



Fundamental rights and religion: The space between Cathedral and Parliament

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This history of exclusion from basic rights in South Africa until fundamental rights of every individual were entrenched in the constitution illustrates that respect for sanctity of every person is the basis of the freedom of all the people of South Africa and that all religious communities should protect the *Bill of Rights*. Neither confessional nor denominational considerations should be put to the fore; the focus should fall instead on the common concern of all religions for the sanctity of the individual.

Here at St. Georges, we are close to parliament.¹ Is the distance between Law and Religion also short? It was a long haul before Christian religion found a justifiable access to law that could ensure justice for everyone. The basic reason is that the principle of exclusion always interfered with efforts to do justice. Justice is not a Christian topic only (Witte 2012). Even if a high percentage of South African citizens are confessing Christians, it is not enough to build a just society when those who were renewed by Christ live according to the love commandment and thus fulfil the law. Although love towards our neighbours – not towards fellow Christians only – would take us a long way on the road to a just society, more specific rules of conduct are needed. Such rules of general conduct are found in chapter two of the Constitution of South Africa (CSA). I quote Jesus of Nazareth from Matthew's text and take the same liberty in *adapting* the Markan text as he did:

And one of them, a lawyer, asked him a question, to test him. (36) 'Teacher, which is the great commandment in the law?' And he said to him, 'You shall love the Lord your God with all your heart, and with all your soul, and with all your mind.' This is the great and first commandment. And a second is like it, 'You shall love your neighbour as yourself.' On these two commandments depends *the Bill of Rights in the Constitution of South Africa*. (Mt 22:35–39)

First, justice in a society is guaranteed when those living in a country embrace the universal human rights entrenched in the constitution. Religion can play a fundamental role in furthering the cause of justice by mobilising support for the human rights in the constitution, bridging the distance between the cathedral and the parliament. I do not claim that in South Africa religious leaders spearheaded the movement towards human rights. Christianity can hardly claim the credit for the rise of human rights (cf. Gräb 2014:300–318; Joas 2011:204–210). Nevertheless, they can embrace and cherish this gift now.

Allow me to explain this with an example. In 1760, the Dutch administration stipulated that every slave going from town to the countryside, or from the countryside to town, had to carry a pass signed by his or her master, which any passers-by might ask him or her to show. Slaves did not have freedom of movement. In 1795, after the French invaded Amsterdam, the British took control of the Cape. In 1797, the *Landrost* of Swellendam ordained that not only slaves, but also all Khoikhoi moving around the country for any purpose, should carry passes. With the *Caledon (Hottentot) Code of 1809*, it was then ruled by the British governor that the Khoikhoi were to have a fixed 'place of abode' and that if they wished to move they had to obtain a pass from their master or from a local official. In controlling the mobility of the labour force, the *Caledon Code* deprived the first inhabitants of the Cape from the 'right to freedom of movement' (a right that is now expressed in *Article 21[1] of the CSA*) and put them at the mercy of the landowners. How was this possible? Because the Khoikhoi were not regarded as part of the colonial population of the Cape, they were excluded and legally 'enslaved'. In the course of time, the pass laws were extended to the entire black population of South Africa. One of the aims of the future struggle for liberation would then become the abolition of pass laws.

Fortunately, slavery was forbidden in 1833 and according to *Article 13 of CSA*, today nobody may be subjected to slavery, servitude or forced labour; but it was a long way from 1797–1996.

