

# Comments on the constitutional protection of religion in Swaziland

Christa Rautenbach\*

Professor of Law, North-West University (Potchefstroom Campus), South Africa

## Summary

*Comparable to the South African legal system, the Swazi legal system has the characteristics of a dual legal system. Though the common law of Swaziland is Roman-Dutch law, Swazi customary law has a firm hold in the Swazi legal system. With a population in the region of 1,2 million, made up of different religious denominations, religion in Swaziland is an important matter. Although Christianity is the majority religion in Swaziland, there has generally been freedom of religion from an early stage. This was recently confirmed in the Constitution of the Kingdom of Swaziland Act 1 of 2005, which came into operation on 8 February 2006. The focus of this presentation is on the fairly new constitutional provisions dealing with freedom of religion in Swaziland. The first part of this contribution consists of a general discussion dealing with the commonalities of and interaction between the South African and Swazi legal systems, as well as certain key elements in the making of the Swazi Constitution. The second part deals with specific constitutional provisions pertaining to religion in general and freedom of religion in particular. The contribution concludes with a few comments on the role the South African constitutional jurisprudence has to play in future Swazi constitutional adjudication.*

## 1 Introduction

Nestled in between South Africa and Mozambique, Swaziland is the smallest African country south of the Sahara, covering an area of just

---

\* Blur, LLB, LLM, LLD (North West); Christa.Rautenbach@nwu.ac.za. I am greatly indebted to Prof Gerrit Ferreira for his helpful comments on an earlier draft.

over 17 000 square kilometres.<sup>1</sup> Keeping Swaziland's geographical position in mind, it probably comes as no surprise that South Africa and Swaziland share more than just borders. Swaziland was a protectorate of the South African Republic (ZAR) for a brief period stretching from 1894 to 1899, but after the Anglo-Boer War in 1902, Swaziland became a British protectorate until its full independence on 6 September 1968.<sup>2</sup>

Comparable to the South African legal system, the Swazi legal system has the characteristics of a dual<sup>3</sup> legal system.<sup>4</sup> Surprisingly, it is not the English common law, but the Roman-Dutch common law (also the common law of South Africa) which is the common law of Swaziland. In addition, Swazi customary law also has a firm hold in the Swazi legal system.<sup>5</sup> This situation was recently affirmed by the Constitution of the Kingdom of Swaziland Act 1 of 2005 (Swazi Constitution), which came into operation on 8 February 2006. Section 252 of the Swazi Constitution determines that Roman-Dutch law is the common law of Swaziland,<sup>6</sup> and also recognises Swazi customary law as part of the

<sup>1</sup> G Collard (ed) *Swaziland review* (2006 Swazi Review of Commerce and Industry Swaziland) 4; JB Mzizi 'Challenges of proselytization in contemporary Swaziland' (2000) 14 *Emory International Law Review* 912.

<sup>2</sup> Mzizi (n 1 above) 914.

<sup>3</sup> It is not only the Swazi legal system which is dual in character, but also the Swazi governmental system. The government consists of the traditional monarchy and western government structures. See the discussion of LG Dhlamini 'Socio-economic and political constraints on constitutional reform in Swaziland' unpublished LLM dissertation, University of the Western Cape, 2005 16-32. He is of opinion that the dual system of government ridicules constitutional reform in Swaziland (77).

<sup>4</sup> Mzizi (n 1 above) 914; T Nhlapo *Marriage and divorce in Swazi law and custom* (1992) 17. He points out that this classification is not without problems. According to him, 'duality' implies the existence of two legal systems on par with each other, whilst the co-existence of customary law and the general law are mostly an unequal relationship where the first is seen as inferior to the latter (6). However, a discussion of these issues falls beyond the scope of this discussion. Also, finding legal information on Swaziland, such as legislation, royal decrees, court decisions and textbooks, is no easy matter. A research report written by B Dube & A Magagula *The law and legal research in Swaziland* <http://www.nyulawglobal.org/Globalex/Swaziland.htm> (accessed 13 April 2008) provides valuable background information as a starting point to discover more about the Swazi legal system. Some of the latest decisions of the higher courts of Swaziland can be found at <http://www.saflii.org/sz/> (accessed 13 April 2008).

<sup>5</sup> Nhlapo (n 4 above) 7-16 explains how this progressed in Swaziland from 1907 onwards. In South Africa, it is no secret that colonialism has had a considerable impact on the existence and development of law. Modern South African law comprises a conglomeration of so-called transplanted laws made up of a mixture of Roman-Dutch law and English common law, as well as indigenous laws, referred to as customary law.

<sup>6</sup> Sec 252(1) reads: 'Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute.'

law of Swaziland, subject to a repugnancy provision that prohibits the application of Swazi customary law if it is 'inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity'.<sup>7</sup>

The Swazi repugnancy provision bears a remarkable resemblance to the controversial South African repugnancy provision,<sup>8</sup> which provides that South African customary rules may not be applied if they are 'opposed to the principles of public policy or natural justice'. Though this provision has not yet been repealed, it is generally accepted that the validity of customary law no longer depends on its consistency with the common law, but its consistency with the Constitution of the Republic of South Africa Act 108 of 1996 (South African Constitution) and, more specifically, the Bill of Rights.<sup>9</sup>

<sup>7</sup> Sec 252(2) reads: 'Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland.' Sec 252(3) reads: 'The provisions of subsection (2) do not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity.'

<sup>8</sup> See sec 1 of the Law of Evidence Amendment Act 45 of 1988. This provision resembles the Swazi repugnancy clause in the Swazi Courts Act 80 of 1950 which lays down that Swazi customary law prevails in Swaziland 'so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in Swaziland' (see sec 11(a) of the Act).

<sup>9</sup> The South African Constitution compels the courts to apply customary law when that law is applicable. However, such application is subject to the Constitution and any legislation that specifically deals with customary law; see secs 31(2) and 211. Although section 1(1) of the Law of Evidence Amendment Act is still in operation, it can safely be accepted that the South African Constitution removed any doubt as to the status of customary law in the South African legal system; it is part of modern South African law on a par with (and not subordinate to) the common law (Roman-Dutch law). In *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) para 51 it was stated: 'While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law, it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution.' See also *Bhe v Magistrate, Khayelitsha* (Commission for Gender Equality as Amicus Curiae); *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) paras 40 & 148; *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44; and *Mabuza v Mbatha* 2003 4 SA 218 (C) para 32. However, the question as to when customary law is applicable and when not, is not always easy to answer. For one, there is always the question whether the general law of South Africa (Roman-Dutch law) is to be applied or the customary law and, in addition to this, the question which customary laws must be applied, because South Africa does not have a unified system of customary laws. For a discussion of the choice of law rules in South Africa, see TW Bennett 'The conflict of laws' in JC Bekker *et al* (eds) *Introduction to legal pluralism in South Africa* (2006) 18-27.

With a population in the region of 1,2 million, made up of different religious denominations, religion<sup>10</sup> in Swaziland is no small matter. Succumbing to the temptation of generalisation in order to provide a brief overview of the historical development of religion, especially the Christian faith in Swaziland, it can be noted that Swazi traditional religion<sup>11</sup> slowly, but surely, made way for other religions since Christian missionaries were allowed into Swaziland during the nineteenth century.<sup>12</sup> Their presence was tolerated, mainly because of a vision King Somhlolo had about a strange man with long hair who would bring two things: *umculu* (Bible)<sup>13</sup> in the one hand and *indilinga* (money)<sup>14</sup> in the other. A voice directed the King to choose the *umculu*, that is, the Bible. This vision paved the way for Christian missionaries to settle in Swaziland and they began with their labours to proselytise the entire

<sup>10</sup> It is not easy to try to define religion. Over the years, many scholars have attempted to explain what they think the definition should be. In *Wittmann v Deutscher Schülverein*, Pretoria 1998 4 SA 423 (T) 449, the court held that the concept 'religion' is not neutral and declared as follows: 'It is loaded with subjectivity. It is a particular system of faith and worship. It is the human recognition of superhuman controlling power and especially of a personal God or gods entitled to obedience and worship .... It cannot include the concepts of atheism or agnosticism which are the very antithesis of religion. The atheist and agnostic is afforded his protection under the freedom of thought, belief and opinion part of this section.' For purposes of this presentation, the definition of RL Johnstone *Religion and society in interaction* (1975) 20 is satisfactory, namely that it is 'a system of beliefs and practices by which a group of people interprets and responds to what they feel is supernatural and sacred'.

