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## Religious Freedom and Human Rights in South Africa After 1996: Responses and Challenges

*Cornel W. du Toit\**

### I. INTRODUCTION

In 1996, a new constitution was passed in South Africa displaying cultural and religious sensitivity in an ethnically-diverse country. The previous constitution entrenched the religious values and moral norms of the mainline churches to the exclusion of the indigenous population. In contrast, the new constitution contains a secular bill of rights that adequately protects religious freedom, but it also addresses real-life inequities in employment, health care, and housing in a way that ecclesiastic rhetoric did not.

Despite these benefits, there are challenges to the implementation of the new constitutional provisions of South Africa. The Western orientation of the constitution disregards the collective nature of human rights in the African context. Additionally, the living (i.e. unwritten) law, which underlies traditional African society, does not really feature in the constitution, despite some lip service to it. Finally, the African worldview makes no distinction between the sacred and the worldly (religious and secular).

The new South African Constitution permits the secular administration of human rights if the dialogue concerning those rights is sensitive to the challenges presented by the universality of human rights, the living law, and the non-separation of the sacred and the secular in African culture. This Article argues that the bill of rights in the new South African Constitution institutionalizes the moral and judicial rights of human beings in a way that makes far better sense in an African context than the standard Western approach adopted by the South African mainline churches. The approach in the bill of rights is more appropriate in South Africa since African morality and belief systems are essentially secular. Part II of the Article provides a background of South African history and

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constitutional development. Part III reviews secular and religious human rights, and Part IV examines three problem areas: universal versus contextual rights, living law, and the religious-secular dichotomy. Part V identifies responses to the constitution from a number of religious groups. Finally, Part VI offers a brief conclusion.

## II. BACKGROUND

### *A. South African History*

There was a strong alliance between politics, law, Western religion, and Afrikaner civil religion in pre-1994 South Africa. “Afrikaner civil religion, which . . . promoted in particular the three Afrikaans [Reformed] churches, offered religious justification for whites’ and Afrikaners’ self-assumed position of superiority in relation to the ‘non-white’ population and thus also for the policy and ideology of apartheid.”<sup>1</sup> And even today, the country’s statutory and common law still show a Christian bias.<sup>2</sup> Religion, specifically the Reformed traditions, provided the theological justification to keep discriminatory laws in place, and Reformed churches were favored by the Apartheid government. “Legislation of a not so overtly religious nature, such as the infamous Prohibition of Mixed Marriages Act and the controversial section 16 of the Immorality Act, were enacted at the behest of, amongst others, the Afrikaans churches in an attempt to prevent ‘miscegenation.’”<sup>3</sup> Some laws had a specifically Christian bias, like the censorship law in the Publications Act,<sup>4</sup> which introduced blasphemy as a criterion for

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1. See Lourens M. du Plessis, *Religious Human Rights in South Africa*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 441, 446 (John Witte, Jr. & Johan D. van der Vyver eds., 1996).

2. See *id.* at 443.

3. *Id.* at 447. The Prohibition of Mixed Marriages Act 55 of 1949 “[p]rohibited marriages between white people and people of other races. Between 1946 and the enactment of this law, only 75 mixed marriages had been recorded, compared with some 28,000 white marriages.” Alistair Boddy-Evans, *Apartheid Legislation in South Africa*, ABOUT, <http://africanhistory.about.com/library/bl/blsalaws.htm> (last visited Mar. 22, 2006). The Immorality Amendment Act 21 of 1950 “[p]rohibited adultery, attempted adultery or related immoral acts (extra-marital sex) between white and black people.” *Id.* For an extensive discussion of the Immorality Act, see generally OP DIE SKAAL: GEMENGDE HUWELIKE EN ONTUG [ON THE SCALE: MIXED MARRIAGES AND IMMORALITY] (Etienne de Villiers & Johann Kinghorn eds., 1984).

4. Du Plessis, *supra* note 1, at 444 (citing Publications Act 42 of 1974 s. 42).

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ensorship; the National Education Policy Act,<sup>5</sup> which prescribed a Christian orientation in education; and some Sunday observance laws.<sup>6</sup> These laws focused on the ruling white minority and favored their religious and cultural preferences. A section of “the Blacks (Urban Areas) Consolidation Act of 1945 authorized the prohibition of blacks from attending church services and functions in urban areas occupied by ‘non-blacks.’”<sup>7</sup> White churches did not oppose this law, suggesting that they condoned it.

It is important to note that in apartheid South Africa, the religious and secular spheres were closely linked.<sup>8</sup> The preamble to the erstwhile constitution explicitly acknowledged the rule of the Christian God.<sup>9</sup> In practice, the system resembled a theocracy as expressed in the Calvinist-centered Belgian Confession accepted by the Afrikaans Reformed Churches.<sup>10</sup> This is positively expounded in a theology of the kingdom of God, which gave Christians a mandate

5. *Id.* (citing National Education Policy Act 39 of 1967 s. 9).

6. The Belgian Confession, one of the three creeds of Afrikaans Reformed churches in South Africa, maintains that state authority has the duty to promote true (i.e., Christian Reformed) religion and to eliminate all idolatrous forms of religion. See GUIDO DE BRES, CONFESSIO BELGICA (1561), available at <http://www.reformed.org/documents/BelgicConfession.html>.

7. Du Plessis, *supra* note 1, at 446 (referencing Urban Areas Consolidation Act 25 of 1945 s. 9(7) (Black)).

8. See HERMANN GILIOME, THE AFRIKANERS: BIOGRAPHY OF A PEOPLE 477 (2003). A so-called Sauer report mandated by former South African Prime Minister Daniel Malan in 1947 specifically addressed the role of religion in the apartheid regime: “It was decreed by God that diverse races and volke [peoples] should survive and grow naturally as part of a Divine plan. . . . The Gospel has to be taught to all *volke* and population groups as part of the calling of the Christian church.” *Id.*

9. See S. AFR. CONST. 1983 pmb1.

In humble submission to Almighty God . . . we declare that we are conscious of our responsibility towards God and man; are convinced of the necessity of standing united and of pursuing the following national goals: to uphold Christian values and civilized norms, with recognition and protection of freedom of faith and worship . . . .