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Christianity cannot claim to have introduced Human Rights in South Africa, but it played a seminal role at key moments. A swift journey through history can uncover the religious orientation of the predecessors of some aspects of the *Bill of Rights* on the way. In his study on *South Africa's struggle for human rights*, Saul Dubow (2012:21–22) underlines the role of the liberal Dutch Commissioner-General of the Cape, Colony Jacob Abraham Uitenhage de Mist (20 April 1749 – 03 August 1823). During a short period, from 21 February 1803 – 25 September 1804, this liberal Dutch administrator introduced ideas of the French enlightenment into the Cape. One can understand that De Mist, who divorced three wives, introduced the possibility that a couple could be married by a *landrost* and not only before a minister of religion. More important, however, in July 1804, De Mist introduced freedom of religion in the Cape. All religious societies that worshipped an Almighty Being were to enjoy equal protection under the law, and no civil privileges were to be attached to any creed. This must have caused a stir amongst the inhabitants of the Cape. For 80 years, the forebearers of the Dutch who had settled here had to withstand the Catholic attack, absorbing many emigrants when the cities of Flanders and Brabant fell to Alejandro Farnesio, Duke of Parma, during the last quarter of the 16th century. When Dutch arrived in the Cape (during the period of 1652–1657), their memories of the war with Spain and the loss of the south of the Netherlands were still fresh (De Jong 1965:161). French Huguenots had to flee to the Cape to escape death by religious persecution. Louis XIV repealed the *Edict of Nantes* with the *Edict of Fontainebleau* in October 1688. After De Mist, the Calvinistic Dutch had to tolerate the Anglicans and the feared Catholics. Moreover, the Muslim slaves brought from the Dutch East Indies could practise their religion, making the Cape of Good Hope one of the few places where Islam and Christianity co-existed peacefully under the roof of religious freedom.

As forerunner of *Article 15 of the CSA* on freedom of religion, belief and opinion, De Mist opened up the space for emerging interdenominational mission societies, primarily the London Mission Society. It is well known that the social reforms demanded by the superintendent of the London Mission Society, the Scottish Rev. John Philip, played an instrumental role in preparing the way for *Ordinance 50 of 1828*. This Ordinance repealed the *Caledon Proclamation of 1908* and freed the Khoikhoi from the pass system and the risk of being flogged for offences against the labour laws, made contracts for hire compulsory and affirmed their right to land ownership. This was a far reaching ruling, giving back the human rights of freedom of movement, physical integrity and access to work to the people of colour. Due to Philip, Christianity can claim some credit for this 'first clear statement of human rights in South Africa' (Dubow 2012:27). Notwithstanding his insistence that all humans are equal in God's conception, the principle of exclusion was still at work in *Ordinance 50*, because it made special provision for the people of colour, instead of placing them on equal footing with the other subjects of His Majesty's. The burghers, however, experienced this as '*gelykstelling*'. In 1807, combined forces of

Christian Pietism succeeded in having slave trade outlawed by the British (Hunt 2007:160–161), but it would take another 30 years until 01 December 1938 dawned: Emancipation Day for slaves in the Cape Colony (Giliomee & Mbenga 2007: 89–93). Forever it will stain the history of the Afrikaners that the effect of *Ordinance 50 of 1828* and the financial loss slave owners suffered through the abolishment of slavery were amongst the mayor reasons for their exodus to the north, the Groot Trek (Giliomee 2003:152). They left the Colony, taking 'care that no one shall be held in a state of slavery' but at the same time, as it is expressed under point 5 in Piet Retief's manifesto, preserving 'proper relations between master and servant' (cf. Chase 1843:83–84; Retief 1837).

Ordinance 50 thus only seemingly placed the Khoikhoi on equal footing. When the *Cape Constitution* was accepted in 1853, citizens had to own property of 75 pounds to vote and 1000 pounds to be elected. For a long time electoral right in the Cape were connected to economic status. On leaving the Colony, Retief declared in his manifesto that they would frame a code of laws for their future guidance. On 10 April 1854, the constitution of the Orange Free State was promulgated. As to be expected, the constitution was race based and citizen rights were only given to white males. Again, the principle of exclusion was at work. The Basotho had their own kingdom in the Maloti Mountains, but what about those serving the citizens, and what about women? Interestingly, it was due to the influence of the American constitution and the constitution of the French Republic of 1848, that the first constitutional (limited) democracy in southern Africa was erected. The rights of peaceful assembly and petition, equality before the law, the right to property, personal freedom and the freedom of the press were guaranteed for the white citizens. The *Volksraad* was subjected to the constitution as interpreted by the chief justice, and could amend the constitution only with a two-thirds majority (Thompson 1954:51–56). These were advantages the Transvaal Republic and the British Colonies never had and which were lost in the constitution of the Union of South Africa of 1910. Uniting the British Colonies in South Africa 'under one Government in a legislative union under the Crown of Great Britain and Ireland' (cf. Anker 2001; The Union of South Africa), the *South Africa Act of 1909* did not bind the legislative to a constitution, but opted for a system of parliamentary sovereignty:

