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The Background and Contents of the Proposed South African Charter of Religious Rights and Freedoms

*Rassie Malherbe**

“So in everything, do to others what you would have them do to you.”
Matt. 7:12

I. INTRODUCTION

The quest for the ideal relationship between people and the governments ruling over them is nothing new, and numerous theories, views, and approaches to ensure a just relationship between rulers and their subjects have prevailed at different junctions of human history. These theories and approaches primarily relate to forms of state and government, but also relate to the substantive balancing of interests between the state and its subjects.¹ In our age, a just relationship is believed to be found not only through democratic institutions and processes, but, in particular, through the constitutional protection of human rights. Consequently, most modern constitutions contain a so-called bill of rights that

- (a) defines the fundamental rights of people;
- (b) prescribes to whom and how the bill of rights applies;
and
- (c) regulates how and when the rights in the bill of rights may be lawfully limited.

As a legal instrument, a bill of rights therefore regulates the relationship between the people and the state and the relationship among the people themselves. In most states including a bill of rights in the constitution makes sense, as the constitution is entrenched, and the courts are vested with the power to enforce the constitution.

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1. I.M. RAUTENBACH & E.F.J. MALHERBE, *CONSTITUTIONAL LAW* 7 (2009). Other recent theories and approaches in this regard include the so-called “rule of law” doctrine and the concept of the constitutional state.

The history of humankind is also the history of religious intolerance, discrimination, domination, and persecution.² It therefore comes as no surprise that the right to freedom of religion³ is recognized in most prominent international human rights instruments,⁴ as well as in the bills of rights of many individual countries.⁵ The South African Constitution of 1996 is no exception.⁶ In this Article, recent developments in South Africa concerning the protection of religious freedom are explored, specifically the proposed South African Charter of Religious Rights and Freedoms.⁷ By way of background, the South African democratic constitutional framework, in existence now for a decade and a half, is explained briefly, with emphasis on the supremacy of the South African Constitution and the justiciable Bill of Rights forming part of that Constitution. This discussion is followed by a justification for the adoption of a South African Charter of Religious Rights and Freedoms, a brief explanation of the main features of that Charter, and a few remarks about the way forward.

2. See, e.g., BAHIIYIH G. TAHZIB, FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION 27 (1996); Yoram Dinstein, *Freedom of Religion and Religious Minorities*, in THE PROTECTION OF MINORITIES AND HUMAN RIGHTS 145–69 (Yoram Dinstein & Mala Tabory eds., 1992); Brian Tierney, *Religious Rights: An Historical Perspective*, in 1 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 17, 17–45 (John Witte, Jr. & Johan D. van der Vyver eds., 1996) [hereinafter RELIGIOUS HUMAN RIGHTS].

3. Religious freedom has been defined in *R. v. Big M Drug Mart Ltd.* as follows:
The essence of the concept of freedom of religion is the right to entertain such beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.
[1985] 1 S.C.R. 295, ¶ 94 (Can.).

4. Natan Lerner, *Religious Human Rights Under the United Nations*, in 2 RELIGIOUS HUMAN RIGHTS, *supra* note 2, at 79; see also W. Cole Durham, *Perspectives on Religious Liberty: A Comparative Framework*, in 2 RELIGIOUS HUMAN RIGHTS, *supra* note 2, at 9 n.20.

5. Durham, *supra* note 4, at 1, 9–11.

6. S. AFR. CONST., 1996 § 15(1). For an early account in this regard, see Johan D. van der Vyver, *Constitutional Perspective of Church-State Relations in South Africa*, 1999 BYU L. REV. 635.

7. See *infra* Annexure.

II. THE SOUTH AFRICAN CONSTITUTIONAL FRAMEWORK

A. Constitutional Supremacy

The South African Constitution of 1996 is the remarkable outcome of the historic transformation process that took place in the country during the early nineties.⁸ The Constitution represents and embodies in legal terms the principles and main features of the new democratic constitutional order.⁹ The Constitution is the supreme law of the Republic of South Africa.¹⁰ Law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency, and the obligations imposed by the Constitution must be fulfilled. The Constitution is entrenched, and special procedures and majorities apply to its amendment.¹¹ The courts are formally vested with the power to invalidate any law or action that is inconsistent with the Constitution.¹² All legislative and executive bodies, including Parliament, are subject to the Constitution.¹³ All high courts have constitutional jurisdiction, but a special Constitutional Court was added as the spearhead of judicial control.¹⁴ In *Executive Council of the Western Cape Legislature v. President of the RSA*, the Constitutional Court emphasized the supremacy of the Constitution as follows: “It is of crucial importance at this early stage of the development of our new constitutional

8. An excellent account of the fascinating process resulting in the adoption of the Constitution can be found in HASSEN EBRAHIM, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* (1998); see also Rassie Malherbe, *Die Teorie en Praktyk van die 1996-grondwet: 'n Versigtige Waarderung* [The Theory and Practice of the 1996 Constitution: A Careful Assessment], 2008 J.S. AFR. L. [T.S.A.R.] 425, 425 (2008).

9. Rassie Malherbe, *The South African Constitution*, 2000 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT [ZfV] 61 (Austria).

10. S. AFR. CONST., 1996 § 2.

11. *Id.* § 74. The Constitution has been amended several times since coming into effect, mainly because of the activities of a standing parliamentary committee responsible for the annual review of the Constitution. *Id.* § 45(1)(d)(iii).

12. *Id.* § 172(1)(a). Many provisions in acts of Parliament have been invalidated over the last decade and a half, mainly for being in violation of a right in the Bill of Rights.

13. *President of the RSA v. Hugo* 1997 (4) SA 1012 (CC) at para. 28 (S. Afr.).