*Id.*

10. See DE BRES, *supra* note 6. Article 36 of the Confessio Belgica reads (translated): “And the government’s task is not limited to caring for and watching over the public domain but extends also to upholding the sacred ministry, with a view to removing and destroying all idolatry and false worship of the Antichrist; to promoting the kingdom of Jesus Christ . . . .” *Id.* This Article of faith is presently defended by Reformed Theologian Pieter Coertzen. See generally Pieter Coertzen, *Die Gereformeerde Kerke in Suid-Afrika en die verhouding tot die owerheid: geleenthede en knelpunte* [The Reformed Churches in South Africa and the Relation with the Government: Opportunities and Problematic Areas], 43 DUTCH REFORMED THEOLOGICAL J. (NGTT) 197 (2002).

to embody God's reign in societal structures.<sup>11</sup> Calvinism sees politics as a religious vocation,<sup>12</sup> and the Christian state has to support the church in its mission. It is well known that Reformed theologians provided politicians with theological backing for the apartheid ideology for many years. Many believed that it was the preordained will of God that whites, who represented the "only true" religion and civilization, had to colonize Southern Africa three hundred years ago to evangelize its people.<sup>13</sup> Unfortunately, the structures erected were almost exclusively for the benefit of whites.<sup>14</sup>

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11. JOHN W. DE GRUCHY, *LIBERATING REFORMED THEOLOGY: A SOUTH AFRICAN CONTRIBUTION TO AN ECUMENICAL DEBATE* 246 (1991).

12. See P.G.J. Meiring, *Nationalism in the Dutch Reformed Churches*, in *CHURCH AND NATIONALISM IN SOUTH AFRICA* 56, 62 (Theo Sundermeier ed., 1975) ("This awareness of vocation can only be understood properly if it is set against the background of Afrikaner Calvinism. And under Calvinism a certain way of life rather more than a set of theological truths is to be understood. The Afrikaner traditionally has had an unshakeable belief in the sovereignty of God, the Almighty, who is at work through the ages, completing his plan for all mankind, for individuals as well as nations.").

13. Cornel du Toit, *Fin de siècle and the Development of a Post-Secular Religion*, 4 *RELIGION & THEOLOGY* 13 (1997).

14. The *Kairos* document, made public on 25 September 1985, condemned "state theology" and the "false peace" and "counterfeit reconciliation" of the "church theology" preached in so-called "English-speaking churches." See du Plessis, *supra* note 1, at 447-48. The *Kairos* document was one of the most influential critiques against Apartheid directed to South African churches. It was written by various theologians. See *THE KAIROS DOCUMENT: A THEOLOGICAL COMMENT ON THE POLITICAL CRISIS IN SOUTH AFRICA* (2d rev. ed. 1986). The document criticizes state theology and church theology and challenges the churches to proclaim a prophetic theology. "Our services and sacraments have been appropriated to serve the individual for comfort and security. Now these same Church activities must be reappropriated to serve the real religious needs of all people . . ." *Id.* at 29.

The Dutch Reformed Church, the largest white Reformed church, has still not accepted the Belhar confession, which remains a major stumbling block to unification with the Uniting Reformed Church, comprising the Reformed black and colored communities. During its convention in Ottawa in August of 1982, the World Alliance of Reformed Churches declared a *status confessionis* (state of confession) with reference to the situation in South Africa, which means a conviction carrying the status of confession. The Dutch Reformed Mission Church (comprised of predominantly colored people) responded on its October 1982 Synod by accepting and declaring a *status confessionis*. This became known as the Confession of Belhar with three articles of faith dealing with lived unity, true reconciliation, and sympathetic justice. The white Reformed church, among others, has difficulty accepting a fourth confession. See generally JOHAN BOTHA & PIET NAUDÉ, *OP PAD MET BELHAR [PROGRESSING WITH BELHAR]* (1998).

*B. The 1996 South African Constitution*

In contrast, the current South African Constitution, adopted in 1996, is hailed as one of the most liberal in the world.<sup>15</sup> Its emphasis on human dignity, freedom, equality, and individual rights contrasts starkly with the preceding history of apartheid. The South African Constitution deals with concerns about the segregation and dominance of white Christianity by displaying sensitivity to linguistic, cultural, and religious rights, which will probably receive much attention in the years to come.

While the new South African Constitution extends rights to groups who have historically been discriminated against, various religious groups criticize many provisions extending these new rights as conflicting with their beliefs and practices. The constitution includes provisions dealing with discrimination based on sexual orientation and gender, which displease Christian and Muslim citizens. Other provisions of the new constitution allow abortion, which provokes strong opposition from Christian groups. Other provisions on bodily integrity conflict with the traditional practices of the indigenous African population.<sup>16</sup>

The new constitution also guarantees human dignity and security of the person.<sup>17</sup> In particular, section 12 states that “[e]veryone has the right . . . not to be treated . . . in a cruel, inhumane or degrading way [and] . . . the right to bodily and psychological integrity, which includes the right . . . to security in and control over their body.”<sup>18</sup> Some may consider traditional African practices to contravene these provisions.<sup>19</sup>

Moreover, the new constitution demands equal treatment of women. It states that “[e]veryone is equal before the law and has the

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15. See SA Ruling ‘May Allow Gay Unions,’ BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/4055549.stm> (last visited May 4, 2006); see also *infra* Part II.B. For an overview of the 1996 Constitution and a brief history of the passage process, see generally Lucrecia Seafeld, *South Africa: The Interdependence of All Human Rights*, in HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS: REALIZING THE PROMISE FOR OURSELVES 295, 295–336 (Abdullahi Ahmed An-Naim ed., 2003).

16. See *infra* Part IV.D.

17. S. AFR. CONST. 1996 ch. 2, §§ 10, 12.

18. *Id.* ch. 2, § 12(1)(e), (2)(b).

19. For example, virginity testing and genital mutilations, practiced by some traditional African cultures, are viewed by some as violations of the human right to bodily integrity and human dignity. See discussion *infra* Part IV.D.

right to equal protection and benefit of the law.”<sup>20</sup> Discrimination based on gender, sex, pregnancy, and marital status is prohibited.<sup>21</sup>

The South African legislature has construed provisions of the constitution to permit abortion. Relying on provisions regarding human dignity,<sup>22</sup> equality,<sup>23</sup> reproductive rights,<sup>24</sup> and bodily integrity,<sup>25</sup> the legislature passed the Choice on Termination of Pregnancy Act, which “extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs.”<sup>26</sup>

The post-apartheid South African Constitution is the first constitution in the world to make illegal any discrimination based on sexual identity.<sup>27</sup> In 2002, the Constitutional Court interpreted this provision to allow adoption by gay couples.<sup>28</sup> Since then, gay-rights groups have been advocating for the legalization of gay marriage.<sup>29</sup>

20. S. AFR. CONST. 1996 ch. 2, § 9(1).

21. *Id.* ch. 2, § 9(3).

