

**CONFLICT OR CO-OPERATION : AN EXAMINATION OF THE
SOUTH AFRICAN CONSTITUTION AND THE CHURCH**

By

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**Submitted in partial fulfilment of the
requirements for the degree of
DOCTOR OF THEOLOGY
in the Department of Systematic Theology
University of Zululand**

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JANUARY 2003

PREFACE

The idea of this thesis was conceived in a most unusual way. I visited the Faculty of Theology as part of my usual rounds. In the course of our discussion I expressed some views on how certain controversial issues should be approached. Prof Song the Dean of the Faculty then asked me why I could not express these in a more concrete form of a doctoral thesis. To this I agreed.

What facilitated this research was it was that dealing with some issues to which applied my mind I had expressed views on. It also gave me the opportunity to express in more comprehensive form some of my Christian views. In almost all my legal writings I have sought to find the answer that is compatible with my Christian convictions or what God wants.

My task was made easier by the fact I had the fortune of having easy access to a considerable amount of research material. A number of philosophical and theological writings were contained in W. Ebenstein Great Political Thinkers : Plato to the present (1969). This is a compilation of the writings of these authors. It also includes commentaries by the compiler. The writings are the original wrings of the authors although some of them ere translated. What changed was the pagination of these writings.

Equally convenient was a compilation of essays by various theologians by the Institute of Reformational Studies of Potchefstroom University for Christian Higher Education. They are published in Orientation for the years 1993 to 1996. The editions for 1995, 1996 and 1998 appeared under the following titles respectively : Confessing Christ in politics; Christianity and democracy; and Signposts for God's liberating kingdom. These made my task even easier.

The following people deserve my thanks and appreciation for their contribution to the finalisation of this thesis. The usual disclaimer obviously applies:

- Prof A Song, erstwhile Dean of the Faculty of Theology for being the cause of this research;
- Prof AL Pitchers, my promoter, for all the support, guidance and helpful comments in the writing of this thesis;
- Ms MS Ntuli is to be commended for typing and retyping the manuscript so meticulously; and
- Ms AB Sigwebela of the University library for assisting me with some of the references.
- I also thank my family for their understanding through another ordeal.
- I thank my alma mater the University of Zululand for the opportunity to learn and develop myself that it gave me over the years.
- To the Lord be the Glory for everything He has done for me including giving me the power and the mind to grapple with issues.
- Finally, I declare that Conflict or cooperation : An examination of the South Africa Constitution and the Church is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of appropriate references.



CRM DLAMINI SC

JANUARY 2003

**This work is dedicated to the Lord for all that
He has meant to me.**

SUMMARY

The purpose of this thesis is an examination of the impact of the current South African Constitution on the church. The question is whether there is conflict or co-operation between certain provisions of the Constitution and the church as reflected in the word of scripture.

The reason for this is that certain sectors of the church expected a Christian rather than a secular state to be established in the new political and constitutional dispensation. Some Christians were also not pleased with the protection in the Constitution of certain practices which are in conflict with Christian values and principles. Some of these are not provided for in the Constitution but in legislation. These include, inter alia, abortion, homosexuality and pornography.

This criticism is based on a misapprehension of the fact that both the secular authorities and the church or alternatively the political kingdom and the kingdom of God are ordained by God. They are mandated by God to perform certain functions.

The state is representing God in matters of governance, good order justice and peace in the country. God holds it responsible for this. The church is supposed to be responsible for the spiritual and moral life of the people. It has to propagate the gospel of the salvation of humankind and of the coming of the kingdom of God.

It is essential that there should be separation between church and state. Not only should there be separation between church and state but there should be structural pluralism. This is so because the state is not omnicompetent and has to allow other structures like the family, the school, the church and the university to play their own roles.

Because of the separation between church and state the state should not decide for individuals what to believe or what not to believe. The reason for this is that the state is not competent to decide on what is true religion. It may also manipulate religion for political reasons. This is unacceptable in a democracy.

Not only should the state allow freedom of religion, but it should also allow the church or members of the church to manifest their belief by adopting certain stances on issues. Religion has a pivotal role to play and seeks to influence society as a whole.

Properly understood, there is no real conflict between the Constitution and the word of scripture. The Constitution provides scope for co-operation between church and state without each taking over the function of the other. The church has more than ample opportunity for propagating the good news of the kingdom of God.

The Constitution provides for the creation of a democratic state based on the rule of law, the independence of the judiciary, free and fair as well as regular elections, adult suffrage, a Bill of Rights policed by a fearless judiciary and a multi-party system. It also promotes openness and accountability on the part of the government. These are not in conflict with Christianity.

The Constitution also provides for a Bill of Rights which is regarded as a cornerstone for democracy and which protects the rights of the individuals including institutions such as the church. It also stipulates that there be equality before the law and that there should be no unfair discrimination based on the listed grounds. These are compatible with fairness and with Christianity.

Christians can play an important role in clarifying the respective roles of the church and state. They can also seek to exercise a positive and constructive influence in the affairs of the country. In this way they can prove to be the real salt and light of the world.

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CHAPTER ONE

INTRODUCTION OF RESEARCH STATEMENT OF THE PROBLEM AND CONCEPTUAL FRAMEWORK

1.1 Introduction

South Africa had a miraculous peaceful and smooth transition from the old order to the new democratic constitutional and political dispensation. Some attributed this miracle to God's intervention as a result of the prayers of Christians. The advent of the new South Africa simultaneously raised a lot of expectations from various people in the country. There were those who felt that the old order had passed away and that everything had to be new maybe in line with 2 Corinthians 5 : 17, *"If a man is in Christ he is a new creature, old things have passed away and all things have become new"*. The only snag is that not all South Africans were in Christ and not everything would become new. Nonetheless there was a strong belief that everybody would be his or her brother's or sister's keeper and this would almost be an utopia. There was also an oversimplification of the situation relating to apartheid. Some believed that apartheid was the only evil in the country and if you removed apartheid, everything would be all right. They, however, failed to realise that apartheid was a manifestation of human selfishness and greed and that even in its absence we would still have to reckon with human nature which could still be responsible for other evils and problems.

This feeling of optimism, was also reminiscent of the establishment of the League of Nations after the First World War, where the drafters of the Covenant of the League of Nations adopted in its preamble the words from the prophet Isaiah: *"They shall beat their swords into ploughshares and their spears into pruning hooks"* (Isaiah, 2:4). This euphoria was elicited by the advent of peace after the horrific experience of the First World War. But it is safe to say that the drafters of the Covenant were too optimistic. The era of the blissful millennium had not yet arrived. Hardly did they know that there would be another World War soon.

After the demise of apartheid which had caused so much heartache, it is understandable that people would greet the new era with excitement. But were the expectations realistic?

There is no doubt that in human beings in general, and in Christians in particular, there is this yearning for a perfect society, ruled by a perfect government, a government that conforms to God's precepts and that is just, where there is peace, prosperity, security and justice. Even St Augustine declared: "Justice being taken away, then what are kingdoms but great robberies? For what are robberies themselves, but little kingdoms? (The City of God (1887)) the problem, however, is that owing to the fallen nature of human beings to expect a perfect government in this world is to expect the impossible. In many cases we have to settle for a government consisting of imperfect human beings but subject to certain checks and balances to limit the abuse of political power. That is what a constitution is largely supposed to do. How successfully does our Constitution do this?

1.2 **Statement of the problem**

South Africa emerged from the old political dispensation with a constitution that is regarded as second to none in the world. This was contained in the Constitution of the Republic of South Africa Act 200 of 1993 known as the interim Constitution. This was superseded by the Constitution of the Republic of South Africa Act 108 of 1996. Although this Constitution meets the reasonable expectations and aspirations of ordinary South Africans, some sectors of the church may be critical of it as they believe it does not conform to God's standard as revealed in His word. Is there a clear standard to be found in God's word with which a constitution should comply? If that be the case, is there real conflict or cooperation between our Constitution and the Word of God?

South Africa is generally regarded as a Christian country largely because the majority of its citizens uphold the Christian faith although there are variations when it comes to commitment to the tenets of Christianity. Some merely pay lip service to Christianity (Mat 7 : 21-23). There are also variations as to what is regarded as Christian among the churches. The church itself is also deeply divided on many issues. But when it comes to making choices, they would choose something that is regarded as Christian rather than one that is not. Although Christianity is the majority religion in the country, there are other faiths as well. In fact South Africa is a multi-faith, multi-lingual and multi-cultural country. In a true democracy all those faiths cultures and languages have to be accommodated. There is no doubt that the majority of the Christians in the country expected the form of state to be adopted in the new South Africa to be Christian. But the critical question is: what is a Christian form of state? Moreover, would it be fair and just to have a Christian state when a significant number of citizens of the country are either not Christian and uphold other faiths and others have no particular religion at all? A further question is: how can the other faiths be accommodated in such a way that those who uphold them do not feel that they are unfairly treated? It has to be borne in mind that people of other faiths regard their faith as important and as worthy of promotion and protection as the Christians feel about Christianity and they are entitled to feel that way.

It is possible that some did not expect a particularly Christian form of state, but rather expected the Christian faith and the Christian symbols to be given prominence. This would give them a sense of security that they are safe in the new dispensation. Others expected Christians to be given preferential treatment. But the question once again is whether that attitude is more Christian than that of treating all citizens equally.

This may have been caused by the fact that change brings about uncertainty. Uncertainty is unsettling and brings about anxiety. If they observed symbols that they are used to, this would reassure them that they need not fear. There is also

the fear that with the changes Christianity might be endangered. There could also have been sheer resistance to change and the desire to maintain the status quo however unjustifiable it might be. Some might even have thought that the era of the persecution of Christians or of the anti-Christ had come. It is well known that communism is hostile to Christianity. If communists were involved in the drafting of the Constitution some Christians would be justifiably suspicious of this. Many have regarded communism as the anti-Christ. Demanding a Christian state or government would therefore be a pre-emptive defence. It is also well known that Christians were persecuted in various regimes in the history of the world. The possibility of a further persecution cannot be excluded.

In the old Constitution the sovereignty of God Almighty was acknowledged in the preamble and in section 2. In the new one that solemn declaration is wanting. This immediately causes fear that if the rulers do not fear God, then there would be calamity for us all or for the Christians. But the critical question is: what was the effect of paying lip service to the sovereignty of God in the old Constitution when in fact the laws and policies that were developed in terms of that Constitution were a negation of the love and fear of God? Moreover, how would that acknowledgement of the sovereignty of God be interpreted and applied in practice?

The drafters of the current Constitution opted for a secular as opposed to a Christian or a religious state. The reason was largely that religious states have sometimes been as authoritarian and as oppressive as any other. Moreover, throughout history many people who were Christians in particular were not faithful to the Christian faith. They espoused racist ideologies for instance, irrespective of the fact that the bible enjoins love for one's neighbour as oneself. Many heinous and nefarious deeds were perpetrated in the name of Christianity or where Christians were spectators and they did not raise a finger (Fowler, 1994 : 2ff). Even the policy of apartheid was justified in the name of Christianity or religion. It was contended that God had made us different and therefore this justified separating the races even if this meant force being used, if the ultimate

purpose was to attain that ideal state which is the spatial separation of races (Paton, 1988 : 78; Motlhabi, 1984 : 19).

When the new Constitution was adopted, the belief was that a secular or liberal state allows for the freedom of all the people. It is the people who must make their choices in matters of religion or no religion. An important question is whether a liberal state is one that is in accordance with God's will and purpose. What are the implications of adopting a secular state?

Although the secular state was adopted, it does not mean that it is in itself perfect and will solve all problems. There will be times when the state adopts certain policies which are in conflict with God's word. Some have raised a complaint that the Constitution promotes certain values which are in conflict with the accepted norms of the greatest majority of citizens in general and of Christians in particular. They have complained that the promotion or condonation of practices such as abortion and homosexuality is in conflict with the generally accepted views and beliefs of the overwhelming majority of the people. What should be the answer to this?

The perennial problem has been people's inhumanity to others which makes countless mourn. This is caused by the abuse of power to the disadvantage of the people by those who wield power. Christians have been no exception to this. It is this perennial problem the Constitution is trying to address. But in addressing this, is there conflict or cooperation between Christianity or the church and the Constitution?

1.3 Aim of the enquiry

The aim of this enquiry is an examination of the South African Constitution and its impact on the church. Owing to the fact that the church is sometimes divided on certain issues and to the fact that the church itself is governed by the word of God, the aim of this enquiry will be to establish whether the creation of the new

constitutional dispensation in South Africa is in conflict or in line with God's will as revealed in His word. This will be done by subjecting the Constitution and some of the laws which emanate from it to critical scrutiny and the search light of God's word. The questions that have been posed above will be answered in order to come to a well reasoned conclusion.

As a point of departure the thesis that is adopted here is that the bible is the inspired word of God which is a guide to appropriate and acceptable conduct and decision-making. *It is profitable for guidance reproof and for correction* (Timothy 3:16-17). Obviously a state that follow God's word and guidance is sure to prosper and to succeed. Admittedly sometimes God's word needs to be interpreted. The purpose of this thesis is not to be entangled in the intricate question of which method of the interpretation of the text is the appropriate one. Suffice it to say that every attempt will be made to come as near as possible to the correct interpretation by not reading certain texts of the bible in isolation, but also in the context of the bible as a whole.

The aim of this thesis is also not to be an idealistic critique of the Constitution as a whole in the light of the bible. As a result not every provision of the Constitution will be subjected to painstaking analysis in the light of the bible. The bible and the Constitution are two different documents meant for different purposes. The bible is the word of God the purpose of which is to reveal God's will and plan for the salvation of humankind and the coming of his kingdom. The Constitution is meant to establish the government of the country by giving certain organs of state powers to govern and to limit the power of the government to prevent abuse. The word of God may provide guidance to members of the government as to what is the right way of doing things. The bible, however, is not a book on government. It lays down certain principles which it may be wise for government to follow. The attempt will not be to rewrite the Constitution in the light of the word of scripture. It will mostly be provisions of the Constitution which have been controversial and are still judged in terms of scripture which will be subjected to critical scrutiny. The aim is rather to seek for answers when a Christian is faced with hard choices between what he/she believes to be right and what the

Constitution or the law stipulates. It is also to attempt some reconciliation between what the Constitution provides and what the word of God states as well as to provide a guide on how political and constitutional issues on the one hand and Christian values and precepts on the other hand should be approached. It is further to allay unnecessary fears of those who believe in Christianity.

1.4 **Methodology**

The methodology that will be followed in this enquiry is that of assessing the broad constitutional provisions and other legislation in terms of the word of scripture and where necessary to attempt a reconciliation. If there is no possibility of a reconciliation, the conflict will be declared unresolved. There is no doubt that the biblical saying still remains true namely that nothing is new under the sun. What has been will be again (Ecclesiastes 1:9). The questions that we may be grappling with today have been raised before and have received varying answers. It is therefore necessary to refer to some of those who before us have grappled with some of these questions and provided some of the answers. We may agree or disagree with the answers. By reviewing these answers we make them our own.