<sup>11</sup> Swazi traditional religion is a religion which was handed down from generation to generation. It has neither a founder nor a time of revelation and can only be explained through the historical development of the Swazi nation. In this context, the Swazi traditional religion is an amalgamation of the religious traditions of the various traditional communities who merged over the years to form the Swazi nation. See P Kasenene *Religion in Swaziland* (1993) 9-41 for a discussion of the development and characteristics of Swazi traditional religion. The relationship between Swazi traditional religion and Christianity is not always an easy one. Every now and then the courts do express their dissatisfaction with traditional beliefs. Eg, in *Rex v Sibusiso Shongwe & Others* (17/1998) [2000] SZHC 6 (8 February 2000), Judge Maphalala made the following comment during sentence: 'There is also an uncanny aspect to this case, that is you are all proclaimed Christians, and that you believe in the teachings of Jesus Christ. You went further to produce a cassette which is now popular in the Zion circles, but you still have such a dark sinister belief in witchcraft. These two are two different ways of life. Christianity is a way of life or witchcraft practice is another way of life. These two do not come together; in fact the one fights the other; it is a contradiction for one to believe in both of them.'

<sup>12</sup> See MHY Kaniki 'Christianity and the ideological base of the Swazi monarchy' in AM Kanduza & ST Mkhonza (eds) *Issues in the economy and politics of Swaziland since 1968* (2003) 68-82 for an overview of the historical development of Christianity in Swaziland.

<sup>13</sup> Literally meaning something rolled up in a bundle. The term was interpreted to mean a book, and in this context the Bible.

<sup>14</sup> Literally meaning a round, disc-like object. The term was interpreted to mean money.

Swazi population during the 1880s.<sup>15</sup> They have been so successful in their endeavours that the majority of the Swazi population nowadays practise some form of Christianity.<sup>16</sup> About 35% of the population practise Protestantism, 30% Zionism,<sup>17</sup> 25% Roman Catholicism and 1% Islam,<sup>18</sup> whilst the remaining 9% various other religions, such as Anglicanism, Baha'ism,<sup>19</sup> Methodism, Mormonism and Judaism.<sup>20</sup> Attempts by Christian clergy in 1996 to elevate the status of the Christian faith to that of the official religion of Swaziland failed when King Mswati III confirmed the equal status of all religions in Swaziland.<sup>21</sup> Their endeavours to establish the Christian faith as the official faith of Swaziland failed again when the King rejected the constitutional clause pronouncing the Christian faith as the official faith of Swaziland. The government's policy to respect freedom of religion in practice is embodied in the Swazi Constitution.<sup>22</sup> Apart from the provisions in the Swazi Constitution, there are no other statutes or royal decrees protecting religious freedom and/or the violation thereof.

Before now, much has been said about the development and history of religion (especially the Christian faith) in Swaziland<sup>23</sup> and, for that reason, the focus of this contribution is on the fairly new constitutional provisions dealing with freedom of religion in Swaziland. The first section consists of a general discussion dealing with the commonalities of and interaction between the South African and Swazi legal systems, as well as certain key elements in the making of the Swazi Constitu-

<sup>15</sup> Much has been written about the vision of King Somhlolo and not all the authors are convinced of the authenticity and meaning of the vision. See, *inter alia*, Mzizi (n 1 above) 917-918; Kaniki (n 12 above); JB Mzizi 'Is Somhlolo's dream a scandal for Swazi hegemony? The Christian clause debate re-examined in the context of prospects for religious accommodation' (unpublished paper); Vilakati, JN 'Revisiting divine providence in a monetary economy' in AM Kanduza & S DuPont Mkhonza (eds) *Poverty in Swaziland: Historical and contemporary forms* (2003) 163-164; Kasenene (n 11 above) 43-45.

<sup>16</sup> See Kasenene (n 11 above) 63-68 for a discussion of the impact of Christianity on Swazi society.

<sup>17</sup> A blend of Christianity and indigenous ancestral worship. See <https://www.cia.gov/library/publications/the-world-factbook/geos/wz.html> (accessed 17 March 2008). See Mzizi (n 1 above) 923-928 for a general exposition on Zionism in Swaziland. See also JB Mzizi 'Voices of the voiceless: Toward a theology of liberation for post-colonial Swaziland' unpublished LLD thesis, Vanderbilt University, Nashville, 1995 227-232.

<sup>18</sup> For a discussion of Islam in Swaziland, see Kasenene (n 11 above) 69-97.

<sup>19</sup> Kasenene (n 11 above) 99-129.

<sup>20</sup> See United States Department of State, *2007 Report on International Religious Freedom — Swaziland*, 14 September 2007 <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46ee676ac> (accessed 12 March 2008).

<sup>21</sup> See Mzizi (n 1 above) 928-930 936 for his discussion of Christian diversity in Swaziland. See also CAB Zigira 'From Christian exclusion to religious pluralism' in Kanduza & Mkhinza (n 12 above) 83-88.

<sup>22</sup> See sec 2 below.

<sup>23</sup> Eg, Mzizi (n 1 above) 909-936; Kaniki (n 12 above) 68-82.

tion. The second section deals with specific constitutional provisions pertaining to religion in general and freedom of religion in particular. The conclusion offers a few comments on the role South African constitutional jurisprudence has to play in future Swazi constitutional adjudication.

## 2 Constitutional protection of religion in Swaziland

### 2.1 Background<sup>24</sup>

Before commenting on issues pertaining to constitutional protection of religion in Swaziland, it is perhaps appropriate to make a few observations on the application of South African legal principles in the Swazi courts. The highest courts of Swaziland<sup>25</sup> apply Roman-Dutch law (also the common law of South Africa) in their decisions and subsequently refer to South African authors,<sup>26</sup> case law<sup>27</sup> and legislation<sup>28</sup> during the course of their interpretation and application of the law. A recent court case illustrating this phenomenon is *Dlamini v Attorney-General*,<sup>29</sup> where the court had to decide who bears the onus to prove that there had been malicious prosecution. Although the court referred to the commonalities between malicious prosecution in English law and Roman-Dutch law, Judge Tebbutt's use of South African authorities to support his arguments is notable. He confirmed that Roman-Dutch law, 'as it has been applied in South Africa, for over a hundred years',

<sup>24</sup> For a detailed discussion of the making of the Swazi Constitution, see Dhlamini (n 3 above) 33-62.

<sup>25</sup> High Court and Supreme Court (formerly Court of Appeal).

<sup>26</sup> See eg *Malambe Solomon Petros v Rex* (59/1999) [2003] SZCA 5 (24 April 2003), where the court referred to some of the well-known South African criminal law authors such as Hoffmann & Zeffert, Gardiner & Lansdowne and Hunt.

<sup>27</sup> Eg, in the Swazi case, *Mike Mamba v Fidelis De Sousa* (28/2002) [2002] SZCA 40 (22 November 2002), the court referred to the South African cases *Sewmungal NNO v Regent Cinema* 1977 1 SA 814 (N); *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 3 SA 1155 (T); *Trust Bank van Afrika Bpk v Western Bank Bpk NNO* 1978 4 SA 281 (AD) and *Administrator Transvaal v Theletsane* 1991 2 SA 192 (AD). Other examples of recent Swazi cases referring to South African cases include *Dlamini Themba v Rex* (25/2002) [2002] SZCA 36 (15 November 2002); *Mabuza Roy Ndabazabantu v King* (35/2002) [2002] SZCA 23 (1 November 2002); *Gwebu Ray v Rex* (19/2002; 20/2002) [2002] SZCA 22 (1 November 2002); *Councilor Mandla Dlamini and Manzini City Council v Musa Nxumalo* (10/2002) [2002] SZCA 16 (1 November 2002); *Dlamini v Editor of the Nation* (2534/2007) [2008] SZHC 16 (1 February 2008) and *R v Oparaocha* (193/2007) [2008] SZHC 17 (14 February 2008).

<sup>28</sup> See eg *Gwebu George Rex; Bhembe Lucky Nhlanhla David v King* (11/2002; 20/2002) [2003] SZCA 2 (4 February 2003) where the court compared the Swazi Interpretation Act 21 of 1970 with the South African Interpretation Act 33 of 1957, as well as the writings of South African authors.

