

How Should the Constitutional Court Approach Tensions between Women's Rights and Religious Rights under the South African Constitution?

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I. Introduction: How Should the Constitutional Court Approach Tensions between Women's Rights and Religious Rights under the South African Constitution?

This paper explores whether women's rights may potentially conflict with religious rights under the South African Constitution, and if so, how the Constitutional Court might attempt to resolve such conflicts. These two categories of rights may appear to be in tension with each other in numerous respects.¹ For example, the Catholic Church does not permit women to become priests. Certain tenets of Islam allow polygyny (a practice which in itself gives rise to violations of women's human rights) and does not allow polyandry (therefore, men are permitted to marry more than one woman, but women are not permitted to marry more than one man).² Orthodox Jewish communities require women to obtain a "get" from their husbands in order to obtain a divorce (which the husband may refuse to grant), but do not impose the same obligation upon men.³ One could easily come up with many other examples.

For purposes of this paper, the term "women's rights" under the South African Constitution includes a broad range of human rights pertaining to women, such as women's equality with men; non-discrimination on the basis of gender; and the rights of women to full enjoyment of other specific human rights; such as the right to freedom of assembly; the right to freedom of occupation and profession; the right to human dignity; the right to freedom of expression; and indeed the right to freedom of religion, belief, and opinion.

¹ See speech by Patricia Fresen, D.Th., Southeast Pennsylvania Women's Ordination Conference, March 12, 2005, Today, in this post-apartheid time, what we have is a transformed South Africa, a rainbow nation, and there is no comparison with the divided apartheid society in which I grew up... Now we in the Church are on another 'long walk to freedom', this time freedom from sexism, from unjust discrimination against women in the church, freedom from oppression by the privileged clerical caste in the church. Once again, we need to stand together in protest, to break the unjust laws because we cannot wait forever, and we need, at least at the beginning, to move into the structures that exist and change them... Just as the Black people of South Africa needed to move into the structures set up by the Whites so as to claim their equal rights as citizens of the country, so we women need to move into the structures in the church so as to claim our right to be there. In both cases, the structures are being changed by the presence of the formerly excluded group. See http://www.romancatholicwomenpriests.org/history_1.htm.

² See *Hassam v Jacobs NO and Others (Muslim Youth Movement of South Africa and Women's Legal Trust as Amici Curiae)* CCT 83/08 [2009] ZACC 19. Customary law in South Africa and other countries also permits polygyny.

³ South Africa has enacted a statute requiring that a spouse seeking a divorce must remove all impediments to the other spouse's ability to remarry, but thus far has not provided any relief for a situation in which the spouse not seeking the divorce refuses to remove such impediments. See Alexandra Leichter, "The Effect of Jewish Divorce Law on Family Law Litigation," 2009, International Academy of Matrimonial Lawyers, http://www.iaml.org/cms_media/files/jewish_divorce_law.pdf.

Also for purposes of this paper, the term "religious rights" under the South African Constitution includes the rights of all individuals (including women)—regardless of their religion and religious (or non-religious) beliefs—to freedom of religion, belief, and opinion. It also includes the right of individuals to equality and to non-discrimination, regardless of their religion or religious (or non-religious) beliefs. Moreover, it includes the rights of individuals—regardless of their religion and religious (or non-religious) beliefs—to full enjoyment of other specific human rights, such as freedom of assembly; freedom of occupation and profession; human dignity; freedom of expression; etc. Additionally, it encompasses the rights of individuals belonging to a religious community, along with other members of that community, to practice their religion and to form, join and maintain religious associations and other organs of civil society; as long as those rights are not exercised in a manner inconsistent with any provision of the Bill of Rights.

This paper explores the interrelationships between these categories of rights under the South African Constitution. It suggests that they are not necessarily as far apart as one might first imagine, and that they can be read together to provide a high level of protection for both women's rights and religious rights of individuals simultaneously. In Part II, the next section of the paper briefly recounts the current context in South Africa regarding the religious demographics of the country and the status of women, and notes that the exclusion of women from the Roman Catholic priesthood will be used as a case-study. Part III examines women's rights and religious rights as set forth in various articles of the South African Constitution and explores how they have been applied by the Constitutional Court. Part IV provides a few, brief examples of international approaches to women's rights and religious rights. Finally, Part V concludes that the Constitutional Court could adopt an approach that integrates women's rights and religious rights in a manner that most fully respects and protects both categories of rights, by focusing on the rights specifically as they pertain to individuals.

II. Women and Religion in South Africa

This section provides several statistics on the current religious demographics in South Africa, along with a few brief examples of discrimination and subordination that women continue to face in this country. It then explores the ban on women's ordination in

the Catholic Church as a case study through which the intersection between women's rights and religious rights under the South African constitution will be examined throughout the rest of the paper.

The religious composition of South Africa is predominantly Christian (80%), with other religions comprising 5% of the population (including Muslim, Jewish, Hindu, African Traditionalist, Buddhist and Baha'i adherents), and 15% not expressly affiliating with any particular religion.⁴ Out of a population of about 46.9 million in South Africa, approximately 3.3 million people (about 7%) are Catholic, including about 2.7 million who are black, 300,000 who are coloured, and 300,000 who are white.⁵ According to one source, "The government has actively encouraged specific Christian beliefs during much of the twentieth century, but South Africa has never had an official state religion nor any significant government prohibition regarding religious beliefs."⁶ It continued:

In the twentieth century, however, several Christian churches actively promoted racial divisions through the political philosophy of apartheid. The largest of these denominations was the Dutch Reformed Church ..., which came to be known as the "official religion" of the National Party during the apartheid era. Its four main branches had more than 3 million members in 1,263 congregations in the 1990s.⁷

On the other hand, "senior officials within the Roman Catholic Church in South Africa opposed apartheid," as did officials of other denominations such as the Anglican Church, the Methodist Church, as well as the South African Council of Churches, which was an umbrella coalition of anti-apartheid churches.⁸

Both historically and in the present day, women have been discriminated against and treated as subordinate to men in South Africa, as in all regions of the world. Despite the fact that, in recent years, South Africa has made significant progress regarding women's rights in certain areas, such as women's participation in the national government,⁹ pervasive women's

⁴ State Department International Religious Freedom Report on South Africa 2009, October 26, 2009, <http://www.state.gov/g/drl/rls/irf/2009/127256.htm>.

⁵ Anne-Marie Mooney Cotter, *Heaven Forbid: An International Legal Analysis of Religious Discrimination*, Ashgate, 2009. See "Roman Catholicism in South Africa," http://en.wikipedia.org/wiki/Roman_Catholicism_in_South_Africa.

⁶ Federal Research Division of the Library of Congress, Country Studies/Area Handbook Series sponsored by the U.S. Department of the Army between 1986 and 1998, <http://countrystudies.us/south-africa/52.htm>.

⁷ Id, at <http://countrystudies.us/south-africa/53.htm>.

⁸ Id, at <http://countrystudies.us/south-africa/53.htm>.

⁹ U.S. State Department Human Rights Country Report on South Africa 2009, March 11, 2010,

human rights violations remain entrenched throughout society. According to the 2009 U.S. State Department Human Rights Country Report on South Africa,¹⁰ pervasive violence against women and societal discrimination against women remain significant human rights problems facing the country. Rape and sexual violence against women are rampant,¹¹ as well as domestic violence.¹² Elderly women are accused of practicing witchcraft and are subjected to various forms of abuse.¹³ Women also face multiple forms of economic discrimination.¹⁴ Moreover, women are still relegated to being the primary caregivers to children and responsible for maintaining the home.¹⁵ Numerous laws inspired by religion have historically

<http://www.state.gov/g/drl/rls/hrrpt/2009/af/135977.htm>, last accessed on April 18, 2010 ["Human Rights Report"]. ("In the new administration, women held 14 of 34 ministerial positions, including the ministerial portfolio of foreign affairs, and 11 of 28 deputy ministerial positions. There were 172 women in the 400-seat National Assembly and 19 women among the 54 permanent members of the NCOP. Women occupied two of four parliamentary presiding officer positions, including the deputy speaker of the National Assembly and deputy chair of the NCOP.").

¹⁰ Human Rights Report, <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135977.htm>.

¹¹ See, e.g., *Carmichele v. Minister of Public Safety and Security*, CCT 48/00, August 16, 2001; and *NK v. Minister of Safety and Security*, CCT 52/04, June 13, 2005; both addressing sexual assault and violence against women. See also, Human Rights Report ("Rape, including spousal rape, is illegal but remained a serious and pervasive problem. The country had one of the highest incidences of rape in the world... A June report released by the Medical Research Council found that more than 25 percent of men interviewed in KZN and Eastern Cape Province admitted to committing at least one rape and, of those, more than half admitted to raping more than one person ... A poor security climate and societal attitudes condoning sexual violence against women contributed to the problem ... [One] estimate implied that during the year well over half a million women suffered sexual violence. The NGO Treatment Action Campaign reported that one in three South African women would be raped in her lifetime.").

¹² Human Rights Report ("Domestic violence was pervasive and included physical, sexual, emotional, and verbal abuse, as well as harassment and stalking by former partners ... According to NGOs, about one in four women were in an abusive relationship ... A June report released by the Medical Research Council found that more than two-fifths of men interviewed in KZN and the Eastern Cape Province had been physically violent toward an intimate partner. TCC counselors also alleged that doctors, police officers, and judges often treated abused women poorly.").

¹³ Human Rights Report ("persons accused of witchcraft were attacked and driven from their villages in rural communities, and in some cases murdered, ... [and] suspicion of witchcraft activity could lead to accusation, assault, forced exile, and killings, particularly of elderly women.").

¹⁴ Human Rights Report ("Discrimination against women remained a serious problem ... governing inheritance, divorce, and child custody. Women experienced economic discrimination in areas such as wages, extension of credit, and ownership of land. For example, township housing transfer schemes favored existing titleholders, who tended to be men. Many rural areas were administered through traditional patrilineal authorities, such as a chief or a council of elders, who did not grant land tenure to women, a precondition for access to housing subsidies.").