For this reason it will be necessary to refer to the views of the church fathers and other thinkers and contemporary writers. In doing this one of necessity becomes involved in reviewing not only theological views but also some philosophical thinking that was prevalent and influential at the time. But the ultimate test is whether those views are in line with the biblical text. The research will therefore be literary and not an empirical. On the legal side reference will be made to legal writings by legal scholars, legislation and to case law.

The main reason why the research will purely be literary and not empirical is largely because it cannot be expected that many people will be well versed with the provisions of the Constitution and that many questions can be effectively

answered by looking at the provisions of the Constitution as against the word of God.

1.5 Definition of terms and concepts

It is necessary to define certain terms and concepts which will be frequently used in this research.

1.5.1 The state

The word "state" is often used interchangeably with "government". It is more correct to separate the two. A state is an entity that must satisfy three conditions

- a) It must have territory although absolute certainty about a state's frontiers is not a requirement.
- b) A state must have a population.
- c) A state must have a government capable of maintaining effective control over its territory and of conducting international relations with other states (Akehurst, 1978:57).

1.5.2 Government

A state cannot exist for long without a government. A government is a legally constituted authority of a particular state. It has the power to run the affairs of the state. The term "government" can be used in a broad or narrow sense. In a broad sense it means the whole constituted authority of a country which includes the legislature, the executive and the judiciary. In a narrow sense it means the executive branch of the government.

1.5.3 Constitution

A constitution is a legal document which outlines how a country is governed. It defines the various organs of state power, legislative, executive and judicial and how they are constituted. It also defines the powers and functions of those organs. It may further divide tiers of government into national provincial or local. It may also describe how the laws of the country are made, executed and applied and how the country is administered.

1.5.4 The church

The church is an organised body of Christians organised according to scriptures. It is a community of believers in Christ. The bible also refers to the church as the body of Christ. The church can be local or universal. The church is difficult to define precisely because ultimately those who belong to Christ are known by Christ alone. Some of those we see as practising Christians may not be truly his. Broadly, however, the church consists of the true followers of Christ, who believe in him and who are his true disciples. The word "Christian" will be used synonymously with the church, and no attempt will be made to judge who are true Christians and who are not.

1.6 Some fundamental constitutional principles

It is apposite to refer to some fundamental constitutional principles and values and some general provisions of the Constitution. It is important to refer to these because they have an important bearing on the current research. They should be highlighted because they put the present constitutional dispensation and some of its key features in proper perspective.

1.6.1 **The supremacy of the constitution**

One of the most important general provisions of the Constitution is that the Constitution of the country is the supreme law of the land (section 2). It overrides any conduct or act which is in conflict with its provisions. It is also binding on the various organs of state, legislative, executive and judicial. It contains the Bill of Rights which is regarded as the cornerstone of democracy and upholds the core democratic values of freedom, equality and human dignity. The Bill of Rights contains the fundamental rights of the people. It is imperative that all the government organs should respect and implement these rights (section 2). The government should also fulfil the obligations imposed by the Constitution. It is necessary to elaborate on some of the provisions and principles.

There is no doubt that the provision which regards the Constitution as the supreme law of the country is of fundamental importance and has far-reaching implications. The Constitution is a document that takes into account the past history of this country. It seeks to correct the wrongs that occurred in the past and to create a securer and better future. This has to be commended although it involves a number of challenges.

The past dispensation was characterised by inequality and discrimination. It was also characterised by lack of freedom and respect for the dignity of all people. Draconian security laws were passed to reinforce the policy of racial and spatial separation and to suppress those who opposed the discriminatory laws and policies. These laws involved detention without trial and other laws which violated the rule of law. They resulted in a state of lawlessness which is aptly described by Hobbes in his five adjectives of solitary, poor, nasty, brutish and short (Hobbes, 1651 : 374).

1.6.2 **Parliamentary sovereignty**

What facilitated this was the doctrine of parliamentary sovereignty according to which Parliament could make any law just or unjust and courts of law were incompetent to pronounce upon the validity or constitutionality of a law passed by a supreme Parliament. As a result a plethora of laws which were unjust, oppressive, discriminatory and violated the rights of individuals were passed. These laws brought about a lot of suffering and misery for especially the people of colour. They also led to a lot of anarchic violence in the country (Mathews, 1986 : ix). The doctrine of parliamentary sovereignty was imported from Britain although its importation led to distortions and it was stripped of some of the checks and balances. If Parliament took its subjection to God seriously it would not have passed some of those laws and would have considered whether those laws were in conformity with God's word.

1.6.3 **Judicial review**

Our Constitution provides for judicial review in terms of which the courts can question the validity or constitutionality of an Act of Parliament. The doctrine of judicial review had been discredited early in the history of South Africa. It was especially President Paul Kruger in the South African Republic who dubbed this the principle of the devil which the devil had introduced in the Garden of Eden to test God's law. If Parliament was equated with God, it was rather an unfortunate analogy. This President Kruger said at the swearing-in ceremony of the new Chief Justice after he had dismissed his Chief Justice, Kotze, and admonished the other judges not to follow his example. From that time on judicial review of the constitutionality of an Act of Parliament was regarded as anathema in South Africa's constitutional history (Dugard, 1978 : 24). The form of judicial review that remained was the one where a judge would be asked to review an administrative act or subordinate legislation.

The introduction of the principle of judicial review of an Act of Parliament in the new constitutional dispensation has therefore meant that the Constitution and not Parliament is now supreme. This has a number of implications. One of them is that the court and in particular the Constitutional Court can declare a law passed by Parliament as *invalid for being in conflict with the Constitution* which could never happen during the days of parliamentary supremacy. Judicial review, is meant to enforce the supremacy of the Constitution. It is, however, not free from controversy. One of the arguments raised against it is that it is undemocratic to let a group of unelected judges to temper with the will of the elected representatives of the people as revealed in legislation. Those who favour the principle of judicial review argue that the role of the judiciary in a constitutional democracy is *not to impose its will over that of the elected representatives of the people*, but its purpose is to draw the attention of the elected representatives of the people to the interests and aspirations of the people as encapsulated in the Bill of Rights. The Bill of Rights is regarded as constituting the social contract in terms of which the powers of the elected representatives are limited. The counter-majoritarian rule is, however, quite cogent although not completely convincing (Davis, 1994 : 6 ff).

It is not possible or necessary to have an in-depth analysis of the principle of judicial review. Suffice it to say that judicial review is a lesser evil than parliamentary sovereignty which, as we all know, led to the passing of laws which were unjust and unfair and violated the fundamental rights of certain groups in the country. There was no way of challenging these laws in a legal way and incalculable harm was done to the country from which it is *still recovering*.

From a Christian perspective, judicial review would be much more supportable than the unbridled supremacy of Parliament. What was lost sight of especially in the past was that Parliament was not representative of all the people of the country. The majority was excluded from the mainstream political participation.

1.6.3 The bible as supreme law of the Christian

What needs to be emphasised, is that while the Constitution is the fundamental law of the country, for the Christian that is not the end of the story. For the Christian the bible is the fundamental law. Anything that is in conflict with it is challengeable. This does not mean that the Christian is exempted from the duty to obey the Constitution and the laws that emanate from it. On the contrary the Christian is duty bound to obey these laws. But in the case of a serious conflict between the law and the word of God, the Christian must choose to obey the word of God (Acts 5:29). Obviously that is not a decision to be taken lightly. It has to be taken when there is a clear and fundamental conflict between the law and the word of God. It must also be borne in mind that disobeying the law will not exempt the Christian from the consequences of such disobedience. The Christian has to bear the consequences of his decision which may mean punishment by the government organ.

1.6.5 Core democratic values

Apart from the issue of the supremacy of the constitution our Constitution is based on the core democratic values of freedom, equality and human dignity. These values are not incompatible with Christianity. Freedom broadly means the ability of a person to think, to speak and to believe what he will, to do what and to go where he will without unnecessary restrictions. This freedom does not mean licence. It is compatible with the laws of arrest and detention if the purpose thereof is to defend such freedom. Even the word of scripture upholds freedom (John 8:32). But the Christian idea of freedom involves more than mere physical freedom. It entails freedom from sin which can enslave a person. Therefore it means moral and spiritual maturity and control over oneself. The two freedoms are, however, not incompatible. Apart from spiritual freedoms Christians are not averse to freedom of thought of movement and of belief. What the bible

admonishes is that they should not use their freedom as an opportunity for sin to relapse into bondage of sin and slavery (Gal 5:1; 13-14; 1 Pet 2:16).

Similarly equality can be found in the Genesis story of creation, where people were created by God in his own image and all of them have Adam as their progenitor. Equality means that all people must be treated equally before the law and that they are entitled to equal protection and benefit of the law. No person should be above or below the law. Moreover, no person should be unfairly discriminated against on the basis of impermissible grounds like race, colour, sex, gender, national or ethnic origin or similar grounds. This does not mean that there can be no differentiation but what is proscribed is unfair discrimination.

Dignity is equally supportable from the Genesis story of creation which entails that people are made in the image of God and have to be treated as such. They should not be treated inhumanely or disparagingly, but should be treated as people having dignity and self-worth. Although these principles and values can be supportable from the bible, they can also be supportable from other sources. This does not detract from the fact that they do have a Christian basis.

1.6.6 **Constitutional democracy**

It is important to point out that South Africa is a constitutional democracy. Constitutionalism entails limited government. The purpose of constitutionalism is to limit the powers of government so that the government does not abuse its power to the atrophy of individual freedom. This is because individual freedom is important in a proper democracy. Constitutionalism entails balancing the principles of liberty and equality against power. For these reasons *constitutionalism* accords an important role to the judiciary. Its power to review the actions of government and legislation is designed to ensure that government operates within the framework of the constitution and the values and principles contained in the Bill of Rights (Cachalia *et al*, 1994 : 3).

1.7 **Conclusion**

The purpose of this thesis is to establish whether there is a serious clash between *Christianity and the current constitutional dispensation which is based on our final Constitution* or whether there is cooperation between the two. This will be done by an analysis of some of the provisions of the Constitution in the light of the word of scripture. The following chapters will be devoted to that. This will entail an analysis of the secular government as against the kingdom of God. It will also necessitate an examination of the compatibility of Christianity with democracy and human rights. It will then be necessary to look at some of the rights which are protected in the Constitution which may or may not be in conflict with the word of God.

CHAPTER TWO

THE SECULAR KINGDOM VERSUS THE KINGDOM OF GOD

2.1 Introduction

Despite disappointed expectations from certain sectors of the church, South Africa has widely been applauded for having a Constitution that is truly remarkable. An important question is whether there is justification for this disappointment. One of the causes of the disappointed expectations about the new Constitution is that it does not provide for a Christian state. As stated earlier many Christians expected the new state to be a Christian state because the majority of the citizens of the country are Christians. This is due to the failure to realise that there is a clear separation in the bible between the kingdom of this world or the secular kingdom and the kingdom of God or alternatively between church and state. The purpose of this chapter is to put this matter in proper perspective.

Before the kingdom of God and the kingdom of this world are analysed, it is important to clarify what is meant by the kingdom of this world or the sense in which it will be used in this research. The kingdom of this world appears to be used in two senses in the bible. On the one hand it relates to the kingdom of Satan and on the other it refers to temporal authority represented by the civil government as opposed to the kingdom of God. That the kingdom of the world may be synonymous with the kingdom of Satan is evident from the account of Jesus' temptation by the devil where Satan pointed out that he had been given dominion over the whole world and he could give it to anyone he wanted to. He therefore asked Jesus to worship him in exchange for dominion over the world kingdoms which Jesus rejected (Luke 4:5-8). There is no doubt that Satan had usurped this kingdom from man when man fell into sin, because initially man was given dominion over the earth. In this thesis, the kingdom of this world refers specifically to the secular authority and does not refer to Satan's realm.

From the biblical perspective both the kingdom of God and the secular kingdom are established by God and they are legitimate. This implies that the kingdom of this world does not exist outside God's will. On the contrary it is ordained by God himself. The major difference between the kingdom of this world or the political kingdom and the kingdom of God is that the kingdom of this world is temporary and will pass away with everything that is in it whereas the kingdom of God will never pass away. This is made clear in the book of Daniel. If the kingdom of the world referred generically to both temporal authority and the kingdom of Satan it would state a manifest absurdity, namely that the kingdom of Satan was established by God. It is essential to look at the reasons why we have these two kingdoms and how they should relate to each other. Moreover, it is important to analyse how our Constitution addresses this relationship.

2.2 The secular or political kingdom

As already stated our Constitution establishes a secular as opposed to a Christian or religious state. This is the political kingdom or the kingdom of the world. The question is whether establishing a secular state in a Christian country is not in conflict with Christianity as reflected in the word of God. Whether or not this is so depends on whether the Word of God requires Christianity to be legislated upon as the religion of the country. It is important to outline the implications to Christianity of the creation of a secular state.

2.2.1 The basis of the kingdom

First, it is essential to establish the biblical basis of the kingdom of this world or the political kingdom. The clearest exposition of the kingdom of this world or the political kingdom is Romans 13. Here Paul makes it explicitly clear that every secular ruler or authority exists by the will of God. Every political authority is ordained by him. The establishment of a secular government therefore forms part of His plan. For this reason any rebellion against constituted authority is regarded as rebellion against what God himself has instituted. Those who do that

are deemed to have brought judgment upon themselves. Paul is of the view that rulers are not a threat to those who do right, but to those who do wrong. Rulers will commend those who do what is right. This is so because they are God's servants to benefit those under their rule. Those who do wrong will obviously fear because they expose themselves to punishment. The ruler as God's agent will punish the wrongdoer. For this reason Paul admonishes the believers to submit to the secular authorities not only out of fear of punishment, but also because of conscience. This means he advocates submission that is pleasing to God.

Similarly Peter declares as follows:

“Submit yourselves for the Lord's sake to every authority instituted among men : whether to the king, as the supreme authority, or to governors, who are sent by him to punish those who do wrong and to commend those who do right” (1 Pet 2 : 13-14).

Paul also justifies the payment of taxes. He justifies it on the basis that the authorities are God's servants who devote their time to governing. The taxes therefore enable them to govern effectively. It is therefore clear that believers should pay not only taxes they owe, but also that they should show respect or honour where respect or honour is due.

There is no doubt Paul's statement is based on the assumption that the authorities act in the best interests of the people. He does not deal with a situation where those in government are corrupt or abuse their power. Paul would obviously not have advocated their forcible removal or resistance to their rule. On the contrary he asserts that requests, prayers, intercession and thanksgiving be made for everyone in particular for kings and all those in authority. This is essential for leading, peaceful and quiet lives in all godliness and holiness (Timothy 2 : 1-2). In this way Paul demonstrates the interdependence between the kingdom of this world and the kingdom of God. It must be pointed out that Paul was not propounding a comprehensive theory of the authority of the state nor of the role of law. He was merely advising Christians on how to view and relate to secular authority. This is important for the church today. He was concerned that they should not inadvertently find themselves being in conflict

with what God had ordained. That is why he insisted that they should obey the secular authorities. This is so because he only refers to punishment. The law is broader than the criminal law.

