

Opening Keynote Address at the Eighteenth Annual International Law and Religion Symposium on “Religious Freedom in a Pluralistic Age: Trends, Challenges and Practices”

Presented by Z.M Yacoob, Justice of the Constitutional Court of South Africa on 2 October 2011 at Brigham Young University, Provo Utah United States of America

Programme Director, most honourable organisers and participants of this Conference, Ladies and Gentlemen: allow me first to express my sense of gratitude and humility to this Symposium for having asked me to make some contribution to it. I am particularly honoured to be able to speak here today for a number of reasons. First, the issues concerned with religion, belief and thought that you will discuss here are matters of considerable significance to the attainment of peace and harmony in our universe. This is because differences in religious thinking, belief or action have more and more the potential to cause increased strife, pain and misery. These are consequences that humanity should make every effort to remove. Secondly, an appropriate and measured understanding of the freedom with which we are concerned here has the potential to give rise to a deeper appreciation of the positive dimensions of our very humanity. And finally, in an age where there is a tendency for more and more human beings to think that they are better than other human beings because they believe in a particular way, the Symposium will hopefully throw some light on whether and the extent to which any sense of worldly superiority is consistent with healthy notions of both religious freedom on the one hand and the role of religion in a plural or secular society on the other. May I say at the outset in this connection that I will not be going into the theoretical distinction between secularism and pluralism because, in my view, it would be better to adopt the approach that the difference in these concepts is immaterial for present purposes.

Religion, conscience, thought and belief should, I believe, be regarded as the core of our humanity as a crucial component of our humanness. They are indeed so crucial and so essential that I doubt whether we would be able to call ourselves human beings without them. These aspects of our personality have the potential to enable us to realise our goodness so that we become the drivers of the achievement of value wherever we may be.

Yet, as I show later, the practise or manifestation of a religion or belief could give rise to difference, intolerance, lack of acceptance, or even conflict. There are many, many religions and systems of belief on this Earth and we have reached the stage of development where every country, state, city, town or village are likely to have human beings living in it who subscribe to different religions. And this is where law comes into it.

Law in its primary and most simple definition is a set of rules adopted and enforced by society as a whole presumably for the good of all. Law in its most general sense is aimed at managing conflicts within society. And laws concerned with freedom of religion are, in my view, intended to cope in a way acceptable to all with those conflicts and negative consequences which might arise on account of differences in religion, conscience, thought and belief. Laws that are in place concerning freedom of religion are both of an international character or of national application only. And it is to some of these laws that I now turn.

It is apparent from the detail contained in the Annexure to this paper that international law provisions concerning freedom of religion are virtually universal. They are, as you will see from the Annexure contained in the United Nations Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights; in the Americas, the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights; in Europe, the European Convention on Human Rights; in Africa, the African Charter on Human and Peoples' Rights (the Banjul Charter) and the African Charter on the Rights and Welfare of the Child. This is in itself an indication of the importance of freedom of religion clauses. As will be seen from the Annexure provision for freedom of religion is also made in the national Constitutions and other national legal instruments of United States of America, South Africa, Canada, India and Germany.

It is as well to start by recognizing what these instruments do not say. Firstly, they are not limited to freedom of religion but apply to freedom of conscience, thought, belief and action as well. The next important aspect to note is that none of the constitutional provisions provide that a belief in God is an essential prerequisite to the protection that is afforded. It must follow therefore that the protection is given whether the person concerned believes in God or not. The third significant conclusion that can be legitimately drawn from all these provisions is that none of them create a hierarchy in relation to the importance of the beneficiary of the protection. In other words, it is not material for purposes of these instruments whether thought, belief, conscience or religion is the subject matter of the protection. And finally and most importantly, the instruments that are highlighted are not of a religious character. They cannot and do not say anything at all about what should happen inside a religion or what a religious belief should or should not embrace. These provisions are what we may call legal provisions as distinct from religious provisions. They are about religion and the way in which religion would work in a multi-religious, multi-cultural environment. It must be accepted therefore that these freedom of religion provisions are not intended to be nor can they be, in every detail, consistent with every religion. They are concerned not, with intra-religious issues but with what may be called inter-religious and inter-belief matters, for the benefit of all the people within the jurisdiction of the instrument concerned.

It is now time to talk about some of the dimensions that most of the international instruments have in common. The first is that all of them guarantee the right to freedom of religion and conscience and the right to practice a religion. Parents and guardians of children have the right or duty to ensure that children are brought up in accordance with their convictions or that they receive guidance or direction according to what they believe.