¹⁵ See Justice O'Regan's dissent in *Harksen v. Lane*, CCT 9/97, October 7, 1997, para. 94: "women who were married were often the subject of discrimination. Many of the laws governing marriage were based on an assumption that women were primarily responsible for the maintenance of a household, and the rearing of children, while men's responsibilities lay outside the household. These rules therefore both reflected and entrenched deep inequalities between men and women. Not infrequently women's experience of marriage therefore was (and sometimes still is) one of subordination, both in relation to the rules regulating matrimonial property (whether customary or common law) and in relation to the division of labour within the household. A strong social expectation that married women would not work outside the household also translated into patterns of discrimination against married women outside of the marriage relationship, particularly in the labour market."

had a negative impact upon women, for example, in the area of family law.¹⁶ A women's rights advocate has noted that "As in most countries, South African society is patriarchal. Religious and traditional norms relegate women to an inferior position in both society and family."¹⁷ Conservative interpretations of Catholicism, Islam, and other religions have regarded women as inferior because women's traditionally prescribed functions of motherhood, domesticity and nurturing supposedly render them "weak, unable to reason, inadequate to engage in public or political activities."¹⁸ Additional examples of issues intersecting between religion and women's rights in South Africa include inheritance laws,¹⁹ lobola (dowry), levirate marriage (*ukungena*), child marriage, virginity testing, female genital mutilation, and polygamy.²⁰ Women's roles, as framed within religious precepts, have been shaped significantly by the historical, social and cultural context of the times, and have changed dramatically across regions of the globe through recent decades.²¹

See also Justice Kriegler's dissent in *President of the Republic of South Africa v. Hugo*, CCT 11/96, April 18, 1997, para. 80: "the notion ... that women are to be regarded as the primary care givers of young children, is a root cause of women's inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the Constitution so vehemently condemns. Section 8 and the other provisions mentioned above outlawing gender or sex discrimination were designed to undermine and not to perpetuate patterns of discrimination of this kind ... One of the ways in which one accords equal dignity and respect to persons is by seeking to protect the basic choices they make about their own identities. Reliance on the generalization that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely."

¹⁶ Julie Mertus, "State Discriminatory Family Law and Customary Abuses," in Julie Peters & Andrea Wolper, *Women's Rights, Human Rights: Internat'l Feminist Perspectives*, Routledge, 1995, p. 137. "However constructed throughout the world, family laws and practices tend to perpetuate a patriarchal structure in which women are subordinated to men and in which male economic and decision-making powers are enhanced ... Men have been granted the right to make all important decisions for women, unilaterally determining when they shall marry and divorce, when and how often they shall bear children, and whether they shall be educated and permitted to work outside the home. To varying degrees, all societies employ legal measures and social practices designed to protect the superior position of men."

¹⁷ Brigitte Mabandla, "Women in South Africa and the Constitution-Making Process," in Julie Peters & Andrea Wolper, *Women's Rights, Human Rights: Internat'l Feminist Perspectives*, Routledge, 1995, p. 67.

¹⁸ Jane H. Bayes and Nayereh Tohidi, eds., *Globalization, Gender, and Religion: The Politics of Women's Rights in Catholic and Muslim Contexts*, Palgrave, 2001, p. 18.

¹⁹ See *Hassam v Jacobs NO and Others*, CCT 83/08 [2009] ZACC 19. See also *Bhe v. The Magistrate, Khayelitsha and Others*, CCT 49/03, October 15, 2004, where the Court struck down as unconstitutional a statute that had enconced and ossified the customary law concept of male primogeniture into statutory law. The Court noted that "The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family," para. 78.

²⁰ Some of these practices are more prevalent in immigrant populations within South Africa, and some are found among indigenous populations.

²¹ Mahnaz Afkhami, ed., *Faith and Freedom: Women's Human Rights in the Muslim World*; Syracuse University Press, 1995, p. 235. "It is important to note that the status of women in society-social, political, legal, economic-has

Although numerous examples could be explored, this paper questions the practice of excluding women from the priesthood in the Roman Catholic Church as a case study for the examination of the tension between women's rights and religious rights under the South African Constitution. A South African Roman Catholic theologian, Dr. Patricia Fresen, has expounded upon these tensions:

It is a pity that the official Roman Catholic church clings largely to the values and the worldview of many centuries ago and still organizes itself as a feudal society. It is a pity that the Roman Catholic church is still influenced by the Greco-Roman and later the Augustinian view of women, regarding them as intrinsically inferior to men. This worldview is reflected in Canon Law and in Church structures...

I learnt about prophetic obedience in South Africa, our great role model being Nelson Mandela. There are many parallels between racism and sexism. Both racism and sexism attempt to give all the power and privilege to one group of people to the exclusion of the other group. Both racism and sexism are horrendous systems of injustice. Once one becomes aware of the injustice within these systems, one cannot go back. We learnt, in the apartheid years, that sometimes the best or even the only possible way to change an unjust law is to break it. But one person alone cannot achieve this. It takes the voice and the protest of a group, a community, who stand together in the face of injustice. And when the previously-excluded group moves into the structures set up by the group that was in power, the structures change.

Today, in this post-apartheid time, what we have is a transformed South Africa, a rainbow nation, and there is no comparison with the divided apartheid society in which I grew up. It is not perfect ... there are still many problems, but the transformation has truly

been fundamentally the same across history for a majority of the world's population. Except for surface differences in manner and style, the basic arrangements for division of labor and power between men and women have been the same across the world. A woman's rights concerning major decisions about her children's future, place of residence, marriage, inheritance, employment, and the like have been severely curtailed in most of the world during most of human history. Until the beginning of the twentieth century, when New Zealand became the first country to give women the right to vote, there was no place on earth where women shared in the political process. Nor did they have the same chance to train for a job, get a job, or, once having gotten it, receive equal pay. Indeed, in some of these areas, especially in the area of ownership of land, Muslim women fared better than women in the West. Significantly, the first fundamentalist movement started in the United States at the beginning of the twentieth century. Protestant fundamentalism came into existence very much in response to the modern age and especially the new visibility and mobility of women. Everywhere, change in women's status has meant a change in the culture of patriarchy. In other words, cultural change is both a byproduct and requisite of change in women's status."

begun and we live and work together in a way that most South Africans would never have believed possible. The system of apartheid, of racial discrimination, has gone from our law and very largely from South African society.

Now we in the Church are on another 'long walk to freedom', this time freedom from sexism, from unjust discrimination against women in the church, freedom from oppression by the privileged clerical caste in the church. Once again, we need to stand together in protest, to break the unjust laws because we cannot wait forever, and we need, at least at the beginning, to move into the structures that exist and change them.²²

I never dreamt that my experience of the breaking-down of racism in South Africa would in part lead me to where I am today: an ordained Roman Catholic woman whose journey towards ordination has led me to stand up against unjust church laws and join the community of women priests in Germany-Austria -and who is standing here today talking about prophetic obedience!...

Just as the Black people of South Africa needed to move into the structures set up by the Whites so as to claim their equal rights as citizens of the country, so we women need to move into the structures in the church so as to claim our right to be there. In both cases, the structures are being changed by the presence of the formerly excluded group.²³

Elsewhere, Dr. Fresen has written:

In 1998 I resigned from the seminary staff. I wanted to work for justice for women in the church and could not accept that women are excluded from priesthood. What I saw and experienced at the seminary had shown me the havoc that patriarchy and hierarchy have wrought in the Church for centuries. I was convinced that women could and should offer a different model of priesthood within the Church. Rome was becoming more and more intransigent in its attitude to women's ordination. We would have to take matters

²² This statement is reminiscent of the Godfrey Pitje case, in which Mr. Pitje was fined for sitting at the table designated for whites before a magistrate judge. Regrettably, Mr. Pitje lost his case at each level of appeal up to the highest court in the 1950s; but he made an important statement of protest. Such statements of protest against an unjust system taken in the aggregate can become a powerful force for ultimate change in the system. *State v. Pitje*, SA Law Reports 1960 (1) SA page 709. See *Minister of Home Affairs & Another v. Fourie and Others*, CCT 60/04, CCT 10/05, 2006 (3) BCLR 355 (CC), December 1, 2005, para 150, discussing the *Pitje* case. See also History of the Black Lawyers Association, at http://www.bla.org.za/asp/content_sub.asp?id=4&sid=3&pageName=History.

²³ See speech by Patricia Fresen, D.Th., Southeast Pennsylvania Women's Ordination Conference, March 12, 2005, See http://www.romancatholicwomenpriests.org/history_1.htm.

*into our own hands. In the years of apartheid in South Africa, we learnt that sometimes the only way to change an unjust law is to break it, particularly when it is a law that denies people basic human rights. Much of our Canon Law discriminates against women, most especially Canon 1024, which states that only a baptized male can be ordained in the Roman Catholic Church. (Recent statements from the Vatican have not only rubber-stamped this canon but have forbidden discussion about the topic of women's ordination and there has even been the declaration that women will never be admitted to priesthood).*²⁴

Dr. Fresen later learned about the "Danube Seven"—the first group of women in modern times to be ordained publically into the Roman Catholic priesthood by Bishop Romulo Braschi in 2002.²⁵ She was ordained as a priest in 2003, and subsequently was ordained as a bishop, along with two other women, by progressive male Catholic bishops who support the cause of women's ordination, and who wanted to ensure that women's ordinations into the priesthood could continue. Dr. Fresen had hoped that her denomination, which had been strongly and actively opposed to racial apartheid in South Africa, would also support the steps she had taken toward ending gender apartheid in the Catholic Church hierarchy. Regrettably, instead they bowed to the pressures brought upon them by the Vatican, and she was ousted from her denomination (but interestingly, she was not excommunicated, unlike the original Danube Seven).²⁶ Since that time she has worked with an international organization called Roman Catholic Womenpriests, which is an international initiative within the Roman Catholic Church that began with the ordination of the seven women in 2002, through which women deacons, priests, and bishops provide ministry in the Roman Catholic Church and "women bishops ordained in full apostolic succession continue to carry on the work of ordaining others in the Roman Catholic Church."²⁷

Women have been largely proscribed or have been altogether prohibited from participating in leadership positions within many of the religions that are practiced in

²⁴ See http://www.virtuelle-dioezese.de/Lebenslauf_Patricia_Fresen.html.

²⁵ The women were ordained on a boat in the Danube River. See Women's Ordination Conference, 2006, <http://174.125.45.132/search?q=cache:NpShsm7cfsJ:www.womensordination.org/content/view/184/+Patricia+Frese+n+south+africa&cd=2&hl=en&ct=clnk&gl=us>, Bishop Patricia Fresen Midwest Speaking Tour. The Women's Ordination Conference is a U.S.-based Catholic organization working for women to be deacons, priests and bishops.

²⁶ Judith Johnson, "Ordinations on the St. Lawrence," *New Women, New Church*, Women's Ordination Conference, Vol. 27, No.4, winter 2004-2005; <http://www.womensordination.org/content/view/223/>.

²⁷ See <http://www.romancatholicwomenpriests.org>.

Africa.²⁸ Few women have played a central role in the development and interpretation of such religions. Women's human rights are violated by the discrimination against women in all major world religions that have historically prohibiting them from becoming religious leaders.²⁹ Such discrimination has largely inhibited women from participating in the evolution of religious tenets, practices and principles of these religions. The rest of the paper will explore how these issues might be addressed by the Constitutional Court of South Africa.