14. S. AFR. CONST., 1996 § 167. The Constitutional Court is the highest court for constitutional matters. *Id.* § 167(3)(a). Any high court may invalidate an act of Parliament or of a provincial legislature, but such invalidation must be confirmed by the Constitutional Court. *Id.* § 172(2)(a).

order, to establish respect for the principle that the Constitution is supreme.”¹⁵

*B. The Bill of Rights*¹⁶

Given the background of apartheid, the Constitution states unequivocally that it aims to eliminate the discrimination, inequality, and injustice of the past, and that the protection of human rights is accordingly a major focus and objective in the new South Africa.

The Preamble states that the Constitution has been adopted to heal the divisions of the past and create a society based on democratic values, social justice, and basic human rights.¹⁷

Section 1 states that human dignity, meaning the achievement of equality and the advancement of human rights and freedoms, is one of the founding values of the Republic.¹⁸

Section 7 states that the Bill of Rights included in chapter 2 of the Constitution is the cornerstone of democracy in South Africa, and that it affirms the democratic values of human dignity, equality, and freedom.¹⁹

The rights guaranteed in the Bill of Rights cover a wide spectrum of human interests and activities²⁰ and have had a profound impact on the legal system as a whole. Each right protects certain interests and conduct of those persons protected under the Bill of Rights. The Bill of Rights applies to all law and binds all legislative, executive,

15. 1995 (10) BCLR 1289 (CC) at para. 100 (S. Afr.).

16. For extensive overviews and discussions of the Bill of Rights, see, e.g., IAIN CURRIE & JOHAN DE WAAL, *THE BILL OF RIGHTS HANDBOOK* (2005); G.E. DEVENISH, *COMMENTARY ON THE SOUTH AFRICAN BILL OF RIGHTS* (1999); SOUTH AFRICAN CONSTITUTIONAL LAW: *THE BILL OF RIGHTS* (H. Cheadle, D. Davis, & N. Haysom, eds., 2002). Shorter discussions appear in I.M. Rautenbach, *Introduction to the Bill of Rights, in BUTTERWORTHS BILL OF RIGHTS COMPENDIUM 1A* (2008); I.M. RAUTENBACH & E.F.J. MALHERBE, *CONSTITUTIONAL LAW* 315 (2009). For a brief overview see, e.g., Rassie Malherbe, *A New Beginning: Introducing the South African Constitution and Bill of Rights*, 2000 NETH. Q. HUM. RTS. 45.

17. S. AFR. CONST., 1996 pmbll.

18. *Id.* § 1(a).

19. *Id.* § 7(1).

20. The rights include so-called social and economic rights, such as a right to have access to adequate housing, *id.* § 26, a right to have access to health care services, sufficient food and water, and social security, *id.* § 27, and a right to education, *id.* § 29. These rights have led to several leading cases decided by the Constitutional Court. For a brief overview see Rassie Malherbe, *The Development of Social and Economic Rights in South Africa*, 2005 ZEITSCHRIFT FÜR OFFENTLICHES RECHT 111 (2005) (Austria).

judicial, and other organs of state.²¹ It also applies to private relationships.²² The state has an obligation to respect, protect, promote, and fulfill the rights in the Bill of Rights,²³ but, indeed, everyone has the inherent duty to respect the rights of others. The rights mentioned in the Bill of Rights may be limited only in accordance with the general and specific limitation provisions in the Bill.²⁴ In order to have the widest possible impact on the protection and advancement of human rights and freedoms, the Bill of Rights is interpreted in a generous and purposive fashion.²⁵ Apart from enforcement by the courts, a special South African Human Rights Commission was established to promote a human rights culture and enhance the protection of human rights in South Africa.²⁶

The right to freedom of religion is guaranteed in the Bill of Rights without qualification. It has been accepted that the freedom of religion protects the right and freedom to believe according to one's convictions, and the right to manifest those beliefs and convictions, as is generally understood.²⁷ Various other provisions of

21. S. AFR. CONST., 1996 § 8(1).

22. *Id.* § 8(2) provides that "a provision in the Bill of Rights binds 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." This refers to the so-called horizontal application of the Bill of Rights. See I.M. Rautenbach, *The Bill of Rights Applies to Private Law and Binds Private Persons*, 2000 J.S. AFR. L. [T.S.A.R.] 296 (2000).

23. S. AFR. CONST., 1996 § 7(2).

24. *Id.* § 36. The general limitation provision, reads as follows:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

25. This approach was endorsed by the Constitutional Court in *S v. Makwanyane* 1995 (6) BCLR 665 (CC) paras. 9, 10 (S. Afr.); see also RAUTENBACH & MALHERBE, *supra* note 16, at 37. In general, for the application of the Bill of Rights, see Rautenbach, *supra* note 22.

26. S. AFR. CONST., 1996 § 184; South African Human Rights Commission Act 54 of 1994 (S. Afr.). Various other bodies assist in this endeavor, such as the Commission for Gender Equality, the Public Protector, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. Because they are dependent on the state for funding and the implementation of their recommendations, the effectiveness of these bodies has been questioned, and the courts remain the spearhead of human rights protection in South Africa.

27. *S v. Lawrence*; *S v. Negal*; *S v. Solberg* 1997 (10) BCLR 1348 (CC) (S. Afr.). For

the Constitution relate to religion and religious freedom.²⁸ The preamble to the Constitution concludes with the words “May God protect our people. God bless South Africa,” which incidentally is also the title of the South African national anthem.²⁹ Section 9, the equality clause, prohibits unfair discrimination on various grounds, including religion.³⁰ Section 15 allows religious observances in state and state-aided institutions.³¹ Section 15 also creates the possibility for the recognition of religious legal systems and marriages that are not inconsistent with the Constitution.³² Section 31 protects the right of persons belonging to a religious community to practice their religion together with other members of that community and form voluntary religious associations.³³ Sections 185 and 186 provide for a commission for the promotion and protection of the rights of cultural, religious, and linguistic communities.³⁴ Of course, various rights, such as the right to human dignity, the right to freedom of expression, and the right to freedom of association, relate indirectly to the protection of religious freedom.