It is important to answer the question why God provided for the secular kingdom. It is important because there appears to be a contradiction here.

2.2.2 The rationale for the secular kingdom

According to Paul, God established the secular kingdom in order to secure order and good government of the world and to punish offenders. The authorities are regarded as God's agents to punish offenders and to encourage those who do good.

The need for the kingdom of this world appears to have originated from man's fall into sin. God said the ground had been cursed because of this. From this fall sin started to reign in human beings. This is evidenced by the fact that one of Adam's sons Cain killed his brother Abel. From there on it became necessary to have laws which prevented some from killing others and from harming others in any way. This was confirmed after the flood (Genesis 9 : 5-6). It was further stressed in the law of Moses (Exodus 21). But this did not mean the start of the secular kingdom. God was still responsible for issuing the commandments through Moses. In God's theocratic relationship to Israel, there was no division between religion and civil, secular and Christian, or church and state as we have it today. God provided a body of laws intended to assist his people in maintaining proper relationships with him and one another. In this respect life was a unity. The nation was a priestly kingdom and the individual was a religious civilian. God ruled both as King and Priest (Palmer, 1986 : 23-24).

As the theocracy developed in the Old Testament, its limitation and the deterioration of its ideal increased. A major turning point in the nation's history took place when the people declared in Samuel 8 : 5 "Now appoint a king to

lead us, such as all the other nations have". Although the prophet Samuel was clearly disconcerted by this request and compromise, the Lord made it clear to Samuel that the people had rejected Yahweh himself as their king. God gave a warning to the people about the serious and drastic nature of their step towards a monarchy. He nonetheless granted their request.

Despite this rejection by his chosen people God did not forsake them. God partly granted their request but remained responsible for choosing the man who would be king starting with Saul (1 Sam 15 : 11, 35) and later David (1 Sam 16 : 1) and then Solomon (1 King 3 : 7; 2 Chron 1 : 8 – 11). Although the kingdom under David and Solomon saw a glorious fulfilment of the promises of God this could not last (Palmer 25). This was the beginning of the gradual separation between the kingdom of God and the secular realm especially when people started appointing their kings. As this was the general practice among other nations, it meant that God's acquiescence in these practices was an acceptance of these kingdoms. With God being distant from these realms people started experiencing the problem of abuse of power by those in authority.

In the Old Testament, as already stated God established the law through Moses. He ruled his people through kings and judges. While they had the power over the people, God held them accountable for what they did. He spoke to them through his prophets. Paul says the law is given for the unrighteous, that is, that those who are not Christians may be externally controlled by the law from evil deeds. Owing to people's sinful nature it is necessary to put restraints on them so that they may not freely commit wrongful deeds.

Martin Luther is of the opinion that the justifications for the existence of the kingdom of the world which uses the law or the sword side-by-side with the kingdom of God, is that it would be impossible to control those who are not Christian through the system of control used in the kingdom of God. Moreover, true Christians are fewer than those who are not Christian. Attempting to use Christian principles to replace the sword would, as he puts it, be like a shepherd who places in one fold wolves, lions, eagles and sheep together and lets them

freely mix with one another and say they should help themselves and be good and peaceful among themselves. While sheep might be amenable to being peaceful and governed in peace, they would not live long, nor would any beast resist friction from others. For this reason he says it would be a futile exercise to attempt to rule the whole world or even a country through the gospel (Secular Authority : To what extent it should be obeyed (1523) : 312).

2.2.3 Obedience to secular authority

The fact that the government is secular does not mean that Christians are exempt from obeying it. Both Paul and Peter say they must not only submit to the secular authorities, but they must honour and respect them. Paul says, as already stated, they should do this not simply because of fear of punishment, but because of conscience. The reason is that they are God's agents. As Christians believe and honour God, they should honour those God has sent as his agents.

This view is supported by the Reformation writers, Martin Luther and John Calvin. In the words of Martin Luther:

Since, however, a true Christian lives and labours on earth not for himself, but for his neighbour, therefore the whole spirit of his life impels him to do even that which is profitable and necessary for his neighbour. Because the sword is a very great benefit and necessary to the whole world, to preserve peace, to punish sin and to prevent evil he submits most willingly to the rule of the sword, pays tax, honors those in authority, serves, helps and does all he can to further the government, that it may be sustained and held in honor and fear. Although he needs none of these things for himself and it is not necessary for him to do them, yet he considers what is for the good and profit of others, as Paul teaches in Ephesians" (Secular Authority 313-14).

Calvin also stresses the fact that Christians should not just obey the secular authorities because of fear of punishment. He says they must genuinely honour and revere them as God's agents because they derive their authority from God (Institutes, 1536 : 327). He further states that the office is worthy of honour and

respect irrespective of the type of person who occupies it, whether he be a good and just person who performs his duties honestly and with integrity, but also even if he fails to do what he is supposed to do (Institutes 328). From this account it is clear that Christians are supposed to obey and honour secular authorities even if they are not Christian. It is the institution of government which God has created. The fact that the secular authorities are not Christian does not mean that they are not ordained by God and that Christians should be unduly perturbed by them. An important question, however, is whether Christians have to obey secular leaders in all things.

2.2.4 The limits to obedience to secular authority

Although Paul and Peter enjoin submission to secular authority, this is not unlimited. Admittedly Christians are supposed to obey and submit to the government of the day in all things. But there is a line that the government dare not overstep. If the government goes too far and encroaches upon the kingdom of God, that is not permissible.

The government is free to make laws for the good order and governance of the country. It is, however, not entitled to make laws relating to matters of faith. Luther for instance says that every kingdom must have its own laws and regulations and without law no kingdom or government can exist. The laws, however, must only extend to life and property. But the government cannot make laws for the soul because that is God's exclusive prerogative. Where it purports to make laws for the soul it encroaches upon God's government and destroys the soul. The government has no authority to prescribe what people should believe or not believe. Belief should be based on God's word alone. Therefore in matters which concern the salvation of souls only the word of God should be taught and accepted (Secular Authority 315-16).

If the government purports to make laws relating to matters of faith it is traversing forbidden territory. It has no authority to make law on what people should believe because God alone has authority to do that. If they forbid people to believe what they ought to believe or command them not to do what God commands them, Christians are entitled to disobey that command. In Acts 5:29 Peter and the other apostles had to declare: *"We must obey God rather than men"*. They said this when they were questioned by the high priest before the Sanhedrin why they had continued to teach in the name of Jesus.

In matters of faith no person can kill a soul or make it live, or conduct it to heaven or hell. That is why Jesus asserted: *Do not be afraid of those who kill the body but cannot kill the soul. Rather, be afraid of the one who can destroy both soul and body in hell"*. (Mat 10 : 28).

Every person is responsible for his own faith and he must ensure that he believes rightly. Belief or unbelief is a matter of a person's conscience. This does not impinge on the secular authority. People should believe freely what they want to believe. They should not be compelled to believe certain things. God alone is the ultimate judge of what people believe.

Although Paul and Peter say that believers should submit to earthly authorities, they say this on matters over which the secular rulers have authority and not on matters over which they have no authority. That is why even Jesus said: *"Give unto Caesar the things that are Caesar's and unto God the things that are God's"* (Matt 22). This makes it clear that Jesus accepted that there are things that are due to the secular authorities and others that are due to God. There should be no confusion of the roles. In Romans 10:17 Paul says: *"Consequently, faith comes from hearing the message, and the message is heard through the word of Christ"* This emphasises the truth that faith comes from hearing the word of God as opposed to the teachings of the people.

2.2.5 The duty of secular authorities

Although it has been said that it is not the duty of secular authorities to prescribe to people what to believe and what not to believe Calvin is of the view that as God's agents secular authorities have the solemn duty to *"employ their utmost efforts in assisting and defending the honor of Him whose vice regents they are and by whose favour they govern"* (Institutes 326). He also makes it explicitly clear that they should not make laws relating to religion. As he puts it:

"For I do not allow men to make laws respecting religion and the worship of God now any more than I did before, though I approve of civil government which provides that the true religion contained in the law of God be not violated and polluted by public blasphemes with impunity" (Institutes 325).

There is no doubt that in the Old Testament good kings were commended for having restored the worship of God when it had been corrupted or abolished or when they had devoted their attention to religion to enable it to flourish in purity and safety under their reign. When there was anarchy or a lack of good government and when *"there was no king in Israel, every man did that which was right in his own eyes"* (Judges 21 : 25). This obviously God did not like.

This demonstrated that while secular rulers are not expected to make laws regarding matters of faith, they are not exempted from the worship of God. They are not expected to pay attention only to the administration of justice and the governance of the country to the utter disregard of the worship of him who put them in their positions.

Apart from the worship of God, it is important to emphasise that God has given the secular authorities a mandate to govern the country to administer justice fairly, impartially and even-handedly. They must protect those who are weak against those who are more powerful than them. Thus in the Old Testament the prophet Jeremiah says to the king: *"This is what the Lord says: Do what is just and right. Rescue from the hand of his oppressor the one who has been robbed. Do no wrong or violence to the alien, the fatherless or the widow and do not shed*

is to forestall a situation where the government falls into disrepute as being inefficient or even collapses because of lack of effective leadership. The country and the world cannot do without proper government (Secular Authority 314).

Luther is further of the opinion that Christians may be involved in these positions even if Christ himself did not involve himself in them. As he further puts it, Christ fulfilled his own office and vocation, but he did not thereby reject any other. He could not bear the sword because he was only supposed to bear that office by which his kingdom is governed and which serves his kingdom. Although Christ did not bear the sword, he did not forbid or abolish it. On the contrary he endorsed it by word and deed (Secular Authority 315).

If Christians are people of integrity it is so much more important that they be involved in government because good governance requires people who are people of integrity, who are free from corruption and who will do their job faithfully, honestly and with dedication. What is important for a Christian is not to have authority or to exercise power over those who are under him, but it is to emphasise selfless service to his neighbour. Christ himself was an example of this (Mark 9 : 35).

Although it has been said that Christians can involve themselves in government positions, it does not mean that being involved in politics is an easy undertaking. The reason for this is that being involved in politics entails being a member of a political party. Belonging to a political party entails submitting oneself to the policy of the party. Subjecting oneself to the policy of that party therefore may itself sometimes cause conflicts with Christian principles (Skillen, 1996 : 152 ff; Balkenende, 1996 : 191 ff). Even Christian political parties will have their own peculiar problems and need to be treated with circumspection and wisdom (Schuurmann, 1996 : 206 ff). For this reason Martin Luther is of the opinion that a calling in temporal government is not every Christian's task.

innocent blood in this place" (Jeremiah 22:3). Similarly, the psalmist declares as follows: *"Defend the cause of the weak and fatherless; maintain the rights of the poor and oppressed. Rescue the weak and needy; deliver them from the hand of the wicked"* (Ps 82 : 3-4).

Moses instructed judges he appointed in the following words:

"Hear the disputes between your brothers and judge fairly, whether the case is between brother Israelites or between one of them and an alien. Do not show partiality in judging; hear both small and great alike. Do not be afraid of any man, for judgment belongs to God" (Deut 1 : 16-17).

The governing authority must seek and pursue justice (Is 1 : 10-17). Justice comes from the Lord (Prov 29 : 26). This implies that the governing authority in its law-making and law-enforcement function must pursue justice and not injustice (Prov 12:12; Deut 16 : 19) especially by being partial (Ps 94 : 20; Prov 18 : 5; Is 5 : 22 -27). According to scripture a throne is established through righteousness (Prov 16 :12). It is through justice that a governing authority gives stability to the country (Prov 29 : 4).

From this brief account it is clear that secular authorities are supposed to govern the country according to principles of fairness and justice. They are supposed to settle disputes justly, fairly and in an impartial manner. The aim of justice has been regarded as the co-ordination of the diversified efforts and activities of the members of the community and the allocation of rights, powers and duties among them in a way which will satisfy the reasonable needs and aspirations of individuals while at the same time promoting the maximum productive effort and social cohesion.

From a cursory look at the Constitution, there is no doubt that an effort is made to ensure that the country is governed in terms of the principles of justice, equity and fairness. The principle of equality is a pervasive theme of the Constitution. In order to facilitate the independence and impartiality of the judiciary, certain guarantees are introduced to ensure that justice is administered fearlessly and

without favour. This is no doubt in accordance with scriptures. No church or Christian should have problems with this.

2.2.6 Participation of Christians in secular politics

It is important to raise and answer the question whether Christians are supposed to be involved in politics and to hold office in government. It is important to clarify this because politics is sometimes referred to as a "dirty game". If by this is meant that the science of politics is dirty, it is no doubt misconceived. What people often have in mind is that in politics dishonesty and corruption are the order of the day. They therefore feel that he who involves himself in politics cannot maintain the straight path and will therefore be corrupted or tainted. To shun politics therefore is the safe and honourable thing to do. This was the view of the Anabaptists to which Martin Luther had to react. Our Constitution provides that every citizen is free to make political choices. These include the right to form a political party; to participate in activities of, or recruit members for a political party; and to campaign for a political party or cause (section 19 (1)). Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution (section 19 (2)). Moreover, provision is made for every adult citizen to have the right to vote in elections for any legislative body established in terms of the Constitution and to do so in secret and to stand for public office and, if elected to hold public office (section 19 (3)).

The Constitution does not discriminate as to who should exercise these political rights. All citizens are entitled to exercise them. Christians can become members of political parties. They can be part of secular political parties or they can form a specifically Christian political party.

Martin Luther is quite unequivocal that Christians may bear the sword even though in the true Christian community the sword has no place. Thus if there is a vacant position of hangman, judge, prince or any other office and a Christian is qualified for it, he is entitled to make himself available and to do it properly. This

Luther offers advice to the Christian prince. He says that the Christian prince must devote his attention to his subjects rather than his personal interests. He should use his office to serve and protect them and they should benefit from his rule. He must be wary of the high and mighty and of advisors who give wrong and flattering advice. He must treat them with circumspection and ensure that the views of government are kept in his own hands and that he must exercise sound judgment. He must deal justly with wrongdoers. This must be done in a wise and prudent way so that he can punish without injury to others. He must also act in a Christian way toward God, by subjecting himself to Him in full confidence and by praying for wisdom (Secular Authority 319).

There are various viewpoints on Christian involvement in politics. The most acceptable one is that Christianity should be transformative of politics (Chaplin, 1995 : 61 ff). This is in line with the view that Christians are the salt and the light of the world. Although sometimes the impression is created that the separation between church and state or religion and politics implies that one can be a Christian and when he is in politics should completely disregard his Christianity, that is not biblical. While there is no rule or word of scripture which prohibits Christians from being involved in politics, the bible does not countenance paying lip service to God's word nor does it advocate the creation of schizophrenic personalities. When there is a conflict between a certain policy and a clear word of scripture, for the Christian the word of God has overriding influence. After all God is sovereign over both spiritual and civil government matters.

2.2.7 The Christian state

An important issue to address is whether in a country where the majority consists of Christians, it is not advisable to create a Christian state. After all the majority rules.