III. Women's Rights and Religious Rights in the South African Constitution and Cases

In light of the cases touching upon women's rights and religious rights that have already been decided under the South African Constitution by the Constitutional Court, how might the Court approach a case if one were brought challenging the ban on women in the priesthood by the Catholic Church?³⁰ How would the Court react if a woman such as Dr. Fresen brought a complaint against the Southern African Catholic Bishops Conference for not allowing her to become a member on the basis of her gender? Of course, the same question could be asked of other religions whose governing hierarchies ban women from leadership positions as well.³¹

²⁸ Of course, this fact applies globally as well. See, e.g., Bart D. Ehrman, *Misquoting Jesus: The Story Behind Who Changed the Bible and Why*, Harper Collins Publishers, 2005 (discussing the deliberate exclusion of women from leadership positions within Christianity); Elizabeth A. Johnson, *She Who Is: The Mystery of God in Feminist Theological Discourse*, Herder & Herder, 1992 (discussing the exclusion of women from leadership positions in the Catholic Church and theology); and Irshad Manji, *The Trouble with Islam Today: A Muslim's Call for Reform in her Faith*, St. Martin's Griffin Press, 2003 (discussing the exclusion of women from leadership positions in Islam).

²⁹ Bayes and Tohidi, p. 19. "Both the Roman Catholic and the Muslim religions are often associated with autocratic governments having laws, special male officers, and bureaucratic organizations. Neither Roman Catholic nor Islamic authorities will allow women to hold higher positions of religious authority. Both exercise executive, legislative and judicial functions. Both cross the boundaries of nation-states ..."

³⁰ Note that the standing provision in the South African Constitution is very broad, so this case could be brought not only by women who themselves would like to become ordained, but also congregants who would like to have female priests and bishops, progressive male priests and bishops who would like to have female colleagues (which could take some of the strain off of them due to the current shortage of Catholic priests and bishops), and other entities such as non-governmental organizations that are acting in the public interest. See *Lawyers for Human Rights and Another v. Minister of Home Affairs and Another*, CCT 18/03, September 3, 2004.

³¹ For example, women are not permitted to perform many aspects of Jewish services in synagogues: "[E]ven the most liberal Orthodox authorities hold that women cannot count in a minyan for purposes of public prayer... Haredi and much of Modern Orthodox Judaism have a blanket prohibition on women leading public congregational prayers. See "Jewish Services" at http://en.wikipedia.org/wiki/Jewish_services#cite_note-22. On a very positive note, recently the Constitutional court upheld the right of a woman to become a tribal leader under customary law, and dismissed a challenge brought against her and her community by a male relative who wanted the position for himself. See *Shilubana and Others v Nwamitwa* (The Commission for Gender Equality, the National Movement of Rural Women and the Congress of Traditional Leaders of South Africa as amici curiae), CCT 03/07, [2008] ZACC 9, 4 June 2008. See Karin Brulliard, "South Africa's 'Breakthrough' Succession Case: Ruling in Favor of Woman in

Article 15 of the South African Constitution provides significant protections guaranteeing the right to freedom of conscience, religion, thought, belief and opinion.³² In interpreting this provision in *Solberg*, Justice Chaskalson quoted Chief Justice Dickson of Canada as writing:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.³³

Justice Sachs expounded upon these sentiments in *Christian Education South Africa*, adding:

This broad approach highlights that freedom of religion includes both the right to have a belief and the right to express such belief in practice. It also brings out the fact that freedom of religion may be impaired by measures that coerce persons into acting or refraining from acting in a manner contrary to their beliefs. Just as it is difficult to postulate a firm divide between religious thought and action based on religious belief, so it is not easy to separate the individual religious conscience from the collective setting in which it is frequently expressed. Religious practice often involves interaction with fellow believers. It usually has both an individual and a collective dimension and is often articulated through activities that are traditional and structured, frequently ritualistic and ceremonial.³⁴

The right to freedom of conscience, religion, thought, belief and opinion is guaranteed "to everyone"—i.e., to human beings, not to corporate entities such as religious organizations; it is a personal right adhering specifically to individuals.³⁵ Since religious bodies are made up of individuals, many of whom will have differing

Chieftaincy Dispute Seen as Victory Over Patriarchal Tribal Traditions," *Washington Post*, Monday, June 1, 2009.

³² Article 15. Freedom of religion, belief and opinion

I. Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

Religious observances may be conducted at state or state-aided institutions, provided that—those observances follow rules made by the appropriate public authorities; they are conducted on an equitable basis; and attendance at them is free and voluntary.

a. This section does not prevent legislation recognising—marriages concluded under any tradition, or a system of religious, personal or family law; or systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

b. Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

³³ *Solberg v The State*, CCT 39/96, October 6, 1997, para92.

³⁴ *Christian Education South Africa v. Minister of Education*, CCT 4/00, August 18, 2000, para. 19.

³⁵ *Id* para. 23 ("protection of [religious] diversity is not effected through giving legal personality to groups as such").

beliefs about particular religious tenets, the right provided in the South African Constitution must inherently guarantee the right of those individuals to maintain their different religious beliefs. This is especially true where a hierarchical governing body of a religious entity attempts to impose only one monolithic perspective on a religious tenet upon all of the members of a religious community.³⁶

Religions are constantly changing, developing and evolving. Religious tenets are continually questioned and challenged. Religious beliefs that were once considered heresies frequently evolve into orthodoxies over time. Religions change in response to the constant changes in society and the world, and in response to growing knowledge and increased access to information. Religion and culture are frequently intertwined, as Justice Langa emphasized in the *Pillay* case, and he discussed the fact that such communities are multifaceted (since they are so intertwined, the term religion is substituted for culture in his discussion of culture below):

[W]hile [religions] are associative, they are not monolithic. The practices and beliefs that make up an individual's [religious] identity will differ from person to person within a [religion] ... While people find their [religious] identity in different places, the importance of that identity to their being in the world is the same. There is a danger of falling into an antiquated mode of understanding [religion] as a single unified entity that can be studied and defined from outside. As Martin Chanock warns us:

There are no longer (if there ever were) single [religions] in any country, polity or legal system, but many. [Religions] are complex conversations within any social formation. These conversations have many voices.

[Religions] are living and contested formations. The protection of the Constitution extends to all those for whom [religion] gives meaning, not only those who happen to

³⁶ Bayes and Tohidi, p. 19. "Both the Roman Catholic and the Muslim religions ... cross the boundaries of nation-states, yet the histories, the customs, and the cultures of specific localities shape the practice of each religion. Neither religion is monolithic or unified ... Each contains within it many schisms, disagreements, and conflicts." See also, Ann Elizabeth Mayer, "Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience," in Peters and Wolper, p. 180-181. "[I]ntense conflicts and debates on rights issues rage within Muslim countries from Africa to Asia, particularly regarding the rights of women; there is no single monolithic cultural position on women's role in society and no unanimity of opinion about how Islamic requirements should apply to problems of contemporary societies. A substantial feminist literature has been produced by Muslim women in the Middle East that seriously challenges the patriarchal biases that infect the political systems in the region as well as the readings offered by male interpreters of the Islamic sources."

... speak with the most powerful voice in the present [religious] conversation.³⁷

The same, too, can be said about customary law. The Constitution carves out a place for customary law as an equally valid part of South African law, yet it, too, is subject to the Bill of Rights and must be developed by the courts promoting the object and purpose of the Bill of Rights.³⁸ Although customary law had sometimes been codified, and therefore fossilized and subsequently marginalized, the Court in *Bhe* indicated that "It should not however be inferred from the above [codification and fossilization] that customary law can never change and that it cannot be amended or adjusted by legislation. In the first place, customary law is subject to the Constitution. Adjustments and development to bring its provisions in line with the Constitution or to accord with the 'spirit, purport and objects of the Bill of Rights' are mandated."³⁹

Similarly, the ever-changing religious and cultural practices are also subject to the Bill of Rights. Moreover, although many Christians believe their religious manuscript, the Bible, to be divinely inspired, its words have been scribed, copied, translated, and changed—primarily by men (e.g., monks, educated elite, etc.)—countless times over the centuries.⁴⁰ Those holding power within religious hierarchies may understandably be reluctant to accept changes within the religious organization that may erode their claims to power. They may, therefore, attempt to ossify church teachings that substantiate their power, and resist anyone questioning their authority to define and impose their version of religious beliefs upon other members of the religious community—particularly upon lay members who have little official power within the religious institution, such as women. The Christian scripture contains many contradictory statements and injunctions about the role women in society in general and regarding religion in particular. Men holding positions of authority within the Christian religious hierarchal structures have historically interpreted and redefined the religious scriptures and tenets to their benefit and to bolster their power, and have imposed that interpretation upon those holding less power within that community (e.g., women).⁴¹ Modern theological scholars have commented that "some of

³⁷ *MEC for Education: Kwazulu-Natal v. Pillay*, CCT 51/06, October 5, 2007, para 54 (footnotes omitted).

³⁸ See, e.g., Article 39 of the Constitution.

³⁹ *Bhe v. The Magistrate, Khayelitsha and Others*, CCT 49/03, October 15, 2004, para. 44.

⁴⁰ See, e.g., Ehrman, *Misquoting Jesus: The Story Behind Who Changed the Bible and Why*, 2005.

⁴¹ Bayes and Tohid, p. 19. "Historically, both Islam and Catholicism are similar in that they are monotheistic ... A system of laws and rights emerges along with intellectual male elites (popes, bishops, clergy, priests, ulama, muftis, ayatollahs, and mullahs) who are the propagators and rulers of the new religious and moral order. The order is hierarchical, communal, and authoritarian ..."

these general assumptions are being challenged by modern feminist theorists."⁴² Although women are beginning to exercise a stronger voice in interpreting religion,⁴³ they are still largely excluded from religious institutions and hierarchies. Since religious leaders interpret and shape the religious tenets that are applied to the entire religious community, the ban on women's participation in religious leadership prevents them from helping to shape the evolutionary progress of their religion, which is yet another layer of discrimination against women.⁴⁴

Of course, diversity of opinion and interpretation within a religious community is to be protected and celebrated under the South Africa Constitution,⁴⁵ just as diversity of opinion and religious belief is to be protected and celebrated as between different religious faiths and non-religious beliefs.⁴⁶ Not only must minority religious communities—such as Muslims, Hindus, Jews, Baha'is, and Buddhists—be protected against discrimination and treated equally within South Africa; but minorities *within* each religious community must also be protected.⁴⁷ Therefore, attempts by some members of a religious community to impose

⁴² Id. "Both [Islam and Catholicism] have an element of egalitarianism in that they recognize all humans, whether male or female, as equal before God." See also, Arati Rao, "The Politics of Gender and Culture in International Human Rights Discourse," in Peters and Wolper, p. 173. "We must acknowledge change, complexity, and interpretive privilege in cultural formation to avoid reductionism, essentialism, and rhetorical rigidity. This enables us to locate and condemn the particular historical formulations of culture that oppress women (such as the emphasis placed by male religious leadership on those passages in a religious text that permit wife beating) as well as to understand and support women's ability to wrest freedom from amidst these oppressive conditions (such as women's emphasis on other passages that advocate nonviolent and respectful treatment of wives)."

