

## 25 HUMAN FLOURISHING THROUGH THE RIGHT TO SELF-DETERMINATION OF RELIGIOUS COMMUNITIES

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### INTRODUCTION

Human flourishing (*eudaimonia*), broadly speaking, denotes human well-being and encompasses life satisfaction and happiness in close social relationships. This chapter focuses in particular on the right to self-determination of religious communities as a means of promoting human flourishing within such communities. The right to self-determination and human flourishing are, of course, not confined to religious communities, but will nevertheless for purposes of this analysis be confined to such communities, simply because the African Consortium of Law and Religion Studies (ACLARS) is particularly dedicated to the interaction between law and religion.

The concept of self-determination is an important component of international human rights law and will for purposes of this survey be analysed in some detail. Its implementation within the African context will be considered with special reference to a country that does not, and a country that does comply with the demands of self-determination as proclaimed in international law, namely Nigeria and South Africa, respectively. Special attention will also be given, in a broader context, to African countries that afford special prominence to particular religious denominations, the vital question in this regard being whether or not such politically-based religious preferences are in conformity with the right to self-determination of religious communities and conducive to human flourishing.

### THE RIGHT TO SELF-DETERMINATION OF RELIGIOUS COMMUNITIES

International law has come to promote human flourishing on basis of the right to self-determination of peoples, including religious communities. The right to self-determination is an important principle of international law. It is mentioned in the Charter of the United Nations,<sup>2</sup> and it has been afforded a special place of prominence in the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>3</sup> and in the International Covenant on Civil and Political Rights (ICCPR), both of

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2 Charter of the United Nations, UNTS No 993, arts 1(2) and 73.

3 International Covenant on Economic, Social and Cultural Rights, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, *entered into force* Jan. 3, 1976, art 1.

which were adopted at the UN in 1966.<sup>4</sup> It is included in the Convention on the Rights of the Child of 1989,<sup>5</sup> and features prominently in the UN Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960,<sup>6</sup> as well as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970, which contains a distinct section on “The principle of equal rights and self-determination of peoples”.<sup>7</sup> On the regional level, it has been endorsed by no less than the Helsinki Final Act of 1975.<sup>8</sup>

### *Historical perspective on the right of self-determination*

The concept of self-determination owes its origin to economic socialism. In 1913, Joseph Stalin composed a detailed pamphlet on *Marxism and the National Question* in which he denoted as a matter of “self-determination” the disposition of political communities within the overarching and universal economic structures of communism and, in March 1916, Lenin published a more elaborate exposition of the same theme in his seminal work, *Thesis on the Socialist Revolution and the Right of Nations to Self-Determination* – described by one analyst as “the first compelling enunciation of the principle” of self-determination of peoples.<sup>9</sup> Self-determination of nation-states within a non-negotiable economic world order was not where it all ended.

The prominence of the right to self-determination in international law has mostly been attributed to the American president, Woodrow Wilson. Robert Friedlander thus accredited President Wilson’s Fourteen Points Address of 8 January 1918 as “transforming self-determination into a universal right”<sup>10</sup> – though the President never really used the word “self-determination”. He included in those Fourteen Points one that proclaimed a “free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the population concerned must have equal weight with the equitable claims of government whose

4 International Covenant on Civil and Political Rights, GA Res 2200 (XXI) of 16 Dec 1966, 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316, 999 UNTS 171, art 27.

5 Convention on the Rights of the Child, 28 ILM 1448 (1989), art 30.

6 Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 (XV) of 14 Dec 1960, art 2.

7 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970, GA Res 2625 (XXV) of 24 Oct 1970.

8 The Final Act of the Conference on Security and Cooperation in Europe of 1 August 1975, sec VIII, 14 ILM 1292.

9 Cassese A. 1995. *Self-Determination of Peoples: A Legal Reappraisal*, 15.

10 Friedlander R. 1975. “Self-Determination: A Legal-Political Inquiry”, *Detroit College of Law Review* 1:71, 73.

title is to be determined.”<sup>11</sup> This statement has come to be regarded as the basis of the League of Nations policy for dealing with the future dispensation of nation-states that were part of the world empires defeated in and dissolved through World War I.<sup>12</sup> But this, too, was not where it all would end.

Leaving aside the connotation attributed to that concept within socialist political thought, the right to self-determination, over time, acquired at least four quite distinct meanings, depending in each instance on the nature and disposition of the peoples claiming that right.<sup>13</sup> The post-World War I nuance of the term denoted the right to eventual political independence, within the confines of the mandate system of the League of Nations, of nation-states that had been part of the Ottoman, German, Russian, and Austro-Hungarian empires, which were conquered in World War I. In this context, self-determination vested in “ethnic communities, nations or nationalities primarily defined by language or culture”,<sup>14</sup> and thus denoted the right of “peoples” in the sense of (territorially defined) nations to political independence. Following World War II, the emphasis shifted to the principle “of bringing all colonial situations to a speedy end”,<sup>15</sup> and here the right to self-determination vested in colonised peoples, while the substance of their right again denoted political independence.<sup>16</sup> The United Nations Millennium Declaration

11 Fourteen Points Address delivered on 8 January 1918 to a Joint Session of Congress by president Woodrow Wilson, Point 5, in Baker RS and Dodd WE (eds). 1927. *Public Papers of Woodrow Wilson: War and Peace*, vol. 1, 155-159.