The legislative power of the Union shall be vested in the Parliament of the Union, herein called Parliament, which shall consist of the King, a Senate, and a House of Assembly. (The Union of South Africa, *South Africa Act 1909*, Section IV [19])

The sovereignty of the bicameral parliament opened the door to numerous discriminatory laws, especially after the Statute of Westminster had been passed in 1931, and the United Kingdom could no longer legislate on behalf of South Africa. There was nothing to protect the public against those making racial laws, an increasing tendency when the National Party under Hertzog or its post war revival under D.F. Malan won the poll and installed statutory Apartheid. This is illustrated vividly by the initial failed attempt to



remove the coloured Cape people from the common voters role 1951 in the *Separate Representation of Voters Act No. 46* and the resulting legal tricks to set aside the Supreme Court decision in the *South Africa Amendment Act of 1956* and the *Separate Representation of Voters Amendment Acts* of the same year. Usurping sovereignty, the white parliament cancelled the basic right to free, fair and regular elections the coloured people had for more than hundred years. There was no constitution to stop them (Dugard 1978).

But back to 1910: Smuts graduated from Cambridge before his years as state attorney and guerrilla fighter in the South African war (Bossenbroek 2012:472–476, 484–485, 497, 503–515). Knowing another England than that of Lord Kitchener of Karthum's concentration camps, and burnt earth genocide; he played a seminal role in redefining the role of the defeated Afrikaners under British rule. A distinguished international career followed. At the Paris Peace Conference after World War I, Smuts believed that another Germany, that of Goethe, Schiller and Kant could re-emerge and fought tirelessly against the humiliation of Germany. Sadly, history would vindicate his minority position that the *Treaty of Versailles* would lead to another, more horrific war (Lentin 2010:46–113). After the capitulation of Hitler's Germany, presiding over the San Francisco meeting in 1945 that prepared the foundation of the United Nations, it was this keen reader of Kant and the Greek New Testament who introduced the notion of human rights in his draft of the preamble of the United Nations' Declaration (Moyn 2010:61–62). In Smuts's words, the United Nations are determined:

[...] to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to re-establish faith in fundamental human rights, in the sanctity and ultimate value of human personality, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.² (Preamble to the Charter of the United Nations)

In 1952, 2 years after the death of Smuts in Doornkloof, Winston Churchill said in the British House of Commons, 'Jan Smuts did not belong to any single state or nation. He fought for his own country, he thought for the whole world'. Sadly, this is not true. The minutes Z.K. Matthews wrote of the interview members of the 'Native Representative Council' had with the South African Prime Minister on 08–09 May 1947 document that Smuts proposed a system of elected, as he called it, 'Native Government' (cited in Karis & Carter 1993:233–261). For Smuts it was clear that Europeans and Africans share the same country, but his vision was to let the two sections of South Africa work together, but live separately, facing the future – as he expressed it in the

words of St. Paul – in hope, faith and charity (cited in Karis & Carter 1993:239, 241). Councillor Thema immediately raised his concern, identifying the principle of exclusion at work: 'Where is that process of segregation going to lead us?' (cited in Karis & Carter 1993:243). In the written reaction on Smuts's proposals, the councillors stated, inter alia, that the policy proposed does not safeguard the legitimate rights of the African people and is not calculated to integrate them into the general life of the country. Z.K. Matthews summarised their mayor concern; the policy:

[...] is based upon the principles of permanent separation which engenders spirit of hostility and racial bitterness between black and white as against that of mutual cooperation in the interest of both sections and of the country as a whole. (cited in Karis & Carter 1993:252)

In reaction on the Prime Ministers' proposal, Dr A.B. Xuma said on behalf of the African National Congress (ANC) on 11 May 1947: '[W]e do not accept any proposal that does not provide for direct representation of all sections of the community in all legislative bodies' (cited in Karis & Carter 1993:258). Exclusion through separation was unacceptable.