<sup>29</sup> Civil Appeal 27/07 [2007] SZSC 1 (6 November 2007). See also *Stapley v Dobson* (2240/07) [2008] SZHC 11 (1 February 2008).

is also the law of Swaziland and referred to South African case law<sup>30</sup> to illustrate his point.

But it is not only on the terrain of Roman-Dutch law that South African law is referred to. Recent developments in the Swazi courts indicate that South Africa's constitutional jurisprudence will also be playing a major role in the constitutional law of Swaziland. Given the fact that the Swazi Constitution is fairly new, it is almost a matter of course that the case law in this regard would be sparse. In the recent case of *Jan Sithole NO (in his capacity as a Trustee of the National Constitutional Assembly (NCA) Trust) v Prime Minister of the Kingdom of Swaziland*,<sup>31</sup> the Swazi High Court had to adjudicate on matters concerning the newly-enacted Swazi Constitution. In an application to obtain certain classified documents of the Constitutional Review Commission (CRC) and the Constitutional Drafting Commission (CDC), the applicants contended that the Swazi Constitution was null and void and thus of no force and effect.<sup>32</sup> However, before the Court could decide on the merits of the application, it had to decide on a preliminary issue which concerned the question as to whether the applicants had *locus standi* to bring the application.<sup>33</sup> In dealing with this question, the Court preferred to apply South African case law<sup>34</sup> and the relevant provisions of the South African Constitution dealing with *locus standi* in constitutional matters,<sup>35</sup> thereby illustrating the persuasive character of the influence of South African jurisprudence on the Swazi legal system.

In some instances, it seems that even South African jurisprudence has authoritative value, for example, the Court referred to the South African certification case, *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996*<sup>36</sup> as authority to define the powers of the court to review political processes preceding the drafting of legislation. The Court comments as follows:<sup>37</sup>

It is important to observe that the Constitutional Court of South Africa found that the Constitutional Assembly's function in drafting the new Constitution for South Africa was a political function on which they, as a court, would not comment because it was not their function. It is the Constitutional

<sup>30</sup> *Beckenstrater v Rottcher & Theunissen* 1955 1 SA 129 (A).

<sup>31</sup> Civil Case 2792/2006 [2007] SZHC 1 (6 November 2007).

<sup>32</sup> In the alternative, they contended that sec 25 of the Swazi Constitution afforded them the right to free and fair elections. The court's comment on this contradiction is quite entertaining: 'It is curious to observe that section 25 on which the applicants rely for the alternative relief is part of the very Constitution they seek to have declared null and void with no force and effect. It is a curious contradiction!' (See para 11.)

<sup>33</sup> Sec 35 of the Swazi Constitution provides for so-called 'bill of rights' litigation. See para 21.

<sup>34</sup> See paras 15-16, 21 & 25-28.

<sup>35</sup> See paras 21-31.

<sup>36</sup> 1996 4 SA 744 (CC).

<sup>37</sup> See para 31.

Drafting Commission (CDC) in Swaziland which drafted the Constitution of Swaziland and on the authority of the Constitutional Case of South Africa this Court would have no power to comment on the constitutional model which was adopted for Swaziland.

With reference to the South African position, the Court found that the functions of the CRV and the CDC are political and, therefore, in light of the South African *Certification* case, the applicants have no *locus standi* to bring an application for a declaration of nullity of the Swazi Constitution.<sup>38</sup>

The Court's comments and finding clearly illustrate the persuasive value of South African judgments, which will in all probability dominate future constitutional decisions in Swaziland.

## 2.2 Status of religion in the making of the Swazi Constitution

As already explained, the Christian religion initially came to Swaziland by way of royal tolerance. As Christianity grew stronger, so did the endeavours of its followers to 'crown' it as the official religion of Swaziland.<sup>39</sup> In reaction to the aspirations of the members of the Swaziland Christian Churches United in Christ (SCCUC) to enshrine the Christian religion as the official religion of Swaziland, the following clause was inserted into the Constitution of the Kingdom of Swaziland (Draft) (draft Swazi Constitution):<sup>40</sup> 'The official religion of Swaziland is Christianity.'<sup>41</sup>

This clause proclaiming Christianity as the official religion of Swaziland sparked a public debate on the question as to whether or not such a provision should be in the final Constitution.<sup>42</sup> Eventually, the clause was adapted in the Constitution of the Kingdom of Swaziland Bill of 2004 (Swazi Constitution Bill)<sup>43</sup> to read: 'Swaziland practises freedom of religion.' And finally, after the Swazi Constitution Bill had been returned to parliament to attend to the changes the King had suggested, this particular clause was removed in its totality. What remained were the other constitutional provisions dealing with freedom of religion and religious equality.<sup>44</sup>

<sup>38</sup> See paras 42-46.

<sup>39</sup> Mzizi (n 1 above) 910.

<sup>40</sup> See also Mzizi (n 15 above) 18-24.

<sup>41</sup> See sec 4(1) of the draft Swazi Constitution. Although it proclaimed Christianity as the official religion of Swaziland, it did provide for the co-existence or practice of other religions (see sec 4(2) of the draft Swazi Constitution).

<sup>42</sup> The 1968 Swazi Constitution did indeed contain a general clause protecting freedom of religion; albeit subject to public interest (see sec 11). However, this Constitution was in essence replaced by the King's Proclamation to the Nation of 12 April 1973 and subsequent royal decrees. C Maroleng 'Swaziland: The King's Constitution' *African Security Analysis Programme Situation Report*, 26 June 2003 Institute for Security Studies <http://www.iss.co.za/af/current/swazijun03.pdf> (accessed 12 March 2008) 1-3.

<sup>43</sup> See clause 4 of the Swazi Constitution Bill.

<sup>44</sup> See sec 2.3 below.

During the Somhlolo Festival of Praise on 22 July 2005, the King finally put an end to the debate by emphasising that Christianity comes from God and earthly protection thereof is thus not required. He also cautioned religious observers not to enter the arena of politics.<sup>45</sup> With these words he squashed all aspirations to endorse Christianity as the official religion of Swaziland but, on the other hand, his recognition of the divinity of the Christian God and the equality of all religions in Swaziland should negate all fears of royal discrimination against religion.<sup>46</sup> Perhaps something can be said for the viewpoint of Mzizi,<sup>47</sup> namely, that it should be the goal of all religions 'to create community, not at the expense of individuality, but for the common good'.<sup>48</sup>

On the other hand, a point of concern is the fact that constitutional protection of religion can be restricted where the King or *iNgwenyama*<sup>49</sup> is involved. Although the Swazi Constitution compels all the citizens of Swaziland, including the King and *iNgwenyama*, to uphold and defend the Constitution, this constitutional imperative lies fallow of a potential constitutional tug-of-war between the constitutional provisions protecting human rights and freedoms on the one hand and those protecting the immunity of the King and *iNgwenyama* on the other. The origins of the immunity provision<sup>50</sup> contained in the Swazi Constitution lie in the maxim 'the King can do no wrong'.<sup>51</sup> The result is that the public and private actions of the King or *iNgwenyama* could not be scrutinised for human rights violations.

<sup>45</sup> Mzizi (n 15 above) 24.

<sup>46</sup> The Swazi King and government's commitment to freedom of religion is also evident from the annual United States Reports on International Freedom of Religion which illustrates that there are relatively few incidents relating to religion. For the latest report, see United States Department of State (n 20 above).

<sup>47</sup> Mzizi (n 15 above) 25-26.

<sup>48</sup> This viewpoint is in accordance with the South African principle of *ubuntu* — a concept of customary law that refers to the key values of group solidarity, namely compassion, respect, human dignity and conformity to the basic norms of the collectivity. See C Rautenbach 'Therapeutic jurisprudence in the customary courts of South Africa: Traditional authority courts as therapeutic agents' (2005) 21 *South African Journal on Human Rights* 330-331 and the additional sources referred to in the notes.

<sup>49</sup> Traditionally, the mother of the King. See sec 7(1) of the Swazi Constitution.

<sup>50</sup> Sec 11 of the Swazi Constitution reads: 'The King and *iNgwenyama* shall be immune from (a) suit or legal process in any cause in respect of all things done or omitted to be done by him; and (b) being summoned to appear as a witness in any civil or criminal proceeding.' The immunity of the *iNgwenyama* is reiterated in sec 7(5) which reads: 'Civil proceedings shall not be instituted or continued in respect of which relief is claimed against the Queen Regent for anything done or omitted to be done by the Queen Regent in her private capacity and shall not be summoned to appear as a witness in any civil or criminal proceedings.'