The second dynamic is that these rights are hardly ever unlimited. The limitations are expressed differently in different instruments but no instrument that I have come across talks to the practice of religion regardless. So for example, the United Nations instrument, the International Covenant on Civil and Political Rights limits "the freedom to manifest one's religion or beliefs" by saying that this manifestation or practice is subject only to "limitations as are prescribed by law and are necessary to protect public order, health or morals or the fundamental rights and freedoms of others. The European and the American Conventions are

generally to the same effect except that they do not expressly refer to the limitation of rights occasioned by the enjoyment of fundamental rights and freedoms. The provision in the African Charter, although negatively phrased, also provides for a limitation of rights. According to this provision, measures “restricting the exercise of these freedoms” may be taken subject only to “law and order”.

The third aspect that is common to all is that no particular religion is singled out over and above other religions. It must follow from this that all religions practised within the jurisdiction of the international instrument concerned are regarded by the instruments themselves as worthy of equal respect and protection. It should not matter for the purpose of the application of the instrument, whether the religion is one which has been practised for a long time or is new, which is practised by the vast majority of people in a particular country or whether it falls in the category of being a traditional religion or not. It is true that the practise of one aspect of a particular religion may be limited where practise in that respect does not exist in other religions, where the manifestation concerned is regarded as needs to be protected. That apart all religions must be treated equally.

So the first challenge that arises in the case of international instruments is that a limitation of the right to practice a religion is necessary for the purposes within the meaning of the instrument concerned. The next related challenge arises from the fact that all these instruments do not confine themselves to the protection of the right to freedom of religion, belief, conscience and thought alone. They also protect the right to equality, and to equal protection of the law and the right to non-discrimination on grounds like sex, race and gender. The third challenge is that while each religion or system of belief encourages and even mandates a value system of its own, the international instrument itself might provide a value system. The third challenge is less important in the international arena than in the case of national instruments. This is because each state which is signatory to an international instrument enjoys a margin of appreciation. If the challenge in the context of the enforcement of international freedom of religion clauses could be expressed broadly, it would be put like this: how far can international instruments go to limit the right to freedom of religion as encapsulated in the international instrument.

A reference to the general approach of the European Court of Human Rights as reiterated in a recent case<sup>1</sup> will I think be useful. The Court made it plain that freedom of thought, conscience and religion is one of the foundations of a democratic society. It went on to say “this freedom is in its religious dimension one of the most vital elements that go to make up the identity of believers and their conception of life.” But the Court also emphasised that the right is not important to religious believers alone. The Court said in no uncertain terms that the right is also a “precious asset for atheists, agnostics, sceptics and the unconcerned”. It was also said that the freedom is one “to hold or not to hold religious beliefs and to practise or not to practise a religion”.<sup>2</sup>

---

<sup>1</sup> *Leyla Sahin v. Turkey*, application no. 44774/98, ECtHR, 10 November 2005.

<sup>2</sup> *Id* at para 104.

The State had a duty so the European Court held “to ensure that everyone’s beliefs are respected”.<sup>3</sup> In addition, the State role is one of a “neutral and impartial organiser of various religions, faiths and beliefs”. This neutrality is “incompatible” with any State power to “assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed”. Religious tolerance was also important.<sup>4</sup> Finally, the European Court reiterated that the spirit of compromise necessary in a democracy renders necessary “concessions on the part of individuals or groups ...to maintain and promote the ideals and values of a democratic society”. It was also acknowledged that other rights guaranteed by international instruments may have to be restricted in order to protect the freedom of religion.<sup>5</sup>

Before turning briefly to experiences in my country I would like to give a few examples of decisions of European Court of Human Rights. That Court has held:

- (a) that the banning of the wearing of headscarves was necessary on the basis of the need to protect and advance the equality of women and to prevent one religion becoming more dominant;<sup>6</sup>
- (b) the wearing of a headscarf by a teacher was rightly prohibited largely because of the age of the children and the ease with which they might have been influenced;<sup>7</sup>
- (c) the display of a crucifix in a classroom at a school in Spain was permissible;<sup>8</sup> and
- (d) that a law in Armenia limiting the right of freedom of religion by prescribing compulsory military conscription was not necessary since the subject could be asked to provide alternative necessary labour.<sup>9</sup>

It will have been seen from the Annexure that the provisions of the Constitution of the Republic of South Africa is somewhat different from those in the international instruments. Some of these differences will now be discussed.