According to Luther the creation of a Christian state is an impossibility. The reason for this, as he states it, is that a Christian state would have to be ruled by the gospel and that is not feasible in contemporary society because true Christians are few and those who are not Christian would flout the gospel with impunity and that would create chaos. If all were Christian there would be no need of law or state. For Luther therefore a Christian state is a contradiction in terms (Secular Authority 312).

This view of Martin Luther has been criticised as it tends to contradict what he stands for when he supports Christian involvement in government or to water down the impact of Christianity. If Christianity is the ideal, every effort should be made to promote it in the state which was also Luther's ideal (Sinnema, 1995 : 87 – 88).

Although Luther's views are open to criticism, it appears that he was more realistic. He realised the impossibility of making people who are not Christian to behave like Christians. They have no incentive to do that. One must rely on what they can respond to. If they violate the law, they should be punished. Punishment has a retributive and a deterrent effect and this has the effect of ensuring peace. Calvin on the other hand did not consider a Christian state to be a state which is ruled by the precepts of the gospel alone rather than by temporal law. For him a Christian state can involve rule by law. For him a Christian state is an ideal to be kept in mind (Institutes 325). It is, however, important to point out that imposing Christianity by law will strictly speaking not make that state Christian. It will simply constitute Christianity as an official state religion as has happened in the past. Of the two views that of Calvin is more acceptable. As a lawyer Calvin was able to understand that even in a Christian state law is necessary and that a Christian state need not be governed only by the gospel. From the cradle to the grave law regulates our lives even those who are Christians. What makes a state Christian is not the declaration of Christianity as the religion of the state but the way people are treated in that state.

2.3 Karl Barth

Karl Barth is another of the theologians who expressed himself on Romans 13 : 1-7. Both in his book on The Epistle to the Romans (1933) and The Theology of John Calvin (1992) he devotes some attention to the role and significance of secular authorities. In these books he approaches the subject from different angles.

In his book on The Epistle to the Romans (1933) he approaches this subject from the point of view of revolution. He links this to the earlier chapter which admonishes believers not to repay evil for evil. He emphasises subjection to God where he points out that subjection derives from obedience to God which entails that a person who obeys God should abandon thinking for himself. A person has encountered God and is thereby compelled to leave judgment to him. He also stresses that the source of power and authority of the temporal authorities is God himself. For this reason revolution against rulers is revolution against God. Our subjection is predicated on the fact that vengeance belongs to God (485).

Revolt entails judgment which actually belongs to God and not to the revolutionary. God is not only judge, but he is also the righteous judge. Any insubordination is insubordination against God. This is in line with the view that believers should not resist evil.

On the verse that deals with the fact that rulers are not a terror to the good but to the evil Barth says the terror is justified obviously only in-so-far as our action moves upon the same plane as theirs, only in-so-far as we oppose evil with evil thoughts words and actions, "and set what we call freedom against what we call authority, illegality against legality, relative disorder against relative order, the new against the old – only in other words when we rough-handle the rough customer". As he puts it: "To revolutionaries rulers must be a terror, a continual source of irritation and resentment, anxiety and misgiving, bitterness and self-defence – just as they themselves are to rulers". There is no terror against good works (487). Rulers are pleased with those who do good works.

Barth then comments on the verse which states that those who do evil should be afraid of the authority because he is entitled to use the sword to punish those who do evil. He points out that we often overlook this (489). He further points out that God does not yield before our encroachments. The encroachment of the revolution he meets with the sword of government and the encroachments of government with the sword of revolution.

He also comments on the verse which states that we must be in subjection not only because of the wrath but also for the sake of conscience. He regards conscience as an important aspect of our lives which warns us of the evil that we want to do. As he further puts it "It reminds us that we are evil; but it also recognizes in the sword that is drawn upon us the righteousness of the hand of God. Conscience sees in the evil that is done against us the minister of good". It interprets our judgment, not to our advantage, but to our salvation. It makes of the injury done to us, not our justification, but our hope. As he points out :

"Conscience, therefore, does not allow us to rise up from the severity of our lives – embittered and ready to revolt; rather it pronounces the end of the grim cycle of evil unto evil. Conscience bards us out of the turmoil of human suffering back to our Primal Origin, back to God" (490 –91).

He then concludes with reference to the payment of taxes and echoes the fact that the powers that be are God's priests. That is why they deserve to be honoured and revered (491).

In his commentary on the Institutes of John Calvin he once again devotes attention to Romans 13 : 1-7. He points out that in Calvin's doctrine of the state and society we find three trains of thought namely authorities, laws and people and government.

As regards authorities, he considers Calvin as starting out from the premise that the bible does not merely recognize civil authorities but eulogizes them. He regards those who hold political office as having a divine mandate and consequently the divine authority to play the part of God in every relation, seeing to it that to some degree they act as his representatives. "What kings and their advisers and other officials decide and carry out is thus God's work. The divine providence and sacred ordinance are a sufficient reason why human affairs are regulated in this and not some other way. Civil authority is thus the most sacred and honourable of things of this kind in all mortal life" (210).

The dignity ascribed to public officials involves a duty and responsibility to rule those who are God's creatures. The rulers must always bear in mind that in their persons they have to offer to others a picture of the divine providence, protection, goodness, benevolence, and righteousness. If they fail to do this, they sin not only against their fellows, but against God, whose justice they besmirch. As God's servants they do what God does, and those who reject them reject God (210).

Although the office of kings differs from that of apostles, both rest on divine appointment. As to whether the government should be a monarchy or republic, Barth is of the opinion that this is a matter of circumstance, conditions, and usefulness. Both forms may be right in the right place. In the light of God's will it is for us to be obedient where the one or the other exists.

As to what the task of government is he points out that Calvin considers this as rewarding the good and punishing the bad. He then deals with three short excursions which he regards as problematic. These are the fact that the government has to shed the blood of wrongdoers, that the government has to wage war and that it has to raise taxes. On all three of them Barth is of the view that authorities are entitled to exercise them. Imposing the death penalty is God's injunction to the rulers in respect of those who deserve it. He also supports the view that the government is entitled to wage war if there is justification for it. For this reason it has to have standing armies and to have defensive alliances. The function of government in both peace and war stands under God's command. He

also supports the idea of raising taxes not just for truly necessary and generally useful state expenditures, but also to achieve domestic splendour, to carry out duties of representation and to make possible the pomp and magnificence that are indivisibly associated with government of any kind. This is not wrong as long as it is not extravagant. The state treasury belongs to the people. It is their lifeblood and the government should not squander it. "Unjustifiable tax burdens are tyrannical robbery" (213).

In dealing with the second element that of laws, Barth is of the view that Calvin regarded law as the nerves and the soul of the state. As he aptly states: "Without law there is no government, though the converse, of course, is also true. The law is silent government, the government living law" (214). The law legitimises the regime.

The law is a divine command which makes the king a king and that permits and even commands him to draw and use the sword and adopt a kingly style (214). He regards this as deriving from the natural law which God has engraven in every human soul. "Its content, however, is the eternal and unalterable will of God that we will worship him and love one another. Understood and written thus, it is the magna carta or basic law of human society in all its forms" (215).

According to Barth Calvin had to show that the state which has in fact evolved historically "does not rest on chance or caprice, that it does not rest on any uncontrollable institution, on any intrinsically sacred origin, or on any arbitrarily invented human orders or statutes, but that it finally rests on the one law of all laws known to us all" (216).

On the issue of the people and government, Barth supports the view of Calvin that we should accept the state in practice. But he points out that Calvin's real concern here is not the state but he begins first with God.

Barth then deals with the question posed by Calvin whether Christians should be involved in litigation. Calvin was of the view that legitimate complaint and defence at law have a role. Christians are entitled to seek justice through the courts as long as this is not done in bitterness. It should not be to harm the opponents nor to seek revenge but to ensure the protection of rights. It should not be to create enemies and there should be no strife anger or hatred because the contrary would result in ungodliness. This Barth regards as impractical but concedes that Calvin is depicting a miracle.

Barth is also of the view that those who reject the seeking of justice before human judges should realise that they are rejecting the divine order and that if they keep on criticising this order they will not realise its divine origin. Although Christians are supposed to suffer evil and not seek revenge, they are entitled to earnestly seek justice either on their own behalf or as the public interest demands. They should suppress the love of combat that plays a part in every trial. They should keep in their hearts the love that bears all things even in court. It is for that very reason that they can go to court (217-218).

Barth also refers to the main theme of the final train of thought which Calvin deals with. This is the duty of subjects to rulers which entails that subjects should respect and obey the divine mandate which has been entrusted to rulers. This also implies that they should not regard government as a necessary evil, but should willingly obey it, renouncing self-will and accepting that it is the prerogative of the authorities and not private citizens to be subjects in public life. They have the power to act and to take the initiative. Citizens should do so only to the extent that the constitution provides (218).

On the issue of bad government, Barth considers the view of Calvin about the attitude to be adopted to tyrants who fail to honour their obligations. Barth agrees with the view of Calvin that even bad rulers and authorities are worthy of respect and obedience. They are not thereby divested of their divine mandate and majesty. The divine right is still vested in the government even though those who rule are not worthy of it. It is the right of the divine judge and avenger that

is revealed in the injustice of a bad ruler against his people. This is reinforced by the fact that even though David was himself chosen to be king, he did not harm Saul because Saul was the Lord's anointed. It is not the individuals that count but their role and function (218 – 219).

Barth concedes that this view is hard to accept but he is of the opinion that as in Romans 13, which deals with this problem, what appears to be the most faithful historical interpretation is that there is an acceptance, justification, exalting and extolling of the state. This is so because it is by God's command unless one can find some external pragmatic explanation for the contrary (220). According to Barth it is really the case that the affirmation is true that even bad rulers are God's envoys and representatives for the sake of the role that is given them and that sanctifies them in their total lack of sanctity. In this he justifies and supports the views of Calvin in this respect (222-223).

As to the question what we should do to bloodthirsty, voracious, spendthrift, idle and ungodly rulers, Barth seems to concur with Calvin who says we should first remember our sins which may have merited this punishment and remove the cause thereof. Our only help comes when God ceases to chastise us through the tyrant. We should therefore call on God. Barth, however, concedes that God can use the people to chastise the rulers. There are other democratic ways against tyranny. But the strongest bar against tyranny is the freedom of conscience in relation to God that even kings may not violate (225)

2.4 The kingdom of God

It is now appropriate to articulate what the kingdom of God encapsulates. The kingdom of God can be understood in two ways. First, it is the reign of God over the creation by his word. Secondly, it is the realm where God's word is heard, obeyed and done (Zylstra, 1995 : 26). It consists of true believers in Christ. It is the kingdom of which Christ is king. There can be no kingdom without a king. It consists of those who have repented of their sinful ways and have believed the

good news of the kingdom of God. It is not ruled by the temporal law but by the word of God and the Holy Spirit (Zylstra, 1995 : 26; Ridderbos, 1995 : 11ff; Palmer, 1986 : 18) as Paul puts it:

“For the Kingdom of God is not a matter of eating and drinking, but of righteousness, peace and joy in the Holy Spirit” (Romans 14:17).

Whether the kingdom of God was there from the beginning of creation or only arrived with the coming of Jesus is a bit debatable. The reason for this is that even after the fall of man into sin, God did establish a covenant with his people. There are those who believe that those who belonged to the new covenant were God's people and therefore belonged to the kingdom (Palmer, 1986 : 21 ff; Zylstra, 1995 : 27 ff).

One prophet in the Old Testament who expressed himself on the good news of the kingdom is Isaiah. From the prophet Isaiah's pronouncements, it appears that this kingdom was still to come. This is particularly evident from chapter 61 where he says:

“The Spirit of the Sovereign Lord is on me, because the Lord has anointed me to preach good news to the poor He has sent me to bind up the broken-hearted, to proclaim freedom for the captives and release from darkness for the prisoners, to proclaim the year of the Lord's favour and the day of vengeance of our God” (Isaiah 61 : 1-2)

At the start of his ministry Jesus incidentally read this passage and declared that this had been fulfilled (Luke 4: 18-22). He proclaimed that the kingdom of God was at hand, people should repent and believe the good news. This is the message which permeates the gospels and it is the message which the apostles had to propagate.

Jesus had been preceded by John the baptist who was preparing the way for the arrival of Jesus and who preached that people should repent for the kingdom of God was near (Matt 3 : 1-2) John's message was quite significant in that he was

reviving the message which had been declared by the prophets in the Old Testament. He claimed Isaiah 40 : 3 as his keynote. A voice of one calling. "In the desert prepare the way for the Lord; make straight in the wilderness a highway for our God". He proclaimed the imminence of the kingdom of God that God was about to act and would again visit his people. The kingdom of God was about to be inaugurated by the "Coming One" (Matt 3 :11; Mark 1 : 7). When Jesus came he therefore inaugurated the kingdom but it still has to be consummated (Palmer, 1986 : 38 ff; Ridderbos, 1962 : 18 ff; Weiss, 1971 : 67 ff; Willmington, 1988 : 7 ff).

As already stated the kingdom of God consists of the true believers in Christ. Its ethos is characterised by what is proclaimed in the Sermon on the Mount. Members of the kingdom are those whose sins are forgiven and who in turn forgive others; redemption and not descent is the characteristic feature of the kingdom; members love their neighbours as themselves; they even love their enemies and pray for those who abuse them; if they are wronged they turn the other cheek; there is no room for revenge among them; they go the extra kilometre; they give without expecting anything in return; although they are in this world, they are not of this world, just as their king, Jesus, declared that his kingdom was not of this world. They are not so much ruled by the law as by the word of God and the Holy Spirit, the word being the sword of the spirit. Faith and love permeate or should permeate their activities. The law, the prophets, and the psalms placed human politics in the context of the anticipation of the one who would come as the Prince of Peace, the Just King, the Righteous Lord, the Perfect Judge, the Mighty God (Isaiah 9:6-7; 40:9-11); Jer 23 :6; Pss 82: 8; 98 : 4-9). When Christ came on earth he announced that, "All authority in heaven and on earth has been given to me" (Matt 28:18). He came to realise the rule of his Father over the whole earth (Luke 4:1-21; Cor 15 : 20-28; Phil 2 :5-11; Col 1 :15-20; Rev 19 : 1-16). These were indeed serious claims.

Because members of the Kingdom are unique, Paul was appalled that they were doing something inconceivable. They were hauling each other before the secular magistrates for settling disputes. They should be able to resolve their differences in a spirit of love and brotherhood. The Christian community should be a self-

contained society that does not need world coercion and should be conscious of its high calling (1 Cor 6 : 1-11).

The pertinent questions are then, how did Christ fulfil the law and the prophets? How did he place himself in relation to Israel as God's chosen but exiled people? What kind of kingdom did he come to establish? How did he answer the disciples' question about whether now was the time when he would restore the kingdom to Israel? (Act 1:6). In broad outline what was his political agenda?