22. *Id.* ch. 2, § 10 (“Everyone has inherent dignity and the right to have their dignity respected and protected.”).

23. *Id.* ch. 2, § 9.

24. *Id.* ch. 2, § 12(2)(a).

25. *Id.* ch. 2, § 12(2)(b).

26. Choice on Termination of Pregnancy Act 92 of 1996 pmbl. [hereinafter Pregnancy Act], available at <http://www.info.gov.za/acts/1996/a92-96.pdf>. The Act authorizes abortion on a woman’s request alone during the first twelve weeks of the gestation period. *Id.* ch.2, § 2(1)(a). Between the thirteenth and twentieth week, abortion is legal if a medical practitioner also finds that the continuation of pregnancy might harm the mother physically or mentally, that the fetus would run a substantial risk to “suffer from a severe physical or mental abnormality,” that the mother conceived via rape or incest, or that “the continued pregnancy would significantly affect the social or economic circumstances of the woman.” *Id.* ch. 2, § 2(1)(b)(i)–(iv). After the twentieth week of gestation the Act allows abortion if two medical practitioners or a medical practitioner and a midwife conclude that the continuation of the pregnancy would threaten the mother’s life, “would result in a severe malformation of the fetus,” or “would pose a risk of injury” to the unborn child. *Id.* ch. 2, § 2(1)(c)(i)–(iii).

27. See S. AFR. CONST. 1996 ch. 2, § 9(3) (“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . sex . . . marital status . . . *sexual orientation*.”) (emphasis added).

28. *Du Toit v. Minister of Welfare & Population Dev.* 2003 (2) SA 198 (CC) at 198 (S. Afr.); see *Equal Benefits for SA Gays*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/2856811.stm> (last visited May 4, 2006); *South Africa’s Gays Target Marriage*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/2251859.stm> (last visited May 4, 2006); *South Africa To Have Gay Weddings*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/4487756.stm> (last visited May 4, 2006).

29. See *SA Ruling ‘May Allow Gay Unions,’* BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/405549.stm> (last visited May 4, 2006). The group advocating for gay marriage is the Lesbian and Gay Equality Project. *Id.*

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Their efforts recently achieved success when the Constitutional Court legalized same-sex marriage in South Africa.<sup>30</sup>

## III. SECULAR HUMAN RIGHTS AND RELIGION

Alasdair MacIntyre, a theologian, considers belief in human rights similar to “belief in witches and unicorns.”<sup>31</sup> To him, “[n]atural or human rights are fictions.”<sup>32</sup> By contrast, authors Max Stackhouse and Stephen Healey view human rights as “cultural by-products of socio-evolutionary processes.”<sup>33</sup> They state that “human rights . . . are seen to be an historical artifact, pertinent only insofar as social conditions stand at a particular stage of development, and subject to disappearance if those conditions do not obtain or eventually pass away.”<sup>34</sup>

If human rights are fictitious, the idea of *religious* human rights would be doubly so because of the metaphysical dimension of belief. Sinful humans have no rights before God, because everything comes as an undeserved gift from God.<sup>35</sup> The South African Reformed churches espouse these views and opposed the promotion of human rights.<sup>36</sup>

30. *Minister of Home Affairs v. Fourie* 2005 (3) SA 429 (CC) (S. Afr.).

31. Max L. Stackhouse & Stephen E. Healey, *Religion and Human Rights: A Theological Apologetic*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES, *supra* note 1, at 488 (quoting ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 69, 70 (2d ed. 1984)).

32. *Id.* at 489.

33. *Id.*

34. *Id.* One can imagine, for example, that discrimination against gay people or women in society may end in the future, in which case the propagation of rights of women and gay people become obsolete. “Living constitutions and bills of rights ‘must be reinterpreted as times change . . .’” ALAN M. DERSHOWITZ, RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS 225 (2005).

35. See W.D. Jonker, *Christelike Geloof en Menseregte*, in MENSEREGTE [HUMAN RIGHTS], 48 (D.A. du Toit ed., 1984). Professor Jonker, a prominent South African theologian, explains that the idea of human rights is unacceptable for a conservative Christian because of the liberal and humanistic background of the idea. *Id.*

It came to the fore during the Enlightenment and with the American Declaration of Independence (1776). It is foreign to the Bible and displays a revolutionary inclination rejecting the authority instituted by God. . . . Humans have, according to the Bible, no rights to appeal to. Everything a human has, comes undeserved as a gift from God. . . . The idea of a ‘right’ results from the acceptance of the glorification and autonomy of humans.

*Id.*

36. “There exists in our country . . . an explicit dislike in the concept ‘human rights’ and what it stands for. [One reason] is that it is identified with the United Nations and the World

Others argue that religious human rights are self-contradictory.<sup>37</sup> Ironically, “human rights thinking set out to protect the outcome of the ‘religious debate’ . . . but it has ended up . . . distorting it.”<sup>38</sup> The difficulty is that “religious belief becomes acceptable only to the extent that it poses no challenge to the accepted orthodoxies of [the human rights] framework.”<sup>39</sup> Thus, as the human rights debate raises issues like gender equality, racial discrimination, and homosexuality, which are still contentious in many religions, it influences the outcome of the religious debate.<sup>40</sup>

However, human rights can be administered effectively on a secular, nonreligious basis. Secularism does not exclude religion but represents alternative ways of exercising moral and belief systems outside the confines of formal religious structures. In a secular society, religion has no monopoly on value systems fundamental to human rights; hence, different people can honor and hold the same value without basing it on similar religious principles. For example, the basic value of respect for human life can be inferred from different religious texts as well as from secular, philosophical, or sociological premises. Although religious history includes abundant examples of human rights violations, most religions have contributed to good interpersonal relations that form the basis for human rights.<sup>41</sup>

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Council of Churches, and the world wide campaign against apartheid.” *Id.* at 47. Some churches opposed the idea of individual human rights because an emphasis on individual rights may induce aberration from church doctrine. *See generally* Pieter Coertzen, *Godsdiensvryheid in Suid-Afrika—‘n geleentheid vir voortgaande reformasie* [*Freedom of Religion—An Opportunity for Ongoing Reformation in South Africa*], 46 *DUTCH REFORMED THEOLOGICAL J.* (NGTT) 88 (2005).