III. MOTIVATION FOR A CHARTER OF RELIGIOUS RIGHTS AND FREEDOMS

Given the constitutional framework, the obvious question is: why propose a South African Charter of Religious Rights and

discussions of the right to freedom of religion in the South African context, see E.F.J. Malherbe, *Die Grondwetlike Beskerming van Godsdienstvryheid* [*The Constitutional Protection of Freedom of Religion*], 1998 J.S. AFR. L. [T.S.A.R.] 673 (1998) [hereinafter Malherbe, *Constitutional Protection*]; Rassie Malherbe, *Enkele Kwelvrae oor die Grondwetlike Beskerming van die Reg op Godsdienstvryheid* [*A Few Nagging Questions About the Constitutional Protection of the Right to Freedom of Religion*], 2006 J.S. AFR. L. [T.S.A.R.] 629 (2006) [hereinafter Malherbe, *Nagging Questions*]; Rassie Malherbe, *Die impak van die Grondwet op godsdienst – ’n voorlopige waarneming* [*The Impact of the Constitution on Religion – a Preliminary Observation*], 2008 NED GEREF TEOLOGIESE TYDSKRIF [DUTCH REFORMED THEOLOGICAL JOURNAL] 263 (2008).

28. Malherbe, *Nagging Questions*, *supra* note 27, at 630.

29. S. AFR. CONST., 1996 pmb.

30. *Id.* § 9(3).

31. Such observances must follow the rules of the relevant institution, and must be conducted on a free, voluntary, and equitable basis. *Id.* § 15(2). This constitutes one reason why a so-called strict wall of separation between religion and the state does not apply in South Africa. *See infra* note 71.

32. S. AFR. CONST., 1996 § 15(3).

33. *Id.* § 31.

34. *Id.* §§ 185–186.

Freedoms?³⁵ Aren't there sufficient protections for religious rights in the Constitution? The argument for the Charter is as follows.

First, there is no doubt about the importance of religion in the lives of the majority of individuals and communities in South Africa.³⁶ Nominally, about eighty-six percent of the population professes the Christian faith.³⁷ The rest are spread among traditional African religions, Islam, Hinduism, Judaism, and a few others.³⁸ Consequently, religious affairs, religious freedom, and the relationship between religion and the state in particular, are always under fairly sharp scrutiny. Generally speaking, religious freedom is respected in South Africa, and the relationship between religion and the state is healthy and mutually constructive. Of course, for the benefit of society, it should be kept that way. The present absence of tension or conflict is not a convincing reason to refrain from putting mechanisms in place to maintain the beneficial church/state relationship. History shows that such a relationship between religion and the state is fragile and can deteriorate very rapidly.³⁹ To fix

35. This is not a completely novel idea. See Dina Shelton & Alexander Kiss, *A Draft Model Law on Freedom of Religion, with Commentary*, in 1 RELIGIOUS HUMAN RIGHTS, *supra* note 2, at 559–92. Two decades ago, a former judge of the Constitutional Court also floated the idea of a charter of religious rights and freedoms in the following terms: “Ideally in South Africa, all religious organizations and persons concerned with the study of religion would get together and draft a Charter of religious rights and responsibilities It would be up to the participants themselves to define what they consider to be their fundamental rights.” ALBIE SACHS, PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA: CONTEMPORARY SOUTH AFRICAN DEBATES 46–47 (1990).

36. For example, in *Syndicat Northcrest v. Amselem*, [2004] S.C.R. 551, 576 (Can.), religion has been defined as follows:

In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

37. Jewel Amoah & Tom Bennett, *The Freedoms of Religion and Culture Under the South African Constitution: Do Traditional African Religions Enjoy Equal Treatment?*, 24 J.L. & RELIGION 1, 12 & n.74 (2008–2009) (citing *Census 2001: Primary Tables South Africa*, STATISTICS SOUTH AFRICA (2004), <http://www.statssa.gov.za/census01/html/RSAPrimary.pdf> (last visited Jan. 23, 2008)) (“[E]ighty-six per cent [sic] of the population (38.5 million people) belong to a Christian denomination of one kind or another.”). 8.2% of the population is Pentecostal/Charismatic, 24.4% belong to established churches and 36% to “other Christian” denominations. *Id.*

38. *Id.* (“1.5% of the population professes Islam and smaller minorities profess such religions as Hinduism and Judaism.”).

39. See Austin M. Ahanotu, *Religion and the State - Africa - Bibliography*, SCIENCE ENCYCLOPEDIA, <http://science.jrank.org/pages/8043/Religion-State-Africa.html> (last visited Aug. 2, 2011).

things when they have already gone sour is extremely difficult, and it is always sound strategy to act proactively. At the same time, under the influence of a steadily increasing secularism in society, there are indeed a few issues that require clarification, which can be accomplished through the Charter.⁴⁰

Second, the South African Constitution itself invites the initiative taken with the Charter. Perhaps because South Africa has not fully emerged yet from the intense social engineering of the last two decades, the Constitution provides that “in order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.”⁴¹ Any such charter of rights adopted by Parliament will then have the force of law. The Constitution envisages, in other words, that the rights in the Constitution may be extended, supplemented, and given content by way of such additional charters. The Constitution creates this space for additional charters of rights because most constitutional rights are described in cryptic, vague, and general terms. The intention is that society, including the state by way of legislation, the judgments of the courts, and other measures, should flesh out these rights over time. For example, section 15 of the Constitution protects the right to religious freedom only in these few words: “[E]veryone has the right to freedom of religion.”⁴² Apart from the provisions mentioned earlier, it provides very little about the content of the right.

