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South African Charter of Religious Rights and Freedoms

Constitutional framework, formation and challenges

Iain T Benson¹

Abstract

The creation, under Section 234 of the *Constitution of South Africa* (1996) of a *South African Charter of Religious Rights and Freedoms*, signed by every major religious group in South African as well as representatives of leading South African Constitutional Commissions and others is a development of some importance and potential world significance. It will be, once passed into law, the first Charter created under this section. The civil society initial phase of discussions, consultations, meetings and drafting and re-drafting led to the public signing ceremony at the University of Johannesburg on 21 October 2010. The next phase moves to the more formal political phase of government consultations and, presumably further discussions and, it is hoped, eventual passage into law. The governmental part of this looks to be the most challenging. This introductory article discusses some of the relevant background to the formation of the South African Charter and appends the document for wider circulation, and perhaps, emulation in other settings.

Keywords South Africa, constitution, charter, religious freedom, rights, dialogue, policy-making.

1. Why a Charter in addition to the Enumerated Rights?

The role that religions could play in relation to the ongoing formation of the South African Constitution was understood early on by Justice Albie Sachs when he wrote:

Ideally in South Africa, all religious organizations and persons concerned with the study of religion would get together and draft a charter of religious rights and responsibilities. . . it would be up to the participants themselves to define what they consider to be their fundamental rights.²

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² A. Sachs, Protecting human rights in a new South Africa. *Contemporary South African debates* (1990), at 46-47.

Section 234 of the *Constitution of South Africa* stipulates as follows:

In order to deepen the culture of democracy established by this Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.

Section 234 gives South Africans a means to offer guidance to both politics and the courts though, since it has not been used until now, it is not certain what the political process will do to the work with which civil society (in terms of the major religions) has already been involved.

In principle, however, Section 234 gives those who come up with such Charters, emerging from civil society, the chance to specify in greater detail what they think matters, and the location of Section 234 in the Constitution suggests that legislation passed under this provision will be accorded a kind of “super statutory” or constitutional status by virtue of that inclusion.

So what has happened in South Africa to date in terms of the South African Charter of Religious Rights and Freedoms?

2. History of the South African Charter of Religious Rights and Freedoms

The first formal substantive step towards the formation of the South African Charter of Religious Rights and Freedoms was when a group of legal and theological academics called a meeting in Stellenbosch in October 2007 at which a variety of groups (primarily Christian at the beginning though this changed over time) met to discuss the background to such a document and whether it would be advisable to develop such a document. The author spoke about the Canadian experience of “inter-faith cooperation” and how such cooperation is essential in constitutional democracies formed around notions of pluralism and multiculturalism.³

One conclusion of that meeting was that representation had to be extended further afield to invite all the major religions (including African customary religions) to attend to comment upon a basic Draft that was to be prepared prior to that meeting and that particular care should be taken to invite all religions to the table.

The Draft was prepared by a small working group and a further meeting called for 14 February 2008. Prior to that meeting an invitation was sent out to every major religion in South Africa inviting participation and stressing that the Draft was completely open for discussion and was not in any way “set in stone”.

One of the principle rationales for the Charter was the realization that by leaving the right to religious freedom undefined in the Constitution, one actually accepts that the

³ Both terms are open to a variety of interpretations. Whatever interpretations are given, however, extension of cooperation beyond simply one racial or religious group is implied and important.

content of the right will be determined through court decisions and other measures on an *ad hoc* basis, in other words, as issues and difficulties occur. This is a process over which religious institutions have little control. Section 234, on the contrary, created, so it was successfully argued, the possibility to propose a Charter of Religious Rights in which the content of the right is spelled out fully in a single charter.

Throughout history conflict between religion and the state occurred from time to time in most countries and there were even periods of large scale religious persecution. In South Africa, it was noted, as well, that issues sometimes occurred over which religious institutions differed from the state or where the state takes steps that limit or may limit religious freedom. By defining and stipulating clearly some of the major concerns to religious groups, it was hoped that the Charter would provide a guide both to legislators and to courts and tribunals about the interpretations that religions believed to be most important to protect religious freedom.