12 Van Dyke V. 1970. *Human Rights, the United States, and World Community*, 86.

13 See Van der Vyver JD. 1991. “Sovereignty and Human Rights in Constitutional and International Law”, *Emory International Law Review* 321(5):395-416; Van der Vyver JD. 2000. “Self-Determination and the Peoples of Quebec”, *Journal of Transnational Law & Policy* 1(10):14-19; Van der Vyver J. 2002. “Self-Determination and the Right to Secession of Religious Minorities under International Law”, in Danchin PG and Cole EA (eds). *Protection of the Human Rights of Religious Minorities in Eastern Europe* 251, 258-261; Van der Vyver JD. 2003. “Cultural Identity as a Constitutional Right in South Africa”, *Stellenbosch Law Review* 14(1):53-56, 58.

14 Berman N. 1988. “Sovereignty in Abeyance: Self-Determination and International Law”, *Wisconsin International Law Journal* 51(7):86-87.

15 Western Sahara (Advisory Opinion), 1975 ICJ 1, 31 (25 May 1975); See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion), 1971 ICJ 16, 31 (21 June 1971) (the Court holding that the right to self-determination was applicable to “territories under colonial rule” and that it “embraces all peoples and territories which ‘have not yet attained independence’”).

16 Berman, “Sovereignty in Abeyance: Self-Determination and International Law”, 54; See also Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, sec 43 (at 76); Van Dyke, *Human Rights, the United States, and World Community*, 87; Emerson R. 1971. “Self-Determination”, *American Journal of International Law* 66:463; Schachter O. 1974. “The United Nations and Internal Conflict”, in Moore JN (ed). *Law and Civil War in the Modern World* 401, 406-407; Tesfagiorgis G. 1987. “Self-Determination: Its Evolution and Practice by the United Nations and its Application in the Case of Eritrea”, *Wisconsin International Law Journal* 6:78-80.

extended the principle of decolonisation to include “the right to self-determination of peoples which remain under ... foreign occupation”.<sup>17</sup>

In the 1960s, yet another category of “peoples” with a right to self-determination came to be identified, namely those subject to a racist regime. Here the concept substantively signified the right of such peoples to participate in the structures of government within the countries to which they belonged.<sup>18</sup> The “self” in self-determination was no longer perceived to be territorially defined sections of the population in multinational empires or colonial dominions, but also came to be identified with the entire population of a territory where the social, economic, and constitutional system was structured on institutionally sanctioned racial discrimination.<sup>19</sup>

In contemporary international law, the right to self-determination has been extended to national or ethnic, religious and linguistic communities within a political society whose particular entitlements are centred upon a right to live according to the traditions and customs of the concerned group. The right to self-determination of such “peoples” has been defined in compelling terms in the International Covenant on Civil and Political Rights, which states: “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 members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”<sup>20</sup>

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17 United Nations Millennium Declaration, sec 4, GA Res 55/2 of 18 Sept 2000, UN Doc A/RES/55/2 (2000).

18 The linkage within the confines of the right to self-determination of systems of institutionalised racism and colonialism or foreign domination may be traced to the United Nations General Assembly’s Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty of 1965, in which the United Nations demanded of all States to respect “the right to self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms”, and to this end proclaimed that “all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations”. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, GA Res 2131 of 21 Dec 1965, 20 UN GAOR Supp (No 14), at 11, UN Doc A/6014, sec 6 (1965).

19 This development was probably prompted by the claim of South Africa that the establishment of independent tribal homelands as part of the policy of separate development (apartheid) constituted a manifestation of the right to self-determination of the different ethnic groups within the country’s African population. Not so, responded the international community. The tribal homelands were a creation of the minority (white) regime and did not emerge from the wishes, or political self-determination, of the denationalised peoples themselves.

20 ICCPR, art 27; See, in general, Ermacora F. 1983. “The Protection of Minorities before the United Nations”, (1983-IV) *Recueil des Cours*, IV:246.

## 25. Human flourishing through the right to self-determination

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities similarly speaks of “the right [of national or ethnic, religious and linguistic minorities] to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.”<sup>21</sup>

This, then, is where the right to self-determination of religious communities comes in. A religious community is made up of people sharing the same confession of faith. The group comprising a religious community is not necessarily structured or organised in any formal way, but its members are bound together by a common religious commitment or belief. In the *Greco-Bulgarian Communities Case* of 1930, the Permanent Court of International Justice gave the following definition of the “general traditional conception” of a community, which in contemporary usage would be called a people:

... the “community” is a group of persons living in a given country or locality, having a race, religion, language and tradition of their own and united by this identity of race, religion, language and tradition in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.<sup>22</sup>

International law denotes communities with a right to self-determination in the contemporary sense as “peoples”. According to international law scholar Yoram Dinstein, peoplehood comprises two elements: an objective component, designated by the factual contingencies upon which the unity of the group depends, and a subjective component, constituted by a certain state of mind – the consciousness of belonging, and perhaps the will to be associated with the group.<sup>23</sup> The right to self-determination belonging to a people, including a religious community, is therefore a group right of a special kind, namely a *collective group right*. A collective group right must be distinguished from an *institutional group right*.