In their reactions to the proposals of Smuts, Matthews and Xuma reiterated the principles formulated in 'African's Claims in South Africa' from 16 December 1943 in which the ANC formulated its reaction on the 'Atlantic Charter' agreed upon by the President of the United States and the Prime Minister of Great Britain on 14 August 1941 and subscribed to by the other Allied Nations. In the response document drafted by Z.K. Matthews, a *Bill of Rights* was included (cited in Karis & Carter 1993:217–218). These were demands that the ANC regarded as essential to guarantee Africans a worthy place in the post war world. Taking up the Charter's right to choose the form of government, this *Bill* demanded, inter alia, 'the granting of full citizenship rights such as are enjoyed by all Europeans in South Africa' (cited in Karis & Carter 1993:30). This should include:

1. the Abolition of political discrimination based on race ... and the extension to all adults, regardless of race, of the right to vote and be elected to parliament, provincial councils and other representative institutions.
2. The right to equal justice in courts of law, including nominations to juries and appointments as judges, magistrates, and other court officials.
3. Freedom of residence ...
4. Freedom of movement ...
6. Right of freedom of the press.
7. Recognition of the sanctity or inviolability of the home as a right of every family ...
8. The right to own, buy, hire or lease and occupy land and all other forms of immovable as well as movable property ...
9. The right to engage in all forms of lawful occupations, trades and professions, on the same terms and conditions as members of other sections of the population.
10. The right to be appointed to and hold office in the civil service and in all branches of public employment on the same terms and conditions as Europeans.
11. The right of every child to free and compulsory education and of admission to technical schools, universities, and other institutions of higher education. (cited in Karis & Carter 1993:30–33)

Even if the demands formulated in this catalogue are wider than basic human rights, they are clearly aimed at overcoming

²For these ends it was imperative 'to practice tolerance and live together in peace with one another as good neighbours, and to unite strength to maintain international peace and security, and to ensure ... that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples'. For a discussion on the origin of the preamble and the edition of Smuts's draft (Heyns 1995:329–348). The sanctity of human personality is later taken up by Joas (2011).

the exclusion of the African people from the rights of citizens and granting every individual equal rights.³

Did Smuts mean what he said in San Francisco? I think he did (Mazower 2008:21–22). However, he meant it to be valid for Europeans only. His paternalistic belief in white stewardship and the Eurocentric frame of mind of the 75-year-old doyen of the San Francisco conference did not allow him to apply human rights in domestic policy (Mazower 2008:9, 19–21, 52–53, 61–65). Again, the principle of exclusion was at work. Smuts did not think for the whole world; tragically not even for all the people in the country, which he represented. In 1948, the National government unseated Smuts and introduced statutory Apartheid through a whole range of laws. Persistently, the legislation of this minority government would be challenged before the United Nations for contravening the spirit and principles of the *Human Rights Charter*. In 1987 and 1989, the ANC National Executive Committee endorsed their proposal for a justiciable bill of human rights with Albie Sachs, former judge on the Constitutional Court of South Africa, and Kader Asmal, former professor of law at Trinity College in Dublin, playing a leading role (Dubow 2012:107–108).

In his speech at the opening of Parliament on 02 February 1990 (cf. Nelson Mandela Centre of Memory), F.W. de Klerk stated that his government had accepted the principle of the recognition and protection of fundamental individual rights as constitutional basis. They acknowledged also, 'that the most practical way of protecting those rights is vested in a declaration of rights justiciable by an independent judiciary' (De Klerk 1990). Revealing is, however, the qualification that 'a system for the protection of the rights of individuals, minorities and national entities has to form a well-rounded and balanced whole' (De Klerk 1990). The Law Commission was asked report on 'the balanced protection in a future constitution of the human rights of all our citizens, as well as of collective units, associations, minorities and nations' (De Klerk 1990).