37. *See, e.g.*, Malcolm D. Evans, *Religion and the Law: The Role of the ‘Religious’ Debate*, in *LAW AND RELIGION IN CONTEMPORARY SOCIETY: COMMUNITIES, INDIVIDUALISM AND THE STATE* 177, 190 (Peter W. Edge & Graham Harvey eds., 2000).

38. *Id.*

39. *Id.* at 182.

40. *Id.* at 190.

41. Examples can be cited of both the positive and negative use of religion to accomplish one’s goals:

God’s law has been the source of justification for genocide crusades, inquisitions, slavery, serfdom, monarchy, anti-Semitism, anti-Catholicism, bigotry against Muslims, genocide, against native Americans, homophobia, terrorism, and many other wrongs. God’s law has also been cited in opposition to these evils. Today God’s law is invoked both in support of terrorism and in justification of the war against terrorism.

Jonker, *supra* note 35, at 24.

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Though different, the values advocated by the secular sphere are not necessarily opposed to religious values. While many Christians may specifically invoke the Bible as the source of their values when commenting on a specific right, the secular voice invokes the constitution enacted by positive law. From the perspective of local black Christians, their plight may have been addressed from the pulpit without making real change to their lives. Effective change was eventually brought about by secular values entrenched in the constitution and not by Christian values propagated by churches.<sup>42</sup>

A discourse on secular values is also more effective because Christian values have no legal force, whereas human rights, protected by the bill of rights, have judicial leverage. Additionally, Christian values may differ from denomination to denomination, leading to doctrinal strife, while human rights are less ambiguous and can be enforced by law. Therefore, churches could retain a significant role in the public sphere if they engage in serious dialogue with the “secular” proponents of human rights. This secular discourse is appropriate to the South African context given that few black people make the holy/secular distinction.

In any case, there is little difference between secular human rights and religious human rights, and religious rights may become obsolete.<sup>43</sup> Freedom of speech, freedom of association, and freedom

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42. The African National Congress (ANC) has taken the only noteworthy initiative to involve religion in addressing the problems of crime, violence, and corruption. See African National Congress Homepage, <http://www.anc.org.za> (last visited May 4, 2006). The ANC propagates moral renewal in its booklet *THE MORAL RENEWAL OF THE NATION*, available at <http://www.anc.org.za/ancdocs/misc/moralrenewal.html>.

Nelson Mandela addressed religious leaders in Johannesburg on June 24, 1997, stressing that all sectors of South African society, including the religious sector, have to collaborate “to bring about social transformation through the reconstruction and development of our country. . . . Government alone cannot bring about this change.” Nelson Mandela, *From Liberation to Transformation*, PHAKAMANI: MAGAZINE OF THE ANC COMMISSION FOR RELIGIOUS AFFAIRS, Apr. 2004, at 7–9. In view of the fragmented, uncoordinated efforts so far, he asked them whether there is not “a way in which the participation of organized religions in our programme of reconstruction and development can be strengthened . . . through cooperative endeavours with each other and with government and community.” *Id.* He pointed out that “the ANC recognizes that social transformation cannot be separated from spiritual transformation” and proposed that all religious leaders should gather within the next two months to “analyse the cause of this spiritual malaise, and to find ways of tackling it.” *Id.* He promised that the ANC stands ready to assist such an endeavor. *Id.*

43. Churches antagonistic towards human rights have tempered their response. See Jonker, *supra* note 35. Jonker confirms that “the world church is practically unanimous that the issue at stake (i.e. human rights) cannot be dismissed or neglected by Christians.” *Id.* at 50. From churches, one could expect religious comment on secular rights and dissent from

of conscience implicitly protect religious freedom, although it may become difficult to apply these rights in the light of religious diversity. In this regard, Evans points out that at present most countries have “multi-faith societies” and, therefore, “a variety of competing dialogues between the State and religious communities.”<sup>44</sup> These competing dialogues will either lead to complicated laws regulating differences or result in a system of secular rights that deal generically with religious rights. One could say that religious rights are reduced to the function of regulating religion insofar as it affects the public sphere where different religions and groups compete for domination (e.g., education, decisions affecting ethically based laws, and religious participation in public ceremonies).

#### IV. CHALLENGES

Successful application of the 1996 Constitution faces various challenges because of the uniqueness of the African context. This section questions the universality and contextuality of the Western approach to human rights in South Africa. The living law and the lack of separation between the sacred and the secular are other aspects of South African culture that challenge the success of the new rights framework.

##### *A. Universal Versus Contextual Rights*

The values upheld in the new constitution reflect the global development of a human rights culture with a strong Western basis. In this regard, van der Venn asks “why Western countries try to ‘convince’ developing countries of the meaning and usefulness of human rights, and why they urge developing countries to apply human rights the way they are applied in Western countries: what economic and/or political interests are at stake?”<sup>45</sup> Among the many possible factors involved, economic globalization and world peace stand out. The progress of globalization presupposes shared global values to sustain worldwide commercial success. This does not mean

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specific rights such as legalized abortion on demand, rights of gay people, and advancement of women in all spheres of life, but not a total dismissal of human rights.

44. Evans, *supra* note 37, at 181.

45. JOHANNES A. VAN DER VENN ET AL., *IS THERE A GOD OF HUMAN RIGHTS?* 35 (2004).

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that universal values leave no room for culture-specific values. There is not just one world-view, but many conceptions of the good life and a variety of norms and values.<sup>46</sup> Van der Venn states, “It could . . . indicate imperialist tendencies if we try and put an end to such pluralism by imposing our own world-view and set of values and norms . . . on all people, including adherents of other religions” and people with different lifestyles.<sup>47</sup> The question is to what extent the South African Constitution incorporates universal values and to what extent these represent and accommodate “authentic” African values.

Van der Venn critically questions whether the West tries “to sell its own, thoroughly contextually determined notion of society and the state—a notion based on human rights—to the rest of the world as a universal concept[.] Is universality not just a Western ideology camouflaging an underlying neo-colonialism?”<sup>48</sup> Similarly, many fear that

the doctrine of human rights [increasingly] claim[s] to be the single universal framework within which all views must fit. One might say it has all the hallmarks of a proselytising religion and advocates the adoption of a particular worldview which does not necessarily reflect the views of individuals in some religious cultures.<sup>49</sup>

The application of the human rights framework through the 1996 Constitution may be problematic in view of the unique context of South African society and culture. An example of such conflict is found in the collective experience of South Africans as opposed to the individual nature of human rights. What takes precedence?—the horizontal dimension of the community as author of its own laws or the vertical dimension of human rights? Human rights in traditional

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46. *Id.* at 49.