A collective group right is afforded to individual persons belonging to a certain category, such as children, women, or ethnic, religious and cultural communities. The right of national minorities to peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion,<sup>24</sup> thus belongs to every member of the group and can be exercised separately or jointly

21 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art 2.1, GA Res 47/136 of 18 Dec 1992, 47 UN GAOR Supp (No 49), at 210, UN Doc A/Res/47/135 (1992).

22 *The Greco-Bulgarian “Communities”*, PCIJ, Series B, Advisory Opinions, 2(17):21 (31 July 1930).

23 Dinstein Y. 1976. “Collective Human Rights of Peoples and Minorities”, *International Law Quarterly* 25:103.

24 See European Framework Convention for the Protection of National Minorities, art 7, ETS 157, reprinted in 1995 *International Legal Materials* 34:351.

with any other member(s) of the group. An institutional group right, on the other hand, vests in a social institution as such and can only be exercised by that collective entity through the agency of its authorised representative organs.

A religious community has a right to self-determination. Members of the group are entitled to profess and practise their religion without undue constraints imposed on that entitlement by the political powers that be. The right to self-determination, as a collective group right, involves more than merely an accommodating disposition towards particular sectional beliefs and practices. In virtue of the right to self-determination, governments are required to secure, through their respective constitutional and legal systems, the interests of distinct sections of the population that constitute a people in the above sense. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities clearly spells out that obligation: to protect, and encourage conditions for the promotion of, the concerned group identities of minorities under the jurisdiction of the duty-bound state (Articles 1(1) and 4(2)); to afford to minorities the special competence to participate effectively in decisions pertinent to the group to which they belong (Article 2(3)); not to discriminate in any way against any person on basis of his or her group identity (Article 3), and in fact to take action to secure their equal treatment by and before the law (Article 4(1)). The Declaration provides that, “States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.”<sup>25</sup>

The Council of Europe’s Framework Convention for the Protection of National Minorities specifies minority rights in much the same vein: It guarantees equality before the law and equal protection of the laws (art 4(1)); States Parties promise to provide “the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage” (art 5(1)); States Parties recognise the right of a person belonging to a national minority “to manifest his or her religion or belief and to establish religious institutions, organizations and associations” (art 8).<sup>26</sup>

A collective group right of religious communities to self-determination has been recognised in the United States on various fronts, for example, to substantiate the payment of unemployment benefits to Sabbatarians who refused to work on their day of rest,<sup>27</sup> or to a Jehovah’s Witness who refused, on religious grounds, to accept

25 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art 4(2), GA Res 47/136 of 18 Dec 1992, 47 UN GAOR Supp (No 49), at 210, UN Doc A/Res/47/135 (1992).

26 Council of Europe. 1995. “Framework Convention for the Protection of National Minorities”, February. Online at: <https://www.coe.int/en/web/minorities/text-of-the-convention>

27 *Sherbert v Verner*, 373 US 398 (1963); See also *Hobbie v Unemployment Appeals Commission of Florida*, 480 US 136 (1987); *Frazee v Illinois Department of Employment Security*, 489 US 829 (1989).

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employment in a factory which produced parts that would be used in military armament;<sup>28</sup> or to exempt members of the Old Order Amish religion and of the Conservative Amish Mennonite Church, on religious grounds, from the statutory obligation to cause their children to attend formal high school education to the age of 16.<sup>29</sup>

### *Limitations on the rights to self-determination*

People are tied up in all kinds of group affiliations, some deriving from biological attributes (sex, racial identity, and family ties) and others founded on an historical base, a shared national, cultural, religious or linguistic alliance. The group affiliation of persons tends to provoke any degree of commitment to traditional beliefs and practices perceived by their constituents as a *sine qua non* for maintaining the identity and interests of the group. Those beliefs and practices may include ones that have come to be discredited in view of contemporary notions of human rights and fundamental freedoms. In the fields of sociology, law and political science, such beliefs and practices have raised questions of how best to accommodate the group identities in a political community within the laws and structures of the state – for example, where to draw the line between practices of religious communities that ought to be protected under the rubric of a right to self-determination and those that can no longer be tolerated in this day and age of humane governance. There are two quite distinct aspects to the problem posed: the first, the extent to which group formations can or should be accommodated in the political structures of the state and, the second, how to respond through legal interventions to religiously based practices that have come to be identified as a threat to life or limb of vulnerable members of the group.