Third, in the normal course of business, Parliament has indeed adopted specific pieces of legislation to flesh out the content and application of several rights in the Bill of Rights. The following examples may be mentioned:

40. For a comparison of developments in Canada, see Iain T. Benson, *The Freedom of Conscience and Religion in Canada: Challenges and Opportunities*, 21 EMORY INT’L L. REV. 111 (2007) [hereinafter Benson, *Freedom of Conscience*]. See also his criticism of the false juxtaposition of the so-called “secular” versus religion in Iain T. Benson, *Considering Secularism*, in RECOGNIZING RELIGION IN A SECULAR SOCIETY, 83 (Douglas Farrow ed., 2004). See also Shaun de Freitas, *Religion, Legal Scholarship and Higher Education: Perspectives for the South African Context*, 39 ACTA ACADEMICA 45 (2007) (S. Afr.) (showing to what extent religion is being excluded from law studies under the influence of this false dichotomy).

41. S. AFR. CONST., 1996 § 234.

42. *Id.* § 15.

- (a) Section 9 (the right to equality): the Promotion of Equality and Prevention of Unfair Discrimination Act;⁴³
- (b) Section 23 (labour rights): the Labour Relations Act;⁴⁴
- (c) Section 32 (the right of access to information): the Promotion of Access to Information Act;⁴⁵
- (d) Section 33 (the right to administrative justice): the Promotion of Administrative Justice Act.⁴⁶

The Constitutional Court explained with reference to the Promotion of Equality and Prevention of Unfair Discrimination Act that the Act represents Parliament's response to the duty imposed on it by the Constitution to adopt legislation giving effect to the equality clause.⁴⁷ The Court accepts the validity of the Act unless its constitutionality is directly challenged, and is therefore obliged to apply the Act before reverting to section 9 of the Constitution.⁴⁸ Clearly, this would be true of any piece of legislation giving effect to a right protected by the Constitution, including the proposed Charter, should it become an Act of Parliament.

Fourth, directly or indirectly, numerous other acts give effect to the rights in the Constitution as well, as in the case of health care, housing, education, the environment, the rights of children, the right to vote, the right to have access to the courts, and the rights of arrested and accused persons and prisoners.⁴⁹ Actually, very few rights in a modern bill of rights can be exercised properly without a comprehensive framework of supporting legislation dealing with the particulars relating to the exercise of every right.⁵⁰

43. Act 4 of 2000 (S. Afr.).

44. Act 66 of 1995 (S. Afr.).

45. Act 2 of 2000 (S. Afr.).

46. Act 3 of 2000 (S. Afr.).

47. *KwaZulu-Natal v. Pillay* 2008 (2) BCLR 99 (CC) at para. 39 (S. Afr.); see also Rassie Malherbe, *Kulturele en religieuse diversiteit moet gevier en nie gevrees word* [Cultural and Religious Diversity Should Be Celebrated and Not Feared], 2008 J.S. AFR. L. [T.S.A.R.] 367 (2008) (discussing the case); *Minister of Health v. New Clicks (Pty) Ltd.* 2006 (1) BCLR 1 (CC) at 625 para. 437 (S. Afr.).

48. *Pillay* (2) BCLR at 19 para. 40.

49. See *National Plans of Action for the Promotion and Protection of Human Rights – South Africa*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www2.ohchr.org/english/issues/plan_actions/safrica_2.htm (last visited Aug. 17, 2011).

50. See Mitra Ebadolahi, *Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South*

Section 234 of the Constitution creates yet another opportunity for legislation supplementing the Bill of Rights, in this case for religious freedom. The structure created by section 234 provides religious communities with an opportunity to take the initiative in a matter that is crucially important to every religious person and institution.⁵¹ In an open, free, and democratic society it should not be left only to the state to determine the content of constitutional rights. Civil structures, such as religious communities, should make a contribution in areas in which they have a direct interest and of which they have intimate knowledge. It is as much the function and responsibility of civil society as of the state to define the content of constitutional rights, and in so doing to contribute to setting the boundaries between the individual and the state. If, through a process of consultation and negotiation, religious communities succeed in submitting to the state a consensus proposal for a charter of religious rights and freedoms, the state will be hard pressed not to take it seriously or impose its own views instead. Thus, through the proposed Charter, religious communities will be able to leave their own significant imprint on the content of the right to freedom of religion.

Moreover, the right to freedom of religion is an important and effective mechanism regulating the relationship between religion and the state. By providing more particulars about the content of the right to freedom of religion, the Charter will outline even more clearly the relationship between religion and the state, and will contribute significantly to securing the present beneficial relationship between them. This relationship, in which freedom of religion and the authority of religious institutions over their own affairs are recognized and religion and religious communities enjoy impartial protection from the state, is stipulated unequivocally in the Charter. On the other hand, by leaving the right to freedom of religion undefined in the Constitution, one actually accepts that the content of the right will be determined on an *ad hoc* basis through court decisions and other measures—in other words, as questions, issues and difficulties occur from time to time. This is an incremental and piecemeal process over which religious communities have little control. Section 234, on the contrary, creates the opportunity to put

Africa, 83 N.Y.U. L. REV. 1565 (2008).