These questions are aptly answered by Skillen (1995 : 202 ff). He clearly points out that according to the New Testament writers the period between Christ's first and second comings is a time of great patience and long-suffering on the part of God, who is not willing that any should perish and consequently calls the whole world to repent and believe the gospel of his kingdom (Mark 11:15; Acts 1: 7-8; 2 Pet 3:9). During this time Jesus did not authorise his disciples to administer any kind of forceful, political separation of non-Christians from Christians. On the contrary his followers were commanded to love their enemies, to care for others (including those who do evil to them), to pray for God's will to be done on earth as it is in heaven, and to leave the responsibility for the final separation of believers and unbelievers in God's hands (Matt 5:38-48; 6:10; 26:51-54; Luke 3:15-17; Rom 12:20; Phil 2:4; Rev 5:1-14).

Skillen refers to the parable of the wheat and the weeds (Matt 13:24-30) in order to support his argument. He contends rightly, that this parable prohibits any idealising of ancient Israel and the longing for a return to a separate, pre-exile state for God's people. It does not hold out any hope for a "Christian state" in which Christians are organised into a separate political community from which all non-Christians are removed. On the contrary the "weeds" (enemies of the kingdom) are entitled to enjoy the same rain and sunshine, the same care and fertilizer, as the "wheat" (the followers of Christ) as long as both are in this world together (Skillen, 1995 : 202).

A Christian view of justice, a Christian view of politics, in Skillen's considered opinion, should be founded on this understanding of God's patience during this age. He disputes that Christian justice should entail that Christians should enjoy political privileges denied to others. But a just state, and a just world is one in which all citizens enjoy the same civil rights and public concern. Christian politics should not be identified with the church's attempt to control the state for its own well-being. Accordingly to him Christian politics cannot be constituted by typical interest-group competition to ensure that Christians get away with a lion's share of everything while others have to fend for themselves (203).

As Skillen further points out, the children of God, the followers of Christ, will remain scattered throughout all kingdoms of this world until the second coming when the kingdom of God will come in its fullness. Political communities governed by the common public law have no claim to being God's chosen people, nor may they claim to be God's elected kingdom. Christ's followers should not attempt to take on the "form" of an earthly empire or state as the church did after Constantine. It is not possible to constitute states as communities of faith without doing injustice to those who hold the "wrong" faith. The children of God cannot purport to gather together in a single exclusive political community without doing injustice to both believers and unbelievers.

When Christ came, the argument continues, all human political authorities were put in their proper place, under his feet. They are not competent to be the chief mediators between God and the earth because there is only one mediator, the Lord Jesus Christ himself. Every political community should in the meantime find its proper place, humble place under Christ's common grace until God's kingdom is fully revealed. Specific states should each be content with the task of promoting legal protection for all citizens and residents without discriminating against any of them on account of different faith (Skillen 203).

He attributes the current situation to the fact that biblical revelation has not had the dominant influence but Greek and Roman traditions have shaped Western politics. The result has been that the implications of biblical revelation for politics

have not yet been worked out in any comprehensive detail in the West. Greek and Roman political conceptions have had a hegemony over medieval and modern political life rather than biblical revelation. Modern nationalism is more rooted within enlightenment's revival of ancient stoicism and the new secular idealism of individual freedom than in biblical reformation (203).

Skillen further regards contemporary American embarrassment about old Constantinianism, the Crusades and Christian imperialism as the cause and effect of many Christians adopting the stance that they should not enter politics with any distinctively Christian claims because that would be to violate the supposedly neutral, non religious, non dogmatic, public world of politics.

Although some Christians especially in the United States today are trying to revive a new engagement in politics and a rediscovery of older traditions they believe are more Christian than present practices, these views are to a large extent misconceived. They are based on the faulty assumption that the supreme political power can be identified with the Christian dogmatic framework. This is reminiscent of the mistake which Christians committed by accepting the Constantinian tradition. The church and the whole kingdom of God became falsely identified with the Roman Empire. As a result in the Roman imperial realm the emperor decided which religion would be approved by his "grace". Where Constantine and his successors occupied the office of emperor, their granting privileges to Christians and demoting other religions went against the grain of biblical revelation. They were by implication asserting that Christianity would exist by the grace of the emperor and at the expense of injustice to the other faiths thereby meaning that they would be entitled to mediating God's grace to earth. On the contrary Christians should have challenged the whole imperial framework by pointing out that governments exist by the grace of God and that no earthly kingdom can claim to be equated with Christ's body, the church (Skillen, 1995 : 204).

The proper response of governing officials to the diversity of faiths on earth, is to treat them equitably. Although the West has rightly rejected the mistaken synthesis of church and state which was finally dealt a death blow during the religious wars of the seventeenth century, there has been no further development of a distinctively Christian, non-Constantinian philosophy. Contemporary Christians have just become used to the separation of church and state and have simply accepted the enlightenment approach to politics with its nationalism and secularism. The challenge is for Christians to develop a truly biblical approach to life. In the words of Newbegin.

“Christian discipleship is a following of Jesus in the power of his risen life on the way which he went. That way is neither the way of purely interior spiritual pilgrimage, nor is it the way of real politics for the creation of a new social order. It goes the way that Jesus went, right into the heart of the world’s business and politics, with a claim which is both uncompromising and vulnerable. It looks for a world of justice and peace, *not as the product of its own action but as the gift of God who raises the dead and calls into existence the things that do not exist (Rom 4:17)*. It looks for the holy city not as the product of its policies but as the gift of God. Yet it knows that to seek escape from politics into a private spirituality would be to turn one’s back to the true city. It looks for the city “whose builder and maker is God” , but it knows that the road to the city goes down out of sight the way Jesus went, into that dark alley where both ourselves and all our works must disappear and be buried under the rubble of history. It therefore does not invest in any political programme, the hope and expectations of which belong properly only to the city which God has promised” (Newbegin, 1983:36-37).

In Jesus Christ politics has been put in proper perspective as one of our human responsibilities in this world through which we are to serve the King. What is important for Christians is not whether or not to be involved as Christians in public affairs, but whether our responsibilities in the public sphere are to be discharged under the kingship of Christ or under the dominion of the evil one (Skillen, 205).

Skillen sums up the whole situation in the following words.

"In sum, my argument is on behalf of a principled pluralism in public life, by which I mean the recognition that the God-ordained responsibility of governing officials in modern states is to provide non-discriminatory public justice for citizens of all faiths. This is not a temporary, pragmatic accommodation to the times simply because Christians are too weak to gain control of government. Rather, it is an argument that democratic freedom for all citizens, a constitutional order protecting all faiths, and civil rights of every citizen grow directly, as a matter of principle, from a biblical view of the meaning of this age between the first and second comings of Christ. The "Christian" state is one that gives no special public privilege to Christian citizens but seeks justice for all as a matter of principle" (206)).

2.5 The kingdom of God versus the kingdom of the world

2.5.1 Early views

Although reference has been made to the kingdom of God and the kingdom of the world, it is important to define the parameters of these kingdoms and to clarify which should override the other in the case of a conflict. While it may no longer be an issue today this was seriously controverted in the past. It will be essential to outline this historical controversy in order to put the matter in proper perspective.

St Augustine one of the church fathers, was so deeply concerned with the theological defence of Christianity against paganism and heresy that he did not devote considerable time to expanding a political theory clearly defining the boundaries between political and ecclesiastical power. Towards the close of the fifth century Pope Gelasius defined the relations between the two authorities. According to Gelasius, Christ himself was both king and priest, but owing to the sinfulness and weakness of human nature, he divided the two offices, giving to ecclesiastical authority the spiritual and religious welfare of human beings, and to political authority the care and administration of temporal matters. He regarded both ecclesiastical and political powers as deriving from God and as each

independent and supreme in its own sphere, the church in religious matters and the state in political affairs. This independence, however, implied mutual dependence in that because the state is supreme only in its own sphere, the political, it must yield to the supremacy of the church in religious matters and since the church is supreme only in religious matters, it must recognize the authority of the state in matters of government and administration. What Gelasius did not answer was the question of who would decide whether a matter is predominantly religious or political. He assumed that the church and state would cooperate in practical tasks and would not be locked in bitter jurisdictional disputes, the reason being that the church needs the state for temporal purposes, and the state needs the church for the attainment of spiritual salvation. For this reason, the clergy should not interfere with the government's secular business, and the political rulers should not meddle in the spiritual sphere. There is no doubt, however, that whoever had the decisive say in the dispute would be the sovereign authority (Ebenstein, 1969: 190-1).

Although a clash between the two authorities was never really envisaged, God being the source of both and both serving God, Gelasius nevertheless was inclined in favour of the church by mentioning that its burden is more onerous than that of the state because the priest is answerable for the souls of all. This doctrine of the heavier burden, originally being a moral ideal, from the ninth century on, became a positive claim for more dignity and authority as regards mundane government matters.

From the tenth to the twelfth century the conflict between the church and the empire intensified and this led to each side jettisoning the older Gelasian doctrine of two authorities poised in equilibrium. The papalists claimed supreme authority for the church as the representative of the spiritual principle in society and asserted that all authority, ecclesiastical and secular, was originally given to the church. While the church retained the title and exercise of spiritual power, it delegated the exercise of secular authority to the state without, however, completely giving up the original title to it. The church held its authority directly from God, whereas the state exercised its authority indirectly, it having been

delegated to the state by the church as the intermediary between God and society (Ebenstein, 1969 : 191).

What the papalists demanded was not necessarily that the pope actually rule and administer the empire, but that he control the emperor's action, from the viewpoint of Christian values, that he protect subjects against rulers who strayed from the path of righteousness, and that he have the right to censure and admonish the emperor, and if necessary, excommunicate and depose him. Such wide powers would be unpopular with the secular rulers.

The representatives of the imperialist position on the other hand, while they conceded that neither power was supreme over the other as far as its source and title were concerned, affirmed that both powers were handed down directly from God to the church and state. As a result they were willing to restate the Gelasian doctrine of equality and equilibrium between secular and spiritual authorities. As the contest between the papalists and imperialists escalated, especially from the eleventh century on, extreme antipapalists propagated the view that the office of the king or emperor was, in itself, higher than that of bishop and pope, and that secular authority was supreme in worldly and spiritual matters (Ebenstein, 1969 : 192).

The conflict between the church and state was also connected to the feudal system. Bishops were not only responsible for the administration of the church and the care of souls, but they were also feudal holders of land and as such were vassals of the king. The feudal title of authority was of a highly personal nature, and loyalty of the vassal to the lord was quite profound and absorbing. The church was also owner of landed properties.

Another source of conflict was the fact that the clergy in the Middle Ages for a long time enjoyed the monopoly of literacy and learning. As a result they were entrusted with important administrative positions in the courts and chancelleries of Europe. The theory that bishop could be a faithful representative of the church in spiritual matters and a loyal vassal of the king in economic and political affairs

rested on the assumption that church and state did not disagree on major issues. When there was disagreement it became necessary to decide which was their first loyalty. The papalists advised them that the church was higher in dignity and authority whereas the antipapalists emphasized that in secular matters at least, although even in spiritual matters also, royal authority was supreme.

The first great conflict between the church and the empire took place in the latter part of the eleventh century. In 1076, Emperor Henry IV deposed Pope Gregory VII. Soon thereafter, the pope not only deposed the emperor but also excommunicated him. He also relieved the king's subjects from their oath of allegiance. From that period until the end of the thirteenth century the conflict between ecclesiastical and secular power dominated the theory and practice of politics (Ebenstein, 1969 : 193). A number of thinkers expressed themselves on this issue. A few of these will be referred to. These include John of Salisbury, Thomas Aquinas, Dante and later Dutch thinkers.

2.5.2 **John of Salisbury**

The most powerful presentation of the papalist viewpoint is contained in the book of the Englishman, John of Salisbury (about 1120-1180), *The Statesman's Book*. He was a protagonist of the supremacy of the ecclesiastical over the temporal authority. He unequivocally stated that both swords, the material and the spiritual, belong to the church and that the prince receives his sword, or authority, from the church, that he is "minister of the priestly power, and one who exercises that side of the sacred office which seems unworthy of the hands of the priesthood". As the original and true owner of the temporal sword, the church has the right to depose the prince if he violates the law of God and disregards the precepts of the church, for "he who can lawfully bestow can lawfully take away" (200 – 201).

John of Salisbury also used the analogy of the human body to illustrate his point. He compared the commonwealth to a body. In his view each organ, group, and class represents symbolically parts of the body. Farmers and workers correspond to the feet, public-finance officers to the stomach and intestines, officials and soldiers to the hands, and the senate to the heart, while the prince occupies the place of the head. The church and clergy, in his view, occupy the highest position of all, as they are linked to the soul in the body, and "the soul is, as it were, the prince of the body, and has rulership over the whole thereof". The secular ruler is therefore subject to God "to those who exercise His office and represent Him on earth" (203).

By this John of Salisbury did not imply that the church actually had to take over the temporal government and administer it through priests, nor did he recommend that a prince submit every law for prior approval to a supreme court of priests. Yet he states that "a statute or ordinance (constitution) of the prince has no force or effect unless it conforms with the teaching of the church".

John of Salisbury relied on the Old Testament which has a firm bias against the temporal rulers. He quotes frequently from Hebrew prophets and their struggle against kings and princes. The Old Testament was consistent in its hostility against secular rulers (206 - 207). An inference to be drawn from the medieval struggle between church and state is that unless there are some strong countervailing ideas and institutions in society, totalitarianism is likely to develop.

2.5.3 **St Thomas Aquinas**

The Middle Ages saw the rise of universities which had a considerable influence on society. One of the men from universities who exercised some influence on issues of state and religion during this era was St Thomas Aquinas. He was largely influenced by the views of Aristotle Greek philosophy. The pre-Thomistic medieval theory of the state, in conformity with Aristotle's *Politics* and *Ethics*, viewed the

origin of political association, of government, as the result of sin and evil, which had distorted people's natural and original impulses.

St Augustine had been a typical exponent of this Christian Stoic view of the state. According to him God did not intend that man, 'His rational creature, who was made in His image, should have dominion over anything but the irrational creation – not man over man, but man over the beasts' (The City of God 1887 : 187). St Thomas on the other is of the view that if dominion refers to slavery, there is no slavery in the state of nature. But if dominion refers to the "office of governing and directing free men", it is not incompatible with the state of innocence.

For St Thomas Aquinas there are two reasons for the necessity of government even in the state of innocence, before sin and evil came into the world. "Man is naturally a social being and so in the state of innocence he would have led a social life". Because it is necessary to organise social life, government emerges as the specific organ of looking after the common good. Moreover, if one person, possesses superior knowledge and justice, it would be inappropriate to disregard such superiority for the benefit of all. According to St Thomas Aquinas therefore government is necessitated by people's social nature and the organisation of government on the superior wisdom and morality of the ruler for the benefit of the ruled (On kingship 226 – 228).

As society has the same end as the individual, the ultimate purpose of social life is not just virtuous living, "but through virtuous living to attain to the possession of God" (On kingship 231). If human beings and society could acquire this supreme ideal and by human power, the king could guide them in the right direction. The possession of God, however, can only be attained by divine power, and human government is not able to guide people to this end. The ministry of the kingdom of God is not in the hands of earthly kings, but of priests, and especially the chief priest, the successor of St Peter, the Vicar of Christ, the Roman Pontiff to whom all kings are to be subject as to Christ himself (On kingship 219).