⁴³ Bayes and Tohidi, p. 42. "It has taken western women two centuries of fierce struggle (which continues today) to avail themselves of the egalitarian themes of modernity. Initially, the egalitarian goals of modernity and its call for 'liberty, equality, and fraternity' were meant for men only."

⁴⁴ Bayes and Tohidi, p. 49. "An important challenge for Muslim feminists... is that the Quran is seen as the 'word of God' and consequently is immutable. In response, Muslim modernists and feminists have noted that the symbolic wording of the Quran is not critical. Rather the interpretation of the Quran by men forms the basis of Islamic law, application, and practice. This male (*ulama*) monopoly of authority to interpret the Quran or engage in *Ijtihad* is what Muslim feminists are challenging now. As Erika Friedl explains: 'Theoretically these texts are beyond negotiation because they are claimed to emanate from divine or divinely inspired authority. Practically, however, the Holy Writ has to be translated, taught, and made understandable to the faithful... This means it has to be interpreted. Interpretation is a political process: the selection of texts from among a great many that potentially give widely divergent messages, and their exegesis are unavoidably influenced, if not outrightly motivated, by the political programs and interests of those who control the formulation and dissemination of ideologies.' (Friedl 1997, 146)."

⁴⁵ See *Hassan v. Jacobs NO*, CCT 83/08, July 15, 2009, para 33 ("It bears emphasis that our Constitution not only tolerates but celebrates the diversity in our nation.")

⁴⁶ Lourens du Plessis, "Freedom of or Freedom from Religion?" p. 442 ("The explicit protection of the right to freedom of religion and the right to religious equality must be understood as part of this project of cultivating tolerance. Specific provision is made for the particular concerns created by a diversity of religious individuals and communities, so much so that it may well be said that the Constitution foresees a celebration of religious plurality in South Africa – in other words, a high degree of affirmative tolerance. Section 31 may well be understood as enjoining the 'religious majority' – whoever they may be – to honor the 'otherness' of the other. As a result, an era of privileging *certain understandings* of the Christian faith has most certainly come to an end.") (emphasis added).

⁴⁷ See Justice Sachs' opinion in *Christian Education*, para. 24, explaining that the Constitution through various

their particular interpretations of religion upon other members of the religious community goes against the right to freedom of conscience, religion, thought, belief and opinion; particularly when imposed upon those who do not control the reins of power within that religion. This is especially true when an entire segment of the population—such as women—has been so drastically subordinated, marginalized, and discriminated against by those in power, both within the religious community and within society as a whole. It is also especially true when that segment of the population has been forbidden from being a part of the religious leadership and power structure, and therefore they have been denied any role in shaping and defining the religious precepts that have been imposed upon them (including the very precept banning women from leadership positions that shape and define those discriminatory precepts).⁴⁸

In addition to protecting the rights of people who hold minority views within a religious community, the South African Constitution provides significant protections guaranteeing women's rights. The Constitution aims at transforming society in order to overcome past discrimination against women, to ensure the respect for women's fundamental human rights, to guarantee that women are equally protected by law, and to free the potential of each woman.⁴⁹ Ending discrimination against women, along with ending racial discrimination, is one of the most important principles enshrined in the Constitution.⁵⁰

provisions taken together affirms "the right of people to be who they are without being forced to subordinate themselves to the cultural or religious norms of others, and highlight[s] the importance of individuals and communities being able to enjoy what has been called the 'right to be different.'"

⁴⁸ Although on a somewhat different angle, Justice Kriegler's dissent in *President of the Republic of South Africa v. Hugo*, CCT 11/96, April 18, 1997, para. 77 is instructive here: "True as it may be that our society currently exhibits deeply entrenched patterns of inequality, these cannot justify a perpetuation of inequality. A statute *or conduct* that presupposes these patterns is unlikely to be vindicated by relying on them. One that not only presupposes them but is likely to promote their continuation, is even less likely to pass muster." (emphasis added)).

⁴⁹ The preamble provides that: "[T]he people of South Africa... adopt this Constitution as the supreme law of the Republic so as to: *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights*; Lay the foundations for a democratic and open society in which government is based on the will of the people and *every citizen is equally protected by law*; Improve the quality of life of all citizens and *free the potential of each person ...* (emphasis added).

⁵⁰ See Justice Kriegler's dissent in *President of the Republic of South Africa v. Hugo*, CCT 11/96, April 18, 1997, paras. 73 ("Discrimination founded on gender or sex was manifestly a serious concern of the drafters of the Constitution. That is made plain by the Preamble (first main paragraph); the Postscript (first paragraph); the ranking of sex/gender discrimination immediately after racial discrimination in the enumeration of specifically prohibited bases for discrimination in s 8(2); in ss 119 and 120, especially 119(3), providing for the creation of a Commission on Gender Equality; and the repeated use of both sexes throughout the Constitution in emphasis of the break with the former mind set and statutory drafting style... which used the masculine gender only") and 74 ("The importance of equality in the constitutional scheme bears repetition. The South African Constitution is primarily and emphatically an egalitarian constitution... [I]n the light of our own particular history, and our vision

Indeed, the first article of the Constitution indicates that non-sexism and non-racism are two of the founding values upon which the Republic of South Africa is based.⁵¹ Women's equality is a fundamental component of the Constitution, as the Court explained in *Bhe*:

The centrality of equality is underscored by references to it in various provisions of the Constitution and in many judgments of this Court. Not only is the achievement of equality one of the founding values of the Constitution, section 9 of the Constitution also guarantees the achievement of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and non-sexist society is available to all, including those who have been subjected to unfair discrimination in the past. Thus, section 9(3) of the Constitution prohibits unfair discrimination by the State "directly or indirectly against anyone" on grounds which include race, gender and sex.⁵²

Although this passage refers to state action (a statute codifying customary law), it could similarly apply to private action, as addressed further below.

The right to human dignity⁵³ also protects the rights of women, and supports their claims to equality and non-discrimination in all matters, including in matters concerning religion. Dignity is of central importance in the ban on ordination of females, where women have been forbidden from entering into the leadership of the Catholic Church due to "the Greco-Roman and later the Augustinian view of women, regarding them as intrinsically inferior to men."⁵⁴ It is important to note that an institution cannot be said to feel

for the future, a constitution was written with equality at its centre. Equality is our Constitution's focus and organizing principle.").

⁵¹ Article I. The Republic of South Africa is one, sovereign, democratic state founded on the following values: ... (b.) Non-racialism and *non-sexism*. (emphasis added).

⁵² *Bhe v. The Magistrate, Khayelitsha and Others*, CCT 49/03, October 15, 2004, para. 50.

⁵³ See *NM et al v. Smith et al*, CCT 69105, April 4, 2007, paras. 48-54, for a thoughtful discussion of human dignity in the context of HIV/AIDS. See also *Dawood and Another v. Ministry of Home Affairs and Others*, 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para. 35 ("The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life... Section JO, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as... the right to equality.") (footnotes omitted).

⁵⁴ See *NM et al v. Smith et al*, CCT 69105, April 4, 2007, paras. 48-54, for a thoughtful discussion of human dignity in the context of HIV/AIDS. See also *Dawood and Another v. Ministry of Home Affairs and Others*, 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para. 35 ("The value of dignity in our Constitutional framework cannot

an infringement upon its human dignity, since an institution is not itself a human being.⁵⁵ A religious entity is certainly made up of individual human beings, but each individual may have different feelings from other individuals about what constitutes an infringement upon that person's human dignity. For example, some people within the Catholic Church would certainly feel that their human dignity would be violated if they were to receive the sacraments from a female priest. On the other hand, some people within the Catholic Church currently feel that their human dignity is violated by Catholic Canon 1024, which forbids women from becoming ordained. Whose human dignity, then, should the Constitution protect—those who want to perpetuate discrimination against women, or those who want women to be treated equally? Clearly, the right to human dignity must be read in conjunction with the other provisions of the Constitution, which unequivocally favor women's equality and non-discrimination on the grounds of gender.

The right to freedom of association in Article 18 of the Constitution could be viewed from both sides of the case disputing the ban on the ordination of women. On the one hand, men in the Catholic Church hierarchy and congregants who do not want female priests will claim their right to freedom of association within a religious institution that forbids female priests. On the other hand, women who want to be priests, as well as congregants and men in the Catholic Church hierarchy who want female priests, will claim their right to freedom of association within a religious institution that welcomes female priests. Justice Sachs has noted that:

[T]here are a number of constitutional provisions that underlie the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to

therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life... Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as... the right to equality." (footnotes omitted).

⁵⁵ See *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, CCT 11/98, October 9, 1998, para. 26 ("it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.").

subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the "right to be different." In each case, space has been found for members of communities to depart from a majoritarian norm.⁵⁶

The party opposing ordination of women could claim that their religious tenet banning female priests departs from the majoritarian norm of gender equality in South African society, affirms their right to self-expression, and comprises their right to be different, and therefore space must be made for such an association. Of course, the party favoring ordination of women could claim that their religious tenet allowing female priests departs from the majoritarian norm of gender discrimination within the Catholic Church hierarchy, affirms their right to self-expression, and comprises their right to be different, and therefore space must be made for such an association. Again, the question then becomes a matter of whose right to freedom of association should the Constitution protect—those who want to perpetuate discrimination against women, or those who want women to be treated equally? And once again, the right to freedom of association must be read in conjunction with the other provisions of the Constitution, which unequivocally favor women's equality and non-discrimination on the grounds of gender.

The right to freedom of religious communities in Article 31⁵⁷ of the Constitution could also be viewed from both sides of the case disputing the ban on the ordination of women. This article provides that "(1) Persons belonging to a... religious... community may not be denied the right, with other members of that community... to practice their religion... and to form, join and maintain... religious... associations... (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights." On the one hand, men in the Catholic Church hierarchy and congregants who do not want female priests will claim their right to practice their religion, including the religious tenet forbidding female priests, and to maintain their religious association within an institution that forbids

⁵⁶ *Minister of Home Affairs & Another v. Fourie and Others*, CCT 60/04, CCT 10/05, 2006 (3) BCLR 355 (CC), December 1, 2005, para 61 (footnotes omitted).

