

Religious communities are notoriously vulnerable to the overreach of secular government. Nowhere is this more evident than in the vast and varied continent of Africa. Freedom of conscience and religion is one of the most vital elements that go to make up the identity of believers. But it has also been said to constitute a "precious asset for atheists, agnostics and the unconcerned". In these preliminary remarks, I intend to make three short points: one global, one national and one local.

Point One: Global

Article 18 of the *Universal Declaration of Human Rights* (1948) provides that everyone has the right to freedom of thought, conscience and religion. As its title implies, the document does not invent something new, but is declaratory of the innate rights of humanity.

The Declaration is augmented by the *International Covenant on Civil and Political Rights* (1966). It is important to note the legal architecture of Article 18(3). Freedom of religion is absolute. No state authority can restrict what an individual or group may believe. However, the freedom to manifest one's religion or belief is qualified, and the limitations are extremely narrowly drawn:

- i. they must be prescribed by law; and
- ii. they must be necessary to protect (a) public safety, order, health or morals or (b) the fundamental rights and freedoms of others.

The burden of proving the legitimacy and therefore the lawfulness of any limitation rests with the government. The standard of proof is a demanding one: 'necessity' is a high bar.

But the recent Covid-19 pandemic has had the unintended effect of lowering the bar and diluting the necessity test. Many governments used the cloak of Coronavirus to force through some of the most authoritarian peacetime provisions limiting the free practise of religion. Places of worship were closed, religious gatherings prohibited, and traditional rituals rendered unlawful. Governments leaned into the 'public health' justification, but with little regard for concepts of reasonableness and proportionality.

A research exercise into these emergency provisions was presented to the ACLARS conference on *Law, Religion, Health and Healing in Africa* which

met in Cote d'Ivoire in 2021. It concluded convincingly that in the vast majority of countries the restrictive provisions were *ultra vires* and unconstitutional.

With some notable exceptions, these draconian provisions were not challenged. Litigation is the pursuit of the wealthy. Most people were more concerned with putting food on the table. Further, due to lockdown, many court buildings were closed and judges were simply not hearing cases.

One case which has started, is that brought by Jan Figel against the Republic of Slovakia. It concerns anti-Covid measures including a complete ban on all public religious services, which he claimed was an infringement to his right to freedom of religion under the ECHR. I consider Figel's case to be a strong one, and if the Strasbourg court agrees with me, it will create a meaningful restraint on future overreach. Absent such a corrective, the enhanced authoritarianism of government constitutes a major threat to religious liberty. Governments who exercise draconian powers, rapidly acquire a taste for it.

Point Two: National

In common with most African nations, the Republic of South Africa includes in its constitution the tapestry of human rights articulated in international instruments such as the Universal Declaration. But these rights – of which freedom of religion is a central component – are merely exhortatory. They are valueless unless they can be enforced by citizens. The Republic of South Africa can be justly proud of its Constitutional Court. Constructed on the site of a former prison, where Nelson Mandela was once incarcerated, it stands as a beacon to civil liberties and democratic values. I am proud to have known several of its former justices: Albie Sachs, Tholie Madala and Edwin Cameron. The Constitutional Court has been robust in ensuring that the rights and freedoms embedded in the constitution have become a lived reality for the citizens of this Rainbow Nation. But some may question whether it is as effective now as it was in its early years.

As well as national courts, regional courts and tribunals now exercise a jurisdiction in the field of human rights in general and freedom of religion in particular. The European Court of Human Rights is well known, as is the Inter-American Court of Human Rights, based in Costa Rica. But almost invisible in the world of freedom of religion is the African Court of Human and Peoples Rights. Under-powered and under-funded, the Court claims to be the judicial arm of the African Union. The vision of the Court – and I quote from its website – is 'an Africa with a viable human rights culture'. I

fear it still has some distance to travel largely, I suspect, because African governments of all stripes are sceptical of its jurisdiction and disinclined to implement its decisions.

This is a propitious moment for funding a serious comparative study of the work of equality and human rights commissions, national, local and regional. They need to be evaluated independently, both their ways of working and their outcomes. Such a study should praise all that is good, and identify areas for review and improvement so that an enduring climate of freedom of religion can become the norm internationally. South Africa can lead the way in this.

Point Three: Local

But we can't leave it to the judges to do all the heavy lifting. Our biggest problem concerns religious illiteracy which is all-pervasive in government, the civil service, in schools and universities, and in the workplace. We no longer understand the doctrines, beliefs and practices of other religions. Ignorance breeds misunderstandings. And misunderstandings breed discrimination and hatred. We need to speak to each other, openly and honestly, and with a spirit of humility and generosity. At a local level, community resolutions are readily achievable. Reasonable accommodations can be made when a spirit of trust and respect prevails. This is what I understand by *ubuntu in action*, the theme of our conference.

Individual religious organisations – even large ones – are powerless against governments – particularly those who have acquired an enhanced sense of authoritarianism. But acting together, they can become a force to be reckoned with. I look forward to hearing from my fellow panellists some good news stories of collective action by people of faith showing the conversion of high-minded theories of freedom of religion into a lived reality for the weak, the impoverished and the left-behind. We need both macro- and micro- solutions to the challenges that face us.

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