In the course of the preparation of the Charter, significant consultations with every major religious organization (and many that would be considered minor) and many sub-groups occurred and comments were assiduously considered by the Continuity Committee and the Draft amended many times in response to these comments. The Continuity Committee is made up of some eight persons – one of whom is the writer of this article. The author has been involved in this process since near the beginning, and this article sets out some of the background to this work which remains, in some ways, a work in progress. Beyond the utility of the process to date (which has been most useful already in establishing links and discussion between widely diverse groups), should the Charter become a legal document, it will be the first such Charter created in South Africa and, because of the unique provision in the South African Constitution, likely the first of its kind anywhere. It will be possible, perhaps, to emulate it through laws in other countries, but that is beyond the scope of this article; such initiatives, when they do arise, will rely on the ingenuity of those who bring the provisions together. One thing is sure, such motivations are likely to emerge from the same concerns that animated those of us involved in the creation of the South African Charter: that laws reflect the genuine wishes of the various associations that make up democratic societies and that the piece-meal approach of litigation is not the best way to articulate shared and overlapping concerns about the roles that religions play in society and how best to recognize those in law before tensions resort to litigation or worse.

Time alone will tell the significance of the Charter, but in view of the number of groups consulted, the time spent considering the language of the text and the number of areas covered, it has no equal in South African Constitutional history.⁴

⁴ Religions, like all human institutions, have ways of determining the rules and representations. Whe-

The public signing of the document on 21 October 2010 at the main Board Room of the University of Johannesburg⁵ was followed by a meeting of the signatories that established a South African Council for the Protection and Promotion of Religious Rights and Freedoms pursuant to Section 185 (1) (c) of the Constitution and other relevant provisions of the Promotion and Protection of Cultural, Religious and Linguistic Communities Act 19 of 2002. At the time of this writing a Steering Committee has been established of members and experts that will continue to raise support for the Charter and draft a constitution for the Council to move ahead in discussions with the government. Those who have invested so

ther dogmatic or administrative, questions of who has authority to speak on behalf of a particular religion makes consultation with some sorts of religious bodies, at times, a complicated matter. While it is fairly easy to ascertain the leadership and, if clarified, what the doctrines are within some traditions, Roman Catholicism for example, it is not so clear with others that are either less well organized or who do not have any kind of hierarchical structure (such as Buddhism or some Christian denominations). With respect to denominations, some may be embroiled in the very question of “who speaks?” and “who has or should have authority?” making their involvement even more complicated. In addition those with dissenting and/or “prophetic” voices within traditions pose challenges, not only to those who seek to speak on behalf of the faithful, as well as to those who seek to involve as many groups as possible in civil society projects of the sort the Charter represented. Similarly, those with an axe to grind against religion may wish only to be involved if the document says negative things about religion – this poses yet another challenge. While consulting with as many groups as possible, the drafters of the South African Charter provided an opportunity for leaders to sign on behalf of groups and others to sign as individuals and many individuals did sign on their own behalf. Those who are professionally or psychologically (or both) driven towards the negative side will not like the kind of co-operation such a process and document produce: in relation to the South African Charter see for an illustration of various viewpoints: A. Leatt, C. Jeanerrat and N. Erlank “Public faith and the politics of faith: A review essay” in *Journal for the Study of Religion*, Volume 23, Number 1 & 2 (2010) at 5 -15. The author’s own position is badly characterized in the opening essay – perhaps because the radical nature of the re-thinking of central terms such as “secular” and “secularism” poses a great challenge to existing articulations that do not interrogate sufficiently their own core language presuppositions. For from arguing, as suggested, that “secular public is anti-religious”, I have argued that the idea of “secular” is an illusion as it is often used, since all citizens are “believers” and a dualistic use masks the beliefs of agnostic and atheist citizens, thereby giving them an inappropriately superior cultural position. I also, nowhere, argue that “the beliefs of sexual or gender equality ought not to be held against religious groups” (p. 8) but rather, a far more nuanced position, that some sorts of claims for equality ought not properly to be recognized by the law if associational diversity (different religious beliefs) are to be tolerated in an open society. I do argue that the male-only priesthood in Catholicism or male-recognition congregational rules in Judaism are not the sort of thing that courts should overturn. These debates and their resolution (or not) should occur within the religions themselves and be resolved either by internal development or by the person leaving the particular religious group so as to join one more in agreement with their own thinking (the “right of exit”).