On the nature and form of political authority, St Thomas Aquinas, starts from the premise that government derives from the divine order. Because the commandments of God include the ability of obedience to the commands of a superior disobedience of the commands of a superior is mortal sin. Like Aristotle he classifies forms of government into good and bad types. Unlike Aristotle who is evasive about the monarchy, he is unequivocal in his choice of monarchy.

Aristotle preferred monarch because he believed that it was unlikely that superior moral and intellectual qualities could be found in more than one person. Yet because he doubted that the right man would be found, he was reluctant to commit himself absolutely (*Politics* 100-101). St Thomas Aquinas on the other hand, derives his preference for the monarchical form of government from his religious views of the world. He notices that "in the whole universe there is one God, Maker and Ruler of all things". Among many bodily members, the heart rules all the others; among the bees, there is "one king bee", and generally "every material government is government by one". The governing element represents in many things, their purpose and guiding principle. In political society the main practical task and purpose is the unity of peace. St Thomas identifies unity with peace; he therefore concludes that one ruler is most likely to maintain peace that goes with complete unity, whereas a government consisting of many persons might endanger social peace and stability through disagreement" (*On kingship* 228).

2.5.4 **Dante**

Dante Alighieri (1265 – 1321) apart from being the poet and writer of comedy, in his most important antipapalist, imperialist tract of the Middle Ages, *De Monarchia*, (*On the Monarchy*, (about 1310) raises three questions. The first one is whether a world government, ruled by a monarch, is necessary to the welfare of the human race. This question entails two issues, namely the issue of universal government and the monarchical form of such a world state. The second main question is whether the Roman people acquired world domination by right. The

third main question is whether the authority of the emperor derives directly from God or from some minister or vicar of God, that is the pope (On the Monarchy 251).

The first two questions are not of immediate concern in this enquiry. It is the third main question that deserves more attention. Dante conceives man as being body and soul. Following the Aristotelian ideas that "every nature is ordained to gain some final end" (Politics 77), Dante deduces from man's dual nature two ends : the first is the blessedness of earthly life, and the second is the blessedness of heavenly paradise. As the two ends of man differ, the means for attaining them should also differ. The blessings of earthly life can be ascertained through the lessons of reason and philosophy, whereas the blessings of heavenly paradise can be attained through spiritual lessons, transcending human reason, of theology, faith, hope and charity. The truths of philosophy are revealed by reason and the writings of philosophers and the supernatural truths of theology are revealed by scriptures. "Therefore man had need of two guides for his life, as he had a twofold end in life; whereof one is the Supreme Pontiff, to lead mankind to eternal life, according to the things revealed to us, and the other is the Emperor, to guide mankind to happiness in this world, in accordance with teaching of philosophy" (245-248).

Dante's second main contention in support of his antipapalist view is that the Roman Empire possessed power and authority before the church even existed. Consequently the church cannot possibly be the cause of the power or authority of the empire. The authority of the emperor, as he puts it, "comes down, with no intermediate will from the fountain of universal authority, and this fountain, one in its unity, flows through many channels out of the abundance of the goodness of God" (On Monarchy 260).

The Christian conception of the state had hitherto from the Middle Ages appeared in two versions. According to the earlier view of St Augustine and the church fathers the origin of government lies in human frailty and sinfulness (City of God). The state is therefore established by divine providence as the penalty

and remedy for sin. The later Thomistic view, developed under the influence of Aristotle, is to the effect that the state is the natural expression of man's social needs. Dante is the first writer in the Middle Ages who ingenuously combines Augustinian and Thomistic elements in a new synthesis which supersedes the political theories of both St Augustine and St Thomas Aquinas. What makes Dante's theory revolutionary is his assertion that the authority of the monarchical ruler of the world derives directly from God, without any intermediary, minister, vicar or pope (On Monarchy 260).

2.5.5 **Abraham Kuyper**

The views of the Reformation writers in particular Martin Luther and John Calvin have been referred to. It will be otiose to reiterate them here. One of the nineteenth century thinkers who contributed to the elucidation of the relationship of church and state was Abraham Kuyper (1837 – 1900) theologian, Reformed church leader, political party leader and Prime Minister from 1901 to 1905. He adopted the concept of sphere sovereignty. The Dutch phrase "*souvereiniteit in eigen kring*" which means "sovereignty in one's sphere" was initially noted by Guillaume Groen van Prinsterer, but was developed into the organising category of distinctive Calvinistic social theory by Kuyper. In 1880 he founded the Free University of Amsterdam, and in his opening speech he used the opportunity to explain in a comprehensive and theoretical way his understanding of the nature of society. The title of his speech was "Sphere-sovereignty" and he adopted as his point of departure the sovereignty of God. He contended that God alone has absolute sovereignty and that no man or institution within society can make this claim. This means that the authority which is exercised in the various spheres of society must be delegated to them by God in order that each sphere of society must be free from interference by other spheres so that it is able to fulfil its own role before God. He contextualised his speech by pointing out that the sphere of the state is distinct from that of the university, which is again distinct from that of the institutional church. God has given different kinds of authority and different laws to each sphere. Universities must consequently be free to serve God in their

own way (Thompson, 1995 : 176). He felt that the particular role of the state is to regulate the relationships between all spheres of society so as to guarantee to each sphere the conditions necessary for its growth, and particularly to protect weaker spheres such as the family from stronger ones such as industry. The basic rule for the duty of government is to arrange God's justice on earth, and to uphold that justice (Thompson, 1995 : 190).

Kuyper rejected the socialist view that the state should perform the tasks of industrial and commercial spheres. This would have the effect of confusing what are essentially different kinds of activity and which should be governed by different norms. According to the first principle of sphere sovereignty therefore the government is precluded from interfering in the internal arrangements of the family, church, business, trade union or university. As he put it in his *Lectures on Calvinism*: "Bound by its own mandate therefore the government may neither ignore nor modify nor disrupt the divine mandate under which these social spheres stand. The sovereignty, by the grace of God, of the Government is set aside and limited, for God's sake, by another sovereignty, which is equally of divine origin. Neither the life of science or art, nor of agriculture, or of industry, nor of commerce, nor of navigation, nor of the family nor of human relationships may be coerced to suit itself to the grace of the government" (59).

In Kuyper's view, as already stated, the specific role of the state is to regulate the relationships between all spheres of society in order to guarantee to each sphere the conditions necessary for its growth, and especially to protect weaker spheres, such as the family, from stronger ones such as the industry. In the words of Kuyper:

"God the Lord unmistakably instituted the basic rule for the duty of government. It exists to arrange his justice on earth, and to uphold that justice. To take over the tasks of society and of the family therefore lies outside its jurisdiction. With those it is not to meddle. But as soon as there develops collision from the contact of the different spheres of life, so that one sphere trespasses on or violates the domain which by divine ordinance belongs to the other, then it is the God given duty of government to validate

justice... and to *restrain*, by the justice of God over both, the physical superiority of the stronger. What it may therefore do in no case is to grant such assurance of justice, to one sphere and withhold it from another". (*Christianity and the Class Struggle*, 57, 58).

One of the main limitations of Kuyper's theory is that he does not give a clear definition of the various spheres of society. In the words of Dooyeweerd: "Kuyper himself never did think this conception through philosophically, as is sufficiently clear from the fact that he never indicated a methodical criterion for the determination of what he understood by spheres of life sovereign in their own area". Hence one may find several different enumerations of spheres in Kuyper's works where the most heterogeneous matters are mentioned at random, for example : "nature", the human person, and his conscience, individualized societal communities like the family, the state, the church, the business-firms, autonomous parts of the state like municipalities and provinces , and also spheres ... like the logical sphere, the ethical, the aesthetic, and the sphere of faith. In consequence of this unordered and inexact conception of sphere-sovereignty, all insight into the mutual order and coherence of the spheres could not but be lacking" (Dooyeweerd, 1973 : 8).

This means that the confusion in Kuyper's thought prevented him from coming to a thorough social and political philosophy. In Kuyper's thought there are traces of dualism between "nature" and "grace". According to Roman Catholic philosophy, "nature" is the area in which people come to true knowledge by using their unaided reason. "Grace", on the other hand refers to those aspects of life where a human being stands in need of God's special revelation and power. The dualism in Kuyper's thought derives from his attempt to explain the fact that non-Christians also follow God's plan in that they also form families, states and other associations. Kuyper's response to this is that whether or not people recognise it God upholds the creation even now by his common grace which prevents total disintegration of human society. Kuyper distinguished this common grace from which all people benefit, even if they are not Christians, from particular or special grace which only Christians know. This conception has been

regarded as capable of being interpreted in the same way as the Roman Catholic doctrine of “nature” and “grace” which entails that specifically Christian action is necessary only in areas of faith and morality, because in the areas of common grace Christians and non-Christians are on the same level. This view is supported by many evangelical Christians. They believe that as far as the essence of, say, politics, or economics is concerned, Christians have nothing unique to say and Christians should be concerned to make themselves heard on moral and religious issues (Thompson, 1995 : 192).

Kuyper was not prepared to accept this view. His most basic conviction was that there is an antithesis that permeates life between cultural activity that acknowledges God, and that which stems from the hearts of men still rebellious against God. Consequently Kuyper concluded that common grace is not an excuse for Christians to neglect explicitly Christian social and political action, but rather that it is the condition which makes such Christian action possible.

Another limitation of Kuyper’s conception of sphere-sovereignty has been regarded as being that it is too facile to think of his spheres in a spatial sense as if the various spheres of society were in some way isolated from one another. This led to a laissez-faire interpretation of sphere-sovereignty after Kuyper’s death. His followers then insisted that the state must keep out of other spheres such as industry (Thompson, 1995: 193).

2.5.6 Herman Dooyeweerd

The doctrine of sphere-sovereignty was subsequently developed systematically to a high level of philosophical sophistication by Herman Dooyeweerd, a professor of law at the Free University of Amsterdam (founded by Kuyper). Although Dooyeweerd acknowledged his indebtedness to Kuyper, he was not happy with his unsystematic way of thinking.

Kuyper did not make a basic distinction between spheres of society such as the family and those spheres which are aspects of reality such as the aesthetic and ethical. Dooyeweerd, however, adopted as a point departure the application of sphere-sovereignty to be the very nature of created reality. As Kuyper had argued that owing to the fact that reality as it has been created by God has many facets and is irreducible to any one sphere, Dooyeweerd also argued that the nature of reality itself is many-sided. Similarly in line with Kuyper's claim that the spheres of society are essentially different from each other in their inner nature, Dooyeweerd also held the view that the different aspects of reality had been created after their own kind and could not be reduced to one another. For example number is essentially different from space, which is essentially different from motion, organic life, and so on. By carefully observing reality as experienced by people, Dooyeweerd isolated fifteen different aspects of modes of reality, namely arithmetic, spatial, kinematic, physical, biotic, sensitive, logical, historical, lingual, social, economic, aesthetic, juridical, moral and pistical.

He then continues to relate his theory of modal aspects to the spheres of society with which Kuyper had previously been concerned. He points out that all fifteen modal aspects are present in every societal structure. The numerical aspect of the state for instance can be seen in the relationship between the unity of the state and the many individuals who are members of it, and also in the unity of the government and its many departments. The territories over which the government has control and its subdivision into the areas of local government jurisdiction reveals the spatial aspect of the state. The analytical aspect can be seen in the formation of public opinion on political matters. The cultural historical aspect generally relates to the way in which people use their powers in a consciously formative way in history, and in the state this can be observed in the political power exercised by the army and the police. Income from taxation and the internal economy of the estate demonstrate that the state has an economic aspect. The state obviously has a juridical aspect in that the community of the governed and governors is especially concerned with making and upholding laws for the regulation of public justice. The confessional aspect is evident from the

basis that the state acknowledges for its existence. This may be explicit or implicit in the constitution.

Similarly all modal aspects can be seen in all other societal structures. Consequently it can be demonstrated that all spheres have a juridical aspect. In the family this can be seen in the authority of the parents and the rules they formulate for the regulation of home life. In the school situation there must be laws peculiar to the school for its internal arrangements. Even a church in order to function properly has to have a system of discipline to maintain order and discipline. In these spheres of family, school, and church, however, this aspect of law is completely auxiliary to the main character of the respective communities. It is the primary aspect which gives a distinctive character to internal laws. Should the law in any of these communities become dominant, than the life of the community will become seriously distorted. As regards the state, it is precisely the juridical aspect which gives the state its distinctive character. Every other aspect of state is qualified by this function of law.

Although all modal aspects may be present in all societal structures certain aspects are dominant in each structure and give the structure concerned its unique or distinctive feature. The qualifying function of the state is the aspect of justice. But the state cannot simply be defined in terms of its qualifying function because the state has its basis in the cultural-historical aspect as a result of its establishment in history through the culturally formative power of military force. The cultural-historical aspect may therefore be regarded as the foundation function. One can only speak of the state if both its foundation and qualifying functions are present. Together these two functions constitute the state. If the qualifying function is disregarded, the state becomes nothing less than an organised band of robbers. On the other hand, if there is no basis for the monopoly of armed force in a specific territory, then we do not have a state. It may well be a political party, but not a state. The same applies to the other societal structure. Each has to be defined by the presence of both foundation and qualifying functions.

While the followers of Kuyper contended that the state should not interfere in the sphere of industry, Dooyeweerd was of the opinion that it is not possible to restrict the operation of the state in this way. As he puts it:

“The various social structures by which sphere-sovereignty is internally guaranteed do not stand alongside each other in isolation. In temporal life they are intertwined and interwoven. All other societal relationships also have a function within the state, just as conversely the state functions in all other societal relationships. But all these structural interplays remain in the final analysis of an external character with respect to sphere-sovereignty. Members of a family, a congregation, or business enterprise are at the same time citizens. And conversely, the state is always dealing with families, churches and business enterprises. But the competence, the sphere of jurisdiction of the state can never be expanded into the internal, structurally determined concerns that are proper to these societal relationships without thereby violating in a revolutionary way the cosmic constitution of sphere-sovereignty” (The Christian idea of the state 1968 : 49-50).

This means that the state must be involved in all of society's life because of its responsibility for public justice everywhere. Consequently the limits of its authority cannot be imposed externally by trying to keep it out of certain spheres. The limits can only be posed when it comes up against the material rights and responsibilities of other spheres sovereign in their own internal affairs (Thompson, 1995 : 198).

Dooyeweerd undoubtedly developed and refined Kuyper's theory of sphere-sovereignty. From this he developed a theory that gives a basis for positive Christian social and political action. This theory further contributed to the separation of church and state which was controversial since the fifth century. There is no doubt that the conflict between the church and state was largely intensified because of the combination of the church and the state during the emperorship of Constantine. This led to people who were not Christian because of conviction being made Christians by virtue of the fact that Christianity become the state or imperial religion. A number of others became “Christian” because of certain privileges to which Christians were entitled. They were Christians of convenience.

