part of South African politics from the beginning. It can rule on “all constitutional matters and all matters relevant to the constitution, and has the power to determine whether a matter is of such relevance. It is the ultimate authority on whether national and provincial legislation is unconstitutional.” Given the weak separation of powers between Parliament, the executive and the courts in South Africa, as well as the

140. Id. at 12.
141. Id.
142. Id.
143. Id.
144. GLOPPEN, supra note 19, at 226.
145. Id. at 226–27.
character of the Constitution itself and the Bill of Rights, the “Court could [also] end up with what amounts to significant legislative powers.”Indeed, the Court has already made some important and controversial rulings in its brief history. This discussion will first focus on three important Constitutional Court cases that have helped to define the extent and limits of religious freedom and church-state relations. It will then focus on religious and customary marriage and inheritance laws, discussing how the legislature has tried to implement Bill of Rights provisions and the Court has responded to those attempts. I choose to focus on marriage laws because they best illustrate the constitutional conflicts between religious and cultural freedom, and individual equality—especially gender equality.A

A. Religious Freedom Jurisprudence

One of the first major rulings on religious issues was Lawrence v. State. In Lawrence, three employees of a Seven Eleven chain store were charged and convicted of violating the “Liquor Act” of 1989, which prohibited the sale of liquor on Sunday. The employees challenged the laws as “inconsistent with the right to freedom of religion, belief and opinion.” A plurality of the Court ultimately held that the law was constitutional, but there were several opinions which produced little consensus on the meaning of the right to freedom of religion, belief and opinion. Much of the debate focused on whether there was an “establishment” clause in the South African Constitution. While religious and customary law likely does not implicate issues of “establishment,” the issue of whether the South African Constitution

146. Id. at 227.
147. I choose to focus on marriage laws because they best illustrate the constitutional conflicts between religious and cultural freedom, and individual equality (especially gender equality). These conflicts also give us a picture of whether the South African government treats similar situations, such as polygamy, differently, depending on whether they arise in a customary or religious context.
148. 1997 (10) BCLR 1348 (CC) (S. Afr.).
149. Id. Because the violations and arrests took place in 1995 and 1996, the judgment was made based on the Interim Constitution because it was that Constitution that was in effect at the time of the alleged offense. However, there is no material difference in the sections at issue between the Interim and 1996 Final Constitution, so the analysis would most likely be the same today, under the Final Constitution.
150. Id. at ¶ 7.
151. Indeed, there was sparse agreement: there were three different opinions, totaling 138 pages.
152. Lawrence is an extremely important case in South Africa’s religious freedom jurisprudence and is treated extensively in most scholarly writing describing South Africa’s system of church-state relations. It is less important, however, for our own discussion, so I will mention only those aspects of the decision that are most relevant.
provides a similar framework for religious jurisprudence as the United States’ Constitution is significant because it can help to determine what South Africa may or should do with regard to following U.S. trends in other circumstances.

The main opinion, authored by Justice Chaskalson, determined that there is no “establishment clause” in the Constitution. Because South Africa lacks establishment jurisprudence, there is no constitutional problem with laws that support some form of religious belief, so Sunday closing laws are appropriate. Other scholars have pointed out compelling reasons suggesting that he was correct: the whole religion section is based on free exercise language, and other sections actually make provisions for instances of establishment (such as sections allowing religious activities in government or public institutions).

A concurring opinion, authored by Justice Sachs, assumed that the South African Constitution does proscribe establishment. The extent to which the Sachs opinion assumed the existence of an establishment clause and relied on the United States’ religious freedom jurisprudence in its decision is alarming. Not only is there little textual support for the idea that the South African Constitution contains an establishment clause, but there are also historical reasons why South Africa does and should differ from the United States in that respect. One scholar suggests that, in the United States:

153. Van der Vyver, supra note 6, at 823.

154. See id. at 824. Justice Chaskalson did determine that “establishment” practices may be unconstitutional if they amount to unfair discrimination in violation of equality provisions, and also conceded that there were probably some circumstances in which the state infringed on free exercise by coercing people, directly or indirectly, to observe particular religious practices. Here, though, he determined that no such coercion had been proven. On the contrary, he reasoned that the laws had the secular purpose of providing a day of rest from the workweek, and that, although that day happened to fall on the Christian Sabbath, that fact did not compel or coerce people from worshipping as Christians. Lawrence, 1997 (10) BCLR at ¶ 95–96.

155. See van der Vyver, supra note 6, at 824. Justice Sachs held that using Christian holidays as “closed days” amounted to state endorsement of the Christian Sabbath. Nevertheless, he concurred in the judgment upholding the laws, arguing that the negative impacts suffered by non-Christians forced to obey the law would be trivial and the benefits of the law had a legitimate secular purpose, so the “establishment” violation is justified. Id. at 824–25. However, despite its assumption that South Africa’s Constitution has an “establishment clause,” Justice Sachs’s treatment of any such clause is quite different than the United States Supreme Court’s interpretation of the clause. Justice Sachs seems to balance the state’s interest in “establishing” with the individual’s interest in non-establishment; if the state’s interest is more compelling, then the violation is justified. In the United States, on the other hand, courts tend not to engage in any balancing test when it comes to establishment: if a law establishes, it is invalid per se, regardless of great benefits or minimal harm.
The anticolonial spirit of the American Constitution... instilled essentially libertarian values in the fabric of all constitutional arrangements. South Africa, in response to its history of institutionalized discrimination, constructed a new dispensation where considerations of human dignity and equal protection reign supreme. Whereas the libertarian purport of American institutions dictated the "wall of separation" of church and state with all its ramifications, the egalitarian predilections of South Africa set that country on a different course. In South Africa, religion is not perceived as a governmental taboo, but rather the South African Constitution requires evenhandedness in official dealings relating to religion and religious institutions.156