⁵ The event was attended by over a hundred delegates representing all the major religions of South Africa and several of the key NGO’s including the Section 185 (1) (of the Constitution of the Republic of South Africa, 1996) Commission for the Promotion and Protection of the Rights of Culture, Religious and Linguistic Communities.

much time and work in the process are hopeful that it will be passed into law for the guidance of South African society in future cases.

What has occurred has been deep, meaningful and, might well be in the long run of great importance, not only within South Africa but in many other countries as well.⁶ The process, document and meetings have shown both that religions can cooperate at a high level of sophisticated and mature discussion and that principles important to each religion can be shared and recognized as important to all religions. These principles are a substantive contribution to the principles of *modus vivendi* as they include not only the right to join a religion, but also to leave one.

Finally, the process, which is ongoing, shows that there are alternatives to political and legal avoidance of key aspects when the civil society organizations themselves show leadership in important areas in the context of a constitutional document set up so as to encourage the involvement of civil society in its ongoing development. The process also provides a means of more holistic principled development than the *ad hoc* nature of litigation on a case by case basis.

In this respect, use of Section 234 of the South African Constitution provides an important landmark for those who are concerned that constitutional development has become the property of a small number of judges and activist litigation strategists.

It remains to be seen how the political process will respect the hard work that has been done by civil society. A sign of respect would be to recognize that the Charter represents an extraordinary cooperation between as wide a set of interest groups as could be assembled. It did not include every possible group – that goal would be impossible to realize. It is for the government, in conversation with the Council for Religious Rights and Freedoms that has been established to determine whether Section 234 of the Constitution will prove to be useful and usable in South Africa.

⁶ The author has met with officials at the Ministerial level provincially and federally in Canada to discuss whether, in principle, enactments could be developed that might serve in a manner akin to 'Interpretation Acts' in such a way that civil society initiatives could be both encouraged and effective in crafting greater delineation of the meaning of the general rights in the Canadian Charter of Rights and Freedoms. Should this occur it will be in no small part due to the South African experience in relation to that country's Section 234. In addition, discussions of the Charter and its processes have occurred in the UK, Italy and the United States and with delegates from some thirty-five other countries. In addition to the six African, English and Afrikaans versions of the Charter, plans are afoot to have it translated into Khoi/San, Italian, Spanish, French, German and Arabic. At the signing ceremony on October 21, 2010 portions of a letter in support of the process and its cultural importance from the Hon. Noel Kinsella, Speaker of the Senate of Canada was read by the author who gave a short presentation on the international significance of the South African Charter.

Appendix

General outline of the South African Charter of Religious Rights and Freedoms
(NB: This is not part of the Charter as signed)

Particularly notable amongst the provisions are the following:

1. Preamble, particularly #7;
2. Right to change religion 2.1;
3. Principle of religious accommodation 2.2;
4. Medical services or procedure protections 2.3;
5. Non-establishment provision 3.1;
6. Free-exercise provision 4.0 (including access to sacred places 4.2);
7. Freedom of expression (including public debate 6.1);
8. Right to share religious faith (6.1) including to attempt to convert others (6.2);
9. Access to public media (6.3) [a recent addition after representations from African customary religions about difficulty getting access to public media];
10. Advocacy of hatred “that constitutes incitement to immediate violence or physical harm” (6.4) [narrowing from “hate speech” which should be abolished from human rights according to Moon Report recently released in Canada⁷];
11. Education, primary parental, right of information, etc. (7.0);
12. Conditions of employment (9.1);
13. Relationship between Church and state recognizing autonomy (9.3) and confessional protection (9.4);
14. Religion not defined by “service to adherents” so includes “whether they serve persons with different convictions” (12).