It must at the outset be emphasised that the right to self-determination recognises in broad outline the pluralism of ethnic, cultural, religious and linguistic diversities within a political society as a salient fact that ought to be accommodated in the political structures and legal arrangements of the state. However, it is equally important that group alliances based on a common ethnic extraction, cultural heritage, religious conviction or linguistic identity ought not to be afforded a role within the body politic beyond the distinctive attribute that constitutes the bond between members of the group. That is to say, it is the essence of the right to self-determination that the relevance of group interests are to be cut down to size, dictated by the nature of the group. The protected interests of a cultural group are to be confined to cultural affairs, of a religious group to matters of religion, and so on. To afford *political* representation in the structures of government to a *cultural* or a *religious* group, would amount to affording to those latter modalities that qualify the group a pertinence beyond the confines of their true and useful destination in the aggregate of human society.

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28 *Thomas v Review Board, Indiana Employment Security Division*, 450 US 707 (1981).

29 *Wisconsin v Yoder*, 406 US 205 (1972).

As to the second question mentioned above, it is important to note that the right to self-determination is not absolute. Self-determination is generally said not to legitimise violations of human rights that might be part and parcel of an ethnic tradition or religious usage. This assessment is somewhat superficial. International law seems to tolerate discrimination against women as a manifestation of a cultural tradition or religious dogma, but is quite vocal in its condemnation of, for example, female genital mutilation – a practice which at least in some communities is founded on religious considerations. The principle applied seems to be that political authorities will not use the long arm of the law to prohibit religious practices which merely amount to discrimination on the basis of sex or gender, but will not tolerate, under pretences of a right to self-determination, religious or cultural practices which constitute violations of the right to life or physical integrity.

Withholding life-sustaining medication or therapeutic treatment from a child upon instructions of the parents based on religious conviction presents a very special problem in this regard, and it is a problem that has been dealt with differently in different jurisdictions around the world. In the United States, dealing with this problem has had a checkered history.<sup>30</sup> There are, on the one hand, state laws in place that exempt parents who prefer spiritual treatment or faith healing from statutory requirements to furnish health care to a child in their care,<sup>31</sup> but this concession to freedom of religion will not absolve a parent from criminal liability for involuntary manslaughter if the child should die in consequence of being denied conventional medical treatment.<sup>32</sup> Parents will therefore be prosecuted for providing spiritual treatment for their children in lieu of traditional medical care, but only if such treatment turns out to be ineffective and results in death of the child.<sup>33</sup> In South Africa, on the other hand, the High Court, as upper guardian of all children, can intervene by sanctioning a feasible medical procedure while the life of the child can still be saved. It can consequently overrule the decision of parents who, for religious reasons, would not give their consent for a child to receive a blood transfusion or other therapeutic treatment considered by a pediatrician to be necessary for the survival of the child.<sup>34</sup> In South Africa, the constitutionally protected right to life of a child will in all circumstances trump the claim to the exercise of religious liberty of the parent.

The failure of national systems to provide protection to sectional interests of peoples within their area of jurisdiction, or merely the perception of being marginalised, must be seen as an important contributing cause of the tireless aspirations towards

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30 See Smith EE. 1991. "The Criminalization of Belief: When Free Exercise Isn't", *Hastings Law Journal* 42:1491.

31 *Walker v Superior Court*, 763 P. 2d 852, 858 (1988) (referencing sec 270 of the Californian Penal Code).

32 *Walker v Superior Court*, 878.

33 See Ingram JD. 1988. "State Interference with Religiously Motivated Decisions on Medical Treatment", *Dickenson Law Review* 93:59.

34 *Hay v B*, 2003 (3) SA 492 (W) (S. Afr.).

the establishment of homogenous states for sections of the political community with a strong group consciousness: the Muslim community of Kashmir, the Basques in Northern Spain, the Hindu factions in Sri Lanka, the Catholic minority in Northern Ireland, the Christian community in Southern Sudan, the Kurds in Iraq and Turkey, people of Macedonian extraction in Florina (Northern Greece), and most recently the Catalanian community in Spain.

The right to self-determination vesting in ethnic, religious or linguistic communities does not include a right to secession or political independence – even in cases where a government, in breach of international law, does not uphold the right to self-determination of sections of its subordinates. International law is quite explicit in proclaiming that self-determination of ethnic, religious and linguistic communities must coexist with “the territorial integrity of states” – a phrase denoting the sanctity of existing national borders. The right to self-determination, furthermore, vests in a people while a new state created through secession is essentially territorially defined – that is, it is a territory that secedes from an existing state and not a people.

### SELF-DETERMINATION AND HUMAN FLOURISHING IN NIGERIA

When Nigeria opted for independence in the 1950s, certain minority groups in the country opposed independence, probably because they preferred British colonial rule to that of the dominant tribal groups with majority support in the country. Those opposed to independence advanced a rather compelling argument. Prior to independence, the Nigerian people enjoyed protection under the European Convention for the Protection of Human Rights and Fundamental Freedoms. Member states of the Council of Europe could deposit with the Council an instrument that would bind the depositary states to administer their metropolitan areas in accordance with the norms contained in the European Convention. Great Britain had done so in respect of Nigeria and its other African colonies.