Beyond the historical differences between South Africa and the United States, differences in the cultural and religious make-up of the two countries make "the application of American jurisprudence in this context to South Africa... questionable."157 While it is understandable that South Africa looks at other countries for guidance in interpreting its own human rights provisions, South African courts would be well-advised to recognize the unique aspects of the South African experience and Constitution, and to be willing to break new ground in religious jurisprudence to best meet South Africa’s needs. As suggested earlier, the divisive debates in the United States over the establishment of religion in contexts such as school prayer and the Pledge of Allegiance would likely be unnecessary and harmful in South Africa, and would only contribute further to political unrest and intolerance there.158

156. Van der Vyver, supra note 8, at 671.
158. The dissenting opinion, written by Justice O'Regan, admitted that the South African Constitution contains no establishment clause. Van der Vyver, supra note 6, at 825. However, she argued that any "public endorsement of one religion over another is in itself a threat to the free exercise of religion." Lawrence, 1997 (10) BCLR at ¶ 123. She focused on South Africa’s history of repressive religious favoritism and emphasized a need for absolute “[f]airness and evenhandedness in relation to diverse religions.” Van der Vyver, supra note 6, at 825. The difference between the plurality and dissent turns on the difference between "coercion" and "endorsement." Justice Chaskalson suggests that only state coercion in religious matters violates freedom of religion. Justice O'Regan counters that endorsement also violates freedom of religion. Some scholars suggest that Justice O’Regan’s approach may be better, considering the egalitarian concerns of the South African Constitution. Heyns & Brand, supra note 108, at 761. Others, however, advocate Chaskalson’s “coercion” test for the South African context:

Coercion—be it direct or indirect—provides a bright line and avoids problems evident in the endorsement regime. Further, it is a safer initial position, and its use allows the South African case law to develop slowly and deliberatively—a judicially conservative result the Constitutional Court has approved. While using the endorsement test may be enticing for the Constitutional Court, a better position for now would be to follow Chaskalson’s
Overall, and despite the sharp divides among the Court, the ultimate holding in Lawrence bodes well for the future of South African religious freedom jurisprudence because it forges a new path for South African church-state relations which can provide for strong individual religious freedom without invalidating all state-sponsored religious initiatives.

The Constitutional Court decided another landmark case dealing with religious freedom in 2000. In Christian Education South Africa v. Minister of Education, parents challenged the constitutionality of an act that prohibited corporal punishment in schools. They argued that the right to apply corporal punishment in parochial schools was guaranteed by the right to religious self-determination, because corporal punishment was advocated in the Bible. The Court denied the claim on at least two grounds, both of which have important implications for the development of religious freedom jurisprudence in South Africa. First, the Court reasoned that the biblical texts that the parents relied on referred to punishment inflicted on children by parents, not on children in schools. The second and related point was that “flogging” of children has been “designated in South Africa, and elsewhere, as a cruel and inhuman (or degrading) punishment; and, in terms of the Constitution, the right to self-determination may not be exercised ‘in a manner inconsistent with any provision of the Bill of Rights.’”

This holding is significant for two reasons. First, although the Court did not stress this in its opinion, it is interesting that the Court was willing to question the biblical interpretation of the parents involved in the litigation. This seems to run counter to what the Court normally does, in that the justices seem to be questioning the validity of a certain religious belief or interpretation. While people may agree with the result in this opinion, it is potentially disconcerting that the Court would place itself as the definitive biblical interpreter. Second, the Court explicitly favored provisions against “cruel and inhuman (or degrading) punishment” over provisions on religious freedom. The Court applied quite strictly the limitation on religious freedom: that it cannot conflict with any provision of the Bill of Rights. Furthermore, since endorsement might often be considered coercive, using the “coercion-only” test would not substantially curtail religious freedom or result in discrimination. Because the “coercion” test seems more in line with South Africa’s Constitution and understanding of appropriate church-state relations, it is the better test to help South Africa develop its own jurisprudence.

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159. Christian Education S. Afr. v Minister of Education 2000 (1) SA 1 (CC) at ¶ 1 (S. Afr.).
160. Van der Vyver, supra note 6, at 828.
161. Id. at 828–29.
162. Id. at 829 (quoting Christian Education S. Afr. v Minister of Education).
with other provisions of the Bill of Rights. The discussion of religious and customary marriages below will further examine the extent to which courts have placed equality interests or other rights in the Bill of Rights over religious and cultural rights.