Further documents and Charter found at <http://academic.sun.ac.za/theology/religious-charter/>

South African Charter of Religious Rights and Freedoms (as amended 6 August 2009 and signed 21 October 2010)

Preamble

1. Whereas human beings have inherent dignity, and a capacity and need to believe and organize their beliefs in accordance with their foundational documents, tenets of faith or traditions; and
2. Whereas this capacity and need determine their lives and are worthy of protection; and
3. Whereas religious belief embraces all of life, including the state, and the constitutional recognition and protection of the right to freedom of religion is an important mechanism for the equitable regulation of the relationship between the state and religious institutions; and

⁷ This Report of Professor Richard Moon (dealing with hate speech laws and recommending their abolition in a human rights context) may be found at: http://www.chrc-cddp.ca/publications/report_moon_rapport/toc_tdm-eng.aspx (accessed 11 November 2010).

4. Whereas religious institutions are entitled to enjoy recognition, protection and co-operation in a constitutional state as institutions that function with jurisdictional independence; and
5. Whereas it is recognized that rights impose the corresponding duty on everybody in society to respect the rights of others; and
6. Whereas the state through its governing institutions has the responsibility to govern justly, constructively and impartially in the interest of everybody in society; and
7. Whereas religious belief may deepen our understanding of justice, love, compassion, culture, democracy, human dignity, equality, freedom, rights and obligations, as well as our understanding of the importance of community and relationship in our lives and in society, and may therefore be beneficial for the common good; and
8. Whereas the recognition and effective protection of the rights of religious communities and institutions will contribute to a spirit of mutual respect and tolerance among the people of South Africa; and

Therefore the following

Charter of Religious Rights and Freedoms is hereby adopted

1. Every person (where applicable in this Charter “person” includes a religious institution or association) has the right to believe according to their own religious or philosophical convictions, and to choose which faith, worldview, religion, or religious institution to subscribe to, affiliate with or belong to.
2. No person may be forced to believe, what to believe or not to believe, or to act against their convictions.
 - 2.1. Every person has the right to change their faith, religion, convictions or religious institution, or to form a new religious community or religious institution.
 - 2.2. Every person has the right to have their religious beliefs reasonably accommodated.
 - 2.3. Every person may on the ground of their religious or other convictions refuse to (a) participate or indirectly assist in or refer for certain activities, such as of a military or educational nature, or (b) perform certain duties or deliver certain services, including medical or related (including pharmaceutical) services or procedures.
 - 2.4. Every person has the right to have their religious or other convictions taken into account in receiving or withholding of medical treatment.

- 2.5. Every person has the right not to be subjected to any form of force or indoctrination that may cause the destruction of their religion, beliefs or worldview.
3. Every person has the right to the impartiality and protection of the state in respect of religion.
 - 3.1. The state must create a positive and safe environment for the exercise of religious freedom, but may not as the state promote, favour or prejudice a particular faith, religion or conviction, and may not indoctrinate anyone in respect of religion.
 - 3.2. No person may be unfairly discriminated against on the ground of their faith, religion, or religious affiliation.
4. Subject to the duty of reasonable accommodation and the need to provide essential services, every person has the right to the private or public, and individual or joint, observance or exercise of their religious beliefs, which may include but are not limited to reading and discussion of sacred texts, confession, proclamation, worship, prayer, witness, order, attire, appearance, diet, customs, rituals and pilgrimages, and the observance of religious and other sacred days of rest, festivals and ceremonies.
 - 4.1. Every person has the right to private access to sacred places and burial sites relevant to their religious or other convictions. Such access, and the preservation of such places and sites, must be regulated within the law and with due regard for property rights.
 - 4.2. Persons of the same conviction have the right to associate with one another, form, join and maintain religious and other associations, institutions and denominations, organise religious meetings and other collective activities, and establish and maintain places of religious practice, the sanctity of which shall be respected.
 - 4.3. Every person has the right to communicate nationally and internationally with individuals and institutions on religious and other matters, and to travel, visit, meet and enter into relationships or association with them.
 - 4.4. Every person has the right to single-faith religious observances, expression and activities in state or state-aided institutions, as regulated by the relevant institution, and as long as it is conducted on an equitable and free and voluntary basis.
5. Every person, religious community or religious institution has the right to maintain traditions and systems of religious personal, matrimonial and family law that are consistent with the Constitution and are recognised by law.
6. Every person has the right to freedom of expression in respect of religion.

