



Putting the “Religion” Speech in a Proper Perspective

04 June 2014

BY MOGOENG WA MOGOENG

CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA

I was privileged to participate in an international conference under the theme “*Law and Religion in Africa: The Quest for the Common Good in Pluralistic Societies*”. That conference was attended by delegates from diverse religions.

At the heart of the objectives sought to be achieved through that historic conference, was how law and religion in Africa could relate in a manner that would yield a way of life that is beneficial to all in our pluralistic societies. Reflections on the role that religion could play in the furtherance of the common good, was therefore inevitable. And it is in this context that I made statements that seem to have provoked a lot of interesting comments, some perhaps somewhat personal and animated whereas others were arguably, more sober and balanced. Whether some of the comments portrayed extreme intolerance to anything that smacks of religion, is a matter that I choose to leave to all fair-minded people to judge for themselves.

Again I say, Africa yearns for peace, stability, caring, good governance, moral regeneration, sustainable economic development and prosperity for all, now more than ever before. Several factors have an important

role to play in facilitating the attainment of these noble objectives. Law and religion are some of those factors.

As I said, some of the predictable objections to the influence of religion in shaping a legal and constitutional dispensation might be the potential marginalization of minority groups that subscribe to other possibly less influential religions, those who do not subscribe to any religion, and those whose sexual orientation and philosophies of life are perceived to be conflict with the mainstream religions like Christianity, Judaism and Islam.

It bears emphasis, that the world we ought to strive to create is a 'democratic, universalistic, caring and aspirationally-egalitarian society which embraces everyone and accepts people for who they are irrespective of their religious beliefs'. This blends well with the Preamble to the South African Constitution which says: *South Africa belongs to all who live in it, united in diversity.*

Concerns that cannot be left unattended relate to the effect of religious principles on the right to secure a divorce, the freedom to indulge in adultery and promiscuous fornication.

I believe that the paper raises important issues that call for a sober reflection. And I must hasten to add that the operative expression in relation to any proposal is “for the common good of all in our pluralistic society”

Two related issues have proved to be of particular concern to some of those who made comments. Since people have freedom to choose who to have an intimate relationship with, why should religious principles be allowed to interfere with that right? Why should adultery and promiscuous fornication be anybody’s concern especially when it involves two consenting adults who are atheists, for example?

Adultery is one of the major contributing factors to the breakdown of families and divorce. This has often resulted in younger children having to grow up with the pain and psychological scars of a broken family. The tensions that would have resulted from the betrayal and the final emotional blow delivered by separation and divorce, are known to have a profound negative impact on the well-being and development of children. By extension it also tends to inform the kind of role players in society that they end up being. Worse still, adultery has resulted in deaths borne out of jealousy.

For this reason, I believe that the well-being of particularly young children, must be a matter of grave concern to all of us. Their development and educational progress is likely to be affected negatively by the strife and the divorce that often flow from adulterous relationships. The lives of some parents that are lost for this reason also ought to be a matter of great concern to all of us.

All religious principles or any other approach that could help address this matter ought to be embraced provided the outcome is for the common good of all.

Secondly, the Constitution does not prohibit promiscuous sexual relations by unmarried people. This means that any number of consenting adults is free to have relations with one or more people. But we are just too aware of the health risks that promiscuity exposes it practitioners and uninformed participants to. Furthermore, it is doubtful whether disclosures are made to all other partners by the central figure that has several relations. The rights of others who unknowingly participate in such a relationship deserve some attention. Principles sourced from all religions, could be of some help in this regard. Those principles could be infused for example into a national moral code that

could be taught at home and school from a tender age all the way up to adulthood. If this proposal cannot serve the common good of all, then let us look for a viable solution. We cannot fold our arms, and yet stand ready to shoot any possible solution just because it smacks of religion and leave the situation to worsen. Think about the spread of the HIV AIDS pandemic in our country. Additional to what is being done, what else can we do? That is the question you and I should answer. Again I say, if there are other options, lay them on the table.

Others have suggested that my statement on adultery undermines the right to polygamy. That cannot be correct. In a polygamous marriage it is known who is committed to whom. There can be no violence or divorce purely because of the incident of the addition of another spouse if proper traditional consultative procedures are followed.