Although the step taken by Constantine opened the way to these problems, it has been said that one should not be too critical of this. The fact that there was a controversy as to who had the ultimate authority prevented many regimes which could have been oppressive from oppressing people with impunity. Many rulers and emperors had to tread with caution because of the influence of the church.

2.6 **Conclusion**

From the foregoing account it is clear that the establishment of a secular state as opposed to a Christian one by our Constitution was not necessarily unscriptural. This is so because the kingdom of God is separate from the kingdom of this world or the political kingdom. The kingdom of God is established by the word of God and needs no law; it needs no protection or privileges from the state. The political kingdom is established by the Constitution and the law. It is not a precondition that the state be Christian. Both kingdoms are established by God and God is sovereign over both of them. He holds political authorities accountable for the mandate He has given them. He also holds believers accountable for what His word says to them. No government can purport to create God's kingdom through legislative fiat.

Christians have to obey the secular authorities as they are God's agents for ensuring peace, order and good government. Although in many cases the Christians do not have to fear the sword, they need law and order and the state needs the stability that comes from good citizens. As Christians are supposed to be good citizens, the state benefits from their presence in numbers. The view of the Reformation writers that Christians do not need the law is, however, misconceived. It is based on the narrow conception of the law. The law is broader than the penal of criminal law.

By protecting freedom of religion, the Constitution has forestalled any friction that might arise between the church and the state as was the case in the history of the church. The fact that the state does not purport to make laws for religion is commendable. It implies that each kingdom is sovereign in its own sphere.

The concern of those Christians who yearned for a Christian state was unnecessary. As long as the Bill of Rights which, inter alia, protects freedom of conscience and of belief remains, there is no need for fear. In any case Christians themselves should follow the principle of treating others as they would like to be treated. South Africa is a multi-faith country. The faiths of other people should be respected. Christianity does not use coercion but persuasion to convert people to it. Under the present constitutional dispensation there is ample opportunity for propagating the gospel and for persuading all to become Christians and to be part of the eternal kingdom of God.

The separation of church and state, however, does not mean that there will not always be controversy when Christians question certain laws which they regard as in conflict with God's word. More of this will be said below.

CHAPTER THREE

CHRISTIANITY AND DEMOCRACY

3.1 Introduction

Our Constitution provides for the establishment of a democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racism and non-sexism, the supremacy of the constitution and the rule of law, universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness (section 1). These are indeed lofty and desirable ideals.

There is no doubt that democracy is quite popular in contemporary society. It seems to represent in the minds of the people everything that is good. While democracy is quite popular, there is no clear word of scripture which reveals God's commitment to any particular form of government or to democratic government in particular. In the Old Testament the children of Israel were ruled by kings and judges. No doubt these kings had advisers. But the kings had the last say. There was also considerable influence from the prophets whom God used to speak to the rulers of the people. Does it mean that God therefore prefers monarchic to democratic government? Before that question is answered, it is necessary to define democracy. But it may be interesting to point out that even in democracies there may be one or a few people who have the last say on certain political issues. The question then is how democratic should a state be?

3.2 Definition of democracy

The word "democracy" comes from two Greek words, namely "demos" which means people and "kratos" which means power or rule. Democracy therefore means the government where the people have the power. For this reason it has been defined as the government of the people by and for the people.

The earliest people who expressed themselves on democracy were the Greek philosophers and in particular Plato and Aristotle. According to Aristotle in the Politics, the basis of a democratic state is liberty. That is the end of democracy. The principle of liberty entails that all should rule and be ruled in turn. Democratic justice is the application of numerical and not proportionate equality. From this follows that the majority must be supreme and that whatever the majority approve must be the end and just. It must have the force of law (Politics 102). However, this view did not take into account that the majority can be wrong. If the majority is wrong the decision would not be just in the substantive sense.

Aristotle further asserted that every citizen must have equality, and consequently, the poor being many, have more power than the rich. Another principle of liberty is that a man should live as he likes because not to live as he likes would be a mark of a slave. This is another principle of democracy which has given rise to the claim that man should be ruled by none if possible, and if this is impossible, they should rule and be ruled in turns which contributes to the freedom based upon equality (ibid).

Aristotle regarded the characteristics of democracy as being the following:

- officers should be elected by all out of all;
- all should rule over each and each in turn over all;
- the appointment to all officers, or all but those which require experience and skill, should be made by lot;
- no property qualification should be required for officers or only a very low one;
- a man should not hold the same office twice, or not often, or in the case of few except military offices;
- the tenure of all offices or of as many as possible, should be brief;
- all men should sit in judgment or judges selected out of all should judge, in all matters, or in most and in the greatest and most important, such as the scrutinizing of accounts, the constitution, and private contracts; and
- the assembly should be supreme over all causes, or over the most important ones and the magistrates over none or only over a very few.

Another characteristic of democracy enumerated by Aristotle is the payment for services; the assembly law courts, magistrates, and everybody must be paid. The reason seems to be that people involved in government would not be rich and therefore would need to be paid for the job they are doing (Aristotle 102).

There is no doubt that over the centuries the Aristotelian idea of democracy has been modified to accommodate contemporary needs but the essential features remain. The main aim of democracy is to limit the abuse of political power and to direct the use of power to good ends (Cowen, 1961 : 83).

3.3 The current concept of democracy

Although democracy is not new, there is still no unanimity on what it really entails. Liberals and conservatives alike regard themselves as democratic. What democracy is, is often interpreted in different and conflicting ways in our society. This is also a world phenomenon. There is general support for the democratic ideal although there would be differences on the contents of this ideal. Three forms of democracy have been identified, namely the liberal model, the social democratic model and that of the third world democracies. This is not the only typology of democracy. There are others. This demonstrates that when we speak of democracy we do not necessarily refer to exactly the same thing. What needs to be understood is that the ancient ideal of democracy has had a protracted formative history and that in the process of the unfolding of that history, both the practice and meaning of democracy itself has undergone fundamental transformation (Du Toit, 1995 : 375-376).

It is important to outline the relevant meaning and function of the democratic ideal in contemporary South Africa. All systems of government which can be regarded as democratic generally exhibit the following characteristics. They include:

- universal adult suffrage or the right to vote; free and fair elections;
- representation of a fair proportion of the electorate in a legislative body;
- decisions reached by a majority-vote on all major questions of policy;
- equality before the law;

- an independent judiciary;
- equality of opportunity;
- freedom to organise political parties;
- freedom of speech, conscience and dissent;
- the freedom of the press and assembly;
- the rule of law and therefore freedom from arbitrary arrest or punishment;
- the separation of church and state; and
- the freedom of religion and individual liberty with social requirements (De Gruchy, 1995 : 387).

Democracy, however, cannot be regarded as simply a visit to the polls at certain intervals. It is an ongoing quest for justice. The success thereof depends on the development of moral people who are able to participate freely in the body politic, and of institutions which allow and foster such participation (De Gruchy, 1995 : 387). A strong civil society is necessary in order to ensure an effective democratic transition from authoritarian rule to prevent reversals and to pursue democratic transformation (Camerer, 1996 : 218 ff; De Gruchy, 1995 : 387).

Modern democratic theory and practice have evolved along two well defined ideological paths, the liberal and the socialist although the socialist and liberal forms of democracy can be regarded as complementary (De Gruchy, 1995 : 388; Rouvoet, 1996 : 137). This can be illustrated from the approach to equality freedom and justice.

According to liberals, equality means that all human beings are equal and individuals and groups are entitled to be treated as such. Socialists on the other hand are of the view that not all people have the same access to resources or the corridors of power because of the class division. For many in the Third World, liberal democracy is the means whereby the industrialised nations sought to retain power at the expense of the poor and marginalised. In order to move to democracy liberation and the empowerment of the oppressed people would be the pre-condition so that they can

truly participate in the political process. True democracy therefore can only be possible if the *demos* is in control of the situation (De Gruchy, 1995 : 388).

From a liberal perspective, freedom refers primarily to personal freedom, and the protection of human rights. For socialists on the other hand, freedom entails primarily the liberation from oppression and poverty. According to liberals justice entails fairness so that everyone is treated equally before the law. But for socialists justice means that everyone should have equal access to resources, education, housing and health care. Where there has been a legacy of injustice justice is redistributive. This implies that the government should play an active role in ensuring that justice is achieved even if this may result in a temporary curtailment of some individual freedom. "Liberals see this as the dangerous first step on the slippery slope towards totalitarian rule" (De Gruchy, 1995 : 388).

3.4 The nature and form of democracy

From the definition of democracy given above it is clear that certain questions may arise as to the nature and form of democracy. Although the matter may seem no longer controversial, significant questions were in the past raised about the nature and form of democracy. Varying answers were given to these. These questions include who are being regarded as "the people" How should the people govern? What should or should not be covered by such rule? And is popular government an end in itself or a means to other goals.

On who should be regarded as people, various societies have historically prescribed criteria which excluded certain people for purposes of democratic government. These would include slaves, women, the poor, illiterate, heathens and other races. In South Africa for instance in the past black people were excluded from participation in government. Today, however, it is generally accepted that race and gender cannot be used as grounds for excluding certain people from political participation either as voters or as representatives in government. Only a small section of the population

would be excluded such as children below a certain age or the mentally ill (Du Toit, 1995 : 377).

As regards the question of how the people should govern, it is necessary that there should be defined ways of reaching a collective and binding decision, and there must be organs for executing such popular decisions. The classic democratic answer to the form of public decision-making has been regarded as direct participation by all citizens in public life and an equal share in collective decision-making. For practical and sound reasons representative government also developed as an acceptable democratic alternative (Du Toit, 1995 : 377).

There have also been varying answers on the question of how the people should reach binding decisions. Should it be unanimously, through consensus, by outright or relative majority? Each of these different democratic decision principles for popular decision making entails different political dynamics and implications. On the question of the executive and administrative organs through which the people should rule themselves there are different democratic answers. Democracies have been considered to need strong, efficient, centralised executives and bureaucracies in order to implement the will of the people; It is also generally accepted that democratic self-government requires a minimal state and should allow the greatest possible extent of private enterprise and individual liberty (Du Toit, 1995 : 378)..

There is equally no unanimity on what should and what should not be subject to popular rule. The classic model of "government by the people" brought all common affairs under the control of the sovereign power of the people. This meant that all citizens would participate equally in all vital matters including decisions on war and peace, on economic structure and policy, on morality and religion, and on education. The maximisation of the scope of democratic politics in this fashion implies that there is no private realm protected from popular rule. In such a democracy there is no privacy from politics and there is in principle no sphere of individual liberty and private life where popular rule is excluded. This is undesirable. While politics and government are necessary, not everything in social life should be a subject of politics. There should be a realm of private matters which are excluded from popular rule. The converse is

totalitarianism. As discussed above, the more generally accepted view, today is that although a democratic government can regulate other spheres of society to create harmony and balance, it should not meddle in the internal arrangement of these societal spheres. It should not directly interfere in the economy, religion, and morality or the privacy of the family and individual life (Du Toit, 1995 : 378- 379).

On the question whether popular government is an end in itself or it is a means to an end, it may generally be stated that democratic politics and popular participation in public decision-making are often regarded as means towards other ends such as security, welfare, liberty and justice. It is then necessary to calculate the relative costs and benefits of popular rule, its effectiveness in attaining those goods, and the availability of other alternatives. In Churchill's view democracy is "the least bad" of all available alternatives. If it does not deliver the other goods such as liberty, welfare or security, popular government would be of no benefit. Democracy is therefore a necessary evil we have to endure for the sake of what really matters in life. On the other hand the democratic ideal which is the participation in public life and affairs is often regarded as a major good in itself. Through democratic politics "the people" are educated and discover themselves, and it is the only way in which this can happen (Du Toit, 1995 : 378 -379).

It may be necessary to revisit the question of how the people should be involved in governing. This is because this has some implications. Democratic decision-making enhances free and autonomous actions of citizens while it simultaneously binds them morally and politically to the outcomes of these collective decision procedures. Democratic practice increases the political freedom of citizens in ways which create civic obligations.

This distinguishes democracy from tyranny, on the one hand, and from anarchy on the other. In tyrannical rule subjects are coerced and constrained against their will whereas citizens of democratic systems can freely participate and have a say in governing themselves. Democratic citizens participate in a common political life where they rule and are ruled in turn. While subjects of tyranny cannot be said to owe any moral or

political obligations to their rulers, and anarchist individuals assert their own autonomy, democratic participation binds citizens into a network of civic obligations.

3.5 The nature of government

There are different answers as to how people should govern. Four such decision procedures can be distinguished, namely, the majority principle, the consensus principle, the mandate principle, and the principle of legitimate dissent and opposition. Each of these democratic decision procedures entails different ways in which the free and autonomous actions of citizens may be enhanced or curtailed.

3.5.1 The democratic majority principle

In terms of the majority principle all the citizens are entitled to participate equally in the collective decision-making process. Consequently they have a say in the making of the decision and are not merely subjects of the decision who are excluded from political participation. No doubt this enhances their autonomy. But once the decision is taken they are all morally and legally bound by the view of the majority. This includes opposing minorities and individual dissenters. The implication of this is that minorities and dissenters are bound by the outcome of the decision whether they agree with it or not or whether or not it is in their interest.

The majoritarian principle gives rise to what John Stuart Mill termed the tyranny of the *democratic majority* which can be problematic in that while coercive tyranny which relies on force, the democratic majority relies on the civic obligations of democracy itself. For this reason permanent minorities or dissenting individuals may find the obligations of democracy incompatible with their political freedoms. Moreover, the majority may be wrong. This is what has led to the incorporation of bills of rights in constitutions so that the rights of individuals and minorities are protected from violation by temporary majorities. Protecting individuals and minorities is important for social stability. If the majority simply imposes its will even to the detriment of certain individuals and minorities, it is risking resistance from these (Du Toit, 1995 : 381 - 382).

3.5.2 The democratic consensus principle

This may be regarded as more democratic in that the decision is not merely dependent on the majority imposing its will on the minority, but it also depends on arriving at a shared opinion in which no individual or group may feel he is losing. Not only does it increase autonomy but also the outcome which is supported by all and obviates the problem of dissenting individuals and minorities.

The drawback of this principle is that it may vest the power of veto in the hands of any individual or grouping which may prevent consensus. This may paralyse the government. The process of consensus building may also be restrictive. The process of arriving at a shared consensus may prevent the full ventilation of issues and the consensus outcome does not allow a dissenting minority's viewpoint. It is not sufficient for democratic citizens only to adhere to decisions, but they must also support them. Following this principle may lead to "totalitarian democracy" (Du Toit, 1995: 382).

3.5.3 The democratic mandate principle

The democratic mandate principle entails that individuals and leaders may not on their own account undertake political actions in arbitrary and uncoordinated ways as such actions would lack democratic legitimacy. This means that this principle is aimed at forestalling initiatives by leaders, unless properly mandated.