<sup>51</sup> Swaziland acquired independence on 6 September 1968 under a Westminster style Constitution and, although the Constitution was repealed in 1973, its influence is still evident today in certain areas of law. JH Proctor 'Traditionalism and parliamentary government in Swaziland' (1973) 72 *African Affairs* 273-287; *Prime Minister of Swaziland v MPD Marketing & Supplies (Pty) Ltd* (Appeal Case 18/2007) [2007] SZSC 11 (15 November 2007).

Furthermore, the Swazi Constitution limits the powers of the Commission on Human Rights and Public Administration,<sup>52</sup> charged with the responsibility to investigate and eliminate human rights violations where a royal prerogative has been exercised.<sup>53</sup> Section 165(3)(c) reads as follows: 'The Commission shall not investigate ... a matter relating to the exercise of any royal prerogative by the Crown.' Although the exercise of royal prerogatives might not necessarily infringe upon religious freedoms or rights, it is envisaged that there might be circumstances where it can happen — for example, when the King pardons a criminal adhering to a particular faith, but refuses to do so where a follower of another faith committed a similar offence.

The concept of prerogatives is a remnant of the English Westminster system and refers to the executive powers of a head of state.<sup>54</sup> Traditionally the King and *iNgwenyama* had royal prerogatives similar to those of the British royal family in terms of English law,<sup>55</sup> but in the Swazi Constitution the term 'prerogative' has been replaced by the term 'power' in chapter VI of the Swazi Constitution.<sup>56</sup> The question whether or not this name change also effects a change in the nature of the royal prerogatives was soon resolved in *Prime Minister of Swaziland v MPD Marketing and Supplies (Pty) Ltd*,<sup>57</sup> where the Supreme Court held that the eight powers preserved in the Swazi Constitution<sup>58</sup> are nothing but 'royal prerogatives'.<sup>59</sup> The Court agreed with the South African case, *President of the Republic of South Africa v Hugo*,<sup>60</sup> where it was decided that presidential powers are derived from the Constitution, but differed from the latter where the Court held that the traditional prerogatives in South Africa had not outlived the enactment of the interim and final Constitutions. In *President of the Republic of*

<sup>52</sup> Secs 163-171 of the Swazi Constitution deal with the doings of the Commission.

<sup>53</sup> Sec 4(4) of the Swazi Constitution confirms that the King and *iNgwenyama* have all the prerogatives conferred upon him or her by the Swazi Constitution or any other law, including Swazi traditional law, and that these prerogatives must be exercised in the spirit of the Constitution. This is confirmed in sec 276 of the Swazi Constitution.

<sup>54</sup> Secs 78 and 275 of the Swazi Constitution are the only two sections specifically referring to a prerogative, namely that of mercy.

<sup>55</sup> *Prime Minister of Swaziland v MPD Marketing & Supplies (Pty) Ltd* (n 51 above) para 27.

<sup>56</sup> Ch VI sets out the powers of the King in his capacity as head of state and as head of the executive authority.

<sup>57</sup> n 51 above.

<sup>58</sup> Sec 4(4) reads: 'The King in his capacity as Head of State has authority, in accordance with this Constitution or any other law, among other things to (a) assent to and sign bills; (b) summon and dissolve Parliament; (c) receive foreign envoys and appoint diplomats; (d) issue pardons, reprieves or commute sentences; (e) declare a state of emergency; (f) confer honours; (g) establish any commission or *vusela*; and (h) order a referendum.'

<sup>59</sup> See para 27. The Court did find that there can be no other unspecified prerogatives than the eight prerogatives specified in the Constitution.

<sup>60</sup> 1997 4 SA 1 (CC).

*South Africa v Hugo*, the Constitutional Court held that the replacement of the term 'prerogative' by the term 'power' in the interim and final Constitutions<sup>61</sup> meant that South African courts nowadays have the power to review the constitutional powers of the President. In this case the Court had to consider the constitutionality of a presidential pardon granting imprisoned mothers with children under the age of 12 a remission of sentence.<sup>62</sup> The Court pointed out that the presidential power to pardon prisoners was traditionally a natural prerogative power vested in the head of state,<sup>63</sup> and not dependent on legislative enactment. However, nowadays the powers of the President are derived from the Constitution and, as a result, the actions of the President (as head of state or the executive) are bound to the Bill of Rights and thus subject to review by the courts.<sup>64</sup> On the other hand, the viewpoint of the Swazi court is that the traditional royal prerogatives remain the source of the prerogatives mentioned in the Swazi Constitution and not *vice versa*. It is doubtful, in the light of the immunity provision and the limited investigative powers of the Commission, whether a Swazi court would be able to review the constitutionality of any public or private royal actions.<sup>65</sup>

To add to this, the Commission's investigative powers are also restricted in the case of governmental policy decisions. Section 169 lays down:

The Commission shall not, in investigating any matter leading to, resulting from or connected with the decision of a Minister, inquire into or question the policy of the government in accordance with which the decision was made.

Given the fact that human rights violations may occur under royal prerogative and other governmental actions, one could question the effectiveness of the religious freedom provisions<sup>66</sup> in the Swazi Constitution. Also, the preferential treatment of the King when it comes to the protection of human rights and freedoms, may be seen as a negation of the equality provision affording all persons equal protection by the law.<sup>67</sup>

<sup>61</sup> See sec 84 of the South African Constitution (and sec 82 of the interim Constitution). For a discussion of prerogative powers in South Africa, see C Hoexter *Administrative law in South Africa* (2007) 32-34.

<sup>62</sup> An imprisoned father argued that the pardon unfairly discriminated against fathers with children under the age of 12.

<sup>63</sup> See para 5.

<sup>64</sup> See para 13.

<sup>65</sup> This is one point of difference between the South African and Swazi situation. The maxim 'the King can do no wrong' does not apply to the President and the actions of the latter could be reviewed for human rights violations, as was illustrated in *President of the Republic of South Africa v Hugo* (n 60 above).

<sup>66</sup> See sec 2.3 below.

<sup>67</sup> See sec 20 of the Swazi Constitution. See also the concerns raised by Maroleng *African Security Analysis Programme Situation Report*, 26 June 2003 4-5.

## 2.3 Constitutional provisions pertaining to religion<sup>68</sup>

### 2.3.1 Preamble

The Preamble to the Swazi Constitution is not religiously neutral. It reads:

Whereas we, the People of the Kingdom of Swaziland, do hereby undertake in humble submission to Almighty God to start afresh under a new framework of constitutional dispensation ...

Agnostics (those who hold that knowledge of a supreme being is impossible) and atheists (those who reject belief in a supreme being) might find the reference to God problematic, especially since the provisions pertaining to religious equality in the Swazi Constitution are not exactly clear as to what precisely is meant with religion in terms of the Swazi equality provision.<sup>69</sup>

Although the Swazi Constitution's Preamble has not yet been interpreted by the Swazi courts, it can be assumed that the opinions of the South African judiciary in this regard will have persuasive value. They increasingly refer to the value of preambles for interpretive purposes.<sup>70</sup> The words of late Justice Mahomed in *S v Mhlungu*<sup>71</sup> are more or less indicative of the Constitutional Court's attitude towards the Preamble to the South African Constitution:<sup>72</sup>

The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretative value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate [*sic*] its fundamental purposes ... This is not a case of making the Constitution mean what we like, but of making it mean what the framers wanted it to mean; we gather their intention not from our subjective wishes, but from looking at the document as a whole.

Does this mean that the reference to God should be used to infer that the other religious provisions in the South African Constitution refer to the Christian God? The answer is in all probability in the negative. Although the interpretive value of the Preamble has been confirmed by the South African courts on numerous occasions, it is questionable whether the reference to 'God' in the Preamble can be used in relation to other constitutional provisions protecting religion to infer that

<sup>68</sup> A number of provisions in the Swazi Constitution deal with religion. These provisions will be dealt with in the following paragraphs.

<sup>69</sup> See sec 2.3.3 below.

<sup>70</sup> See L du Plessis *Re-interpretation of statutes* (2002) 239-244 for a discussion of these cases and other viewpoints. See also GE Devenish *A commentary on the South African Constitution* (1998) 29-32.

<sup>71</sup> 1995 7 BCLR 793 (CC) para 112.