51. S. AFR. CONST., 1996 § 234.

on the table a charter in which the content of the right is spelled out more fully in a single act of Parliament.⁵²

Throughout history, conflict between religion and the state has occurred from time to time in most countries, with even periods of large-scale religious persecution occurring in some countries.⁵³ In South Africa, as well, issues sometimes arise where religious communities disagree with the state or where the state takes steps that either limit religious freedom or at least test the divide between religion and the state.⁵⁴ By defining this relationship clearly in an act of Parliament, future unwarranted state interference with religion, as well as uncertainty, misunderstanding, and unnecessary conflict between religion and the state, can be prevented.

Finally, there are useful international examples of additional protection for freedom of religion. All the primary international human rights instruments refer to the right to freedom of religion, but not a single one elaborates on the content of the right.⁵⁵ That is why the *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief* was adopted in 1981,⁵⁶ followed by the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* in 1992.⁵⁷ Both of these instruments elaborate quite significantly on

52. *Id.*

53. See sources cited *supra* note 2. It would seem that in certain parts of the globe religious intolerance and persecution has again reached alarming levels over the last decade.

54. A recent example of a serious difference between religion and the state is the legalization of same-sex marriages. See *Minister of Home Affairs v. Fourie* 2006 (3) BCLR 355 (CC) (S. Afr.), in which the provision in the Marriage Act 25 of 1961, reserving marriage for a union between a man and a woman, was declared unconstitutional. Despite the objections of most religious communities, the subsequent legislation made by Parliament, the Civil Union Act 17 of 2006, legalized same-sex marriages, but eventually exempted objecting clergy from solemnizing such marriages or civil unions, the only concession won by religion in this disagreement. For developments in Canada, see Benson, *Freedom of Conscience*, *supra* note 40, at 141.

55. See, e.g., Universal Declaration of Human Rights, art. XVIII, G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 18, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 art. 9; African Charter for Human and Peoples' Rights art. 8, *adopted* June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986).

56. See Donna J. Sullivan, *Advancing Freedom of Religion or Belief Through the Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487 (1988).

57. Willem van Genugten, *Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems*, 104 AM. J. INT'L L. 29, 46-47

the content of the right to freedom of religion. Therefore, domestically, as well as internationally, there are precedents for the proposed Charter.

An objection that requires a response is that “conferring rights on people may lead to abuse” and that the Charter may “open the door to various undesirable or objectionable beliefs and practices.”⁵⁸ It is a popular claim that the “South African Bill of Rights protects only the criminals and not their victims.”⁵⁹ If understood and applied properly, that is not the result of any bill or charter of rights and freedoms. First, every right implies a responsibility because everyone entitled to a particular right has the responsibility to respect the reciprocal right of another. That is why rights never apply without limitations—any right naturally imposes a limitation on the rights of another. Simply put, one person’s right to freedom of movement is automatically limited by another person’s freedom of movement. If rights prove not to be protected effectively, it is therefore not so much the bill of rights itself that is at fault, but rather its ineffective enforcement. Second, as is the case with any other right, everyone is supposed to exercise the rights in the Charter within the framework of the law of the land. The charter does not legalize or even open the door to any belief or practice that may involve or give rise to criminal activities or any action otherwise prohibited by law. Such actions may continue to be prohibited or limited lawfully within the terms of the limitation provisions of the Constitution.

IV. CONTENT OF THE CHARTER

The Charter contains the main elements of the right to freedom of religion as it is generally understood.⁶⁰ It also contains elements

(2010).

58. Continuation Committee: Charter of Religious Rights and Freedoms, *Motivation for a Charter of Religious Rights and Freedoms*, NGKERK.ORG, ¶ 7 (Sept. 2008), <http://www.ngkerk.org.za/noordkaap/documents/inligtingstukke/Hersiene%20Handves%20vir%20Godsdienstre%20-%20Oktober%202009.pdf>.

59. *Id.*

60. See, for example, the brief overview in Malherbe, *Nagging Questions*, *supra* note 27, at 632–35. See also Rassie Malherbe, *The Constitutionality of Government Policy Relating to the Conduct of Religious Observances in Public Schools*, 2002 J.S. AFR. L. [T.S.A.R.] 391, 397–98 (2002). The most comprehensive recent study in South Africa on the content of the right can be found in Gerhard Van der Schyff, *The Right to Freedom of Religion in South Africa* (Dec. 2001) (unpublished LLM dissertation, Rand Afrikaans University, Johannesburg, South Africa). The various contributions in RELIGIOUS HUMAN RIGHTS, *supra* note 2, are equally valuable.

protected by other rights guaranteed in the Constitution.⁶¹ Following a preamble that sets the scene, the most significant rights and freedoms stipulated in the Charter may be summarized as follows:⁶²

(a) All people have the right to believe according to their own convictions and to make choices regarding their convictions and religious affiliation (art 1).⁶³

(b) No person may be forced in any way in respect of their religion or convictions, or to act against their convictions (art 2). This includes the right to change one's faith, religion or religious affiliation; the right to have one's convictions reasonably accommodated;⁶⁴ the right to refuse to perform certain duties, participate in certain activities, or deliver certain services;⁶⁵ the right to have one's convictions taken into account in receiving or withholding medical treatment;⁶⁶ and the right not to be subjected to force or indoctrination that may destroy or compromise one's religion or beliefs.

(c) Every person has the right to the impartiality and protection of the state in respect of religion (art 3).⁶⁷ As is the case with any other right, the state must create a positive and safe environment

61. See, for example, the reference to the right to freedom of expression in section 16, and reference to the right to freedom of association in section 18. S. AFR. CONST., 1996. For useful discussions of the rights protected in the Bill of Rights, see sources cited *supra* note 14.

62. See *infra* Annexure for the full text.

63. This includes the right to change one's religion. See, e.g., J.A. Walkate, *The Right of Everyone to Change His Religion or Belief*, 30 NETHERLANDS INT'L L. REV. 146 (1983).