⁵⁷ The emphasis upon religious communities in Article 31 may in part reflect the South African concept of "ubuntu," indicating that people only live through other people in community with each other, and therefore must respect and affirm each other's humanity. See *S v. Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras. 224-7; 241-51; 263 and 307-13; See also *Azanian Peoples Organization (Azapo) & Others v. President of the Republic of South Africa*, CCT 17/96, July 25, 1996, para 19.

female priests. On the other hand, women who want to be priests, as well as congregants and men in the Catholic Church hierarchy who want female priests, will claim their right to practice their religion, including their religious belief welcoming female priests, and to maintain their religious association within an institution that welcomes female priests. In addition to the analysis utilized in the previous paragraphs, the conclusion must take into account section 31(2), indicating that the rights in 31(1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights. Justice Sachs in *Christian Education* discussed the importance of this limitation:

It should be observed, further, that special care has been taken in the text expressly to acknowledge the supremacy of the Constitution and the Bill of Rights. Section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights. These explicit qualifications may be seen as serving a double purpose. The first is to prevent protected associational rights of members of communities from being used to "privatize" constitutionally offensive group practices and thereby immunize them from external legislative regulation or judicial control. This would be particularly important in relation to practices previously associated with the abuse of the notion of pluralism to achieve exclusivity, privilege and domination. The second relates to oppressive features of internal relationships primarily within the communities concerned, where section 8, which regulates the horizontal application of the Bill of Rights, might be specially relevant.⁵⁸

In his dissenting opinion in *Prince*, Justice Sachs again expounds upon this limitation:

Whether or not a religious practice infringes the Bill of Rights is the basic marker which section 31(2) of the Constitution establishes for limiting the extensive associational rights which section 31(1)(a) emphatically states shall not be denied to religious communities. Thus, practices such as human sacrifice, the immolation of widows or the stoning of adulterers, violate the Bill of Rights and accordingly are not rendered immune to state action simply on the grounds that they are embedded in religious belief.⁵⁹

Granted, the ban on women's ordination does not reach the gravity of the killings provide in each

⁵⁸ *Christian Education South Africa v. Minister of Education*, CCT 4/00, August 18, 2000, para. 26.

⁵⁹ *Prince v. The President of the Law Society*, CCT 36/00, January 25, 2002, para 149, fn. 10.

of the above examples. However, this paper asserts that the prohibition against sex discrimination and guarantee of women's equality weigh in favor of concluding that the ban on female priests is also unconstitutional.

The Catholic Church might argue that the limitation on the right to freedom of expression contained in Article 16 of the Constitution should preclude any lawsuit challenging the ban on ordination of women, or for that matter, any advocacy for the rights of women to become priests. The church might claim that the lawsuit and other advocacy speaks negatively of canon law of the Catholic Church, which could arguably be considered "advocacy of hatred that is based on... religion... that constitutes incitement to harm" under Article 16(2). However, the counter-argument by the women who want to become priests is that they are Catholic themselves, profess adherence to the Catholic religion, and are not attempting to incite harm against the Catholic Church. Indeed, contrary to any advocating hatred of religion in general or of the Catholic Church in particular, the very reason for their advocacy and lawsuit is based upon their strong commitment to Catholicism, their deep Catholic faith, and their love of the Catholic Church. Moreover, as Justice Ngcobo indicated in *Prince*, "it is not demeaning to their religion if we find that the manner in which they practice their religion must be limited to conform to the law ...[Religious groups] are expected, like all of us, to make suitable adaptations to laws that are found to be constitutional that impact upon their practice of religion."⁶⁰ The same could be said where religious groups must make suitable adaptations so that they do not violate the constitutionally protected rights of its members.

The right to occupation and profession⁶¹ is also implicated by the Catholic Church's prohibition upon women entering the priesthood.⁶² Currently the Roman Catholic Church supports about 407,000 priests around the world, which entail a significant number of positions

⁶⁰ *Prince v. The President of the Law Society*, CCT 36100, January 25, 2002, para 76.

⁶¹ Article 22. Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

⁶² "Through it all, the [Roman Catholic women priests] have clung to their vision of their *vocational* calling: to proclaim, by their act of receiving the sacrament of orders, the validity of women as equal participants with men in the priestly ministry of Christ, as handed down through the original apostles. The Womenpriests call for preserving Roman Catholic heritage and traditions and, not to leave the Church, but to renew it and its priestly ministry." *Judith Johnson, Ph.D., "Ordinations on the St. Lawrence," Printed in New Women, New Church, magazine of the Women's Ordination Conference, Vol. 27, No.4, winter 2004-2005; <http://www.womensordination.org/content/view/223/> (emphasis added).*

that are closed to women.⁶³ In an act of civil disobedience to Roman Catholic canon law, between 2002 to 2006, 115 women, three married men, and two gay men have been ordained into the Roman Catholic priesthood in full apostolic succession (although they are still not recognized by the Vatican).⁶⁴ This small, but growing, number of (unrecognized, yet ordained) female priests within the Roman Catholic Church indicates the desire on the part of many women to enter the priesthood as their chosen profession.⁶⁵

Moreover, the ban on ordination of women also discriminates against men.⁶⁶ For example, it has placed a significant strain on the male priests and bishops due to the current shortage of men going into the priesthood. Denying women the opportunity to enter the priesthood tremendously exacerbates the burdens that currently must only be borne by men who have been ordained.

Indeed, the Constitution contains provisions that expressly contravene certain religious tenets that are espoused by the male hierarchy within the Catholic Church (but are neither believed nor adhered-to by millions of its members⁶⁷) in order to protect women's rights. For example, the Constitution provides that women have the right to make decisions

⁶³ "Pope to Close Year for Priests in Rome with Huge Meeting," Catholic News Agency, Vatican City, Aug 14, 2009, http://www.catholicnewsagency.com/news/pope_to_close_year_for_priests_in_rome_with_huge_meeting/.

⁶⁴ Marjorie Reiley Maguire, "The Lady is a Bishop," Roman Catholic Womenpriests, http://www.romancatholicwomenpriests.org/WomenPriest_History_June_2006/THE%20LADY%20IS%20A%20BI_SHOP.pdf.

⁶⁵ It would also be interesting to explore further whether the level of compensation provided by the Catholic Church to males employed as deacons, priests and bishops is substantially higher than the level of compensation provided to women employed by the Catholic Church, and whether there may be any legal significance under the Constitution or statutory law regarding any systemic distinctions in compensation levels. On a related note, in 2000 South Africa ratified the Equal Remuneration Convention (ILO No. 100), 165 U.N.T.S. 303, *entered into force* May 23, 1953; and in 1997 South Africa ratified the Discrimination (Employment and Occupation) Convention (ILO No. 111), 362 U.N.T.S. 31, *entered into force* June 15, 1960.

⁶⁶ For similar reasoning indicating that stereotyping regarding women's and men's roles in parenting not only harms women, but it also harms men, see Justice Mokgoro's concurrence in *President of the Republic of South Africa v. Hugo*, CCT 11/96, April 18, 1997, para. 93: "Section 8 of our Constitution gives us the opportunity to move away from gender stereotyping. Society should no longer be bound by the notions that a woman's place is in the home, (and conversely, not in the public sphere), and that fathers do not have a significant role to play in the rearing of young children. Those notions have for too long deprived women of a fair opportunity to participate in public life, and deprived society of the valuable contribution women can make. Women have been prevented from gaining economic self-sufficiency, or forging identities for themselves independent of their roles as wives and mothers. By the same token, society has denied fathers the opportunity to participate in child rearing, which is detrimental both to fathers and their children... I am concerned that this Court [not act so as to impede societal recognition that] fathers have a meaningful contribution to make in child rearing..."

⁶⁷ See "Catholic Attitudes on Sexual Behavior and Reproductive Health," Catholics for Choice, 2004, <http://www.catholicsforchoice.org/topics/reform/documents/2004worldview.pdf>.

concerning reproduction,⁶⁸ and to have access to reproductive health care⁶⁹ which allow women to make decisions regarding and have access to modern methods of contraception and abortions,⁷⁰ both of which are in contravention of the teachings of the Catholic Church in South Africa.⁷¹ See, for example, the Constitutional Court's statement in *S v. H*: "There is still a substantial body of theological thought which holds that the basic purpose of the sexual relationship is procreation and for that reason also proscribes contraception. There is an equally strong body of theological thought that no longer holds this view. Societal attitudes to contraception and marriages which are deliberately childless are also changing."⁷² The Constitution's explicit stance safeguarding of specific rights that are important to women even when those rights may contravene a teaching of a particular religious institution reinforce the proposition that the spirit of the Constitution is intended to protect the beliefs of religious adherents even when they differ from the orthodox beliefs of the religious institutional hierarchy. Moreover, the Constitutional Court has not hesitated to issue decisions that contravene other tenets of the Catholic Church, such as its decision in *Fourie* regarding same-sex marriage and other decisions supporting the gay and lesbian community.⁷³

It could also be argued that the South African Constitution places a greater emphasis upon the protection of women's right to equality, women's right to non-discrimination on the basis of gender, and women's right to full participation in society, than it does upon religious rights. For example, the Constitution expressly provides that consideration must be given to the racial and gender composition of the judiciary (but it makes no mention of the religious composition of the judiciary).⁷⁴ Moreover, the Constitution provides for the

⁶⁸ Article 12. Freedom and security of the person ... 2. Everyone has the right to bodily and psychological integrity, which includes the right a. to make decisions concerning reproduction; b. to security in and control over their body.

⁶⁹ Article 27. Health care, food, water and social security 1. Everyone has the right to have access to- a. health care services, including reproductive health care...

⁷⁰ See the Choice on the Termination of Pregnancy Act 92 of 1996; see also *Christian Lawyers Association of South Africa v. Minister of Health*, 1998 (11) BCLR 1434 (T).

⁷¹ See, "South African Catholics Aren't Practicing What Pope Preached: Leaders Advocate Condoms To Curb Spread of AIDS Virus," *Washington Post*, By Craig Timberg, Saturday, April 9, 2005; Page A 16; "Anti-Abortion March Attracts Thousands," Southern African Catholic Bishops Conference, March 15, 2010, <http://www.sacbc.org.za/Site/index.php?option=comcontent&view=article&id=417:anti-abortion-march-attracts-thousands&catid=:latest&Itemid=100>; and http://www.virtuelle-dioezese.de/LebenslaufPatricia_Fresen.html.

⁷² *S v H*, 1995 (1) SA 120 (C), at 125A-B; as quoted in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, CCT 11198, October 9, 1998, para. 36.

⁷³ *Minister of Home Affairs & Another v. Fourie and Others*, CCT 60/04, CCT 10/05, 2006 (3) BCLR 355 (CC), December 1, 2005, para 84-98.