Whether or not one agrees with the outcome in *Christian Education*, it did set limits on an individual’s or a group’s expression of religious freedom. In 2002, however, the South African Constitutional Court broadly interpreted freedom of religious expression in the case *Prince v. The President of the Law Society of the Cape of Good Hope.*

Prince wished to become an attorney and had satisfied all academic requirements but needed to perform a period of community service as mandated by the “Attorneys Act.” His application for community service through the Law Society was denied because he disclosed that he had two previous convictions for possession of cannabis, and expressed his intentions to continue to use the drug because it was part of his religion as a Rastafarian. The Law Society contended that his conviction of breaking the law and declared intention to continue to break the law made him a person unfit for the profession of an attorney. Prince challenged the constitutional validity of laws against cannabis possession or use if those laws apply to prohibit required religious use.

The Constitutional Court began by accepting the premise that cannabis is “central” to the Rastafari religion. The Court also acknowledged the fact that there is a highly strict and elaborate protocol regarding the use of cannabis, and that the religion does not provide justification for non-religious, casual use of the drug. The parties stipulated that Prince was a true adherent of the Rastafari religion and had used cannabis in accordance with Rastafari protocol. Thus, the prohibition against cannabis use for religious purposes was an infringement on Prince’s religious freedom and a failure to accommodate religious practice. Based on the relevant constitutional provisions, including the limitations clauses of the Bill of Rights, the Court crystallized the issue as, “whether the failure to accommodate the appellant’s religious belief and practice by means of the exemption... can be accepted as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.”

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163. 2002 (1) SA 1 (CC) (S. Afr.).
164. Id. at ¶ 1.
165. Id. at ¶ 2.
166. Id. at ¶ 4.
167. Id. at ¶ 18.
168. Id. at ¶ 20.
169. Id. at ¶ 21.
170. Id. at ¶ 46.
The Supreme Court of Appeals had decided against Prince, determining that “the statutory prohibition on the use of [cannabis] was meant to protect public safety, order, health, and morals and that these considerations outweighed the right of Rastafarians to practice their religion through the use of [cannabis].”\textsuperscript{171} This decision was criticized as giving “little regard to what the free exercise right of a Rastafarian, or any other religious adherent . . . entails. The court limited the right before making an effort to define it and to determine its scope. This is a rights-unfriendly manner of dealing with fundamental entitlements.”\textsuperscript{172} The Supreme Court of Appeals’ decision followed the U.S. Supreme Court’s reasoning in \emph{Oregon v. Smith},\textsuperscript{173} holding that the law, as it was of general applicability and was a legitimate state interest, was a reasonable infringement on free exercise.

The Constitutional Court, however, took another route when it ruled on the appeal. The Court emphasized that the right to religion is “probably the most important of all human rights”\textsuperscript{174} and that the criminalization of cannabis even for religious purposes essentially criminalizes Rastafarianism, stigmatizes its adherents, puts them at risk for arrest and conviction, prevents some from pursuing their chosen profession, “degrades and devalues” Rastafarians, and “strikes at the very core of their human dignity.”\textsuperscript{175} The Court concluded that, despite the general validity of laws against cannabis use, the laws were overbroad in their infringement of ceremonial use; thus, it held that the provisions of the Drug Act were “invalid to the extent that they did not allow for an exemption for the religious use, possession and transportation of cannabis by bona fide Rastafari.”\textsuperscript{176}

A second opinion, which ultimately dissented on the basis that the exemption could not be regulated appropriately, still agreed with the majority that religious exemptions may be constitutionally required. The opinion addressed the majority’s inconsistency with the United States’ \emph{Smith} and observed that the minority approach in \emph{Smith}, denying the constitutionality of the generally applicable law because of its failure to include religious exemptions, was “more consistent with the requirements of [the South African] Constitution and . . . jurisprudence


\textsuperscript{172} Id.


\textsuperscript{174} \textit{Prince}, 2002 (1) SA 1, at ¶ 48.

\textsuperscript{175} Id. at ¶ 51.

\textsuperscript{176} Id. at ¶ 85.
on the limitation of rights, than . . . the majority."^{177}

An opinion concurring in the judgment expressed the need for tolerance and reasonable accommodation of religious beliefs, even if those beliefs seem bizarre or unwanted to the majority. The concurrence stressed that:

Given our dictatorial past in which those in power sought incessantly to command the behavior, beliefs and tastes of all in society, it is no accident that the right to be different has emerged as one of the most treasured aspects of our new constitutional order. . . . Religious tolerance is . . . not only important to those individuals who are saved from having to make excruciating choices between their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters.^{178}

Ultimately, *Prince* is highly significant, not only because it protects religious freedom, but also because the Court demonstrated creativity, and perhaps wisdom, in determining a remedy: rather than ruling the provisions invalid outright, the Court determined that the declaration of invalidity would be "suspended for twelve months" while Parliament had the opportunity to remedy the statute’s defects.^{179} The Court declined to rule specifically on whether or not Prince should be admitted to the Law Society because it wanted to wait for Parliament to determine the scope and applicability of the religious exemption.^{180} In leaving the matter to Parliament, the Court recognized that legislative bodies can take a role in helping to develop existing laws to better conform to constitutional requirements. This approach may be ideal for dealing with other customary and religious law issues.