If Nigeria were to become independent – the argument went – the people of Nigeria would forfeit this protection. Since Nigeria is not part of Europe, it could not reinstate the *status quo ante* pertaining to the protection of human rights by ratifying the European Convention. The fears of the minority groups were investigated in 1958 by a Royal (British) Commission under Sir Henry Willink.<sup>35</sup> In consequence of the recommendations of the Willink Commission, it was decided to include a Bill of Rights based on the European Convention in the Constitution of Nigeria.<sup>36</sup> Nigeria, therefore, became independent on 1 October 1960 under a constitution containing such a Bill of Rights.

35 *Report of the Commission Appointed to Enquire into the Fears of Minorities and the Means of Allying Them*, Command Paper 505, 18 August 1958. London: H.M.S.O. (1958).

36 *Report of the Commission Appointed to Enquire into the Fears of Minorities*, 31; and see Elias TO. 1959–60. “The New Constitution of Nigeria and the Protection of Human Rights and Fundamental Freedoms”, *Journal of the International Commission of Jurists* 2.2 30.

Probably in consequence of conflict between the population groups of Nigeria highlighted by the above dispute over independence of the country, drafters of the Constitution were prompted to address mechanisms to deal with such group rivalries. It charged the state with the rather peculiar responsibility of encouraging intermarriages between persons of different religions and tribal communities, with a view to promoting national integration.<sup>37</sup> The state must also promote and encourage the formation of associations that cut across religious barriers;<sup>38</sup> and, in order that “national integration shall severely be encouraged”, the Constitution prohibited discrimination based on “place of origin, sex, religion, status, ethnic or linguistic association or ties”.<sup>39</sup>

The Nigerian Constitution thus reflected a trend towards promoting homogeneity. This approach is clearly in conflict with the international decree proclaiming the self-determination of peoples. It also turned out to be the wrong way to go. The truth of the matter is that the Nigerian people are as divided today as they ever were – perhaps even more so. Violence in Nigeria is not confined to conflicts between religious communities in the country, but it does include group-related rivalries between mainly Muslim and Christian population groups. Acts of violence orchestrated by a radical Muslim group, Boko Haram, have disrupted the country now for several years, and according to recent estimates have resulted in the killing of 100,000 people and the displacement of 2 million.<sup>40</sup> The violence has also caused severe damage to (Christian) places of worship and government buildings.

Family law based on Islamic teaching has been part of the legal system of the predominantly Muslim provinces in northern Nigeria. This can be seen as a manifestation of the right to self-determination of the Muslim communities. However, more recently, those provinces also formally adopted Islamic criminal law to be applied to Muslims within their respective areas of jurisdiction. To date, nine states have instituted *sharia* criminal law (Zamfara, Kano, Sokoto, Katsina, Bauchi, Borno, Jigawa, Kebbi, and Yobe). Three Muslim-plurality states have also come to accept Islamic law for Muslims within their jurisdiction (Kaduna, Niger and Gombe).

Although the application of Islamic law in Muslim communities is in principle in conformity with the right to self-determination of religious communities, the substance of such law must comply with the demands of basic human rights and fundamental freedoms. Sentences prescribed by the Quran do not live up to those standards, as appears from the following example: Following the imposition of *sharia* criminal law in the northern provinces of Nigeria, a sentence which by international standards included cruel and inhuman punishment attracted media attention and condemnation from many parts of the world when, in March 2002,

37 Constitution of the Federal Republic of Nigeria (Promulgation) Decree (1989) (No 12 of 1989) *entered into force* Oct. 1, 1992, art 16(3)(c). These provisions of the 1992 Constitution were not repeated in the current 1999 Constitution.

38 Constitution of the Federal Republic of Nigeria (Promulgation) Decree (1989), art 16(3)(d).

39 Constitution of the Federal Republic of Nigeria (Promulgation) Decree (1989), art 16(2).

40 *Premium Times*, 22 September 2017.

a Nigerian Sharia Court sentenced a 30-year-old woman, Amina Lawal, to death by stoning because she was expecting a child out of wedlock. Indeed, in 2004, the Sharia Court of Appeal set aside the sentence, based on the rule against retroactive criminal sanctions, because the law incorporating Islamic criminal law was enacted after she became pregnant. However, the case generated wide publicity as a reminder of penalties that were both unbecoming and in Nigeria, in fact, unconstitutional,<sup>41</sup> as well as the sharp divide between the northern Islamic communities and the predominantly Christian population of Nigeria.

It is respectfully submitted that efforts of certain factions of the Muslim communities in Nigeria to gain political control of the country cannot be justified on the basis of the right to self-determination of such communities. The imposition of Islamic law in regions of the country occupied by Muslims is seemingly in conformity with the notion of self-determination of peoples but must be evaluated in view of constraints applying to the right to self-determination of religious communities.