<sup>72</sup> Although he expressed his views on the Preamble to the interim Constitution, these viewpoints have been followed with regard to the final Constitution as well. See the cases referred to in Du Plessis (n 70 above) 241 n 135.

religion necessarily refers to the Christian God.<sup>73</sup> In *In re: Certification of the Constitution of the Western Cape, 1997*,<sup>74</sup> the Constitutional Court had to decide whether the words ‘in humble submission to Almighty God’ in the Preamble of the Western Cape Constitution was in conflict with the religious freedom provision contained in the South African Constitution.<sup>75</sup> The Court did not think so and held as follows:

The invocation of a deity in these prefatory words to the Preamble to the [Constitution of the Western Cape, 1997] has no particular constitutional significance and echoes the peroration to the Preamble to the [South African Constitution]. It is a time-honoured means of adding solemnity used in many cultures and in a variety of contexts.

In imitation of United States jurisprudence, the Court found the words to be nothing more than ‘ceremonial deism’ that have no ‘operative constitutional effect’ and are not ‘fundamentally hostile to the spirit and objects’ of the South African Constitution. As a result, the words could neither be used to interpret the provisions of the freedom of religion provision in the South African Constitution restrictively, nor could they affect the rights of believers or non-believers. And, in the circumstances, the Court found no inconsistency between the Preamble to the Constitution of the Western Cape and the South African Constitution.<sup>76</sup>

Against this background, the reference to ‘God’ in the Preamble to the Swazi Constitution is in all likelihood nothing more than ‘ceremonial deism’ which does not necessarily imply the Swazi government’s commitment to a particular religion, nor could it be used to construe the reference to religion in other provisions of the Swazi Constitution to mean the Christian religion.

### 2.3.2 Individual fundamental religious rights and freedoms

Section 14(1) of the Swazi Constitution is a declaration of individual fundamental rights and freedoms.<sup>77</sup> It commences with the words ‘[t]he fundamental human rights and freedoms of the individual enshrined in this chapter are hereby declared and guaranteed ...’<sup>78</sup> and then contin-

<sup>73</sup> The Preamble in the South African Constitution reads: ‘May God protect our people.’

<sup>74</sup> 1997 9 BCLR 1167 (CC) para 28.

<sup>75</sup> See sec 15 of the South African Constitution and the discussion in sec 2.3.4 below.

<sup>76</sup> See para 28. In accordance with sec 144, the Constitutional Court has to certify that all provincial constitutions comply with sec 143 of the of the South African Constitution, thus guaranteeing its consistency with the South African Constitution. The right of a provincial legislature to enact a constitution is derived from sec 142 of the Constitution.

<sup>77</sup> The equal status of persons is again emphasised by reference to a person’s ‘gender, race, place of origin, political opinion, colour, *religion, creed*, age or disability’ (my emphasis). See sec 14(3).

<sup>78</sup> Sec 14(1). This section resembles secs 7 and 8 of the South African Constitution.

ues by providing a list of these rights and freedoms, including religion.<sup>79</sup> In terms of section 14(2), the state<sup>80</sup> and other individuals<sup>81</sup> have a positive duty to respect<sup>82</sup> and uphold<sup>83</sup> these rights and freedoms, whilst the courts are responsible for ensuring the fulfilment thereof.<sup>84</sup> To determine the precise scope and extent of the duty on the state could present a problem. Does it imply that the state has a responsibility to advance a religion in need of financial aid in order to ensure that its follower's freedom of religion is upheld? On the one hand, an individual follower may argue that his free exercise of religion must be upheld by the state by providing him with the financial means to exercise his freedom of religion (for example to provide aid to establish a religion) and, on the other hand, the state may argue that such aid would boil down to it favouring that particular religion over another. The problem of undue favouring of one religion above another could be resolved by applying the equality provision which prohibits different treatment to different people on the basis of religion.<sup>85</sup>

Section 14(3) is unique in the sense that it clearly states that an individual's entitlement to these rights and freedoms is subject to respect for the rights and freedoms of others and for the public interest. A right or freedom could thus be limited to the extent that it infringes the rights and freedoms of others and the public interest. This qualification is about the closest one could get to the general limitation provision contained in the South African Constitution,<sup>86</sup> and could be

<sup>79</sup> Sec 14(1) promotes (a) respect for life, liberty, right to fair hearing, equality before the law and equal protection of the law; (b) freedom of conscience, of expression and of peaceful assembly and association and of movement; (c) protection of the privacy of the home and other property rights of the individual; (d) protection from deprivation of property without compensation; (e) protection from inhuman or degrading treatment, slavery and forced labour, arbitrary search and entry; and (f) respect for rights of the family, women, children, workers and persons with disabilities.

<sup>80</sup> Including the executive, legislature and judiciary and other organs of state (see sec 14(2)).

<sup>81</sup> The Constitution uses the phrase 'where applicable to them', but is silent on the circumstances when this duty will be applicable to other individuals. Sec 14(3) might provide a clue as to the applicability, namely that an individual must respect the religious freedom of another individual.

<sup>82</sup> The term is derived from the Latin term *respicere*, which means to 'look back' or 'pay attention to'. Nowadays, it has a variety of meanings, including 'an attitude of deference, admiration, or esteem; regard', 'to pay proper attention to; not violate' and 'to show consideration for; treat courteously or kindly'; Reverso Dictionary <http://dictionary.reverso.net/english-definitions/respect> (accessed 21 April 2008).

<sup>83</sup> The term 'uphold' means 'to maintain, affirm, or defend against opposition or challenge', 'to give moral support or inspiration to' and 'to support physically'; Reverso Dictionary <http://dictionary.reverso.net/english-definitions/uphold> (accessed 21 April 2008).

<sup>84</sup> Sec 14(2).

<sup>85</sup> See sec 2.3.3 below. This is also the viewpoint of I Currie *et al The Bill of Rights handbook* (2005) 350 pertaining to the South African situation.

<sup>86</sup> See sec 36.

used to justify the infringement of religious rights or freedoms where the exercise of such rights or freedoms would disrespect the exercise of other individual rights and freedoms and the public interest.<sup>87</sup> There are examples of religious practices, such as the traditional Hindu custom of burning widows at their husbands' funerals, which would be intolerable for obvious reasons and for that reason its practice would be limited in most societies.

The operational significance of sections 14(2) and (3) is textually clear: Not only does it impose a negative duty on the state not to infringe the rights and freedoms of individuals, but also a positive duty on the state and other individuals to respect, uphold and protect these rights and freedoms.<sup>88</sup> However, the exact scope of these provisions is murky. A positive duty to respect, uphold and protect religious freedom implies some form of active involvement contrary to a mere tolerance. For now the Swazi government neither restricts nor formally promotes inter-faith dialogue, and it does not provide formal mechanisms for religions to reconcile differences.<sup>89</sup> It does, however, provide for a system of registration of religious groups, which could create the impression that registered religions are favoured above non-registered religions.<sup>90</sup>

One last remark could be made regarding individual fundamental religious rights and freedoms. The South African constitutional jurisprudence has come to qualify equality and other rights in terms of the human dignity provision.<sup>91</sup> If the infringement of a particular right, say for example freedom of religion, leads to human indignity, such an infringement would be unconstitutional and consequently not tolerated.<sup>92</sup> The Swazi Constitution has a similar general human dignity provision<sup>93</sup> and the human dignity theme is central through-

<sup>87</sup> The fact that the Swazi Constitution does not contain a general limitation clause is not problematic, since most of the rights and freedoms contained in the Bill of Rights are textually qualified, thus providing the limitations of those rights and freedoms. This phenomenon can be referred to as internal limitations.

<sup>88</sup> This is also in accordance with the comments made regarding sec 7 of the South African Constitution. See L du Plessis & A Gouws 'The gender implications of the final Constitution (with particular reference to the Bill of Rights)' (1996) 11 *SA Public Law* 473-475.

<sup>89</sup> United States Department of State (n 20 above).

<sup>90</sup> See also the discussion in sec 2.3.7 below.

<sup>91</sup> Sec 10 reads: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

<sup>92</sup> See eg *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) para 17, where the Constitutional Court indicated that the right to equality is closely connected to other rights and values such as human dignity. If differentiation results in the impairment of human dignity, such differentiation is unfair and should not be tolerated. The Court applied this factor to the facts of the case and emphasised that the discrimination against gay men had gravely affected their fundamental dignity (para 26).