**B. Marriage and Customary Law**

The Constitutional Court has in its ten-year history decided several important cases defining the limits of religious freedom and expression in *Lawrence, Christian Education*, and *Prince*. It has not considered a major case dealing with religious or customary marriage, but lower courts have made determinations about the validity of Muslim and

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177. *Id.* at ¶ 128.
178. *Id.* at ¶ 170.
179. *See id.* at ¶ 86.
180. *Id.* at ¶ 88. For example, the Court ruled that Parliament may determine that the exemption should apply only to priests or other Rastafarian officials, in which case Prince would not be entitled to the exemption. In any case, the Court wisely left that to Parliament.
customary marriages, and Parliament has enacted legislation pursuant to the Bill of Rights’ authorization to recognize customary law in the “Recognition of Customary Marriage Act.” Despite the Constitutional Court’s relative silence, the issue of religious and customary marriage is an important one in South African society and may prove to be a litmus test for the extent to which the South African government is actually willing, in practice, to recognize customary and religious rights, particularly when those rights may be in conflict with other Bill of Rights guarantees. I will now discuss some of the cases that have been decided by lower courts and the legislation enacted by Parliament. Using the Constitutional Court’s holdings in *Lawrence*, *Christian Education*, and *Prince*, one can speculate about how the Court may likely rule if such cases are ever to reach it. In the end, there is a high possibility that the Court may invalidate customary and religious marriages on the basis of equality and non-sexism.

The common law system of South Africa, based on Roman and Dutch law, “denies the status of marriage to all polygamous and potentially polygamous unions, which applies, inter alia, to Hindu and Muslim marriages and marriages concluded under indigenous African systems of law.”\(^\text{181}\) Prior to the 1996 Constitution, South African courts ruled (based on the common law) that “contractual obligations attending [an] invalid Muslim marriage, as well as other legal consequences intrinsic to the marriage (such as maintenance), are unenforceable.”\(^\text{182}\) More recently, however, a Cape Town court held that since two parties were married by Muslim rites and their union was in fact monogamous, the contractual arrangements dealing with their marriage were enforceable.\(^\text{183}\) While this judgment was a step in the right direction, the court “was not called upon to proclaim the marriage valid, and expressly confined the binding effect of its judgment to a potentially polygamous union that is in fact monogamous.”\(^\text{184}\) Thus, whether Muslim marriages are legally valid is still a question; the court was only willing to recognize “contractual obligations” resultant from the union, and not the union per se. Additionally, the question remains as to whether contractual obligations resulting from a Muslim marriage that is actually polygamous will gain similar legal protection.

The Supreme Court of Appeals validated this holding in *Amod v. Multilateral Vehicle Accident Fund*. In that case, the court decided that

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181. Van der Vyver, *supra* note 6, at 831.
182. *Id.* at 833. (discussing *Ismail v Ismail* 1983 (1) SA 1006 (A) (S. Afr.).
183. See van der Vyver, *supra* note 6, at 833–34 (discussing *Ryland v Edros* 1997 (2) SA 690 (C) at 703 (S. Afr.).
184. Van der Vyver, *supra* note 6, at 834.
“in view of ‘the new ethos of tolerance, pluralism, and religious freedom’ and given the fact that the marriage in this particular instance was de facto monogamous,” a contractual right to support resulting from a Muslim marriage “deserves recognition and protection by the law.”\textsuperscript{185} Again, though, the court declined to rule on whether the marriage itself was valid, and restricted its holding to potentially polygamous marriages that are in fact monogamous. Some scholars criticize the continued failure to recognize Muslim marriages as discrimination on the basis of religion and as an infringement on religious freedom.\textsuperscript{186}

Parliament has not enacted legislation explicitly recognizing religious marriages. This lack of legislation also helps to explain why courts are willing only to recognize the contractual effects of such unions but not their legal validity as marriage. Parliament has, however, given statutory recognition to customary marriages in the “Recognition of Customary Marriages Act.”\textsuperscript{187} The Act came into effect in 2000 and is intended to recognize customary marriages while “bringing their personal and proprietary consequences in line with the Constitution.”\textsuperscript{188} In doing so, the Act, while purportedly recognizing customary marriages that had not previously been recognized, “changed fundamentally the personal and proprietary consequences of customary marriages.”\textsuperscript{189} This was largely because “official” customary marriage law can be discriminatory against women, denying them property rights and other legal rights. While it is certainly the case that reform is needed in order to better secure the position of women and remedy the problems that resulted from codifying and stagnating customary law, the Act may not be the best solution, because it “deprives [people] of important cultural practices in the event that they choose customary law. The marriage might be ‘customary’ in name, but in many respects it will be regulated by the common law.”\textsuperscript{190}

The Act does appear to protect some customary practices, such as the payment of “lobola” (or a dowry) as a part of the marriage. It also provides that polygamy is not an obstacle to the recognition of a customary marriage. However, it remains to be seen whether the Constitutional Court would invalidate those provisions on the basis that

\textsuperscript{185} Id. at 835.


\textsuperscript{187} Act 120 of 1998.


\textsuperscript{189} Id.

