PATRIARCHY AND THE BILL OF RIGHTS*

1 Introduction

In this note the writer has deliberately avoided dealing with the heavily contested issues relating to the substantive rights and duties of spouses in marriages as these issues have already been dealt with in recent legislation (see s 6 of the Recognition of Customary Marriages Act 120 of 1998). This Act has incorporated some provisions of the Matrimonial Property Act (88 of 1984). The thorny issue of succession will soon be satisfactorily resolved in terms of the recommendation of the South African Law Commission.

This note is about African religion and the role played by the elders in that context. In a recent decision of the Constitutional Court, religion has been defined as a means of giving content to the constitutional value of human dignity in an open and democratic society (see the judgment of Ngcobo J in *Prince v President of the Law Society of the Cape of Good Hope* 2002 3 BCLR 231 (CC)). There is no general agreement as to what constitutes religion (see the definition adopted by Nafzinger "The Functions of Religion in International Legal System" in Jaris and Evans (eds) *Religion and International Law* (1999) 158).

In the context of African religion, the Constitutional Court's description of religion is significant because patriarchy, seen from the perspective of the role of the elders at the family level, represents an embodiment of a way of life, that is those things that have given significance to the life of a people and their standards of right and wrong (the whole fabric of a people's standards and beliefs; and see further Bennedict *Patterns of Culture* (1952) 15-16). Religion plays a significant role in shaping the *boni mores* of society.

In countries with a multiplicity of religions the difficulty has always been the extent to which the state can and should give recognition to the manifestation of some of the religiously motivated human acts, particularly those that clash with state interest or the general law of the land. In the United States of America the complexity of this problem is illustrated by a long list of cases whose adjudication centred around the interpretation of the free exercise clause in terms of which Congress is forbidden from making a

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law that forbids the free exercise of religion (see Lupen "Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion" 1989 102 *Harvard Law Review* 933).

In this country the same thing has happened in connection with the adjudication of claims based on section 15 of the new Constitution Act (108 of 1996). The case in point is that of *Prince v President of the Law Society of the Cape of Good Hope* (*supra*), where the applicant challenged the constitutionality of a decision of the Cape Law Society, alleging that it infringed his rights to freedom of religion. The bone of contention was the Rastafarian religious practice relating to the use of cannabis. The other case that attracted a great deal of attention was that of *Nkosi v Bührmann* (2002 5 BCLR 574 (SCA)) dealing with the balancing of the interests of the land owner and that of an occupier in terms of Extension of Security of Tenure Act (62 of 1997) ("ESTA"). In *Prince's* case Ngcobo J, referring to the cases of *S v Lawrence*; *S v Negal*; *S v Solberg* (1997 4 SA 1176 (CC)); and *Christian Education South Africa v Minister of Education* (2000 4 SA 757 (CC)), expressed himself as follows on the contents of the right to freedom of religion:

> "This Court has on two occasions considered the contents of the right to freedom of religion. On each occasion it has accepted that the right to freedom of religion at least comprehends: (a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce one's religion publicly and without fear of reprisal; and (c) the right to manifest such beliefs by worship and practice, teaching and dissemination …" (par [38]).

Ngcobo J added that, seen in that context, sections 15(1) and 31(1)(a) of the Constitution complement one another. In his own words section 31(1)(a) emphasizes and protects the associational nature of cultural religions and language rights. "In the context of religion, it emphasizes the protection to be given to members of communities united by religion to practice their religion" (247 par [39]).

Ngcobo J went on to make the following important comments:

> "The right to freedom of religion is especially important for our constitutional democracy which is based on human dignity, equality and freedom. Our society is diverse. It is comprised of men and women of different cultural, social, religious and linguistic backgrounds. Our constitution recognizes this diversity … the protection of diversity is the hallmark of a free and open society. It is the recognition of the inherent dignity of all human beings" (250 par [49]).

In the light of these and other judicial comments the issue of freedom of religion and what it entails has occupied centre stage in academic discourse (see Smith "Freedom of Religion" in Chaskalson *et al* (eds) *Constitutional Law of South Africa*; Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997); Heyns "The Constitutional Protection of Religious Human Rights in Southern Africa" 1999-2000 32-33 *CILSA* 53; and Freedman "Up in Smoke: Judicially

Mandated Constitutional Exemptions for Religiously Motivated Conduct" 2002 *Stell LR* 35).