<sup>93</sup> Sec 18 reads: '(1) The dignity of every person is inviolable. (2) A person shall not be subjected to torture or to inhuman or degrading treatment or punishment.'

out it.<sup>94</sup> It is against this background that the Swazi High Courts will have to develop a jurisprudence on the exact scope and content of the duty on the state in religious affairs.

### 2.3.3 Equal treatment of religions

Similar to the South African Constitution, the Swazi Constitution confirms the equality of religions<sup>95</sup> and forbids discrimination on the basis of religion.<sup>96</sup> Although the wording of the Swazi provision is not as broad as that of the South African provision, which includes the terms 'religion', 'conscience', 'thought', 'belief' and 'opinion', it does include the term 'creed', which is not found in the South African Constitution. No Swazi court has yet defined creed. There are, however, many indications that creed is broad enough to include all the concepts normally associated with religion or belief. Firstly, the term 'creed' is derived from the Latin term *credo*, which means 'I believe'. Secondly, its dictionary meaning includes terms such as 'a system of belief', 'principles' or 'opinions'<sup>97</sup> and, thirdly, the wording of other sections of the Swazi Constitution uses the terms 'religion',<sup>98</sup> 'creed',<sup>99</sup> 'thought',<sup>100</sup> 'conscience'<sup>101</sup> and 'belief'<sup>102</sup> interchangeably.<sup>103</sup> In addition, some definitions of religion are broad enough to include them all. For example, the preferred definition of Johnstone,<sup>104</sup> namely that religion is 'a system of beliefs and practices by which a group of people interprets

<sup>94</sup> The concept dignity appears in the following provisions of the Swazi Constitution: See secs 18 (inhuman or degrading treatment); 30 (disabled persons); 57(2) (law enforcement); 58(3) (political objectives); 60(6) (social objectives); and 141(3) (judiciary).

<sup>95</sup> Sec 9 of the South African Constitution and sec 20 of the Swazi Constitution. Sec 20(1) of the Swazi Constitution reads: 'All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.'

<sup>96</sup> Sec 20(2) reads: 'For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.' Sec 20(3) reads: 'For the purposes of this section, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.'

<sup>97</sup> *The free dictionary* Farlex <http://www.thefreedictionary.com/creed> (accessed 13 April 2008); *Collins dictionary* Reverso <http://dictionary.reverso.net/english-definitions/creed> (accessed 13 April 2008).

<sup>98</sup> See secs 14(3), 20(2) & (3), 23(1) & (2) & 23(4)(b).

<sup>99</sup> See secs 14(3), 20(2) & 20(3).

<sup>100</sup> See secs 23(1) & (2).

<sup>101</sup> See secs 14(1)(b), 23(1) & (2) & 28(3).

<sup>102</sup> See secs 23(2) & 23(4)(b).

<sup>103</sup> See also the discussion of RC Blake & L Litchfield 'Religious freedom in Southern Africa: The developing jurisprudence' (1998) *Brigham Young University Law Review* 532-534.

<sup>104</sup> Johnstone (n 10 above) 20.

and responds to what they feel is supernatural and sacred', is inclusive of all the aforesaid concepts, which would also include agnosticism and atheism.

There are a few important differences between the Swazi and South African equality provisions. Firstly, the latter compels the South African legislature to enact national legislation which prevents or prohibits unfair discrimination. In fulfilment of this command, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act)<sup>105</sup> was enacted. It is generally accepted that a complainant must now rely on the provisions of the Equality Act and no longer on the equality provision in the Constitution in cases where there are allegations of discrimination.<sup>106</sup> Nevertheless, the case law that deals with constitutional interpretation of the equality provision in the South African Constitution is even now important and authoritative.<sup>107</sup>

A second important difference is the meaning and scope of the term 'discrimination'. As a legal concept, the South African Constitution formulates equality as a directive for equal treatment<sup>108</sup> and a prohibition on unfair discrimination.<sup>109</sup> It lays down that discrimination on certain grounds, including religion, conscience and belief, would be unfair unless it is proven that it is fair.<sup>110</sup> South African authors and the judiciary give preference to substantive equality, in other words the social and economic circumstances of individuals and groups should also be taken into consideration when equality or inequality is judged, and not mere equal treatment under all circumstances.<sup>111</sup> The South African courts have also warned that equality should not be confused with uniformity. Justice Sachs, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,<sup>112</sup> thus declared as follows:

[E]quality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial

<sup>105</sup> The long title of the Act reads: 'To give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.'

<sup>106</sup> See *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 437.

<sup>107</sup> See *Currie et al* (n 85 above) 268.

<sup>108</sup> See sec 9(1).

<sup>109</sup> See secs 9(3) & (4).

<sup>110</sup> See secs 9(3) & (5).

<sup>111</sup> The latter form of equality is referred to as formal equality. See the discussions of TP van Reenen 'Equality, discrimination and affirmative action: An analysis of section 9 of the Constitution of the Republic of South Africa' (1997) *SA Public Law* 153-154; *President of South Africa v Hugo* (n 60 above) para 41; *National Coalition for Gay and Lesbian Equality v The Minister of Justice* (n 92 above) paras 60-64.

<sup>112</sup> 1999 1 SA 6 (CC) para 132.

of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At best, it celebrates the vitality that difference brings to any society.

It is important to note that the South African jurisprudence has interpreted unfair discrimination to mean more than mere differentiation between persons or categories of persons.<sup>113</sup> The constitutional test of unfairness has been fully canvassed by other accomplished writers and the judiciary, and it would suffice to point out that the discrimination would be unfair if it affects the human dignity of a person.<sup>114</sup>

The Swazi Constitution has no reference to the term 'unfair', but defines discrimination to mean

to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.

The generality of this provision could be problematic. At first glance it creates the impression that there is a blanket prohibition on all forms of differentiation (albeit linked to the listed grounds), regardless whether such differentiation could be labelled fair or unfair as done in terms of the South African Constitution. The Swazi equality provision does contain an internal limitation in that the state is empowered to enact legislation that is necessary for implementing policies and programmes aimed at redressing social, economic, educational or other imbalances in society.<sup>115</sup> Although these qualifications are normally associated with so-called affirmative action measures, it could be interpreted to allow for other forms of differentiation with the view to eradicate other inequalities. Also, the term 'discrimination' presupposes some form of unfairness<sup>116</sup> and, following the Swazi courts' treatment of the South African jurisprudence, it is highly probable that they would expect some form of unfairness in order to determine whether there is actionable discrimination or not.

Another point of difference between the two equality provisions is the fact that the South African Constitution prohibits direct and indirect discrimination,<sup>117</sup> whilst the text of the Swazi Constitution does not make the same distinction. Determining whether or not indirect

<sup>113</sup> Z Motale & C Ramaphosa *Constitutional law: Analysis and cases* (2002) 259 say: 'The mere fact that a law treats different people in dissimilar ways is not necessarily discriminatory. Legislation that differentiates between people in a way which impairs their fundamental dignity as human beings is discrimination' (authors' emphasis).

<sup>114</sup> See the discussion in Currie *et al* (n 85 above) 243-248.

<sup>115</sup> See sec 20(5).

<sup>116</sup> The dictionary meaning of discrimination includes 'unfair treatment of a person, racial group, minority, etc,' and is an 'action based on prejudice' (my emphasis) Reverso Dictionary <http://dictionary.reverso.net/english-definitions/discrimination> (accessed 21 April 2008).

<sup>117</sup> See sec 9(4).

discrimination does indeed exist has been no simple task in the South African jurisprudence. The approach of the South African Constitutional Court in this respect does not always present absolute clarity. The problem is that the Constitutional Court is not always in agreement on the precise content and meaning of indirect discrimination. To give one example, one can refer to *Pretoria City Council v Walker*,<sup>118</sup> where the majority of the Court decided that the obvious neutral policy of the local government to demand higher service fees from the inhabitants of certain residential areas is tantamount to indirect discrimination based on race. The Court majority found: 'The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory.'<sup>119</sup>

However, Justice Sachs, who passed the minority judgment, was of opinion that the policy of the local government regarding service fees did not amount to direct or indirect discrimination. To his mind, the policy was founded on the determination of objective features of the different geographic areas and not on race.<sup>120</sup>

Although Swaziland has not been burdened with the same grave racial issues as South Africa, it is nevertheless argued that the Swazi concept of discrimination is broad enough to include both direct and indirect discrimination and that the omission of these terms is immaterial for the purpose of determining whether there has been discrimination or not. In this regard, the Swazi courts can follow the lead of a recent decision of the Constitutional Court in *MEC for Education, KwaZulu-Natal v Pillay*,<sup>121</sup> where the Court gave valuable guidelines in determining whether certain actions of a public school, which were neutral on the face of it, indeed was tantamount to indirect discrimination on the ground of religion.<sup>122</sup> The Court found that discrimination which arose from a rule or practice that was superficially neutral and that was not designed to serve a valuable purpose, but nevertheless had a marginalising effect on certain portions of society, required a reasonable accommodation of religious differences. Since there was no reasonable accommodation in this instance, the Court came to the conclusion that the discrimination was unfair and therefore unconstitutional.<sup>123</sup> The case has far-reaching implications for the accommodation of religious and cultural rights and freedoms in public schools, and as a result it is envisaged that the codes of conduct of public schools would soon be re-evaluated by the various school bodies.