The freedom of conscience, religion, thought, belief and opinion are provided for separately and differently from the right to practice a religion. Presumably this was done on the basis that it is only practise that has an impact on other members of society and on constitutional

---

<sup>3</sup> Id at para 106.

<sup>4</sup> Id at para 107.

<sup>5</sup> Id at para 108.

<sup>6</sup> Above n1.

<sup>7</sup> *Dahlab v. Switzerland*, application no. 42393/98, EctHR, 15 February 2001.

<sup>8</sup> *Lautsi and Others v. Italy*, application no. 30814/06, ECtHR, 18 March 2011.

<sup>9</sup> *Bayatyan v. Armenia*, application no. 23459/03, ECtHR, 7 July 2011.

values. I would suggest that this is correct. Whatever we believe and think in our minds and hearts, provided that there is no manifestation of practise of these beliefs, can have no impact on society. It is for this reason that the right of these freedoms is not internally limited by the South African Constitution in any way. But the right to practise is differently treated. People may not be denied, amongst other things, to practise their religion and to join and maintain linguistic associations. But the limitation is express and clear. These rights may not be exercised in a manner inconsistent with any provision in the Bill of Rights. The question whether any religious practice is inconsistent with our Bill of Rights has not yet come before our Courts. It has not yet been determined therefore what the phrase “inconsistent with the Constitution” means. Nevertheless, there is a strong argument that the other rights in the Bill of Rights might assume a somewhat greater status than the right to practice one’s religion.

Two cases that came before the Constitutional Court concerning the practice of religion may now be briefly discussed. Mr Prince,<sup>10</sup> a Rastafarian wished to be exempted from a provision of South African legislation that prohibited possession or dealing in cannabis (or dagga as it is called in our country). Mr Prince did not say that the law that prohibited the possession and dealing in (and by necessary implication the consumption of) dagga was bad as a whole and should be set aside. In other words he did not want the result that everyone should be allowed to use dagga. Apparently content with the general prohibition, he asked the Court to carve out an exception for all Rastafarians on the basis that its use and consumption was essential to the practice of his religion.

In the second case,<sup>11</sup> the Christian Education Society which ran 300 schools consistently with its constituency’s understanding of the Christian faith also said that the right of its members to religious freedom was infringed by a prohibition exacted by a South African law. That prohibition was, according to the Legislature, aimed at giving effect to the values of our Constitution: the law prohibited corporal punishment from being administered by teachers to children at schools. They referred to corporal punishment as corporal correction and insisted that their religious convictions derived from the Bible as they understood it, made it obligatory on parents to authorise teachers to engage in corporal correction whenever this was considered to be necessary. The Christian Education Society, like Mr Prince, did not challenge the constitutionality of the prohibition as it applied to everyone else. The Society strenuously contended for an exemption to be carved out for itself, its schools and its members.

The Constitutional Court accepted in both cases that it could not second-guess the genuineness or the veracity of the beliefs. That genuineness could not, according to the Court, be tested by cross-examination or any other way. The Constitutional Court accordingly accepted that the religious beliefs were real and genuine. The next question to be answered therefore was whether the limitation of the right to freedom of religion which had

---

<sup>10</sup> *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1; 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC).

<sup>11</sup> *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

occurred in each of the two cases could be justified. The Court said that because there was no challenge to the provisions as they applied to everyone else the Court had to accept that the limitation of the right of everyone else was good and justified. The question to be answered in the case therefore was whether the granting of the exemption would undermine the law as it applied to everyone else. The Constitutional Court held in both cases that the law would be undermined and relief was refused.

I must finally discuss a case which, according to many religious organisations had religious freedom implications. Our Constitution provides that no-one may be discriminated against on the ground of their sexual orientation. And the case that had to be decided<sup>12</sup> was about whether a law that did not allow gay and lesbian people to be married was inconsistent with the equality provision. The Constitutional Court came to the conclusion that it was. The objection before and after the case was centred around the freedom of religion right. Yet, in my view, the judgment had no religious implication whatsoever. No church or other religious institution would ever be obliged to conduct the marriage ceremony and no person who said that his freedom of religion would be impacted upon if he or she were to contract a gay or lesbian marriage would be forced to do so. Officers employed by the State would conduct a civil marriage ceremony if the people concerned wanted to be married. On the divide between freedom of religion on the one hand and the need not to oppress minority practices that are not palatable to majorities I would suggest that this case was rightly decided.