There is much speculation on the motives of this change of heart on the side of the leader of the National Party. Historians underline the impact of the peaceful mass march in Cape Town from Parliament to St. George's Cathedral on 13 September 1989 and the important role of the religious leaders in the run up to it (Giliomee 2012:2893–2900). In strong opposition to the National Party politics, F. van Zyl Slabbert played a key role in promoting the idea that in future a constitution, safeguarding individual rights, would 'act as buttress against abuse of power' (Giliomee 2012:237, 243). Whatever the reasons were, at last the leadership of the majority of white people was also willing to embrace human rights as a cornerstone for building a new society. In the process of negotiating a new constitution, their last efforts to mobilise the principle of exclusion were stopped and they

had to accept that group rights are second degree rights, based on individual human rights.

The rest of the history is known. South Africans negotiated a new constitution, giving up parliamentary sovereignty for constitutional supremacy, the *Bill of Rights* limiting the power of government at the heart of the new constitution drafted by a technical committee of four lawyers (Dubow 2012:100–102, 142). This liberal democratic constitution:

[...] is not the celebration of majoritarianism, but constraint on the use and abuse of power. That is why the separation of power, rule of law, respect for human rights etc. form such a distinctive part of a liberal democracy. (Van Zyl Slabbert 2006:163)

The success of the liberal South African democracy is dependent on the support for the constitution amongst the voters. In the last few years, various political commentators across the spectrum have warned that the South African miracle is imploding and prominent South Africans have expressed concern that South Africa is a failing state, inter alia because the interest of political parties is put above the values expressed in the constitution (e.g. Boraine 2014). In my opinion, there are four very basic landmarks for the way forward to nourish a culture where the loyalty to the sanctity of the person and respect for his or her basic rights as outweighs the loyalty to political, ethnic, racial or religious alliances:

- Never again should South Africans allow any political group to change the relationship between the constitution and the legislature. All political parties have the duty to contribute to lawful legislation that respects the fundamental rights of all citizens as entrenched in the constitution. Any individual, group or institution who infringes the supremacy of the constitution damages the Republic of South Africa. That would reopen the window of opportunity to exclude parts of the population from our inclusive democracy.
- The constitution places high demand on those in public office: when members of parliament do not respect and protect the inherent dignity of each other, they undermine the very foundation of the democratic institutions; when the freedom of the press and other media is curbed; when hatred that is based on race, ethnicity, gender or religion is advocated inciting to cause harm; when the environment is not protected for the benefit of present and future generations, pollution is not prevented and the ecology is degraded; when people do not have access to adequate housing, do not have access to health care services, emergency medical treatment, sufficient food and water, social security; when an efficient administration is not promoted – then the basic constitutional rights are violated and those responsible will bring judgement upon themselves. Eventually the state will fail. Justice is brought about by upholding the law, and the *Bill of Rights* is the foundation of legislation.
- Where does this leave religion? The leaders of religious movements are challenged to join forces beyond denominational differences and religious diversity. They must formulate their conceptions of God and other

³The *Freedom Charter* of 1955 demands equal human rights, but in a nationalised or collective form, not as individual rights (Dubow 2012:73): 'All national groups shall have equal rights! ... All shall enjoy equal human rights!'



transcendent beings and of other humans in such a way that the influence of their religion on their followers does not contravene the rights of others, of members of religious communities different from their own. The way in which religion is lived, the piety amongst worshippers from all major religions, should lead to a support of the *Bill of Rights* in the constitution. This is the way to bring about justice in society. Let us just turn to the constitution. When, for example, the state or a group or individuals discriminate unfairly, 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, it tears the fabric of society. Religious leaders should lead their communities to speak out and to act against such tendencies.

- The supremacy of the constitution instead of the sovereignty of parliament has fundamentally changed the ground between religion and those in government. In a parliamentary democracy, the cathedral, church, mosque or temple has – like all other religious groups – to take influence on the representatives in parliament. In a constitutional democracy, religious leaders should not stop doing this. It is still an important way to influence the process of legislation. However, they should guard the context in which legislation has to take place. This they do by fostering the values of the constitution, especially the fundamental rights. They have to take guardianship for them and have to see that these values are firmly rooted in the hearts and minds of those parts of the electorate that practise their religion and live their piety within the realm of their cathedral, church, mosque or temple. By doing that, religious leadership – who protects religious communities – has a common goal. The mutual support for the constitution will greatly enhance interreligious dialogue, understanding and respect.

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