\textsuperscript{190} Kult, supra note 48, at 719.
they discriminate against women. There are other aspects of customary marriage that may be inconsistent with individual equality according to the Bill of Rights. These include intestate succession, which, according to “official” customary law, tends to favor males. It is highly possible that courts will view aspects of customary marriage to be inconsistent with individual equality, given the Constitutional Court’s commitment to gender equality and nondiscrimination, and its tendency to put those values above customary or religious freedom, as it seemed to do in Christian Education. While the Court in Prince demonstrated a strong commitment to religious freedom, this was limited to a circumstance in which religious freedom conflicted with a legislative enactment, as opposed to a constitutional guarantee. In Prince, there were no fundamental rights of any other persons implicated. In the case of customary or religious marriages, on the other hand, the Court may very well decide that equal protection and gender equality overrides religious or cultural expressions that are inconsistent with equality. Indeed, the trend in other areas of customary law such as intestate succession appears to be one of “victory for the Constitution and a virtual refusal to accept customary law procedures as valid.”

This trend has led some scholars to lament that:

[C]ultural rights are indeed an empty shell. Regardless of the light under which South Africans view the reforms, for better or for worse, it is apparent that indigenous cultures are once again being told to discard what they know and to accept what others wish to thrust upon them. This they have done since 1652.

It seems also that religious freedom, at least for minority groups like Muslims and Hindus, may also become an empty shell if nothing is done to reconcile the Western-style protections of individual rights with non-Western cultural and religious practices.

VI. SOLUTIONS: BALANCING INDIVIDUAL RIGHTS WITH RELIGIOUS AND CULTURAL RIGHTS

The Constitution recognizes the importance of religious and cultural freedom, and provides avenues for the legislature to further protect that freedom. As discussed above, though, legislation such as the Recognition of Customary Marriages Act, while a step in the right

192. Kult, supra note 48, at 728.
193. Id. at 729.
direction, potentially suffers from two severe defects: first, although it
purports to recognize customary marriages, the Act requires that they
conform with particular substantive requirements that undermine (and
even render meaningless) much of the custom itself; and second, to the
extent that the Act does allow customs such as lobola and polygyny,
there is a danger that the Court will ultimately strike it down as
repugnant to the equal protection of women. Legislation recognizing
religious marriages may fall prey to the same weaknesses, and both may
prove to be little more than lip-service to the ideas of religious and
cultural liberty. One solution to this dilemma—and the solution that I
suggest is the most compelling—is to ensure broad autonomy to local
and provincial legislatures and councils to enable them to work out the
problems in customary and religious law and help to reconcile those with
the Constitution. Similar to what the Court did in Prince, it can identify
constitutional problems but allow time for local governments to remedy
those problems instead of imposing its own solution. Although it is
necessary that there be some limited constitutional check to ensure that
basic human rights remain protected, the Constitutional Court should be
reluctant to impose Western values in its interpretation of human rights
and should leave more room for group cultural and religious rights to
factor into any test balancing the interests at stake in a conflict. The
Court would be wisest to exercise restraint in rejecting customary law
and should give local governments the opportunity to resolve problems
before making judgments that will bind the whole of South Africa to one
system of values and law.

A. The Importance of Group Cultural and Religious Rights

Based on numerous constitutional provisions regarding cultural and
religious rights, it is clear that the drafters of the Constitution were
concerned with preserving a peaceful pluralism and diversity in South
Africa. Recognizing that a Western democratic model of government
was useful but not entirely indigenous, the drafters ensured that at least
some protection was given to traditional modes of government, including
customary law and traditional authorities. Perhaps this was especially
acute for the drafters because of the repressive history of colonialism and
apartheid in South Africa. Certainly, they did not want to repeat
colonialism by “saving” the South African people with a Western value
system. They probably also had seen that, in apartheid, individual
freedom depended heavily on group rights: where group rights were
curtailed, individual freedom suffered. Indeed, not only did the
individual freedom of blacks suffer during apartheid, but also that of
sympathetic whites and others. Finally, while the rights of individuals are certainly important, Professor Fred Gedicks has discussed, in the American context, the importance of groups and group rights, particularly religious groups:

[R]eligious groups are valuable to society and to individuals for at least three reasons. First, they protect the individual freedom of their members against government encroachment by providing an effective vehicle for challenging governmental power. Second, religious groups provide a context for the development of individual personality and identity that is considered important by the substantial number of Americans who remain significantly committed to religion and religious groups. Finally, because liberal democratic government is in theory severely constrained from both creating and advocating particular conceptions of morality, religious groups are part of a larger collection of necessary social institutions that create and maintain the values by which Americans choose to live their lives.

One may properly describe religious groups . . . as an indispensable part of individual and social life in the United States.194

The same can be said for cultural groups, especially in the South African context.

The benefits of group autonomy and rights are great even when those groups may infringe on individual rights through discriminatory practices. Professor Gedicks uses the example of membership practices that are discriminatory and even repugnant to the majority and argues:

There can be no doubt that allowing religious groups an absolute freedom to set the terms of membership . . . will result in the protection of beliefs and practices that will be inconsistent with and even repugnant to the majority. This is the paradox of groups. They both enhance and subvert individual autonomy by challenging the sovereign power of the liberal state. Permitting the government to force fundamental change upon or to prohibit altogether certain kinds of groups because, in its judgment, such groups spawn a diffuse social harm or threaten the implementation of majoritarian social policy, is a subversion of the pluralist thesis. If the government can act to eliminate groups that it believes threaten majoritarian social policies and values

merely because such groups are anti-majoritarian, then the power of the government over groups and individuals is unlimited.