### POLITICAL PREFERENCE OF CERTAIN RELIGIONS

Human flourishing cannot be promoted by means of affording to particular denominational religions a preferred status in the laws and policies of a state. The bottom line is that political power and governance ought not to be structured in a way that will make persons of a particular religious persuasion feel that they do not belong. The principle underlying this proposition is violated by states that proclaim a particular alliance with, or preference for, a particular religion.

The following African countries testify in their respective constitutions to being Muslim states and/or proclaim Islam to be the religion of the state: Algeria,<sup>42</sup> the Comoros,<sup>43</sup> Egypt,<sup>44</sup> Libya,<sup>45</sup> Mauritania,<sup>46</sup> Morocco,<sup>47</sup> Somalia<sup>48</sup> and Tunisia.<sup>49</sup>

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41 Article 33(1)(a) of the Constitution of the Federal Republic of Nigeria, 1989, provides that “no person shall be subjected to any form of torture or to inhuman or degrading treatment”.

42 Constitution of Algeria (1989), art 2.

43 Constitution of the Federal Islamic Republic of Comoros (1992), Preamble.

44 Constitution of the Arab Republic of Egypt (1971, as elaborately amended in 1980), art 2.

45 Constitutional Proclamation of the Socialist People’s Libyan Arab Jamahiriya (1969), art 2.

46 Constitution of the Islamic Republic of Mauritania (1991), art 5 (“... of the people and of the State”). In the Preamble, Mauritania confesses the “omnipotence of ALLAH” and depicts the Mauritanian nation as “a Muslim, African and Arab people”. In Article 1 of the Constitution, Mauritania is described as “an indivisible, democratic and social Islamic Republic”.

47 Constitution of the Kingdom of Morocco (1992), art 6. See also the Preamble to the Constitution (proclaiming the country to be “a Muslim ... State”).

48 Constitution of the Somali Democratic Republic (1979), art 3.1.

49 Constitution of the Tunisian Republic (1959), art 1. See also the constitutional Preamble (proclaiming the Constitution “[i]n the name of God, the Clement and the Merciful” and

The Sudan revealed its commitment to Islam by proclaiming its constitution in the name of “Allah, the Compassionate and merciful”.<sup>50</sup>

Colonialism brought to sub-Saharan Africa an impressive variety of Christian religions. While Roman Catholicism seemed to predominate in countries formerly colonised by France, Portugal and Belgium, Lutheranism enjoyed majority support in Namibia, due to pre-1919 German colonial presence in South West Africa. Other Protestant religions became prominent in Anglophone countries, with a particularly strong presence of Calvinism in South Africa, kept alive by the early Dutch settlers at the Cape of Good Hope. European influences also became visible through references in constitutions of many sub-Saharan countries of ideological statements that paid tribute to the deity of Christian religions.

Ghana thus proclaimed its Constitution “in the name of Almighty God”.<sup>51</sup> Liberia testified to its “gratitude to God” and recognised “His Divine Guidance for our survival as a nation”.<sup>52</sup> The National Council for Development of Rwanda, responsible for establishing and adopting the Constitution, in doing so testified to “[t]rusting in God Almighty”.<sup>53</sup> The people of Seychelles confessed their gratitude to Almighty God “that we inhabit one of the most beautiful countries in the world” and expressed their conscious pride for having learnt as descendants of different races to live together as “one Nation under God”.<sup>54</sup> Although said to be a secular state,<sup>55</sup> the Constitution of the Democratic Republic of Madagascar bears testimony of the Malagasy People’s “belief in God the Creator”.<sup>56</sup> The Republic of the Congo, while likewise professing to be a secular state,<sup>57</sup> acknowledged its “responsibility before God”.<sup>58</sup>

There is a clear tendency in Africa, if not in the world, for non-Muslim states to move away from such religiously-based constitutional testimonies. Proclaiming a state to be “Christian” still enjoys some appeal in many (non-African) countries where Roman Catholicism predominates, but even there one finds the tendency to do away with the established status of the Church.<sup>59</sup> Except in the context of an

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further testifying to a commitment “to remain faithful to the teachings of Islam [and] to the unity of the Greater Maghreb”).

50 Transitional Constitution of the Republic of the Sudan (1985), Preamble.

51 Constitution of the Republic of Ghana (1992), Preamble.

52 Constitution of Liberia (1984), Preamble.

53 Constitution of the Republic of Rwanda (1991), Preamble.

54 Constitution of the Republic of Seychelles (1993), Preamble.

55 Constitution of the Democratic Republic of Madagascar (1992), art 1.

56 Constitution of the Democratic Republic of Madagascar, Preamble.

57 Constitution of the Republic of the Congo (1992), art 1.

58 Constitution of the Republic of the Congo, Preamble.

59 See Van der Vyver JD. 1996. “Introduction: Legal Dimensions of Religious Human Rights: Constitutional Texts”, in Van der Vyver JD and Witte J Jr (eds). *Religious Human Rights in Global Perspective: Legal Perspectives*. The Hague/Boston/London: Martinus Nijhoff, xi.

established church, ideological statements in a constitution of non-Muslim states has very little juridical relevance, if any relevance at all.