<sup>118</sup> 1998 2 SA 363 (CC).

<sup>119</sup> See para 32.

<sup>120</sup> See para 105.

<sup>121</sup> 2008 1 SA 474 (CC).

<sup>122</sup> In this case, the Court had to decide whether a public school's prohibition to wear a nose stud discriminated against a Hindu learner's freedom of religion or culture.

<sup>123</sup> See paras 70-79.

Another similarity between the Swazi and South African provisions is the possibility to enact affirmative action or positive discrimination legislation.<sup>124</sup> Although the accessible literature shows no social, economic, educational or other imbalances in Swaziland as a result of systemic discrimination on the grounds of religion, it is no guarantee that it does not occur in practice. There might therefore be circumstances where such positive discrimination measures might become important in order to eradicate imbalances of the past. South Africa already has a vast array of equality jurisprudence which can serve as valuable comparative material for future interpretations of the Swazi equality provision and it would be worthwhile for the Swazi courts to take their lead from them.<sup>125</sup>

### 2.3.4 General freedom of religion provision

Similarly to the South African Constitution,<sup>126</sup> the Swazi Constitution defines freedom of religion positively: 'A person has a right to freedom of thought, conscience or religion.'<sup>127</sup> As already argued, the interchangeable use of the terms 'religion', 'conscience' and 'thought' indicates that the Swazi Constitution also protects beliefs founded on secular grounds, for example the freedom to follow agnosticism or atheism.<sup>128</sup> The scope of freedom of conscience is broadened to include<sup>129</sup> freedom of thought and religion; freedom to change religion or belief; and freedom to worship alone or 'in community' with others.<sup>130</sup>

An anomaly in the Swazi freedom of religion provision is the fact that someone can freely consent to a hindrance in the enjoyment of the freedom of conscience.<sup>131</sup> The scope of this exception is somewhat unclear. Does it mean that a person can renounce his or her religious rights or freedoms or that these rights or freedoms can be infringed when he consents thereto? Another problem is the fact that it is often difficult to determine whether or not consent was given freely. A wife might consent to her denouncing the Christian faith for the Islamic faith or *vice versa*, but the freeness of this consent may be doubtful

<sup>124</sup> Sec 9(2) of the South African Constitution and sec 20(5) of the Swazi Constitution.

<sup>125</sup> For a discussion of some of these cases, see C Albertyn & B Goldblatt 'Equality' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2008) 35.1-85 and Currie *et al* (n 85 above) 229-271 336-357.

<sup>126</sup> Sec 15(1) reads: 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion.'

<sup>127</sup> See sec 23(1).

<sup>128</sup> See also P Farlam 'Freedom of religion, belief and opinion' in Woolman *et al* (n 125 above) 41.12-16.

<sup>129</sup> See sec 23(2).

<sup>130</sup> What is protected here is the individual religious right exercised communally. Sec 31 of the South African Constitution has a similar effect. See the discussion in Currie *et al* (n 85 above) 623-635.

<sup>131</sup> See sec 23(2) of the Swazi Constitution.

if one considers that she is often in a position where she can hardly refuse.<sup>132</sup>

The South African Constitutional Court had the opportunity on a few occasions to express their views on freedom of religion in terms of the South African Constitution.<sup>133</sup> In *S v Lawrence*, *S v Negal*, *S v Solberg*,<sup>134</sup> the Constitutional Court had the first opportunity to give content to the right to freedom of religion.<sup>135</sup> The Court referred, with approval, to the definition of freedom of religion in the Canadian case *Big M Drug Mart*,<sup>136</sup> where it was stated:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

From this definition it can be inferred that freedom of religion includes the right to have a belief, to express that belief openly and to manifest that belief by means of worship, practice, teaching or dissemination.<sup>137</sup> What is required is an absence of coercion or constraint by the state and the absence of measures that could force people to act in a manner contrary to their religious beliefs.

In *S v Lawrence*, the question was whether the prohibition to sell liquor on a Sunday constituted religious coercion. The appellant contended that the purpose behind the prohibition was to induce observance of religious Christian beliefs and therefore it was unconstitutional.<sup>138</sup> The Court stated that the circumstances where a state's endorsement of a religion would contravene freedom of religion would be where the 'endorsement has the effect of coercing persons to observe the practices of a particular religion, or of placing constraints on them in relation to the observance of their own different religion'.<sup>139</sup> In the light of these statements, the Court found that the link between the Christian religion and the restriction to grocers to sell liquor on Sundays 'at

<sup>132</sup> For a discussion of the problem on waiver in South African law, see Currie *et al* (n 85 above) 39-43.

<sup>133</sup> Eg *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 4 SA 1176 (CC); *Christian Education South Africa v Minister of Education* 2000 10 BCLR 1051 (CC); *Prince v President of the Law Society of the Cape of Good Hope* 2001 2 SA 388 (CC).

<sup>134</sup> 1997 4 SA 1176 (CC). The case dealt with religious freedom, contained in sec 14 of the 1993 Constitution. The wording of sec 14 is similar to that of sec 15 of the Constitution. The principles regarding sec 14 would therefore also apply to sec 15 of the Constitution.

<sup>135</sup> In this case, the Court had to consider whether the prohibition to sell liquor on a Sunday infringed on the appellants' freedom of religion.

<sup>136</sup> (1985) 13 CRR 64 97.

<sup>137</sup> Currie *et al* (n 85 above) 339. This is also in accordance with sec 23(2) of the Swazi Constitution.

<sup>138</sup> See para 85.

<sup>139</sup> Para 104. See also the discussion of Motala & Ramaphosa (n 113 above) 381-382.

a time when their shops are open for other business' was too poor for the restriction to be regarded as a violation of freedom of religion.<sup>140</sup>

South Africa surmounted its history of suppression and human rights violations and has taken a leading role in the adjudication of human rights issues. The annual reports on international religious freedom of the United States Department of State illustrates that the Swazi government at all levels sought to protect freedom of religion in Swaziland and that it generally does not tolerate private or public abuse of religion.<sup>141</sup> Except for a few earlier incidents regarding Jehovah's Witnesses and Seventh Day Adventists, followers of all religious faiths are generally free to practise their religion without government interference or restriction.<sup>142</sup>

### 2.3.5 Religious education and observances

The Swazi Constitution makes provision for religious private schools by expressly granting religious communities the right to establish, maintain and manage places of education at their own expense. In addition, such a community may not be prohibited from providing religious education to the members of that community.<sup>143</sup> This provision does not expressly grant a religious community the right to establish religious places of education, but such a right exists by implication.<sup>144</sup>

If a non-member of a particular religious community attends the place of education, such as a Christian school, he would not be in a position to challenge the constitutionality of the Christian faith teachings based on discrimination or the infringement of his freedom of religion. This fact is reiterated, firstly, by the general freedom of religion provision which lays down that a person's freedom of religion may be limited if he consents thereto<sup>145</sup> and, secondly, the implication that one should be able to observe and practise any religion or belief without the unsolicited intervention of members of any other religion

<sup>140</sup> Para 105.

<sup>141</sup> The annual reports are accessible at <http://www.state.gov> (accessed 13 April 2008).

<sup>142</sup> United States Department of State, *2006 Report on International Religious Freedom – Swaziland*, 15 September 2006. Online US Department of State Bureau of Democracy, Human Rights and Labour <http://www.state.gov/g/drl/rls/irf/2006/71327.html> (accessed 12 March 2008).