⁷⁴ Article 174. Appointment of judicial officers. (1) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

establishment of both a Commission for Gender Equality, as well as a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. Notably, the article establishing the commission concerning religion contains a mandate that "The composition of the Commission must... be broadly representative of the main... religious... communities in South Africa; and... broadly reflect the gender composition of South Africa."⁷⁵ Thus the drafters of the Constitution felt it is crucial to have women participate meaningfully in overseeing the development, protection and promotion of religious rights, presumably to ensure that the rights of women within religious communities are safeguarded.⁷⁶ On the other hand, no provision is contained in the article establishing the Commission for Gender Equality mandating that various religions must be represented on the commission. This omission could plausibly be because gender equality means the same equal rights for women across all religious (and non-religious) communities.⁷⁷ Therefore, to remain true to the spirit of the Constitution, the Court should interpret any tension between women's rights and religious rights in favor of protection for women's rights within religious communities, rather than to any right of a religious community to impose a particular belief or practice upon women within that religion.

Finally, in light of the "never again" principle, the Constitutional Court is likely to interpret the Bill of Rights in light of the oppression during the apartheid era.⁷⁸ Therefore, in

⁷⁵ Article 186(2).

⁷⁶ This comports with Article 9 of the Women's Rights Protocol to the Banjul Charter on Human and Peoples' Rights, which recognizes the right of women to participate in the political and decision-making process, including "the equal participation of women in the political life of their countries," and provides that "States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making." Additionally, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides in Art. 7 that "States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right... To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government."

⁷⁷ Despite this proposition, I would hope that a broad representation of religions is included on the Commission for Gender Equality, which could help enhance its credibility and respect among all religious groups.

⁷⁸ For references to the "never again" principle, see *S v. Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para. 329 (O'Regan) ("Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."); *Ferreira v. Levin*, CCT 5195, December 6, 1995, para. 51 (Ackermann); *NM et al v. Smith et al*, CCT 69105, April 4, 2007, para. 49 (Madala) ("A constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid – the restoration of human

the case of the ban by the powerful Catholic hierarchy on participation by women who have historically been relegated to a subordinate position by the Catholic Church, the Court may well interpret the Constitution to protect the rights of the oppressed and marginalized individual plaintiffs against the exclusivity and dominance of the institutional defendant.⁷⁹ In the words of Justice Mahomed in the *Makwanyane* case:

In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.⁸⁰

Additionally, the rights enshrined in the Constitution apply not only to the state, but also to private conduct.⁸¹

dignity, equality and freedom.");

⁷⁹ See *Harksen v. Lane*, CCT 9/97, October 7, 1997, para 63, noting that "the position of the complainant in society," and whether the group affected has suffered discrimination in the past and is vulnerable, are important factors in the Court's consideration of whether discrimination that does not fall within the fourteen specified grounds of Section 8(2) of the Constitution is unfair. Although at first this seems to be not directly on point regarding the ban on women's ordination, since sex discrimination is included within the specified grounds. However, in analyzing a case where the plaintiff claims the right against sex discrimination, on the one hand, and the defendant Catholic Church hierarchy claims the right against religious discrimination, on the other hand – both of which are specified grounds for protection, the Court will need additional factors to determine which claim to favor. Since as between these two parties, women have been the more vulnerable group and the hierarchy of the Catholic Church has been the more powerful and dominating group, a *Harksen-type* test would prompt the Court to favor the claims of the women. (Of course, the determination must be tailored to the situation of the particular plaintiff and defendant in the case before the Court, as in other circumstances the Catholic Church may be in the more vulnerable and discriminated against position vis-a-vis a more powerful and discriminatory entity.). See also Justice O'Regan's opinion in *President of the Republic of South Africa v. Hugo*, CCT 11/96, April 18, 1997: "The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair."

⁸⁰ *S v. Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), para. 262.

⁸¹ See, Article 8(2). A provision of the Bill of Rights binds a natural or a 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. See also, Article 9(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. See also, Article 2. Supremacy of Constitution: This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. (emphasis added) Since this provision does not expressly limit itself to regulating the conduct of the government, it arguably could apply to

Moreover, the Constitution is explicitly the supreme law of the land over statutory law, common law, and customary law, and thus is also implicitly supreme over religious law (such as Catholic canon law).⁸² Article 2 provides "Supremacy of Constitution: This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." Moreover, the Constitution in Section 39(1-2) indicates that the Constitutional Court, when interpreting the Bill of Rights, "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;" and "When interpreting any legislation, and when developing the common law or customary law, [it] must promote the spirit, purport and objects of the Bill of Rights."⁸³ Therefore, the Constitutional Court would clearly have jurisdiction to decide a lawsuit challenging the Catholic Church's ban on the ordination of women.

IV. Examples of International Approaches to Women's Rights and Religious Rights

This section examines a few examples of the protection of women's rights and religious rights within several and international and regional human rights instruments. It reviews rights protected by the Universal Declaration of Human Rights (UDHR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);⁸⁴

private conduct as well, especially when read in light of Article 8(2) and 9(4). See *Carmichele v. Minister of Public Safety and Security*, CCT 48/00, August 16, 2001 (the courts must develop the common law to bring it in line with the Constitution, including the obligation on the state to protect the rights of individuals from the acts of other private parties).

⁸² See Article 1(c). (South Africa is founded on the value of "Supremacy of the constitution and the rule of law."). See *Hassan v. Jacobs NO*, CCT 83/08, July 15, 2009, para 17, where the court reserved judgment about "the constitutional validity of polygynous marriages entered into in accordance with Muslim rites," thus indicating that it has the authority to consider a constitutional challenge against a religious practice if one were brought. Moreover, the Court also "emphasized that this judgment does not purport to incorporate any aspect of Sharia law into South African law," thus distancing South African law from religious law and clarifying that South African law is not subordinate to religious law. See also, *In re Pharmaceutical Manufacturers Association of South Africa et al: Ex parte the President of the Republic of South Africa*, CCT 31/99, February 25, 2000 (clarifying that the Constitutional Court determines what is a constitutional issue under its jurisdiction, and indicating that nearly all matters concerning inconsistency with the rule of law or legality are constitutional matters within its jurisdiction). The only exceptions are purely factual issues, see *S v. Boesak*, 2001 (1) BCLR 36 CC para. 15; 2001 (1) SA 912 (CC) ("A challenge to a decision of the SCA on the basis only that it is wrong on the facts is not a constitutional matter... Unless there is some separate constitutional issue raised... no constitutional right is engaged when an appellant merely disputes the findings of fact made by the Supreme Court of Appeal.").

⁸³ See also *NK v. Minister of Safety and Security*, CCT 52/04, June 13, 2005, developing the common law regarding vicarious liability to bring it in light with the Constitution and the Bill of Rights.

⁸⁴ In 1995 South Africa ratified the Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

the International Covenant on Civil and Political Rights (ICCPR);⁸⁵ the International Covenant on Economic, Social and Cultural Rights (ICESCR);⁸⁶ the African Charter of Human and Peoples' Rights (Banjul Charter);⁸⁷ the Protocol to the Banjul Charter on the Rights of Women (Women's Rights Protocol);⁸⁸ and the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.⁸⁹ The *Velasquez-Rodriguez* decision by the Inter-American Human Rights Court, which has been recognized by the African Commission on Human and People's Rights,⁹⁰ confirms that the State is obligated to ensure that private actors—such as religious entities—must respect human rights.⁹¹ Of course, the state must ensure the protection of religious minorities, such as Catholics in South Africa,⁹² as well as the protection of women. Some

⁸⁵ In 1998 South Africa ratified the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

⁸⁶ In 1994, South Africa signed (but has not ratified) the International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

⁸⁷ In 1996 South Africa ratified the African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

⁸⁸ In 2004, South Africa ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, *entered into force* Nov. 25, 2005.

⁸⁹ United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, Annex, U.N. Doc. A/RES/47/135 (1992).

⁹⁰ See, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, 155/96, African Human Rights Commission. "57. Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties (See *Union des Jeunes Avocats /Chad*). This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case *Velasquez Rodriguez v. Honduras*. In this landmark judgment, the Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this obligation of the State is further emphasized in the practice of the European Court of Human Rights, in *X and Y v. Netherlands*. In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person."

⁹¹ *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988). "167. The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation - it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights... 172. Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."

⁹² See Asma Jahangir, "Report of the Special Rapporteur on Freedom of Religion or Belief, AIHRC/6/5/, July 20, 2007, para. 34 ("States have an obligation under international human rights law to guarantee the right of minorities

scholars hold it to be self-evident that discriminatory religious laws must be changed to conform to international human rights standards.⁹³ This section will address two categories of women's human rights issues (although many others could be explored in another article): first, women's right to equality and non-discrimination, and second, women's religious rights.

Right to Equality and Non-Discrimination

Women are guaranteed the right to equality and non-discrimination under numerous human rights instruments. Article 7 of the UDHR provides "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Article 3 of the ICCPR indicates that "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." Article 26 provides "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as sex..." The Banjul Charter in Article 3 indicates "Every individual shall be equal before the law [and] Every individual shall be entitled to equal protection of the law." And of course, the Women's Rights Protocol and CEDAW each contain very specific provisions guaranteeing equality and non-discrimination. The Women's Rights Protocol, Article 2, warrants particular mention for the breadth and depth of protection guaranteeing women's right to equality and non-discrimination:

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:
 - a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
 - b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination ...

to profess and practice their own religion. The State remains responsible even when abuses are committed against minorities by non-State actors.").

⁹³ An-Na'im, p. 169 ("it is obvious that the responsibility to change domestic laws [to comply with international human rights obligations] must apply to religious and customary law").

- d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;
- e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

Although CEDAW, Article 2 does not appear to be quite as strong as the Women's Rights Protocol, it also bears special mention as the leading global women's rights treaty:

States condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; ...
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

Both the Women's Rights Protocol and CEDAW also guarantee women equality before the law:

Women's Rights Protocol Article 8. Access to Justice and Equal Protection before the Law
Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure: f) reform

of existing discriminatory laws and practices in order to promote and protect the rights of women.

CEDAW, Article 15

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity... [T]hey shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

Furthermore, these treaties contain specific provisions guaranteeing women's equality with men in the context of particular issues, such as marriage⁹⁴ and culture.⁹⁵ In light of the international human rights instruments to which South Africa is a party, clearly the ban on ordination of women by the Catholic Church violates women's right to equal protection of the law and to non-discrimination.

Right to Freedom of Religion or Belief

Some, but not all, of the major human rights instruments provide for a right to freedom of thought, conscience, and religion and a right to non-discrimination based on religion.⁹⁶ For example, the UDHR contains several articles protecting religious rights. Article 2 re-affirms the principle of non-discrimination on the grounds of sex, religion, or any other opinion. Article 18 has one of the strongest provisions protecting freedom of religion or belief, guaranteeing that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change [her] religion or belief, and freedom, either alone or in community with others and in public or private, to manifest [her] religion or belief in

⁹⁴ Women's Rights Protocol Art. 6 and 7; CEDAW, Art. 3 and 16. Note, since the Protocol is a pragmatic compromise document, Article 6 allows discrimination regarding marriage, but only in limited and specifically defined circumstances, such as polygamy and the nationality of children where national legislation permits such discrimination or where discrimination is justified on national security grounds.