47. *Id.*

48. *Id.* at 141.

49. Evans, *supra* note 37, at 183 (footnotes omitted). This problem does not exclusively concern the West but also surfaces wherever one group tries to strengthen its hegemony. VAN DER VENN ET AL., *supra* note 45, at 143. Broadly speaking, it is the problem facing any effort to reconcile universalism with particularism, globalism with contextualism, and historicism with transcendental ideals. This list could also include “ethnocentrism, in-group and out-group thinking, proselytisation, expansionism and imperialism.” *Id.* at 143, 152, 203; *see also* Cornel W. du Toit, *Diversity in a Multicultural and Poly-Ethnic World: Challenges and Responses*, 11 RELIGION & THEOLOGY 246 (2004) (describing the dynamics and evolutionary history of the societal in-group and the out-group mechanism).

Africa do not stem from the individual but from the community; African values are experienced collectively.<sup>50</sup> Wa Mutwa says that although many of the rights enumerated in human rights law pertain to individuals, they only make sense in a collective, social perspective.<sup>51</sup> The individual's morals, attitude towards life and death, and identity derive from this collective, historical construction of reality.

The human rights framework of the 1996 Constitution may also be problematic because traditional South African culture still retains aspects of unwritten law and recognizes no separation between the religious and secular spheres.

### B. "Living Law"

Codified law is foreign to traditional Africa and was first introduced with colonialism. Traditional African societies function as oral communities regulated by unwritten law.

In some traditional African contexts, taboo takes the place of law. Taboo is an unwritten or living law guarded by tradition. "Taboo (or tabu) is a Polynesian word which means that a particular person, object, word or action is to be avoided . . . ."<sup>52</sup> An offender who infringes a taboo becomes polluted and may incur an automatic penalty from an outraged spirit or deity.<sup>53</sup> However, the culprit may avoid the punishment, causing the penalty to fall on the innocent. To prevent harm to the innocent, the community inflicts the penalty on the offender for the wrongdoing and satisfies the power whose

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50. Rhoda E. Howard, *Group Versus Individual Identity in the African Debate on Human Rights*, in HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES 159, 162 (Abdullah Ahmed An-Naim & Francis Deng eds., 1990).

51. Makau wa Mutwa, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 1, at 439. *But see* Howard, *supra* note 50, at 162 (arguing that even if Africans "value their group identity more than their individual identity, this does not invalidate the applicability of human rights to present-day African society").

52. S.A. THORPE, PRIMAL RELIGIONS WORLDWIDE: AN INTRODUCTORY, DESCRIPTIVE REVIEW 114 (1992). "Fear of pollution may also provide a good reason for designating something as taboo. Usually anything involving blood is taboo . . . a corpse, is taboo. Thus the principle of life itself is recognized as sacred. To treat it lightly is dangerous and polluting." *Id.* at 114-15.

53. *See* Hutton Webster, *Influence of Superstition on the Evolution of Property Rights*, 15 AM. J. SOC. 794, 794-95 (1910) ("[T]he breaking of taboo is commonly regarded as the vengeance of an outraged spirit or deity, who visits with sickness, disease, or death the guilty individual.").

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wrath is incurred by the infraction of the taboo.<sup>54</sup> Therefore, the entire community is involved in the violation and rectification of a moral law.<sup>55</sup>

In some cases, “the unwritten law is sufficiently strong to resist being incorporated into written law [of the ruling elite] because of the risk of being adapted to it.”<sup>56</sup> This has occurred to some extent in South Africa where the “indigenous law and institutions have . . . shown remarkable resilience in the face of imposed state law, . . . and they continue to uphold their own regulations and mechanisms of conflict management and conflict resolution.”<sup>57</sup> It is well known that in South Africa, parallel systems of law, medicine, and religion exist—sometimes called religion by day and religion by night. For example, some South Africans adhere to both a Western style of burial and an African one. This is especially true in rural areas, such as Venda, Eastern Cape, and KwaZulu Nata where tribal systems and indigenous practices are still observed.<sup>58</sup>

Other examples of living law include “the regulative actions of the courts of ward heads, chiefs’ courts and people’s courts in the townships. Examples of living laws in both indigenous and religious communities are marriage law, family law, property law, law of delict, and succession law.”<sup>59</sup> Living law is supported by the South African Constitution in section 15, which deals with freedom of conscience, religion, thought, belief, and opinion.<sup>60</sup> Notably, this section later states that “[r]ecognition in terms of [an unwritten law] must be

54. *Id.* at 795 (explaining that the community tries to remove or separate the taboo individual).

55. *Id.*

56. VAN DER VENN ET AL., *supra* note 45, at 217 (citing G. van Niekerk, *Indigenous Law and Narrative; Rethinking Methodology*, 32 COMP. & INT’L L.J. S. AFR. 208–27 (1999)).

57. *Id.*

58. In the words of Mndende, an African religious traditionalist, “Most black Christians were, and are, Christians on Sunday, but ATR [African Traditional Religion] from Monday to Saturday.” Nokuzola Mndende, *From Racial Oppression to Religious Oppression: African Religion in the New South Africa*, 11 DIALOGUE & ALLIANCE 39, 41 (1997); *see also* S.A. THORPE, *AFRICAN TRADITIONAL RELIGIONS: AN INTRODUCTION* (1991).

59. VAN DER VENN ET AL., *supra* note 45, at 217; *see, e.g.*, GEORGE B.N. AYITTEY, *INDIGENOUS AFRICAN INSTITUTIONS* 30–38 (1991).

60. S. AFR. CONST. 1996 ch. 2, § 15. “This section does not prevent legislation recognizing (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.” *Id.* ch. 2, § 15(3)(a)(i)–(ii), *available at* <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#15>.

consistent with this section and the other provisions of the Constitution,” suggesting that recognition of the living law may be quite limited.<sup>61</sup>

### *C. No Separation Between Religious and Secular*

For religious freedom, religious rights, human rights, and other law to be taken seriously in the African context, the South African human rights discourse must allow for non-separation between the religious and the secular. The question remains: To what extent does the Western development of a relation between law and religion, as reflected in the South African Constitution, accommodate African religion and culture?