If one is genuinely concerned about threats to individual freedom, the pertinent question is whether individuals have more to fear from governmental power than they do from religious group autonomy.\(^\text{195}\)

Thus, a court that is truly concerned about protecting individual freedoms and rights should also concern itself with protecting group religious and customary rights, even at the expense of what is viewed as discriminatory behavior in some eyes—for example, in religious groups who discriminate in their membership criteria. Although such a practice may be repugnant to the majority, the very existence of such counter-majoritarian groups is helpful for the flourishing of democracy.

**B. Customary Protection of Human Rights**

A court’s interest in protecting both individual and group rights is especially pronounced in light of the argument advanced by many South African scholars that customary law can be consistent with human rights norms. Substantive rights are not foreign to customary law, which recognizes specific rights such as the right to life, the right to a good name, the right to freedom of thought, the right to property, and the right to family life.\(^\text{196}\) Customary law has as its aim the protection of “human dignity,”\(^\text{197}\) which is the aim of other human rights guarantees, as expressed by the Constitutional Court in *Prince*.\(^\text{198}\) Of course, customary law focuses on group rights, but those are seen as an essential protection for individual rights. Customary law emphasizes community and social solidarity, recognizing that “[i]ndividuals do have rights, but many of these rights are exercised in the context of the group.”\(^\text{199}\)

A concept that may prove key in the reconciliation of traditional African culture and a new constitutional human rights regime is the traditional African idea of “ubuntu.” Scholars point to “ubuntu” to demonstrate that customary law can promote human rights concerns. Ubuntu translates into “humaneness” or “morality” and emphasizes

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\(^{195}\) *Id.* at 168.


\(^{197}\) Dlamini, *supra* note 82, at 6A-5.

\(^{198}\) See *Prince v The President of the Law Soc’y of the Cape of Good Hope* 2002 (1) SA 1 (CC) at ¶ 50 (S. Afr.).

\(^{199}\) Dlamini, *supra* note 82, at 6A-4.
“respect for human dignity,” as well as social justice and fairness. In one South African court decision, justices suggested that “ubuntu” provides “a connection between indigenous value systems and universal human rights embodied in international law.” Indeed, the concept of “ubuntu” could be the key to “constructing a particularly South African constitutional jurisprudence, one that will resonate with the indigenous values of the majority of South Africans.” Similar concepts are likely to be found in South Africa’s religious traditions and could also draw connections between the Constitution and South African religious values. Because a liberal, constitutional democracy is largely foreign to the majority of South Africans, forging this connection between religion or traditional African culture and the Constitution is essential—and possible.

Moreover, customary rights and practices may not be as discriminatory as some suggest. That customary law necessarily discriminates against women—the most specific complaint lodged against its practice—is overly-simplistic. Scholars note that:

Indigenous law did provide a variety of institutions which tended to protect women as well. . . . The context of the family, the clan and ethnic solidarity or the kinship network, provided the framework within which individuals exercised their economic, political and social liberties and duties and provided restraints to arbitrary action.

Indeed, that customary law now discriminates against women is a result of the codification of “official” customary law, and changing circumstances that rendered that law useless. For example, old inheritance patterns, which seemed favorable to men, were partly designed to ensure that a widowed woman was taken care of through an extended kinship network. Now that those networks have been disrupted by colonialism, capitalism, and urbanization, perhaps the inheritance patterns no longer make sense and need to change. Because customary law is fluid and responsive to changing social needs, adaptation should have happened; however, the codification of customary law prevented the necessary changes: “While living customary law is considered to be more flexible and accommodative of women’s rights, official customary law is perceived . . . as the embodiment of institutionalized gender

200. Mqke, supra note 196, at 364.
201. KLUG, supra note 2, at 164.
202. Id. at 165.
203. Id.
204. Dlamini, supra note 82,Id. at 6A(5)–(6).
inequality.”\textsuperscript{205} Attempting to codify it now could perpetuate the same problem, because eventually it would no longer respond to social needs. In fact, in many respects customary law has changed, “remov[ing] certain features of indigenous law which could be regarded as discriminatory against women, thus bringing the law in line with the Bill of Rights.”\textsuperscript{206} This has led one scholar to conclude that “customary law is dynamic and can adapt to meet the changing demands of society. . . . [I]t is in accordance with the spirit, purport and objects of the final constitution.”\textsuperscript{207}

With regard to women’s rights and customary or religious law, the Constitutional Court and Parliament should avoid making Western-centric judgments about women and their needs.\textsuperscript{208} Whatever one’s personal views about polygamy, one can recognize that there are those, including women, who do not find it discriminatory.\textsuperscript{209} The very fact that there is disagreement about the desirability of polygynous marriage systems suggests that the legislatures and the people, not the Court, should determine the contours of acceptable relationships. Outright failure to respect polygamous customary and Muslim marriages “amounts to unfair discrimination based on culture in the first instance and religion in the second.”\textsuperscript{210}