- 6.1. Every person has the right to (a) make public statements and participate in public debate on religious grounds, (b) produce, publish and disseminate religious publications and other religious material, and (c) conduct scholarly research and related activities in accordance with their religious or other convictions.
- 6.2. Every person has the right to share their religious convictions with others on a voluntary basis.
- 6.3. Every religious institution has the right to have access to public media and public broadcasting in respect of religious matters and such access must be regulated fairly.
- 6.4. Every person has the right to religious dignity, which includes not to be victimised or slandered on the ground of their faith, religion, convictions or religious actions. The advocacy of hatred that is based on religion, and that constitutes incitement to imminent violence or to cause physical harm, is not allowed.
7. Every person has the right to be educated or to educate their children, or have them educated, in accordance with their religious or philosophical convictions.
 - 7.1. The state, which includes any public school, has the duty to respect this right and to inform and consult with parents on these matters. Parents may withdraw their children from school activities or programs inconsistent with their religious or philosophical convictions.
 - 7.2. Every educational institution may adopt a particular religious or other ethos, as long as it is observed in an equitable, free, voluntary and non-discriminatory way, and with due regard to the rights of minorities. The preference for a particular religious ethos does not constitute discrimination in breach of the Constitution with respect to religious education.
 - 7.3. Every private educational institution established on the basis of a particular religion, philosophy or faith may impart its religious or other convictions to all children enrolled in that institution, and may refuse to promote, teach or practice any religious or other conviction other than its own. Children (or their parents) who do not subscribe to the religious or other convictions practised in that institution waive their right to insist not to participate in the religious activities of the institution.
8. Every person has the right on a voluntary basis to receive and provide religious education, training and instruction. The state may subsidise such education, training and instruction.
9. Every religious institution has the right to institutional freedom of religion.
 - 9.1. Every religious institution has the jurisdictional independence to (a) determine its own confessions, doctrines and ordinances, (b) decide for itself in

all matters regarding its doctrines and ordinances, and (c) in compliance with the principles of tolerance, fairness and accountability regulate its own internal affairs, including organisational structures and procedures, the ordination, conditions of service, discipline and dismissal of office-bearers and members, the appointment, conditions of employment and dismissal of employees and volunteers, and membership requirements.

- 9.2. Every religious institution is recognised and protected as an institution that functions with jurisdictional independence, and towards which the state, through its governing institutions, has the responsibility to govern justly, constructively and impartially in the interest of everybody in society.
- 9.3. The state, including the judiciary, must respect the jurisdictional independence of every religious institution, and may not regulate or prescribe matters of doctrine and ordinances.
- 9.4. The confidentiality of the internal affairs and communications of a religious institution must be respected. Specifically, the privileged nature of any religious communication that has been made with an expectation of confidentiality must be respected in legal proceedings.
- 9.5. Every religious institution is subject to the law of the land, and must justify any disagreement, or civil dissent, on the basis of its religious convictions or doctrines.
10. Every religious institution that qualifies as a juristic person has the right to participate in legal matters, for example by concluding contracts, acquiring, maintaining and disposal of property, and access to the courts. The state may allow religious institutions tax, charitable and other benefits.
11. Every person has the right, for religious purposes and in furthering their objectives, to solicit, receive, manage, allocate and spend voluntary financial and other forms of support and contributions. The confidentiality of such support and contributions must be respected.
12. Every person has the right on religious or other grounds, and in accordance with their ethos, and irrespective of whether they receive state-aid, and of whether they serve persons with different convictions, to conduct relief, upliftment, social justice, developmental, charity and welfare work in the community, establish, maintain and contribute to charity and welfare associations, and solicit, manage, distribute and spend funds for this purpose.