Africans do not recognize a sharp division between the sacred and the secular. In Africa the spirit world mirrors the material world, which is not divided into different spheres. African spirituality is often practiced in the shadowy realm of the in-between. There is no space for that realm in formal societal and religious structures; in technocentric, daylight reality. It nevertheless influences Africans’ longings and decision making. In fact, “the tendency for politicians to seek spiritual power, and for spiritual leaders to develop substantial material power, shows distinctive patterns in continuity with systems and ideas rooted deep in Africa’s history.”<sup>62</sup>

African spirituality can only flourish when a person is linked in the causal chain that binds the individual, community, ancestors, nature, world, and God together in a single, holistic force field. Life is integrated. For primal humans,<sup>63</sup> reality is a network of interrelated spiritual forces. These forces are not restricted to some terrain in life; the role of the forefathers is experienced in everyday life. The religious and the secular intermingle in the social, psychological,

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61. *Id.* ch. 2, § 15(3)(b).

62. STEPHEN ELLIS & GERRIE TER HAAR, *WORLDS OF POWER: RELIGIOUS THOUGHT AND POLITICAL PRACTICE IN AFRICA* 99 (2004).

63. It would be difficult to find Africans representing a “pure” (traditional) primal worldview. However, many aspects of the primal worldview, operative a hundred years ago, can still be found among African Traditional Religions (ATRs). See Cornel W. du Toit, *Issues in the Reconstruction of African Theology: African Hermeneutics as Key to Understanding the Dynamics of African Theology*, in 11 *RESEARCH IN THE SOCIAL SCIENTIFIC STUDY OF RELIGION* 37, 55–59 (Joanne Marie Greer & David O. Moberg eds., 2000); see also S.A. THORPE, *supra* note 52, at 1–10.

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religious, political, and cultural aspects of life. In the traditional African context nothing is profane.

Westerners' lives, by contrast, are neatly compartmentalized. The transcendent is barely discernible in the hurly-burly of everyday life. On the whole, the developmental history of natural science contributed to the opinion that many Westerners operate with an immanent, closed, scientific worldview governed by cause and effect.<sup>64</sup> Spirituality—if it exists at all—is confined to a well-organized, rational worship session once a week. There is, however, a growing recognition that the secular is not entirely irreligious, and the profane is not always readily explicable in rational terms—a fact that the primal African accepts as natural.<sup>65</sup>

But “the traditional spirit world has lost much of its original morally neutral character” as a result of factors like the nineteenth-century evangelization of Africa, the institution of a secular state, and the loss of esteem for “village elders and notables who officiate in traditional religious cults.”<sup>66</sup> The spirit world has acquired a negative status and is seen as inherently evil by African Pentecostal and other groups.<sup>67</sup> This does not mean that the traditional spirit world does not exert a tremendous influence on Africans; to the contrary, it supports the idea of a secular African spirituality. Many of Africa's new religious movements are attempts to revive these sources of power. These religious movements are trying to re-conquer the public sphere with a “spirit” idiom to address social evil.<sup>68</sup>

The non-separation between the religious and the secular suggests that a secular African spirituality would be the best way to accommodate a human rights discourse. The term “secular religion,” as used in this section, refers to the integral nature of African traditional values and morality that are part of everyday life and not confined to religious or denominational compartments;<sup>69</sup> it is where

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64. Although the generality of this statement is acknowledged, the present-day “science and religion dialogue” testifies to the urgent quest of maintaining supra natural values in an increasingly techno-scientific worldview. See Cornel W. du Toit, *Wisdom Lost and Regained? The Possibility of Reintegrating a Fractured Techno-Scientific Culture*, in 12 RELIGION & THEOLOGY 129, 141 (2005).

65. See du Toit, *supra* note 63, at 58.

66. ELLIS & TER HAAR, *supra* note 62, at 94.

67. *Id.*

68. *Id.* at 100.

69. Chukwuemeka Nze, *The Influence of Christian Values on Culture*, in IDENTITY AND CHANGE: NIGERIAN PHILOSOPHICAL STUDIES, 167 (Theophilus Okere ed., 1995).

religious and societal concerns, religion and tradition, and sacred and secular are seen as one.

Developments in South Africa since 1996 increasingly show that much of the black African response to issues concerning religious rights comes from the secular part of society rather than from the church,<sup>70</sup> suggesting that Africans do not distinguish between religious rights and human rights and find religious rights irrelevant in the absence of basic human rights. Thus, secular human rights, rather than the right to religious freedom, seem to be more apposite to the African context and offer a better language for articulating African values and morals. In view of this, the provisions of the new constitution may be successfully implemented in South Africa through a discourse on secular human rights.

#### V. RESPONSES TO THE NEW CONSTITUTION

With the new South African Constitution taking such a liberal stand on human rights, it is not surprising that many provisions of the constitution provoked vigorous responses. This section focuses on the responses to post-1996 constitutional development that came from the Reformed mainline churches, the Muslim community, and African traditionalists.

##### *A. African Initiated Churches' Response*

The African Initiated Churches (AICs),<sup>71</sup> the largest religious group in South Africa, did not officially respond to the constitution, probably because they have no positive history of protection of religious rights. Since the religious rights of these churches have not been protected historically, they may not expect the current constitution to protect their interests either.

Generally, blacks as a whole have raised issues pertaining to the secular sphere. Such issues include health, unemployment, housing, land distribution, the place of women in government and society, and violence.<sup>72</sup> Although most of these issues surface in black

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70. See discussion *supra* Part IV.A.

71. The AICs are the strongest black Christian church and represent 31% of the black population. They are characterized as comprising charismatic as well as traditional African elements in their worship. See du Toit, *supra* note 63, at 59–60.

72. See generally SOUTH AFRICA: THE CHALLENGE OF CHANGE (Vincent Maphai ed., 1994) (containing essays by various authors on these issues).

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religious communities, blacks view the bill of rights rather than religious rights as impacting their lives.<sup>73</sup> Previously, mainline church-talk about dignity and salvation remained aloof from the everyday problems facing blacks and did not change their physical hardships. The new constitution, and the implementation of its bill of rights, seems to promise real change.

*B. White Reformed Response*

The main causes of discontent among some white Christian believers are religious education, the abolition of the death penalty, abortion on request, gay rights, business on Sundays, and the legalization of gambling.<sup>74</sup> According to Pieter Coertzen, the Reformed view is that society must follow biblical guidelines when deciding these issues.<sup>75</sup> This is not possible in present-day South Africa where no single religion's norms and values are accepted by government. This is not to say that the values of different religions do not overlap significantly, but they cannot be promoted in the name of a specific religion. This necessary distance between church and state, especially in light of former apartheid policies, demonstrates that the secular realm is a more neutral space for deciding these issues.