64. The principle of reasonable accommodation appears in section 14(3)(i) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (S. Afr.), and was applied by the Constitutional Court in *KwaZulu-Natal v. Pillay* 2008 (2) BCLR 99 (CC) at 37 para. 72 (S. Afr.). See the comments in this regard by Benson, *Freedom of Conscience*, *supra* note 40, at 164, on the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981).

65. A good example is that a medical professional may refuse on religious grounds to perform or assist in an abortion unless there are compelling reasons not to refuse, for example, when the mother's life is in danger.

66. Whenever parents act on behalf of their children, the best interest of the child determines the outcome. See, e.g., *Hay v. B* 2003 (3) SA 492 (W) (S. Afr.). This is now a constitutional principle. S. AFR. CONST., 1996 § 28(2).

67. This is sometimes referred to as the state non-identification principle. Note the use of the term "impartiality" instead of "neutrality." See SIGNE SANDSMARK, IS WORLD VIEW NEUTRAL EDUCATION POSSIBLE AND DESIRABLE? A CHRISTIAN RESPONSE TO LIBERAL ARGUMENTS 87 (2000) on the logical inconsistency of a so-called neutral approach. Neutrality requires taking distance from something, which may lead to hostility, whereas impartiality requires the state to be constructively engaged in order to level the playing field for everybody.

for the exercise of religious freedom, but it may not promote, favour or prejudice any faith or religion, and may not indoctrinate anyone in respect of religion. No person may be unfairly discriminated against on the ground of religion.⁶⁸

(d) Every person has the right to the private or public, and the individual or joint, observance or exercise of their convictions (art 4). Religious observances may take various forms.⁶⁹ The right includes the right to associate with others, and form and join religious associations;⁷⁰ to observe sacred days of rest, festivals, and ceremonies; and to conduct single-faith religious observances in state or state-aided institutions.⁷¹

(e) Every person has the right to maintain traditions and systems of religious personal, matrimonial, and family law that are consistent with the Constitution (art 5).⁷²

(f) Every person has the right to freedom of expression in respect of religion (art 6).⁷³ This includes the right to make public statements, produce religious publications, and conduct scholarly research, the right to communicate with others, and the right to share one's convictions with another consenting person.⁷⁴ Religious institutions have the right to have access to public media on an

68. This prohibition also forms part of the equality clause in section 9 of the Constitution.

69. It includes rules relating to attire, appearance, and diet. A prohibition of, or limitation on the wearing of head or facial coverings (an issue in Western Europe) will have to be justified in terms of the general limitation clause, section 36 of the Constitution. The right also includes access to sacred places and burial sites relevant to one's convictions (article 4.1), but South African law does not include a right to be buried anywhere, such as on another's property. *Nkosi v. Bührmann* 2002 (1) SA 372 (SCA) (S. Afr.).

70. See S. AFR. CONST., 1996 §§ 18, 31.

71. As mentioned, such observances must follow the rules of the relevant institution and must be conducted freely, voluntarily, and equitably. S. AFR. CONST., 1996 § 15(2). As confirmed by the Constitutional Court in *Lawrence v. State* 1997 (10) BCLR 1348 (CC) at 66 paras. 101–102, section 15(2) makes clear that a so-called establishment clause does not exist under the South African Constitution. The state in any case has a duty to act positively in order to respect, protect, promote, and facilitate the right to freedom of religion, as in the case of all other rights. S. AFR. CONST., 1996 § 7(2); see also Malherbe, *Constitutional Protection*, *supra* note 27, at 688–90.

72. Section 15(3) of the Constitution provides that such systems may be recognized by law, S. AFR. CONST., 1996 § 15(3), as was done in terms of the Recognition of Customary Marriages Act 120 of 1998 (S. Afr.).

73. Freedom of expression is protected in section 16 of the Constitution. S. AFR. CONST., 1996 § 16.

74. Proselytizing is prohibited in some countries but is protected by the Charter as long as it happens voluntarily.

equitable basis. Every person has the right to religious dignity, which includes freedom from victimization, ridicule, or slander because of one's convictions.⁷⁵

(g) All people have the right to be educated in accordance with their religious or philosophical convictions (art 7).⁷⁶ The state must respect this right and parents may withdraw their children from activities and programs inconsistent with their convictions. An educational institution may adopt a particular religious or other ethos, as long as it is observed equitably, voluntarily, and in a non-discriminatory way. Every private educational institution may impart its religious convictions to all children enrolled in the institution. Every person has the right to receive and provide religious education (art 8).

(h) Every religious institution has the right to institutional freedom of religion and has authority over its own affairs (art 9). Every religious institution may determine its own confessions, doctrines, and ordinances, and may regulate its internal affairs, which include matters relating to structures and procedures, office-bearers and employees, and membership, in accordance with the principles of tolerance, fairness, openness, and accountability. The state may not regulate or prescribe matters of doctrine and ordinances.⁷⁷ The confidentiality of the internal affairs and communications of a religious institution must be respected insofar as the interest of justice permits. Every religious institution is subject to the law of the land. Non-observance of a law resulting from the exercise of the rights in the Charter must be justified.

(i) Every person has the right, for religious purposes, to receive, manage, and spend voluntary financial and other contributions (art 11).

75. This right to religious dignity also includes a prohibition on advocating hatred that is based on religion and that constitutes incitement to violence or to cause physical harm, which is not protected speech under section 16(2) of the Constitution. This specific limitation on the right has to be applied with circumspection so as not to stifle healthy debate.