⁹⁵ CEDAW, Art. 5: States Parties shall take all appropriate measures: a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

⁹⁶ See, e.g., Banjul Charter, Preamble, Art. 2; Women's Rights Protocol, Preamble.

teaching, practice, worship and observance." This mandate is bolstered by Article 19, which guarantees that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Presumably, these opinions and expressions may be about religious, atheist or agnostic beliefs as well as other secular topics. Moreover, Article 16 guarantees individuals the right to marry a person who is not of their religious faith and guarantees equality for women and men regarding at the initiation, during, and at the dissolution of marriage.

The International Covenant on Civil and Political Rights also provides certain guarantees regarding religion. Article 2 indicates that States undertake "to respect and to ensure to all individuals... the rights recognized in the present Covenant, without distinction of any kind, such as... sex,... religion, political or other opinion..." The ICCPR's Article 18⁹⁷ echoes and strengthens the UDHR's Article 18, by affirming that:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Interestingly, Article 23(4) of ICCPR, which provides for equality of rights and responsibilities of spouses, does not make any mention of religion, in contrast to UDHR Article 16. Yet ICCPR adds a new provision concerning religion in Article 27, providing that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other

⁹⁷ The Human Rights Committee in General Comment 28 states that "Article 18 [of the ICCPR] may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion; States parties should therefore provide information on the status of women as regards their freedom of thought, conscience and religion, and indicate what steps they have taken or intend to take both to eliminate and prevent infringements of these freedoms in respect of women and to protect their right not to be discriminated against." (para. 21)

members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

By contrast, Article 8 of the Banjul Charter on Human and People's Rights contains a more limited guarantee, providing that "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms." The only provision regarding religion in the Women's Rights Protocol is found in the Preamble, which simply reaffirms the principle of non-discrimination on the grounds of sex, religion, or any other opinion. Interestingly, CEDAW makes no mention of religion at all.

Religion is frequently deemed to be part of the culture of a community. Considered in this light, there are numerous provisions in human rights instruments requiring the elimination of cultural practices that adversely impact women. For example, CEDAW, Article 5 indicates that "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." Moreover, CEDAW, Article 13 provides that "States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: (c) The right to participate in... all aspects of cultural life." Article 29 of the Banjul Charter provides that "The individual shall also have the duty... to preserve and strengthen *positive* African cultural values..." acknowledging the distinction between positive and negative cultural values. Since religion may be considered to be an aspect of the culture, morals, and values of a country, it suggests that only the *positive* African cultural values are to be preserved and strengthened. When considering the emphasis that is placed on women's equality and non-discrimination against women within the Banjul Charter and other international and African human rights instruments, it can be fairly argued that they are part of the positive African cultural values that are to be prioritized as against other less positive cultural values that may discriminate against women.

The United Nations Declaration on the Rights of Persons Belonging to National or

Ethnic, Religious and Linguistic Minorities is also instructive.⁹⁸ The Declaration protects the rights of persons "individually as well as in community with other members of the group, without any discrimination"⁹⁹—which arguably protects religious individuals from discrimination by other members of the group. Moreover, the Declaration provides that "States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law,"¹⁰⁰ thus protecting the rights of women to equality and non-discrimination from members of their own religious community. It also guarantees the protections for women's human rights embodied in other international human rights documents.¹⁰¹ And significantly, in the article providing for the right of individuals belonging to minority groups to develop their culture, religion, traditions and customs; it expressly excludes from protection "specific practices... in violation of national law and contrary to international standards,"¹⁰² thus enabling States to take measures to eliminate such practices.

The Special Rapporteur on Freedom of Religion or Belief elucidates that any limitations upon the right to freedom of religion or belief "may not be imposed for discriminatory purposes or applied in a discriminatory manner and limitations must be directly related and proportionate to the specific need on which they are predicated. The burden of justifying a limitation upon the freedom to manifest one's religion or belief lies with the State. The chosen measures should promote religious tolerance and avoid stigmatizing any particular religious community."¹⁰³ She has also noted that "some States encroach on the appointment procedure of religious leaders or require approval by the authorities for certain promotions within religious groups. The Special Rapporteur would like to emphasize that the freedom of religion or belief also protects the conduct by

⁹⁸ G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, Annex, U.N. Doc. A/RES/47/135 (1992). See also, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/684 (1981).

⁹⁹ Article 3(1).

¹⁰⁰ Article 4(1).

¹⁰¹ Article 8(1). Nothing in the... Declaration shall prevent the fulfillment of international obligations of States in relation to persons belonging to minorities. In particular, States shall fulfill in good faith the obligations and commitments they have assumed under international treaties and agreements to which they are parties. 2. The exercise of the rights set forth in the... Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.

¹⁰² Article 4(2).

¹⁰³ Asma Jahangir, "Report of the Special Rapporteur on Freedom of Religion or Belief, A/HRC/6/5/, July 20, 2007, para. 45.

religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers."¹⁰⁴ However, the Special Rapporteur has also indicated that: "The States' capacity and willingness to guarantee and protect de jure and de facto freedom of religion of all individuals within its jurisdiction is often the key to developing an appropriate framework for the protection of all human rights, including women's rights. It ensures that individuals can express themselves fully and dissent, even within their own religion... The Special Rapporteur would like to reiterate the importance of ensuring that the right to freedom of religion or belief adds to the values of human rights and does not unintentionally become an instrument for undermining freedoms."¹⁰⁵

As established above, according to international human rights standards each individual is guaranteed the right to freedom of thought, conscience, and religion and the right to non-discrimination based on religion. These rights arguably include the freedom to adopt, exercise, change, and interpret one's own religious beliefs.¹⁰⁶ By logical extension, no individual or religious institution has the right to impose a religion (or a particular tenet or interpretation of religion) upon any other individual.¹⁰⁷ Religious rights under international human rights standards are permissive, not mandatory. In other words, individuals have the right to choose whether or not to exercise religion, and if they choose to exercise religion, they also have the right to choose how they will exercise that religion (e.g., how they interpret the religion and apply it within their own lives). This paper asserts that the Roman Catholic Church's worldwide ban on the ordination of female priests violates the religious rights of those Catholics whose religious faith supports women's ordination. Therefore, the provisions in the above international and regional human rights instruments regarding women's rights and religious rights would arguably help bolster a lawsuit challenging the ban on women's ordination within the Catholic Church in South Africa.

¹⁰⁴ Special Rapporteur Report, para. 16.

¹⁰⁵ Asma Jahangir, "Report of the Special Rapporteur on Freedom of Religion or Belief," A/HRC/4/21, 26 December 2006, para. 38.

¹⁰⁶ The fact that some interpretations of some religions may contravene these rights (e.g., some Muslims assert that individuals cannot convert from Islam to another religion), this does not nullify these precepts as human rights principles. By way of analogy, the fact that the Catholic Church discriminates against women, such as its ban on women in leadership positions, this does not nullify women's equality as a basic human rights principle.

¹⁰⁷ Even if a majority of representatives in a democratically elected government imposed a particular religion upon the population, this forced religion would violate human rights (tyranny of the majority does not justify human rights violations).

V. Conclusion: Women's Rights and Religious Rights Should be Interpreted to Complement (Not Contradict) Each Other under the South African Constitution

According to the above discussion, it seems clear that the rights of women who want to become priests are being violated by the Catholic Church in South Africa, as well as the rights of congregants and men in the Catholic hierarchy who want female priests. Since there is no law of general application which is causing the limitation of rights, the question of justification under Article 36 of the Constitution does not apply.¹⁰⁸ The Constitutional Court may then undertake to balance the infringement upon the rights of women—including their religious rights—caused by the ban upon women in the priesthood, as well as progressive congregants and men in the church hierarchy, as against the infringement upon the rights of men in the Catholic hierarchy and congregants who do not want to allow women to become priests if they were required to lift the ban, in order to determine whether the discrimination is "unfair."¹⁰⁹ Again, according to the discussion above, the Court would likely determine that such discrimination is indeed unfair, because it not only violates women's rights to equality, non-discrimination, association, occupation and profession, and other rights; but also because it violates women's right to freedom of religion. Thus, the Court would be interpreting women's rights and religious rights as complementing—not contradicting—each other under the South African Constitution.

It might be wise to acknowledge that any attempt by the Constitutional Court to force the Catholic Church in South Africa to ordain women as priests would likely be met with incredibly strong resistance, not only from conservatives in the Catholic Church but also in other religious traditions who still do not allow women to hold leadership positions, and would lead to claims of religious discrimination (even though such claims ignore the religious discrimination that the ban itself imposes upon women).¹¹⁰ In certain circumstances, an

¹⁰⁸ *The City Council of Pretoria v. Walker*, CCT 8/97, February 17, 1998, para. 82.

¹⁰⁹ See *NM et al v. Smith et al*, CCT 69/05, April 4, 2007, paras. 48-54, for a thoughtful decision balancing among the competing rights and interests of the two private parties. See *Prinsloo v. Van der Linde*, CCT 4/96, April 18, 1997, for a comprehensive discussion of "differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination," para. 23. See Justice Goldstone's discussion about "unfair discrimination" and his seminal guide to equality analysis in *Harksen v. Lane*, CCT 9/97, October 7, 1997, para 53. Although both *Prinsloo* and *Harksen* involved discrimination by the state rather than discrimination by private parties, a similar analysis could be applied when balancing the rights of private parties involved in discriminatory conduct (though it obviously would entail some differences).

¹¹⁰ See Justice Chaskalson's decision in the death penalty case, holding that public opinion is not irrelevant, but it

evolutionary process, rather than a revolutionary process, of social change could arguably produce better, more solid and lasting results; rather than the turmoil, resentment, and resistance that a drastic and sudden change might engender. The Court, for example, would certainly acknowledge that the religious beliefs of the Catholic Church hierarchy must be taken seriously, and that the Catholic Church has frequently been a force for social justice and tremendous good in society.¹¹¹ The Court would also affirm that the people advocating for retention of Canon 1024 banning women from becoming ordained hold their beliefs due to sincere convictions about their religious tenets.¹¹² However, the court would then likely echo Justice Sachs' sentiment that "It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others."¹¹³

Therefore, in this instance and under these circumstances, the Court may choose to issue a declaratory order indicating that the ban violates both women's rights (i.e., to equality, non-discrimination, etc.) and religious rights (i.e., of people whose religious tenets include women in the priesthood), that it is inconsistent with the Bill of Rights and constitutes unfair discrimination, and therefore that it is unconstitutional. Taking a moderate approach, the declaratory order could indicate that the Court is not a proper venue through which to resolve disputes concerning religious tenets nor the appropriate forum through which to craft a specific remedy, and therefore the Court could refer the matter to the hierarchy of the Catholic Church in South Africa to resolve the matter and to come up with an appropriate solution.¹¹⁴

cannot dictate the outcome of a case decided under the South African Constitution. *Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras. 87-89.