Finally, it is important to note that failing to recognize customary or religious marriages at all may actually leave women worse off. One has only to look at early cases denying Muslim widows continued support to see that women who enter into such marriages—as women will likely continue to do, whether or not they are legally recognized—are double-burdened if the state is unwilling to enforce their expected rights. When the state refuses to recognize a customary or religious marriage, “[t]hey have completely overlooked the fact that the position of the woman whose status they purport to enhance is worse off than before because she is left without a remedy.”\textsuperscript{211}

Indeed, Justice Mokgoro of the Constitutional Court has admitted

\begin{footnotesize}
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\item 206. Dlamini, \textit{supra} note 82, at 6A-31.
\item 208. I certainly consider myself a feminist, and a Western feminist at that. I admit that some of African customary law—at least the official version—strikes me as outdated and discriminatory. I do, however, recognize that there is probably not only one “solution” out there, and that promoting cultural diversity is an important goal. It is simply important to keep an open mind about the way other people choose to live their lives.
\item 209. See Sinclair, \textit{supra} note 115, at 563.
\item 210. \textit{Id.} at 564.
\item 211. Dlamini, \textit{supra} note 82, at 6A-42.
\end{itemize}
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that “customary law is a living law which affects millions of South Africans. It can therefore not be wished away... [I]t is not so much the recognition of the system which is the source of tension, but the technical difficulties that arise from such recognition.” How, then, can we best resolve the technical problems resulting from the tension between the Bill of Rights and customary or religious practices?

C. Local Legislative Change and Customary Adaptation

Some scholars suggest that the courts can provide a “dynamic application and development of customary law.” While the courts will certainly have a role in defining the meaning of the rights protected by the Constitution, I submit that courts ought not to assume a large role in re-crafting customary law. South African courts have been criticized as lacking a good understanding of customary law, particularly “living” customary law, and instead often refer to (and misinterpret) official customary law. They are equally inadequate at determining what Islamic religious norms or the norms of other religious groups should entail. Scholars have also cautioned courts to exercise judicial restraint in order to maintain legitimacy in a divided country.

The Constitutional Court set a wise precedent for itself when, in its judgment in Prince, it refrained from refashioning the law itself and instead described the nature of the violation and proposed possible remedies, but ultimately left the changes up to Parliament. A similar approach could be used with regard to customary and religious law, although, instead of the National Parliament, the Court could encourage provincial and local governments (in the case of customary law) and religious organizations (regarding religious law) to work to harmonize apparently conflicting values with the Bill of Rights.

Such a solution is possible within the framework of powers allocated by the 1996 Constitution. With regard to indigenous and customary law, the Constitution gives concurrent jurisdiction to Parliament and provincial legislatures. In most cases, a provincial law will prevail over an act of Parliament on an issue over which both have jurisdiction (unless there is a compelling problem that the national government needs

212. Mokgoro, supra note 85, at 1289.
213. Meide, supra note 86, at 104.
216. IM RAUTENBAUGH & EFJ MALHERBE, CONSTITUTIONAL LAW 275 (Butterworth Publishers Ltd. 1999).
Given this grant of concurrent authority to Parliament and provincial governments, it is reasonable that changes to customary practices can occur through legislative amendment, “preceded by a thorough investigation of the legal position and the implications of proposed changes, rather than leaving everything to the courts.”

In this way, while indigenous law will not be “insulated from human rights,” attempts can be made to reconcile the two. Where they are truly incompatible:

[T]he underlying reason for that should be established before the rule of indigenous law is rejected. It is crucial in a democratic state that the democratic process be followed in changing the law. Those who are affected by indigenous law should be given an opportunity to discuss the possible reforms and to express their views to their elected representatives or to a commission appointed by the legislature.

Many scholars agree. One suggests that, while change might certainly be needed, a “destructive confrontation between the Bill of Rights and legislation, on the one hand, and customary law . . . on the other, need not take place.” The Constitutional Court itself has recognized this, holding in a case involving customary law and intestate succession that “the legislature rather than the court should develop customary law.

While admittedly more complicated than the reform of customary law, religious law can also be changed at a local level. The reform of Muslim law serves as an example of how all religious law in South African may be reformed at a local level. Muslim scholars have suggested that it ought to be. One scholar suggests that reform in Muslim personal law is well on its way, and that legal tools exist among Islamic scholars to speed the process of reform. She further suggests that “[p]resent-day Muslim jurists should also consider the possibility of introducing reforms within the framework of Islamic principles in, for example, the area of laws relating to maintenance [in marriage].” Even Muslim feminists agitating for change in the Islamic community suggest

217. Id. at 295.
218. Dlamini, supra note 82, at 6A-11.
219. Id. at 6A-14.
220. Id.
221. Kerr, supra note 134, at 269.
222. Id.
224. Id. at 492.
225. Id.
that:

Even though the Constitution promotes and protects the human rights of women through national machinery, their powers do not extend beyond the Constitution. Gradual social reform within the Muslim community, along with active participation by Muslim women, appear to be more realistic safeguards and long term solutions for effective improvement to the status of women.\textsuperscript{226}

Although the process of reforming Muslim personal law, and any other religious law for that matter, may be more difficult for the courts to conceive of than that of reforming customary law, at least courts can start by being sensitive to the religious liberty of Muslim women and allowing them, within that community, to agitate for the changes that they need while preserving the religious liberty of the group. Sensitivity to religious liberties will better prevent the discrimination that has historically occurred against Muslims in South Africa.