2 Connection between an aspect of religion and the Bill of Rights

There has always been a close relationship between human rights law and religious traditions. This relationship has been fully described by Charlesworth ("The Challenges of Human Rights Law for Religious Traditions" in Jaris and Evans (eds) *Religion and International Law* (1999) 404) in the following terms:

> "In one sense, human rights and religion are intimately, if ambivalently, related in that religions provide a transcendent perspective by revealing a dimension of human life over and above the social and political order. Religions set a limit to the power of the collectivity and the state, since in a religious context the state cannot pretend to be the unitary source of all authority" (see Heyns 1999-2000 32-33 *CILSA* 54).

Witte ("Introduction" in Witte and Van der Vyver (eds) *Religious Human Rights in Global Perspective* (1996) xviii-xix) lends support to this by pointing out that the struggle for human rights cannot be won without the support of religions.

> "For human rights norms are inherently abstract ideals – universal statements of the good life and the good society. They depend upon the visions of human communities and constitutions to give them content and coherence, to provide 'the scale of values governing their exercise and concrete manifestation'. Religion is an ineradicable condition of human lives and communities; religions provide universal sources and scales of values by which many persons and communities govern themselves. Religions must thus be seen as indispensable allies in the modern struggle for human rights …"

3 Why patriarchy and the Bill of Rights?

The notion of patriarchy fits in neatly in the kind of religious family envisaged in section 15(3)(a)(ii) of the new Constitution, namely, a "system of personal and family law under any tradition, or adhered to by persons professing a particular religion". Further in section 15(3)(b) it is provided that "recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution".

In the Eastern Cape among the Xhosa speaking tribes, patriarchy manifests itself through the clan system. A meeting of the people related by the same clan name is called a family court or family council. The appropriate vernacular name for this court is *inkundla yemilowo*. *Imilowo* means close relations according to clan names. This court is held at the homestead of the most senior clansman.

Whenever an important religious ritual has to be observed, the family court will assemble. The meetings are held next to the cattle kraal which is a place

thought to be the place of abode of the ancestor spirits. Matters that fall within the domain of the family court include *intonjane* which is a ceremony performed by girls who have reached womanhood, circumcision for boys, discussion about *lobolo*, deaths within the family, birth of a child, reception ceremonies for a newly wed bride and a wide range of family disputes such as burial disputes among surviving widows as was the case in *Thembisile v Thembisile* (2002 2 SA 209 (TPD)).

Although females sharing the same clan name play leading roles in these ceremonies, the wives play a less significant role.

African religion is characterized by *Hlonipha* custom (all the role-players show respect to the ancestors in the most appropriate way). This applies to both male and female role-players.

It is therefore no wonder that the notion of patriarchy featured prominently in the First Certification case cited as *Ex Parte Chairperson of the Constitution Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996* (1996 4 SA 744 (CC) par 195) in the context of the horizontal application of the Bill of Rights in relation to customary law. The objectors expressed fear that "patriarchal principles which underlay much of indigenous law would be outlawed by the Bill of Rights, thereby undermining the core of indigenous law. This would put such hallowed institutions as *lobola* (bride wealth) in jeopardy, thus open the way to allowing women to succeed to the monarchy on the same basis as men and prevent a father from claiming damages for the seduction of his daughter."

The Constitutional Court felt that the objection, in effect, fell "outside our present competence".

The writer feels that the court missed a golden opportunity by not probing the issues raised by the objectors in relation to patriarchy because in African governmental structure, patriarchy is part and parcel of the institution of traditional leadership, which was one of the institutions which the court regarded as "basic structures and premises" of the new constitutional text (see 788 par 45(g)). The Family Court composed of family elders constitutes the lowest tier in the African court hierarchy.

In customary law there is no separation between law and religion. In *Mthembu v Letsela* (1997 2 SA 936 (TPD)) Le Roux J said:

> "There is much to be said for the view that customary law has been accepted by the framers of the Constitution as a separate legal and cultural system which may be freely chosen by persons desiring to do so by virtue of s 31 of the Constitution."

In the light of the recognition of cultural pluralism in recent judgments of the High Court and Supreme Court of Appeal as evident in the three *Letsela*

cases (*Mthembu v Letsela* 1997 2 SA 936 (TPD); 1998 2 SA 675 (TPD); and 2000 3 SA 867 (SCA); and in *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1318 (SCA)). It is the present writer's opinion that patriarchy as the core of the customary law will not disappear overnight.

Critics of customary law's compatibility with human rights, particularly in the debate between culture versus equality, should bear in mind that culture and religion are an integral part of customary law. The writer has dealt with the relationship between law and religion on other occasions (see further Mqeke "Myth, Religion and the Rule of Law in the Pre-Colonial Eastern Cape" 2001 *De Jure* 87).

In this note the writer argues for the recognition of customary law as part of the religious system. Those who criticize patriarchy should see it in this light.

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