¹¹¹ See *Minister of Home Affairs & Another v. Fourie and Others*, CCT 60/04, CCT 10/05, 2006 (3) BCLR 355 (CC), December 1, 2005, para 89-90.

¹¹² See Justice Sachs' discussion in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, CCT 11/98, October 9, 1998, para. 36, about sincerely held religious beliefs opposing homosexuality: "The issues in this case touch on deep convictions and evoke strong emotions. It must not be thought that the view which holds that sexual expression should be limited to marriage between men and women with procreation as the dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons, by persons who would not wish to have the physical expression of sexual orientation differing from their own proscribed by the law. It is nevertheless equally important to point out, that such views, however, honestly and sincerely held, cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation."

¹¹³ *Minister of Home Affairs & Another v. Fourie and Others*, CCT 60/04, CCT 10/05, 2006 (3) BCLR 355 (CC), December 1, 2005, para 92.

¹¹⁴ *Minister of Home Affairs & Another v. Fourie and Others*, CCT 60/04, CCT 10/05, 2006 (3) BCLR 355 (CC), December 1, 2005, para 92. Justice Sachs continued that "Between and within religions there are vastly different

The Court could encourage conversation and dialogue among the parties to the lawsuit, and urge them to work together to come up an appropriate solution through active engagement with each other.¹¹⁵ The Court could also suggest that the parties conduct a thorough factual examination of the various manifestations of discrimination against women in the Catholic Church, including the ban on women's ordination, and the deleterious consequences that such discrimination has wrought upon both women and men in the church. The investigation could be spearheaded by well-respected and knowledgeable persons representing both sides. In addition to gathering statistical data and evidence, they could conduct public hearings allowing oral and written testimony to be submitted by interested stakeholders, which could be broadcast via television and the Internet and excerpts with the highlights shown periodically.¹¹⁶ The subsequent report could help inform the negotiations and the compromise agreement that the parties ultimately reach.¹¹⁷ Hopefully, the ethos of *ubuntu* would infuse this process leading to a respectful solution by which everyone (or nearly everyone) could abide.¹¹⁸ Perhaps the parties might agree to allow each of the bishops in South Africa to decide individually whether to ordain women, and then initially to place female deacons, priests and bishops in positions where they are most wanted (e.g., with more progressive, rather than

and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexual. Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies." Through the remedy proposed in this paper, the Court would be taking sides only as the dispute pertains to the Constitution; it would not be wading into which side has the better interpretation of religious principles.

¹¹⁵ South Africa is a consultative and participatory democracy (as well as a representative democracy), and like the government, in the same spirit private parties should also be encouraged to participate and engage with each other in reaching compromises that are acceptable to all parties. See *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*, 2008 (3) SA 208 (CC) (S. Afr.).

¹¹⁶ Although certainly on a different scale, such an investigation is consistent with South Africa's use of the Truth and Reconciliation Commission (TRC), in attempting to bring to light the factual circumstances surrounding systemic injustice against a segment of the population. As we discussed in class, Bishop Desmond Tutu indicated that the TRC was crucial to ensure that whites "look the devil in the eye," instead of turning a blind eye to the discrimination and other atrocities that were being imposed upon non-whites, as they had done during the apartheid era. Justice Goldstone also noted that the TRC had the salutary outcome of "white conscience and black entitlement," which helped facilitate the nation's historic transition away from apartheid and toward equality. I would hope that a balanced investigation into the discrimination against women within the Catholic Church could produce similar results.

¹¹⁷ Such a report could also spark investigations in other countries of the world, and perhaps throughout the entirety of the Catholic Church as a whole, which would be a very positive outcome of the South African case having ripple-effects throughout the world.

¹¹⁸ The South African concept of "ubuntu," indicates that people only live through other people in community with each other, and therefore must respect and affirm each other's humanity. See *S v. Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras. 224-7; 241-51; 263 and 307-13; See also *Azanian Peoples Organization (Azapo) & Others v. President of the Republic of South Africa*, CCT 17/96, July 25, 1996, para 19; *Bhe v. The Magistrate, Khayelitsha and Others*, CCT 49/03, October 15, 2004, para. 45.

conservative, congregations). This outcome would result in some congregations being led only by male priests, so that option would be available for people opposed to women's ordination, and some congregations being led by both women and men celebrants, so that option would be available for people welcoming women's ordination.¹¹⁹ Of course, the church may decide to ignore the Court's decision entirely and retain the ban, but even the simple fact that the Court declares the ban on women in the priesthood to entail unfair discrimination will most likely spark a heated public debate about the benefits and drawbacks of allowing women to be ordained, which in itself would be a very productive outcome (as they say, "sunlight is the best disinfectant;"¹²⁰ thus, shining a public spotlight upon a discriminatory practice can help people see how harmful it truly is).

In sum, under the South African Constitution, it is likely that the Constitutional Court would hold that the Catholic Church's ban on the ordination of women is inconsistent with the Bill of Rights and is unconstitutional. Such a holding would probably garner a tremendous amount of publicity throughout the world, not only within the Catholic Church, but also throughout other religions that maintain bans on women in leadership positions. This public debate, as long as it remains respectful and peaceful, should be welcomed as a means through which to shed light on other manifestations of discrimination by certain interpretations of religions principles. Perhaps this decision could be yet another landmark in helping not only South Africa, but indeed the world, to move forward toward a more just, fair, and equitable society where all people—women and men—are respected as equals.

¹¹⁹ See Justice Sachs' concurring opinion in *In re: Dispute Concerning the School Education Bill of 1995*, CCT 39/95, April 4, 1996, extolling the virtues of diversity ("On the subject of the intrinsic value of diversity, Otto Klineburg was quoted in the UN Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev. 1 (1979) reprinted as UN Pub.E.78.XIV.1 (1979) (hereinafter referred to as the Capororti Report) as saying: 'An undertaking to abolish discrimination against an individual if he becomes similar to the majority is obviously unsatisfactory in the case of those who do not seek to become like the majority... One of the motives operating here is the growing belief in the value of diversity, the enrichment of community life through the maintenance of cultural variations, the fruitfulness of continuing contrast between different ways of life.", para. 318, 55."). Some people may protest that such a compromise would allow discrimination against women to continue within the Catholic Church, even though it would be somewhat ameliorated as women would be able to become ordained and assume certain positions that had previously been closed to them. My response would be again to reiterate that sometimes change becomes more accepted and more entrenched when it is evolutionary rather than revolutionary.

¹²⁰ U.S. Supreme Court Justice Louis Brandeis, *Other People's Money – and How the Bankers Use It*, Chapter V ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."), originally published as a series of articles in *Harper's Weekly* in 1913, and subsequently published in a book in 1914. Posted by Louis D. Brandeis School of Law, University of Louisville, at <http://www.law.louisville.edu/library/collections/brandeis/node/191>.

VI. Appendix A.: Relevant Excerpts from the South African Constitution

Preamble:

[T]he people of South Africa ... adopt this Constitution as the supreme law of the Republic so as to:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person ...

Founding Principles:

Article 1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- b. Non-racialism and non-sexism.
- c. Supremacy of the constitution and the rule of law.

Article 2. Supremacy of Constitution
This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

The Bill of Rights:

Article 8. Application

1. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
2. A provision of the Bill of Rights binds a natural or a 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.

Article 9. Equality

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. 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.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Article 10. Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

Article 12. Freedom and security of the person

2. Everyone has the right to bodily and psychological integrity, which includes the right-
 - a. to make decisions concerning reproduction;
 - b. to security in and control over their body ...

Article 15. Freedom of religion, belief and opinion

1. Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
2. Religious observances may be conducted at state or state-aided institutions, provided that-
 - a. those observances follow rules made by the appropriate public authorities;
 - b. they are conducted on an equitable basis; and
 - c. attendance at them is free and voluntary.
3. a. This section does not prevent legislation recognising-
 - 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.
- b. Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Article 16. Freedom of expression

1. Everyone has the right to freedom of expression, which includes-
 - a. freedom of the press and other media;
 - b. freedom to receive or impart information or ideas;
 - c. freedom of artistic creativity; and
 - d. academic freedom and freedom of scientific research.
2. The right in subsection (1) does not extend to- ...
 - c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Article 18. Freedom of association

Everyone has the right to freedom of association.

Article 22. Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Article 27. Health care, food, water and social security

1. Everyone has the right to have access to-
 - a. health care services, including reproductive health care;

Article 31. Cultural, religious and linguistic communities

1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
 - a. to enjoy their culture, practise their religion and use their language; and
 - b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Article 36. Limitation of rights

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.
2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Article 39. Interpretation of Bill of Rights

1. When interpreting the Bill of Rights, a court, tribunal or forum-
 - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.
2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Article 174. Appointment of judicial officers

2. The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (ss 185-186)

Article 185. Functions of Commission

1. The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are-
 - a. to promote respect for the rights of cultural, religious and linguistic communities;
 - b. to promote and develop peace, friendship, humanity, tolerance and national unity

- among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
- c. to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.
 2. The Commission has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.
 3. The Commission may report any matter which falls within its powers and functions to the Human Rights Commission for investigation. *[Sub-s. (3) amended by s. 4 of Act 65 of 1998.]*
 4. The Commission has the additional powers and functions prescribed by national legislation.

Article 186. Composition of Commission

1. The number of members of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and their appointment and terms of office must be prescribed by national legislation.
2. The composition of the Commission must-
 - a. be broadly representative of the main cultural, religious and linguistic communities in South Africa; and
 - b. broadly reflect the gender composition of South Africa.

Commission for Gender Equality (s 187)

Article 187. Functions of Commission for Gender Equality

1. The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.
2. The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.
3. The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.

General Provisions (ss 193-194)

Article 193. Appointments

1. The Public Protector and the members of any Commission established by this Chapter must be women or men who-
 - a. are South African citizens;
 - b. are fit and proper persons to hold the particular office; and
 - c. comply with any other requirements prescribed by national legislation.
2. The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

Traditional leaders (ss 211-212)

Article 211. Recognition

1. The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
2. A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
3. The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Article 212. Role of traditional leaders

1. National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
2. To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law-
 - a. national or provincial legislation may provide for the establishment of houses of traditional leaders; and
 - b. national legislation may establish a council of traditional leaders.