South Africa’s Constitution is young and it is difficult to determine how exactly the national government, courts, and local governments can work together to preserve individual rights and group rights. What is important at present is that the framework for such cooperation exists, given the nature of concurrent powers between national and local government, the respect given to local tribal leaders, and the history of customary adaptation. The Court has, in the past, been willing to defer to legislative bodies to come up with solutions to constitutional problems that better reflect the will of the South African people; if it can continue to do so, South Africa can continue to work toward ideals of individual rights while preserving the customs and cultures of its people.

\textbf{VII. CONCLUSION}

South Africa’s commitment to individual rights and equality is admirable and is certainly key to overcoming the devastating effects of the apartheid regime. Also important, though, is South Africa’s constitutional recognition of the importance of local culture, customs, and religion. South Africa’s courts have generally respected religious freedom, but have done so on the basis of Western ideals about individual rights and equality. As the courts continue to develop South Africa’s constitutional jurisprudence, they should also consider the impact of their decisions on local customs and culture, and should be

\textsuperscript{226} Van der Vyver, \textit{supra} note 6, at 838.
mindful that those, too, are important rights. In so doing, the courts can work with Parliament and local government structures to help to develop customary law in accordance with developing notions of social justice and equality.

There are very real disagreements between the courts and the South African people on a variety of important human rights issues, such as sex equality, abortion, religious freedom, and capital punishment. Those disagreements threaten to perpetuate a disconnect between the Western ideals present in South Africa’s Bill of Rights and traditional South African society and values. A recent example is the gay marriage debate in South Africa; disputes about what types of marriages are legitimate under South African law are currently a focal point of public controversy. In December of 2005, the Constitutional Court of South Africa officially recognized same-sex marriages, holding that the denial of such recognition is a violation of individual equality and equal protection.\textsuperscript{227} Oddly enough, unless provisions are made to guarantee the right to marriage under customary and religious law, the Court will have found itself recognizing as “fundamental” something that is approved of by few South Africans, while failing to recognize marital practices that have been established in South Africa for centuries.\textsuperscript{228} Whatever one’s opinion on gay marriage, the Court’s strong stance in its favor is an instance of the Court’s commitment to Western human rights norms, regardless of local public opinion. If the Court continues to forge a path so different from its people’s traditions, without recognizing or respecting those traditions, respect for constitutionalism and the rule of law may be undermined and the purposes of the Bill of Rights subverted—as has happened in so many of the young democracies in post-colonial Africa.

As in other post-colonial African countries, a Constitution and judiciary are foreign to the South African people.\textsuperscript{229} If constitutionalism is to survive meaningfully in South Africa—and indeed, it should, as it is ultimately the best solution for negotiating between the factions and

\textsuperscript{227} \textit{Minister of Home Affairs v Fourie} 2005 (1) SA 1 (CC) (S. Afr.).

\textsuperscript{228} It will be interesting to see the effects that the \textit{Fourie} decision has on marriage jurisprudence in the future. Had the Court made its determination based on a “fundamental right” to marriage, that argument could later be employed in favor of recognizing Muslim and customary marriage. However, the Court instead based its opinion on non-discrimination provisions of the Bill of Rights. Since those provisions also prohibit discrimination based on “religion” and “culture,” though, it could be argued that failing to recognize customary and religious marriages violates the Constitution on those terms. The trouble is reconciling that with the same section’s prohibition on discrimination based on gender or sex: which will the Court prioritize? Perhaps for that reason, it is best left to the legislature.

\textsuperscript{229} \textit{See} KLUG, supra note 2, at 29.
disagreements that will inevitably arise in the diverse country—\(^{230}\) it will need to prove itself accepting of and acceptable to local culture. Furthermore, in order to avoid a repeat of “cultural imperialism,” such as occurred during colonialism, and ensure that principles of human rights and respect for the rule of law remain firmly rooted in South Africa, local cultures need to adopt, incorporate, and “hybridize” constitutional norms with their own understandings and values,\(^{231}\) such of that of “ubuntu.” Simply abolishing indigenous or religious law “can lead to people resorting to informal ‘people’s law’ and the official law will become ‘paper law,’”\(^{232}\) which would be disastrous in terms of South Africa’s attempts to solidify a new Constitution and a new legal order.

The incorporation of a constitutional democracy and human rights values into local culture may be accomplished by recognizing what those differing systems of thought have to offer to each other with regard to the protection of human rights. Ultimately, the preservation of “traditional” customary and religious law may be the best way that the courts can ensure the continued development of a “modern” South Africa by facilitating respect for the rule of law and constitutionalism among all South African people.

\textit{Erin E. Goodsell}\

\(^{230}\) See \textit{id.} at 160.

\(^{231}\) See \textit{id.} at 4.

\(^{232}\) Dlamini, \textit{supra} note 82, at 6A-45.

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