<sup>143</sup> Sec 23(3) reads: 'A religious community is entitled to establish and maintain places of education and to manage any place of education which that community wholly maintains, and that community may not be prevented from providing religious instruction for persons of that community in the course of any education provided at any place of education which that community wholly maintains or in the course of any education which that community otherwise provides.'

<sup>144</sup> Blake & Litchfield (n 103 above) 533.

<sup>145</sup> See sec 2.3.5 above. His attendance of the religious place of education will be seen as his consent to be taught in the religions of the relevant religious community.

or belief.<sup>146</sup> The Swazi Constitution is silent on the question as to who is to fund the religious place of education, although the phrase 'which that community wholly maintains' in all probability implies that it is to be the responsibility of the religious community itself.

Contrary to the South African Constitution,<sup>147</sup> the Swazi Constitution is silent about religious education and observances in state institutions, such as public schools, although it is allowed by the government. Even though the government does not favour the teaching of a particular religion there, it is mainly the Christian religion which is being taught in public schools, whilst the only organised religious youth groups operating in the schools are also mostly Christian.<sup>148</sup>

However, the silence of the Swazi government on issues of religious education and observance, especially in public schools, does not mean that there is in reality no coercion of learners to participate in the teachings and observances of a preferred religion. Such coercion could, contrary to the situation in private schools where consent becomes significant, infringe a learner's freedom of religion or amount to discrimination on the ground of religion. Whether this infringement would be unconstitutional or not, will depend on the Swazi courts' interpretation of the concept of discrimination, as previously discussed.<sup>149</sup>

With regard to religious observances,<sup>150</sup> the viewpoint of the South African Constitutional Court in *S v Lawrence*<sup>151</sup> could provide valuable guidelines. In the context of religious observances in public schools, the Court held that compulsory attendance at school prayers would infringe the learner's freedom of religion. In the context of a school community and the pervasive peer pressure that is often present in such communities, voluntary school prayer could also amount to the coercion of pupils to participate in the prayers of the favoured religion. To guard against this, and at the same time to permit school prayers,

<sup>146</sup> See sec 23(4)(b) of the Swazi Constitution which reads: 'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision ... that is reasonably required for purposes of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited intervention of members of any other religion or belief.'

<sup>147</sup> The South African Constitution allows for religious observances in public schools under certain circumstances. Sec 15(2) reads: 'Religious observances may be conducted at state or state-aided institutions, provided that (a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary.' For a discussion of the scope and meaning of this provision, see Currie *et al* (n 85 above) 351-354.

<sup>148</sup> United States Department of State (n 20 above).

<sup>149</sup> See sec 2.3.3 above.

<sup>150</sup> In *Wittmann v Deutscher Schülverein, Pretoria* (n 10 above) 440, the court defined religious observance as 'an act of a religious character, a rite. The daily opening of a school by prayer, reading of the scripture (and possibly a sermon or religious message, and benediction) is such an observance.'

<sup>151</sup> n 134 above.

section 14(2)<sup>152</sup> makes it clear that there should be no such coercion. It is in this context that it requires the regulation of school prayers to be carried out on an equitable basis. The Court remarked as follows:<sup>153</sup>

Whether this means that a school must make provision for prayers for as many denominations as there may be within the pupil body; rather it seems to me to require education authorities to allow schools to offer the prayers that may be most appropriate for a particular school, to have that decision taken in an equitable manner applicable to all schools, and to oblige them to do so in a way which does not give rise to indirect coercion of the 'non-believers'.

The situation is different in the case of religious education in public schools where religious believers and non-believers must be treated impartially. Equal treatment of religions entails that faith education must not favour one religion above another religion. In South Africa this requirement has led to multi-faith curricula in public schools.<sup>154</sup>

### 2.3.6 Religious oaths

Taking an oath contrary to one's religious belief would almost certainly constitute coercion in violation of freedom of religion.<sup>155</sup> The Swazi Constitution does not have a specific provision dealing with religious oaths,<sup>156</sup> but it does allow for the making of an affirmation instead of taking an oath in certain circumstances. For example, someone who wishes to obtain citizenship may take 'the oath or affirmation of allegiance',<sup>157</sup> and parliamentary committees may examine witnesses under oath or affirmation.<sup>158</sup>

### 2.3.7 Limitation of freedom of religion

The Swazi Constitution does not contain a general limitation provision such as that of the South African Constitution,<sup>159</sup> but allows for the limitation of religious freedom for purposes of national defence, public

<sup>152</sup> This section refers to the 1993 Constitution and is the equivalent of sec 15(2) of the new South African Constitution.

<sup>153</sup> See para 103.

<sup>154</sup> See Currie *et al* (n 85 above) 353-354.

<sup>155</sup> Blake & Litchfield (n 103 above) 536.

<sup>156</sup> In terms of sec 261(1) of the Swazi Constitution, the term 'oath' also includes affirmation.

<sup>157</sup> Sec 45(4) Swazi Constitution.

<sup>158</sup> See sec 129(5)(a) of the Swazi Constitution.

<sup>159</sup> Sec 36(1) of the South African Constitution reads: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors ...' A list of factors are included in secs 36(1)(a)-(e) of the Constitution.

safety, public order, public morality or public health,<sup>160</sup> as well as for purposes of protecting religious rights and freedoms of others.<sup>161</sup> In addition, religious freedom may also be limited by means of the consent of the person whose right to freedom of religion is being limited.<sup>162</sup>

On a macro level there is one point of concern. Although not prescribed on a constitutional level, new religious groups or churches<sup>163</sup> have to register as non-profit organisations with the Swazi Ministry of Home Affairs.<sup>164</sup> In order to register, they have to show that they are organised. This requirement will be met when they can demonstrate that they are in possession of 'either substantial cash reserves or financial support from foreign religious groups with established ties to western or eastern religions'.<sup>165</sup> For indigenous religious groups, the requirements are somewhat different. These groups have to demonstrate that they have a proper building, a pastor or religious leader and a congregation in order to obtain organised status.<sup>166</sup> Requiring registration from religious groups, albeit new or indigenous religions, might be seen as a form of limitation of religious rights and freedoms. It may be argued that this limitation is necessary to protect the Swazi public interest. However, requiring substantial means and/or religious houses might be seen as unfair limitations on religious groups who do not have the necessary resources. In addition, if registration is a requirement for the rightful practice of a particular religion, it might be considered indirect discrimination if a religion is not allowed to be practised due to its non-registration. It is also difficult to see how non-compliance with the registration requirement in these circumstances could be detrimental to the public interest.

### 3 Conclusion

There are commonalities but also important differences between the South African and Swazi Constitutions when it comes to provisions dealing with religion. However, the basic scope and application of the relevant provisions are quite similar. Also, the foundation of both legal systems is comparable: a dual legal system with Roman-Dutch law and customary law as its basis. The majority of the population of both countries are adherents to the Christian religion, and the South African jurisprudence has had a huge influence on the judgments of the Swazi

<sup>160</sup> See sec 23(4)(a) of the Swazi Constitution. All these concepts resort under the maxim 'public interest'.

<sup>161</sup> See sec 23(4)(b) of the Swazi Constitution.

<sup>162</sup> See sec 23(2) of the Swazi Constitution.

<sup>163</sup> That is, religions that have not operated in Swaziland before.

<sup>164</sup> Mzizi (n 1 above) 930.

<sup>165</sup> United States Department of State (n 20 above).

<sup>166</sup> As above.

courts to date. It is thus a matter of course that Swaziland would follow South Africa's religious freedom jurisprudence. In 1998, Blake and Litchfield<sup>167</sup> argued the same and said the following:

- Courts in Swaziland often grapple with similar constitutional issues.
- Courts in Swaziland often use South African jurisprudence as persuasive comparison.
- Courts in South Africa have already had the opportunity to develop jurisprudence on constitutional religious issues which could be used as an example.
- Constitutional provisions pertaining to religion are fairly similar in the Swazi and South African Constitutions.
- South Africa surmounted its history of suppression and human rights violations and has taken a leading role in the adjudication of human rights issues.

Their arguments are also relevant for Swaziland and South Africa. However, the question is not only what Swaziland can learn from South Africa, but what South Africa can learn from Swaziland. Swaziland is a good example of religious tolerance and peace being possible on the African continent while many other African countries grapple with issues pertaining to religious prejudices.

---

<sup>167</sup> n 103 above, 558-560. Although their research focused on religious freedom in Southern Africa in general, their argument can be applied *mutatis mutandis* to constitutional issues pertaining to religious freedom in Swaziland.