The tendency to discard confessions of faith in constitutional instruments may be illustrated with reference to developments in the Republic of South Africa. The South African governments of yesteryear had always claimed that the country was a Christian state and sought to testify to its religious commitment with all kinds of quite nonsensical provisions, such as the one which proclaimed that “[t]he people of the Republic of South Africa acknowledge the sovereignty and guidance of Almighty God”.<sup>60</sup> The “Almighty God” referred to in this provision was intended to denote a kind of “potpourri god” that could be interpreted by all and sundry to suit their own conception of the deity,<sup>61</sup> which, ironically, should be unacceptable to Christians who believe that one ought not to pay homage to any god other than the Trinity revealed in the Holy Bible. South Africa proclaimed its 1993 Interim Constitution “[i]n humble submission to God”.<sup>62</sup> This phrase has altogether been omitted from the 1996 Constitution, which in its Preamble only appeals to God – in the words of the national anthem – to “protect our people”.

Some time ago, Zambia reversed the trend of eliminating a special state commitment to Christianity. The amendment of the Constitution that entered into force on 1 May 1996 included a clause in the Preamble declaring that “the Republic a Christian nation while upholding the right of every person to enjoy that person’s freedom of conscience or religion”.<sup>63</sup> President Frederick Chiluba of Zambia and his vice president, General Miyanda, the driving forces behind this constitutional amendment, were both “Born Again Christians”.

It is to be expected that, in spite of this development in Zambia, more and more countries will follow the example of those who avoided constitutional confessions of faith. Burundi, perhaps, has set the example of religiously neutral ideological statements in constitutional instruments. Its Constitution simply charges citizens to “contribute to the establishment of a morally healthy society”.<sup>64</sup> The type of political community which South Africa currently seeks to establish is depicted in the 1996 Constitution as “an open and democratic society based on human dignity, equality and freedom”.<sup>65</sup>

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60 Constitution of the Republic of South Africa (Act 110 of 1983), sec 2.

61 See Van der Vyver JD. 1986. “Religion”, in Joubert WJ and Scott TJ (eds). *The Law of South Africa*, vol. 23. First Edition. Durban/Pretoria: Butterworths, para 236.

62 Constitution of the Republic of South Africa, 1996, Preamble.

63 Constitution of the Republic of Zambia (Act 1 of 1991, as amended by Act 18 of 1996), Preamble.

64 Constitution of the Republic of Burundi (1992), art 46.

65 Constitution of the Republic of South Africa, 1996, secs 36(1), 39(1)(a); See also sec 7(1).

## SELF-DETERMINATION AS A MECHANISM OF HUMAN FLOURISHING IN SOUTH AFRICA

The political transformation of South Africa in 1994 from a racist oligarchy to “an open and democratic society based on human dignity, equality and freedom”<sup>66</sup> brought about radical changes in regard to almost every aspect of freedom of religion or belief, inspired to a large extent by principles of international law pertinent to that freedom. The pre-1994 era of South Africa’s political and constitutional history was characterised by, amongst other things, totalitarian state interference in matters of religion or belief.<sup>67</sup> By proclaiming South Africa to be a Christian state and enforcing certain scruples of a distinct faction of Protestant Christianity upon the entire community, the legislature did not uphold the principle of equal treatment or self-determination of different religious communities.<sup>68</sup> Religious expression and political opinion in South Africa was furthermore subject to discriminatory state control and censorship.<sup>69</sup>

The current South African constitution, the Constitution of the Republic of South Africa, 1996, can in general be described, as far as religion and religious diversity are concerned, as one of profound toleration and accommodation. In general, it allocates to church institutions the rights in the Bill of Rights to the extent required by the nature of the right and the nature of the church as a legal person.<sup>70</sup> It guarantees the free exercise of religion.<sup>71</sup> It sanctions freedom of assembly<sup>72</sup> and freedom of association<sup>73</sup> of “[e]veryone”. It protects the right to self-determination of religious communities<sup>74</sup> and makes provision for a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.<sup>75</sup> It envisaged the establishment, by means of national legislation, of a Pan South African Language Board charged, *inter alia*, with promoting and ensuring respect for “Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa”.<sup>76</sup>

66 Constitution of the Republic of South Africa, 1996, sec 39(1)(a); See also secs 1, 7(1), 36(1).

67 See Van der Vyver JD. 1999. “Constitutional Perspectives of Church-State Relations in South Africa”, *Brigham Young University Law Review* 2:635, 636-644; Van der Vyver JD. 2000. “State-Sponsored Proselytization: A South African Experience”, *Emory International Law Review* 14:781-795.

68 See Van der Vyver “Religion”, para 222-250.

69 See Van der Vyver JD. 1977. “Censorship”, in Joubert WA (ed). *The Law of South Africa*, vol. 2. Pretoria: Butterworths, para 182-284.