76. See, e.g., Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. Doc. A/RES/36/55 (Nov. 25, 1981). Benson, *Freedom of Conscience*, *supra* note 40, at 165, actually proposes that a duty be imposed on the state to provide support for education across a diversity of belief systems.

77. See, e.g., *Taylor v. Kurtstag* 2005 (7) BCLR 705 (W) (S. Afr.).

(j) All people have the right, on religious grounds, and in accordance with their convictions or ethos, to conduct relief, upliftment, social justice, developmental, charity, or welfare work (art 12).⁷⁸

As explained, an enacted Charter will supplement or flesh out the right to freedom of religion in the Constitution, and will accordingly be subject to the Constitution. If there is any inconsistency between the Charter and the Constitution, the latter will prevail. Any limitation of the rights protected in the Charter must comply with the general limitation clause in section 36 of the Constitution.⁷⁹

V. CONCLUSION

Where do we presently stand with the Charter? Its sponsors, basically a few academics and religious leaders, have been engaged in this exercise for well over two years. After consultations with most religious communities, consideration of numerous written comments, and several redrafts, which have all been circulated among religious communities, we now have the formal or informal support of most religious communities and institutions in South Africa. Although such wide support elevates the status of the Charter, it is still not a final document. It remains a proposal, and further amendments may be effected pursuant to the processes still lying ahead. The next step was taken at a conference held on October 21, 2010 when religious communities and leaders had the opportunity to express their support for the Charter publicly. Those not able to attend could endorse the Charter in writing. At the conference a representative continuation committee was elected to take the Charter forward. The committee will oversee the formation of a statutorily recognized council to consider any further comments and amendments from institutions and communities that have endorsed the Charter in principle, and will engage the government with the objective to present to it a final document and request that it be enacted into law in terms of section 234 of the Constitution.

South Africans have learned not to be show-offs, or to count their chickens before they have hatched. If we are successful in this endeavor, it will probably not make headlines. However, an absence

78. Social involvement of religious communities is the result of their convictions, and they can hardly be expected to conduct their activities in a nonreligious way.

79. See the wording of S. AFR. CONST., 1996 § 36.

of publicity will not diminish the significance of the achievement. First, I believe the Charter represents a major step in the effective protection of the right to freedom of religion, and will provide a firm foundation for ensuring a healthy relationship between religion and the state. As such, the Charter may provide guidance in the sensitive area of religious freedom not only for South Africa, but internationally as well.

Second, the Charter can secure the tolerant spirit prevailing among religious communities in South Africa. Compared to many other countries, South Africa is particularly blessed in this respect, and insofar as the Charter can enhance the prevailing spirit, South Africans should do their utmost to maintain and strengthen the cordial relationship among the different religions. Maybe the idea of the Charter was indeed born as a result of this amicable relationship, because it is easier to reach consensus on its contents in an atmosphere of mutual trust and goodwill than in an atmosphere of mistrust and animosity. The Charter will also deepen our understanding of basic values of justice, love, compassion, human dignity, democracy, rights and responsibilities, and basic good relations with others. As such, the Charter can make an invaluable contribution in determining the rightful place of religion in society, an issue with which many countries struggle from time to time. The Charter is an impartial document not favoring one religion over another. It simply recognizes that South Africa is a multi-religious nation. It requires South Africans to respect, in a spirit of tolerance, the beliefs of others in recognition of each other's religious freedom and human dignity. It is through tolerance that religious communities will be able to coexist in peace and harmony and that all will earn respect for their own convictions and beliefs.

Religious communities should now take ownership of this initiative. This is not the initiative of a particular religion, community, or committee. If religious communities embrace the Charter as their own, join hands in taking it forward, and interact with the government with one voice, the Charter will prove to be a milestone in the protection of religious rights and freedoms and in securing a stable, constructive, and co-operative relationship between religion and the state.

ANNEXURE: SOUTH AFRICAN CHARTER OF RELIGIOUS
RIGHTS AND FREEDOMS⁸⁰

PREAMBLE

1. WHEREAS human beings have inherent dignity, and a capacity and need to believe and organise their beliefs in accordance with their foundational documents, tenets of faith or traditions; and
2. WHEREAS this capacity and need determine their lives and are worthy of protection; and
3. WHEREAS religious belief embraces all of life, including the state, and the constitutional recognition and protection of the right to freedom of religion is an important mechanism for the equitable regulation of the relationship between the state and religious institutions; and
4. WHEREAS religious institutions are entitled to enjoy recognition, protection and co-operation in a constitutional state as institutions with authority over their own affairs; and
5. WHEREAS it is recognised that rights impose the corresponding duty on everyone in society to respect the rights of others; and
6. WHEREAS the state through its governing institutions has the responsibility to govern justly, constructively and impartially in the interest of everybody in society; and
7. WHEREAS religious belief may deepen our understanding of justice, love, compassion, cultural diversity, democracy, human dignity, equality, freedom, rights and obligations, as well as our understanding of the importance of community and relationships in our lives and in society, and may therefore contribute to the common good; and
8. WHEREAS the recognition and effective protection of the rights of religious communities and institutions will contribute to a spirit of mutual respect and tolerance among the people of South Africa,

80. As amended 6th August and 1st October 2009. Reprinted with permission of the Continuation Committee, South African Charter of Religious Rights and Freedoms.

NOW THEREFORE THE FOLLOWING South African Charter of Religious Rights and Freedoms is hereby enacted:

1. Every person has the right to believe according to their own religious or philosophical beliefs or convictions (hereinafter convictions), and to choose which faith, worldview, religion, or religious institution to subscribe to, affiliate with or belong to.

2. No person may be forced to believe, what to believe or what not to believe, or to act against their convictions.

2.1 Every person has the right to change their faith, religion, convictions or religious institution, or to form a new religious community or religious institution.