Specifically, many white Reformed believers are dissatisfied with the way religious freedom was subordinated in the policy mandating religious studies as a school subject.<sup>76</sup> A 1999 document on religious education in South African schools defined religious education as "educating learners to be religious" or "educating learners about religion and religions."<sup>77</sup> The government decided that only the last option would be adopted to further tolerance and understanding

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73. Some of the key provisions of the bill of rights deal with housing, health care, sustenance and social security. "Everyone has the right to have access to adequate housing." S. AFR. CONST. 1996 ch. 2, § 26(1). "Everyone has the right to have access to health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance." *Id.* ch. 2, § 21(1)(a)-(c).

74. See Coertzen, *supra* note 10, at 202-03.

75. *Id.*

76. See Pieter Coertzen, *Freedom of Religion and Religious Education in a Pluralistic Society*, 43 DUTCH REFORMED THEOLOGICAL J. (NGTT) 185, 194-95 (2002); see also L.W.H. Ackermann, *Some Reflections on the Constitutional Court's Freedom of Religion Jurisprudence*, 43 DUTCH REFORMED THEOLOGICAL J. (NGTT) 177, 183-84 (2002).

77. See Coertzen, *supra* note 76, at 191-93.

among South Africans, especially concerning religious differences.<sup>78</sup> White Reformed believers argue that this is a poor option because, according to article 36 of the *Confessio Belgica*, the authority (the state) must create a space for the Christian Church to fulfill its mission (proclamation of the word of God).<sup>79</sup> However, the Reformed churches were favored by the apartheid system of religious education, and the current political climate will likely not allow them to implement their policies again.<sup>80</sup>

The government's policy opts for the model of a modern *secular state*, describing it as a state "which is neither religious nor anti-religious, [and] in principle adopts a position of impartiality towards all religions and other worldviews."<sup>81</sup> The school environment is seen as the space for general religious education, furthering understanding and tolerance: "Schools should also show an awareness and acceptance of the fact that values do not necessarily stem from religion, and that not all religious values are consistent with our Constitution."<sup>82</sup> This policy is confirmed by Kader Asmal, former Minister of Education, in his foreword to the *National policy on Religion and Education*, which states, "The Policy recognises the rich and diverse religious heritage of our country and adopts a cooperative model that accepts our rich heritage and the possibility of creative inter-action between schools and faith whilst, protecting our young people from religious discrimination or coercion."<sup>83</sup>

### C. Muslim Response

Responses from the Muslim community focus on the role that religious moral norms are allowed to play in society. According to

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78. *Id.*; see also NATIONAL POLICY ON RELIGION AND EDUCATION 6–7 (2003), <http://www.info.gov.za/otherdocs/2003/religion.pdf> [hereinafter POLICY ON RELIGION AND EDUCATION].

79. See Coertzen, *supra* note 76, at 202.

80. Christian national education was part and parcel of the Apartheid government and was effectively implemented for many years, benefiting the Reformed traditions. For background, see DE GRUCHY, *supra* note 11; see also GILMEE, *supra* note 8, at 468–69 (stating that the Christian National Education (CNE) "proposed schools that accepted the Holy Scriptures as their foundation, used mother tongue (Afrikaans) as the medium of instruction, and promoted the 'national principle,' which meant 'love for everything that is our own, with special reference to our country, our language, our history, our culture'").

81. POLICY ON RELIGION AND EDUCATION, *supra* note 78, at 4.

82. *Id.* at 13.

83. See *id.* at 2.

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Ebraim Moosa, the bill of rights restricts religion to the private and individual spheres.<sup>84</sup> “As soon as these freedoms are translated into practise, in the form of religious observances at schools or religion-based family law codes, then such actions are subject to conditions and limitations.”<sup>85</sup> Religion in the public realm must “comply with administrative procedures such as obtaining permission . . .[,] comply with a notion of equitable practice, and be voluntary.”<sup>86</sup> Moosa regards the bill of rights as dualistic in distinguishing between “religion as belief” and “religion as practise.”<sup>87</sup> This problem is “a binarism which contrasts religion with non-religion, the private with the public and the secular with the profane.”<sup>88</sup>

Muslim women adhering to Islamic law in South African society demonstrates how the bill of rights restricts religion to the private sphere. The constitution prohibits unfair discrimination based on gender and sex.<sup>89</sup> Muslim succession law, on the other hand, discriminates against women with respect to inheritance—the *Qur’an* teaches that a Muslim woman generally inherits only half of what her male counterpart inherits.<sup>90</sup> Muslims believe that Islamic law is not subject to censure on any ground whatsoever. Hence, “[i]t may be argued that women who choose to participate in cultural life . . . cannot contest the constitutionality of any rules that are characteristic of such a culture.”<sup>91</sup> This implies “that women who choose to live according to a religious legal system are subject to the

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84. Ebraim Moosa, *Tension in Legal and Religious Values in the 1996 South African Constitution*, in BEYOND RIGHTS TALK AND CULTURE TALK: COMPARATIVE ESSAYS ON THE POLITICS OF RIGHTS AND CULTURE 121, 121–35 (Mahmood Mamdani ed., 2000).

85. *Id.* at 129.

86. *Id.*

87. *Id.*

88. *Id.* at 133. For an example of the negative Muslim view towards law in general, see SAYYID MUJTABÁ MUSAVI LARI, *THE SEAL OF THE PROPHETS AND HIS MESSAGE: LESSONS ON ISLAMIC DOCTRINE* 19–27 (Hamid Algar trans., 2000) (“Legislation can belong, then, only to God.”).

89. Section 9 of the bill of rights stipulates, “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” S. AFR. CONST. 1996 ch. 2, § 9.

90. See QUR’AN, *Surah Al Baqarah* 4:11 (“*Allah* commands you in respect of your children’s inheritance. To the male a share equal to that of two females . . .”).

91. Christa Rautenbach & Nazeem M.I. Goolam, *Constitutional Analysis*, in INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA: RELIGIOUS LEGAL SYSTEMS: PART II, 125 (Christa Rautenbach & Nazeem M.I. Goolam eds., 2000).

laws of that system regardless of their social position within that system.”<sup>92</sup> According to Christa Rautenbach, consenting to such a view “would deter the transformation of all spheres of South African society based on equality and human dignity.”<sup>93</sup> This is another example of how difficult it is in a context of religious and cultural plurality to adhere to minority values, especially when they contradict the broader values enshrined in the constitution and bill of rights.