70 Constitution of the Republic of South Africa, 1996, sec 8(4).

71 Constitution of the Republic of South Africa, 1996, sec 15(1).

72 Constitution of the Republic of South Africa, 1996, sec 17.

73 Constitution of the Republic of South Africa, 1996, sec 18.

74 Constitution of the Republic of South Africa, 1996, secs 31 and 235.

75 Constitution of the Republic of South Africa, 1996, secs 181(1)(c), 185 and 186; See the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.

76 Constitution of the Republic of South Africa, 1996, sec 6(5)(b)(ii).

The Constitutional Court has on several occasions emphasised the vital importance of religion as a component of South Africa's constitutional democracy. In *Christian Education South Africa v Minister of Education*, Justice Albie Sachs, had this to say:

There can be no doubt that the right to freedom of religion, belief and opinion in an open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.<sup>77</sup>

The "new South Africa" was committed to abide by international standards of human rights protection. Customary international law,<sup>78</sup> as well as self-executing international agreements,<sup>79</sup> are thus part of the law of the land unless it is inconsistent with the Constitution or an Act of Parliament. The 1996 Constitution furthermore instructs courts of law to prefer an interpretation of legislation that is consistent with international law.<sup>80</sup> When interpreting the constitutional Bill of Rights, courts of law *are permitted* to consider comparable foreign law,<sup>81</sup> but *are compelled* to take international law into account.<sup>82</sup> They are evidently precluded from following international law directives that are at odds with constitutionally protected rights.<sup>83</sup>

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77 *Christian Education South Africa v Minister of Education*, 2000 (4) SA 757; 2000 (10) BCLR 1051 (CC), para 36; See also *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, 2006 (1) SA 524; 2006 (3) BCLR 355 (CC), para 89 (Sachs J reiterating the above); *Prince v President, Cape Law Society & Others*, 2002 (2) SA 794; 2002 (3) BCLR 231 (CC), para 149 (Sachs J, dissenting, noting that "where there are practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the State to walk the extra mile").

78 Constitution of the Republic of South Africa, 1996, sec 232.

79 Constitution of the Republic of South Africa, 1996, sec 231(4).

80 Constitution of the Republic of South Africa, 1996, sec 233.

81 Constitution of the Republic of South Africa, 1996, sec 39(1)(c).

82 Constitution of the Republic of South Africa, 1996, sec 39(1)(b).

83 *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, 2006 (1) SA 524; 2006 (3) BCLR 355 (CC), para 104.

The South African Constitution accordingly guarantees the right to self-determination of cultural, religious and linguistic communities as proclaimed in international law. It provides:

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the 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 or other organs of society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provisions of the Bill of Rights.<sup>84</sup>

## CONCLUSION

Scholarly endeavours to find a feasible answer to the question of group alliances within the body politic have thus far rendered a rich variety of socio-political theories and practices, ranging from strict individualism to any number of totalitarian designs. The most extreme manifestations of individualism deny the relevance – if not the very existence as part of empirical reality – of institutional group entities and tend to devalue the community interests of the persons who make up a distinct community to a subordinate and insignificant part of the human make-up. Totalitarianism, on the other hand, attributes to a particular group – be it the state, or a racial, ethnic or religious community – an inflated significance and dominant disposition over individuals within, and often beyond, the constituency of the concerned group. It aspires towards homogeneity or, alternatively, subordination, repression or persecution of the other. It cultivates a sense of group-defined superiority and domination, exploits a sense of xenophobia within its number, and might on the fringes culminate in genocide or lesser forms of “ethnic cleansing”.

The right to self-determination, on the other hand, seeks to accommodate the group identities of sections of a political community. It promotes pride in one’s cultural extraction and religious affiliation. It is patron to a political dispensation comprising, in the celebrated words of archbishop Desmond Tutu, “a rainbow people”. Accommodating, and indeed protecting, the right to self-determination of religious communities within the political structures of the body politic is after all also in the interest of the state.

For these reasons, constitutionalism should place an obligation on the state to accommodate, and indeed to promote, religion, but must do so on basis of objectivity, which, according to the celebrated South African constitutional lawyer, Francois Venter, rejects the predominance within the structures of the law and good governance of a particular religion, but requires instead that the state affords to all

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<sup>84</sup> Constitution of the Republic of South Africa, 1996, sec 31; See also sec 235.

## 25. Human flourishing through the right to self-determination

religions a place in the sun on the basis of equality and non-discrimination, thereby maintaining “a constant balance between the state’s responsibility of maintaining social order, religious preferences and legal certainty”.<sup>85</sup> Human flourishing thus requires of a political authority to accommodate all religions without preferential treatment of the one or the other denomination, and – most importantly – not to compel all its subjects to uphold the sectarian predilections of a particular religious denomination.

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<sup>85</sup> Venter F. 2015. *Constitutionalism and Religion*. Cheltenham, UK: Edward Elgar, 212-213.