2.2 Every person has the right to have their convictions reasonably accommodated.

2.3 Every person has the right on the ground of their convictions to refuse (a) to perform certain duties, or to participate or indirectly to assist in, certain activities, such as of a military or educational nature, or (b) to deliver, or to refer for, certain services, including medical or related (including pharmaceutical) services or procedures.

2.4 Every person has the right to have their convictions taken into account in receiving or withholding medical treatment.

2.5 No person may be subjected to any form of force or indoctrination that may destroy, change or compromise their religion, beliefs or worldview.

3. Every person has the right to the impartiality and protection of the state in respect of religion.

3.1 The state must create a positive and safe environment for the exercise of religious freedom, but may not promote, favour or prejudice a particular faith, religion or conviction, and may not indoctrinate anyone in respect of religion. In approving a plan for the development of land, the state must consider religious needs.

3.2 No person may be unfairly discriminated against on the ground of their faith, religion, or religious affiliation.

4. Subject to the duty of reasonable accommodation and the need to provide essential services, every person has the right to the private or public, and individual or joint, observance or exercise of their

convictions, which may include but are not limited to reading and discussion of sacred texts, confession, proclamation, worship, prayer, witness, arrangements, attire, appearance, diet, customs, rituals and pilgrimages, and the observance of religious and other sacred days of rest, festivals and ceremonies.

4.1 Every person has the right to private access to sacred places and burial sites relevant to their convictions. Such access, and the preservation of such places and sites, must be regulated within the law and with due regard for property rights.

4.2 Every person has the right to associate with others, and to form, join and maintain religious and other associations, institutions and denominations, organise religious meetings and other collective activities, and establish and maintain places of religious practice, the sanctity of which shall be respected.

4.3 Every person has the right to communicate within the country and internationally with individuals and institutions, and to travel, visit, meet and enter into relationships or association with them.

4.4 Every person has the right to conduct single-faith religious observances, expression and activities in state or state-aided institutions, as long as such observances, expression and activities follow rules made by the appropriate public authorities, are conducted on an equitable basis, and attendance at them is free and voluntary.

5. Every person has the right to maintain traditions and systems of religious personal, matrimonial and family law that are consistent with the Constitution. Legislation that is consistent with the Constitution may be made to recognise marriages concluded under any tradition, or a system of religious, personal or family law, or to recognise systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

6. Every person has the right to freedom of expression in respect of religion.

6.1 Every person has the right (a) to make public statements and participate in public debate on religious grounds, (b) to produce, publish and disseminate religious publications and other religious material, and (c) to conduct scholarly research

and related activities in accordance with their convictions.

6.2 Every person has the right to share their convictions with another consenting person.

6.3 Every religious institution has the right to have access to public media which access must be regulated fairly.

6.4 Every person has the right to religious dignity, which includes not to be victimised, ridiculed or slandered on the ground of their faith, religion, convictions or religious activities. No person may advocate hatred that is based on religion, and that constitutes incitement to violence or to cause physical harm.

7. Every person has the right to be educated or to educate their children, or have them educated, in accordance with their religious or philosophical convictions.

7.1 The state, including any public school, has the duty to respect this right and to inform and consult with parents on these matters. Parents may withdraw their children from school activities or programs inconsistent with their religious or philosophical convictions.

7.2 Every educational institution may adopt a particular religious or other ethos, as long as it is observed in an equitable, free, voluntary and non-discriminatory way, and with due regard to the rights of minorities.

7.3 Every private educational institution established on the basis of a particular religion, philosophy or faith may impart its religious or other convictions to all children enrolled in that institution, and may refuse to promote, teach or practice any religious or other conviction other than its own. Children enrolled in that institution (or their parents) who do not subscribe to the religious or other convictions practised in that institution waive their right to insist not to participate in the religious activities of the institution.

8. Every person has the right to receive and provide religious education, training and instruction. The state may subsidise such education, training and instruction.

9. Every religious institution has the right to institutional freedom of religion.

9.1 Every religious institution has the right (a) to determine its own confessions, doctrines and ordinances, (b) to decide for itself in all matters regarding its doctrines and ordinances, and (c) in accordance with the principles of tolerance, fairness, openness and accountability to regulate its own internal affairs, including organisational structures and procedures, the ordination, conditions of service, discipline and dismissal of office-bearers and members, the appointment, conditions of employment and dismissal of employees and volunteers, and membership requirements.

9.2 Every religious institution is recognised and protected as an institution that has authority over its own affairs, and towards which the state, through its governing institutions, is responsible for just, constructive and impartial government in the interest of everybody.

9.3 The state, including the judiciary, must respect the authority of every religious institution over its own affairs, and may not regulate or prescribe matters of doctrine and ordinances.

9.4 The confidentiality of the internal affairs and communications of a religious institution must be respected. The privileged nature of any religious communication that has been made with an expectation of confidentiality must be respected insofar as the interest of justice permits.

9.5 Every religious institution is subject to the law of the land. A religious institution must be able to justify any non-observance of a law resulting from the exercise of the rights in this Charter.

10. The state may allow tax, charitable and other benefits to any religious institution that qualifies as a juristic person.

11. Every person has the right, for religious purposes and in furthering their objectives, to solicit, receive, manage, allocate and spend voluntary financial and other forms of support and contributions. The confidentiality of such support and contributions must be respected.

12. Every person has the right on religious or other grounds, and in accordance with their ethos, and irrespective of whether they receive state-aid, and of whether they serve persons with different convictions, to conduct relief, upliftment, social justice,

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developmental, charity and welfare work in the community, establish, maintain and contribute to charity and welfare associations, and solicit, manage, distribute and spend funds for this purpose.

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