This brings me to the question of religious oppression. There is religious oppression in many parts of the world and that oppression is aimed at advancing a particular hegemonic position at the expense of the religious practice concerned. The aim is not to protect other rights but either to oppress other religions for its own sake or to oppress and suppress for the sheer purpose of advancing one's own religion cause or agenda. This is on any basis unacceptable particularly if this is done by a State that proclaims its adherence to pluralism or secularism.

And I would make one more point in this regard. Majority religions or the religions of the more powerful protect themselves. The protection of religious practice as well as the practice of beliefs together with the protection of the right to equality can therefore, in my view, legitimately be said to have greater application in the protection of religious or belief practices of minorities or vulnerable people or the non-discrimination against groups of people who are a minority or vulnerable. The protection of people who represent minorities or who are vulnerable is fundamental to a democratic constitutional order. It is an important change of perspective from the dubious concept of the law of the jungle or, to put it another way, the inhumane notion that "might is right". And we care for vulnerable people and protect them not for their sakes but for ours.

May I conclude by saying perhaps somewhat controversially that the idea of religious tolerance is not sufficiently dynamic to cater for the needs of a modern pluralist society. This is particularly so if religious tolerance allows for the correctness of a feeling in one human being that her religion or belief is in some way superior, however slightly to the beliefs and

---

<sup>12</sup> *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC).

practices of others. I find this notion unacceptable and the approach destructive to the humanity of us all. We are all human beings. I strongly believe that we should not harbor any notion that we as human beings are better than other human beings. We are entitled to our own beliefs. I look forward to the world where every human being will internalise the proposition that our common humanity is paramount and that every human being has the potential to add value irrespective of the religion to which that human being belongs.

I thank you.

## ***ANNEXURE A – INSTRUMENTS THAT RECOGNISE FREEDOM OF RELIGION***

### **A. INTERNATIONAL INSTRUMENTS**

#### **The United Nations**

##### **1. Article 18 of the Universal Declaration of Human Rights**

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

##### **2. Article 18 of the International Covenant on Civil and Political Rights**

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.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

#### **The Americas**

##### **Articles III, IV and XXVIII of the American Declaration of the Rights and Duties of Man**

**Article III.** Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private. Right to religious freedom and worship.

**Article IV.** Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever. Right to freedom of investigation, opinion, expression and dissemination.

**Article XXVIII.** The rights of man are limited



by the rights of others, by the security of all, and      Scope of the Rights of Man  
by the just demands of the general welfare and  
the advancement of democracy

### **Article 12 of the American Convention on Human Rights**

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

### **Europe:**

#### **Article 9 of the European Convention on Human Rights**

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

### **Africa:**

#### **Article 8 of the African [Banjul] Charter on Human and Peoples' Rights**

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.

## **Article 9 of the African Charter on the Rights and Welfare of the Child**

1. Every child shall have the right to freedom of thought conscience and religion.
2. Parents, and where applicable, legal guardians shall have the duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.
3. State Parties shall respect the duty of parents and where applicable, legal guardians, to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

### **B. United States of America - The United States Constitution**

#### **Amendment 1 - Freedom of Religion, Press, Expression.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### **B. Republic of South Africa**

Relevant provisions of the Constitution of the Republic of South Africa: sections 15, 30, 31 and 36

#### **1. Section 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.

#### **2. Section 30: Language and culture**

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

### **3. Section 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.

### **4. Section 36 Limitation of rights**

All rights in the Constitution of the Republic of South Africa, including fundamental rights concerned with the belief in and the practise of religion, can be limited in terms of section 36 of the Constitution which is set forth below:

#### **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.

### **C. Canada - Constitution Act, 1982 (Canadian Charter of Rights and Freedoms)**

#### **Section 2. Everyone has the following fundamental freedoms:**

(a) Freedom of conscience and religion;

- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

#### **D. India - The Constitution of India**

##### **Right to Freedom of Religion – Sections 25 to 28.**

**25.** (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

*Explanation I.*—The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

*Explanation II.*—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

**26.** Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.

**27.** No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

**28. (1)** No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such

institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

#### **E. Germany Constitution of Germany**

##### **Article 4 [Freedom of faith, of conscience, and of creed]**

(1) Freedom of creed, of conscience, and freedom to profess a religious or non-religious faith are inviolable.

(2) The undisturbed practice of religion is guaranteed.

(3) No one may be compelled against his conscience to render war service involving the use of arms. Details are regulated by a federal statute.