#### *D. Traditional African Response*

Some of the responses to the new constitution from the traditional African community involve section 12 of the bill of rights: “Everyone has the right to bodily and psychological integrity, which includes the right (1) to make decisions concerning reproduction; (2) to security in and control over their body; and (3) not to be subjected to medical or scientific experiments without their informed consent.”<sup>94</sup>

Some argue that the Zulu custom of virginity testing infringes this constitutional provision.<sup>95</sup> Virginity testing is a custom that the Zulu have in common with their closest tribal cousins, the Swazi.<sup>96</sup> “In both nations, only virgins are supposedly allowed to take part in the ‘Reed Dance’ to ensure that it remains ritually pure.”<sup>97</sup> Virgins participating in the dance “have to be tested by elderly women days before the pilgrimage to Enyokeni” where the reed dance takes place.<sup>98</sup> “Those who pass the test [participate in the dance], . . . are lauded by their community as *izintombi nto*, pure maidens.”<sup>99</sup> “[B]y remaining pure, the maidens are free from unwanted pregnancies and sexually transmitted diseases. . . . This ancient Zulu practice . . . was revived by King Zwelithini in 1984.”<sup>100</sup> The Reed Dance “has

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92. *Id.*

93. *Id.*

94. S. AFR. CONST. 1996 ch. 2, § 12.

95. Dean E. Murphy, *A Time of Testing for Virginity*, L.A. TIMES, July 15, 1999, at A1, available at <http://www.aegis.com/news/lt/1999/LT990702.html>.

96. Bongani Mthethwa, *Tradition and Modernity Collide in Virgin Debate*, SUNDAY TIMES, Sept. 25, 2005, at 35.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

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become a point of controversy between cultural groups and traditionalists on one hand, and human-rights groups and feminists on the other.<sup>101</sup> Those opposed to the bill argue that it is insensitive to African customs and culture and that it undermines the diversity of the South African people.<sup>102</sup> Those in favor of the bill argue that the practice violates the participants' right to privacy.<sup>103</sup>

The bill of rights section on social, cultural, and religious practices prohibits anyone from taking part in what it calls genital mutilation.<sup>104</sup> Opponents of the bill argue that it applies double standards by allowing male circumcision in certain circumstances,<sup>105</sup> as practiced by the Xhosa, but not virginity testing, as practiced by the Zulu.<sup>106</sup> Concerning the initiation rites affecting young Xhosa men, "[t]he [b]ill gives young men the right to refuse to undergo traditional initiation rites but does not ban circumcision itself."<sup>107</sup> "In the Eastern Cape alone, more than 250 deaths in circumcision schools and at least 221 cases of genital amputation have been recorded in the past [ten] years."<sup>108</sup> These conflicts are representative of the tension created between the new constitution and traditional African beliefs.

101. *Id.*; see also Loraine Tulleken, *Mosotho Gran Among 15000 Zulu Maidens*, CHALLENGE, NO. 82, Oct. 2005, at 9–10. See generally NITA GLEIMIUS ET AL., *FIRST PEOPLES: THE ZULU OF AFRICA* (1st Am. ed. 2003).

102. See Murphy, *supra* note 95.

103. See *id.*

104. See Children's Bill, 2003, Bill 70-03 § 12(3), available at <http://www.info.gov.za/gazette/bills/2003/b70d-03.pdf>.

105. See *id.* § 12(8)–(9). "Circumcision of male children under the age of 16 is prohibited, except when—(a) circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed; or (b) circumcision is performed for medical reasons on the recommendation of a medical practitioner." *Id.* § 12(8). "Circumcision of male children older than 16 may only be performed—(a) if the child has given consent to the circumcision in the prescribed manner; (b) after proper counselling of the child; and (c) in the manner prescribed." *Id.* § 12(9).

106. See *id.* § 12. "Virginity testing of children under the age of 16 is prohibited." *Id.* § 12(4). "Virginity testing of children older than 16 may only be performed—(a) if the child has given consent to the testing in the prescribed manner; (b) after proper counselling of the child; and (c) in the manner prescribed." *Id.* § 12(5). "The results of a virginity test may not be disclosed without the consent of the child." *Id.* § 12(6). "The body of a child who has undergone virginity testing may not be marked." *Id.* § 12(5); see also Mthethwa, *supra* note 96.

107. Mthethwa, *supra* note 96; see also Children's Bill, 2003, Bill 70-03 § 12(9), available at <http://www.info.gov.za/gazette/bills/2003/b70d-03.pdf>.

108. Mthethwa, *supra* note 96.

The conflicting responses from these religious groups illustrate the challenges of trying to protect religious freedom and human rights in South Africa with its religious diversity and history of oppression. The dialogue about human rights will be productive if it focuses on a secular African spirituality that is common to all South Africans.

## VI. CONCLUSION

The world may see significant changes in the South African Constitution and Bill of Rights in reaction to the challenges and responses of various religious groups described above. The progressive resolution of these challenges will depend on a variety of factors, including the ability of African traditional voices to make themselves heard and the success of the African renaissance—a modest optimism that Africa can free itself from its post-colonial impasse and realize deeply-rooted African ideals. In addition, the New Partnership for Africa's Development (NEPAD),<sup>109</sup> an economic development program of the African Union, is working to stamp out corruption and promote sound governance. Finally, the African people must allow their spiritual values to influence societal structures. These various efforts will succeed if they keep in step with developments in global human rights and with the responses of mainline African religions. One can only hope that this process will benefit Africans and further their spiritual integrity.

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109. See, e.g., Conway W. Henderson, *The African Union, NEPAD, and Human Rights: The Missing Agenda*, 26 HUM. RTS. Q. 983, 983–1027 (2004); Yash Tandon, *Economic Policy and Conflict in Africa*, 2 J. PEACEBUILDING & DEV. 6, 6–20 (2004); David Beckmann, *Bring Africa Out of the Margins*, CHRISTIAN SCI. MONITOR, July 5, 2002, at 10; Sarah Coleman, *Pan-Africa: The NEPAD Formula*, WORLD PRESS REV., July 2002, available at <http://www.worldpress.org/Africa/578.cfm>; Official Web Site of the South African Chairmanship of the African Union, Documents and Speeches, *Background on the New Partnership for Africa's Development (NEPAD)*, <http://www.au2002.gov.za/docs/background/nepad.htm> (last visited May 4, 2006).