None of the proposals set out in my Stellenbosch speech seek to take away any constitutional right currently enjoyed. The Constitution has been amended several times, for the common good, and none of those amendments took away any right. All the statements I made target societal ills like theft, fraud, corruption, murder, intolerance etc. No objective reading of my paper would justifiably lead to the conclusion that violence and suppression of the constitutional rights of any sector of

our people are under threat. It is what is in the best interest of all our people that is sought to be achieved.

It also bears repetition that we should never worship the idol of religious intolerance in South Africa. But it is not the intolerance of one religion by another that should be guarded against or be a matter of serious concern to us. Any notion that anything based on religious principles is inherently bad and must be rejected out of hand without proper reflection, smacks of intolerance and a disregard for section 15 of our Constitution that guarantees, not only freedom of conscience, thought and opinion, but also freedom of belief and religion.

We are equal in our diversity. And freedom of speech, thought and opinion is a right to be enjoyed by all whether they subscribe to any religion or not.

The fact of the matter is that South Africa, Africa is facing serious problems such as child abuse, rape, HIV and AIDS, murder, intolerance, corruption, a lack of integrity, moral depravity and divorces. And these are the societal ills that must be of particular concern to all, as South Africans.

As I said before, religion has a very important role to play in enriching and strengthening our laws to ensure that overall governance augurs well for the common good of all in our pluralistic societies. I believe that there are sound principles that cut across the religious divide which blend well with the existing legal architecture and philosophy that could further improve our legal systems. This finds some support from the excellent exposition of the relationship between law and religion by Lord Denning in the following words:

“ . . . They say law governs one’s dealing with one’s fellows, religion concerns one’s dealings with God, but the two are quite separate. Likewise they say the law has nothing to do with morality. It lays down rigid rules which must be obeyed without questioning whether they are right or wrong. Its function is to keep order, not to do justice.

. . . Although religion, laws and morals can be separated, they are nevertheless still very much dependent on each other. Without religion there can be no morality; and without morality there can be no law.”¹

Some have asked where has this proposal that religion be factored into the law making process ever worked and how is it to be done in South Africa? In response I say, where in the world did they ever have the

¹ Lord Denning’s address delivered at the Annual Service in the Temple Church in October 1977.

equivalent of the Truth and Reconciliation Commission, before we opted for one? In how many countries was discrimination on the basis of sexual orientation outlawed by the Constitution before our own Constitution did so? And where else are socio-economic rights catered for as in our Constitution? There is always the first time. All proposals that seek to present solutions to our problems deserve to be properly considered, particularly in the light of the nature and magnitude of the problems we face.

Would discrimination against anybody, including those who do not subscribe to any religion be for the common good of all? Would beating up people or killing the gay and lesbian people be for the common good of all? Even a young child would know that it cannot be for the common good of all to persecute others and deny them their constitutional rights.

Invaluable life experiences, knowledge and wisdom that could be of benefit to all are not the preserve of those who do not subscribe to any religion. We all have valuable insights to share for the common good of all in our pluralistic society. Religion, properly practised, does not militate against the common good of all. In fact all religions in this country could play a very positive and important role in shaping our laws, policies, codes of conduct and ways of life in general. Similarly, those

who do not subscribe to any religion also have an invaluable experience-borne contribution to make, for the betterment of our society. Intolerance of religion, opinion thought or belief is bad for our constitutional democracy. The converse holds true. Like President Thomas Jefferson, we must all refuse to bow to the shrine of intolerance.

I conclude by revisiting Lord Denning's remarks:

"Although religion, laws and morals can be separated, they are nevertheless still very much dependent on each other. Without religion there can be no morality; and without morality there can be no law."²

And in line with our National Anthem, I say:

"Nkosi sikelel' iAfrika

Maluphakanyisw' uphondo lwayo,

Yizwa imithandandazo yethu,

Nkosi sikelela, thina lusapho lwayo.

Morena boloka setjhaba sa heso,

O fedise dintwa le matshwenyeho,

O se boloke, O seboloke setjhaba sa heso,

² Id

Setjhaba sa South Afrika— South Africa.”

Translated as follows:

“Lord bless Africa

May her glory be lifted high

Hear our petitions

Lord bless us, your children

Lord we ask You to protect our nation

Intervene and end all conflicts

Protect us, protect our nation

Protect South Africa, South Africa”.

May God Bless You All.