In practice the mandate principle may be manipulated by leaders and central executives of democratic organisations so as to effectively stifle local and grassroots initiatives and to reach decisions that suit them. The requirement that action must be mandated may consequently become an instrument of centralised control. This may militate against opposition and dissent and promote centralised control, or even tyrannical and totalitarian tendencies, which foster undemocratic outcomes (Du Toit, 1995 : 382 - 383).

3.5.4 The democratic principle of legitimate dissent and opposition

Democracies are generally characterised by the fact that they make provision for legitimate and loyal oppositions. This implies that the alternative for supporting the democratic rulers is not necessarily rebellion, revolution or treason. Democratic citizens do not only incur civic obligations by participating in the political process, they also have a right to dissent from public and official policy.

According to this principle democracy is not just concerned with securing the unrestricted will of the majority, building a hegemonic consensus or effecting centralised mandates, but democracy is also concerned with accommodating legitimate opposition and dissent (Du Toit, 1995 : .383). This involves multi-party democracy. In many of the African states after independence, one party participatory democracies became the norm. Although this was regarded as democratic, in practice it was undemocratic as it led to one-party dictatorship and stifled opposition. It also violated freedom of association and led to other problems like coups and military dictatorships .Multi-party democracy did not flourish and is only emerging now (Gitari, 1996 : 85; Dlamini, 1995 : 45).

3.6 Christianity and democracy

An important question to ask is whether democracy is compatible with Christianity. The underlying assumption is obviously that what is compatible with Christianity needs to be supported by Christians largely because it is right and it will last. It was earlier pointed out that there does not appear that there is one form of government which can be regarded as God's blueprint. A further question is why that is so? It would appear that there are sound reasons why God does not prefer a specific form of government. The main reason is that God is concerned much more with the outcomes of what the government is doing rather than its form. Any form of government, democratic or monarchical, can do what is right in God's eyes. Although we generally support democracy, democracy has its limitations and it is not a panacea for all the ills of society. On the contrary, even a democratic government can do what is wrong. We

have become accustomed to the view that democracy is a better alternative to despotic rule. The saying by Lord Acton that power corrupts and absolute power corrupts absolutely is still influential in our thinking. Not only does God realise that any government can do right, he holds every government accountable irrespective of its form.

Because of the fallen nature of human beings, even majorities can err and throughout the history of humankind they have erred. Democracy also tends to flout authority, especially authority from God's word. As long as the majority agrees, that decision has binding authority (Hart, 1995 : 363). The reason why democracy appears to be popular is that it tends to limit the arbitrary use of government power. In the absence of strong adherence and obedience to God's word and direction, democracy tends to be the lesser evil because it has checks and balances which may limit the abuse of government power.

Those on the other hand who are of the view that Jesus supported democracy are able to cite a number of examples from the bible. They point out that Jesus opposed the Jewish priestly aristocracy which represented the dominant ecclesiastical forces of his day. This is clear from the reading of the gospels. He turned social relations upside down and sought to re-establish them along egalitarian lines. He demonstrated this in his own interpersonal relations and in creating his community of disciples. He disregarded those social and hierarchical barriers of gender or class, ritual cleanliness or piety, which traditionally separated people from each other. He also challenged the authoritarian and patriarchal patterns of leadership within contemporary Judaism and the surrounding cultures (De Gruchy, 1995 : 396).

Jesus was also concerned about the wholeness of individual people and their freedom from the various forms of bondage which destroy the quality of life as God intended it. He liberated people from the bondage of dehumanizing powers and enabled them to discover their God-given dignity, just as he also empowered them to live life more responsibly for others. This was amply demonstrated by his exorcism of demonic powers and his healing ministry. Moreover, he strongly challenged social and economic injustices of the time. This is exemplified by his teaching on wealth and poverty. In

pursuance of his mission to declare the advent of God's reign, he confronted the religions and political authorities of his day particularly those who controlled the temple revenue in Jerusalem. His prophetic witness to the reign of God provides a continuous radical critique of all political systems in which people are dehumanized through the unjust domination of others. (De Gruchy, 1995: 397). This was, however, more than his support for democracy because, as already indicated, democratic majorities can also oppress or dominate individuals and minorities. What he advocated was that people be treated fairly and as human beings.

Over the centuries Christians have defended democratic arrangements on various grounds. The first one is the covenantal argument which is based on the biblical idea of a three-way covenant between God, ruler and the people and in which political authority is conceived as a delegation of divine authority, while the people are seen as bearing the right to consent to those who will exercise that authority. There is also the egalitarian argument which derives from the belief in the equal status of all humans as bearers of the image of God which entails that such status should be concretized through the equal possession of political rights including the right to vote. The third argument is that popular elections are regarded as one among several vital constitutional checks on the arbitrary exercise of political authority (Chaplin, 1996: 114).

There are therefore many things which are regarded as democratic which Christians should wholeheartedly support, although there are others about which they should be cautious. If by democracy we mean that the people are sovereign, that the government should do the will of the people, or that it should obey the majority of the people, then all sorts of nefarious things could happen. A typical example is that of Hitler in Nazi Germany who came to power through elections and not through a coup. The Nazi party did all it did in the name of the majority of the people of whom Hitler enjoyed popular support. The atrocities that were perpetrated were perpetrated in the name of a democratically elected government. This shows that people can be wrong and unless they are guided by some fundamental principle, they can err greatly.

From this an important lesson we can learn is that it is folly to trust in the sweet reasonableness of people. Evil is not confined to dictators and generals, but it also lies in all of us; it is universal. People at large may desire evil and choose a government to do *it on* their behalf. We should therefore be wary of romanticising “the people” who are as capable of evil as everybody. Governments can do evil with or without the support of the people. For this reason Christians should not believe that popular support alone can have the effect of legitimising government actions (Marshall, 1996:15).

While popular governments can do evil, it is usually true that a government is better when there is wide responsibility and political leaders are restrained by the need to get popular support for their actions. If they are held accountable by the population, especially in periodic elections, they are less likely to do evil. Consequently, it has been said that democracy, in the sense that a government should only exercise power when it represents and is held accountable by the people, should be understood as a Christian standard for a modern state (Marshall, 1996:16).

According to the bible power and authority do not simply stem from the will of the people but authority derives from God. For some reason this may sound like some theocratic hangover, and as being a threat to freedom. On the contrary it is the foundation of freedom. Democracy in Christian terms means that the people at large should govern and have a responsibility to discover and express God’s will. This implies that the government cannot do as it pleases. The government cannot, however, continuously disregard the view of the population because that could be authoritarianism or totalitarianism and it could spell disaster for the government. The government’s ability to act justly and to carry out measures without resorting to totalitarianism depends on their sensitivity and responsiveness to the population. The government, however, has an obligation not to be the follower of public opinion at all times, largely because of the possibility of its being at fault.

This is particularly important in constitutional democracies. In such democracies the constitution is the fundamental law according to which the country is governed, and to which all other laws are subordinate. It is binding not only on the government but also

on the public will itself. Thus even if a majority of the people would like to do something, but if it is in conflict with the constitution, it cannot be done.

These restrictions on the people are, however, not absolute because if there is a real need the constitution may be amended. But the usual practice is that the constitution may be amended only as a result of a permanent shift in public opinion and after careful deliberation. Constitutions are generally protected from fleeting changes and this is a recognition that cognisance should be taken of a higher order to which government and the people should conform. Relying on popular opinion alone can be dangerous and unworkable especially if the people desire two things which are contradictory (Marshall, 1996:17).

The art of governing requires reconciling sometimes irreconcilable demands of the people. The existence of a diversity of demands, however, demonstrates the need for genuine public involvement. In a genuine democracy decisions should in principle, be accountable to all the population. All policies must be judged and held accountable by all the people, including those who are opposed to them. This sometimes calls for compromises. Moreover, the government must educate the public on the need for compromise or why certain things cannot just be done. Failure to do that could lead to the government losing the support of the people or the government being authoritarian.

Christians are sometimes uncomfortable with politics in that it involves attempts to persuade people that what the government is doing is either right or wrong. This requires obtaining popular support for its course of action and consequently requires "a principled attempt to build support by making deals, building coalitions, sharing power, trading off, giving everyone a place, getting half a loaf rather than none". This approach is messy and unprincipled for many Christians and they do not like it. They would prefer that the government would implement a true principle and do what is right. "However, messy as it is, the only alternative to politics as vote-gathering, making coalitions, and opinion-shaping is authoritarianism or totalitarianism. A government which just makes up its mind and tells everyone what to do is an

authoritarian government. Totalitarianism is organised, democracy is messy" (Marshall, 1996:20).

3.7 **Conclusion**

The government has a responsibility. It is the responsibility to govern the country. In governing it must do what is right and just and at the same time with the support of the people. This is often a difficult task. People, especially in heterogenous societies, may not hold the same idea of what is right and just. In some other instances they may be selfish and desire what will prejudice others. In such a case the government has to act with extreme care. This means that it has to persuade and educate the people on the rightness and justness of its decisions.

While democracy tries to achieve this, democracy is not a panacea for all ills. It has its limitations. But it is a lesser evil than unbridled despotism. In many respects democracy may be compatible with Christianity in that it emphasizes responsibility and accountability. But one has also to take into account the Christian view that human nature has to be treated with circumspection

The decision by the drafters of the current Constitution to opt for a democratic government with all the checks and balances cannot be faulted. But democracy is a human institution. It is as imperfect as the people who develop it. It is not a divine institution. What is ordained by God is the institution government. The form it takes is decided by people. People have a right to have a government that will be fair and responsive to their needs and aspirations.

The fact that democracy has undergone changes over the centuries demonstrates that democracy is a human institution. If it were a divine one, no one would have the power to change it. But God has given people a mind. They are perfectly entitled to use that mind to develop a form of government that is responsible, accountable and responsive to their needs.

CHAPTER FOUR

CHRISTIANITY AND HUMAN RIGHTS

4.1 Introduction

In assessing the relationship between the state and the individual or the church as regulated by the Constitution, it is essential to look at the way the individual, which includes the individual who is a Christian and the church itself as an institution is protected from the power of the state. It is a perennial problem of organised society that those who have power generally abuse that power to the prejudice of individuals and even minorities. The state is generally in a more powerful position than the individual. As a result a mechanism to limit state power and to protect the individual is an absolute necessity. In protecting the individual it will also protect other society structures, like the church and the family from being mauled by the state.

As already stated our Constitution contains a Bill of Rights which enshrines the rights of the individual. It is regarded as the cornerstone of our democracy. The rights it contains are also referred to as human rights. These rights are regarded as "human" because they are the rights which all people should have by virtue of being human. They do not have to be earned or forfeited because of failure to exercise them for whatever length of time. People have these rights simply because they are human beings irrespective of race or colour, or sex, gender, social class, national or ethnic origin, noble or ignoble birth, religious belief or creed, or any other personal idiosyncrasy (Henkin, 1978 :3; Scarritt, 1985 : 26; Dworkin, 1977 : 184).

These rights are also commonly referred to as "fundamental". This means that they are important, that life, dignity and other high human values depend on them. It does not imply that they are absolute and may never be curtailed for any purpose in whatever circumstances. No individual right is absolute; every right is limited by the rights of others and other important considerations. This means that fundamental rights are entitled to a special protection and enjoy at least a *prima facie* presumptive

inviolability, bowing only to compelling societal interests in limited circumstances, for limited times and purposes, and by limited means (Henkin, 1978 :3).

Human rights are rights against or rather upon society as represented by government and its officials. A good society therefore, according to the theology of human rights, is one where individual rights flourish, and where the promotion and protection of individual rights constitute a public good. Although conflict may often arise between the protection of individual rights and some other public good, according to the philosophy of human rights, in the resolution of this conflict, individual rights should not be lightly sacrificed on utilitarian grounds even for the greater good of the greater number, or even for the general good of all. In accordance with this view, the dichotomy between the individual and society is only temporary and superficial. In the long run it is in the interest of society if the individual's right is protected (Henkin, 1978 : 2-3).

4.2 The rationale for the protection of human rights

The underlying reason behind the protection of human rights on the part of the government is an expression of the truism that the government is for the people. It emphasises that the government rules with the consent of the people. The government can be said to be truly representative of the people if it promotes their interests. No rational person will support a government that jeopardises his interests. This is also a manifestation of the fact that a constitutional government is the one which allows some measure of the freedom of the individual. Consequently, a constitutional government does not have unlimited powers. There must be that realm of individual liberty which in crude terms is not the government's business. The idea of a bill of rights is the further development and refinement of democracy (Nwabueze, 1973 : 1; McIlwan, 1974 : 21, Wheare, 1966 : 137; Cowen, 1961 : 192)..

It is important to establish whether the idea of human rights is compatible with Christianity. Before that question is answered, it is essential to sketch the historical development of human rights in order to put the matter in proper perspective.

4.3 The historical development of human rights

Although the idea of human rights is now universally accepted, at least in principle, it has not always been so. The idea of human rights developed largely in the West, with events in the rest of the world resulting in a universal concern for the protection of human rights. It may be interesting to note that individual liberty was secured in the West not as a result of a deliberate aim, but as a by-product of a struggle for power (Hayek, 1975 : 5). It is, therefore, necessary to briefly trace the historical development of the Western idea of human rights and what led to its universal applicability in order to put the matter in proper perspective.

4.3.1 The origins of the human rights idea

The conception of human rights as an individual's politico-legal claims placing limitations and obligations upon society and government, is a product of modern history. There is, however, no single or simple source or ancestry of these ideas. It would appear that these are a synthesis of the eighteenth-century thesis and the nineteenth-century ant-thesis. This does not mean that this idea started in the eighteenth century. Ideas on which the concept of human rights is based predate the eighteenth century. The form which they now have, crystallised in the eighteenth century (Henkin, 1978 : 45).

The Bible, for instance, does not stress rights but duties and these are, essentially, duties to God, although fellow human beings were and still are the ultimate beneficiaries. In early biblical times "society" and "government" were not central conceptions in the life of people governed by God through his prophets, judges, and others chosen, ordained or anointed. The "higher law", God's law was in principle the only law. Although the individual had free will and freedom of choice, he was not autonomous, but subject to God's law, and he was not supposed to do that which was right in his own eyes" (Deut, 12 : 8; Judges, 17 : 6)..

The major religions, philosophies and poetic traditions, on the other hand, claim some ideas and values central to human rights, namely “right and wrong, good and evil; law, legality and illegality, justice and fairness; the essential dignity and equality of men” (Henkin, 1978 : 4). In the Bible justice is particularised in various precepts but is also prescribed generally. In the Old Testament justice means that which is right. It refers to “an encompassing state of being ‘good’ and upright, while law denotes the proper conditions in which the said, ‘goodness’ and ‘uprightness’ prevail.” (Du Plessis, 1986 : 2).

Although the Bible does not refer to human rights by name, it is not opposed to the idea; it enjoins treating others in the same way you would like to be treated (Matt., 7 : 12); Luke, 6 : 31). This is what human rights are also aimed at. They are aimed at ensuring that human beings are treated as such with fairness and justice.

The idea of human rights can also be traced to the theory of natural law (Bodenheimer, 1962 : 13; Friedmann, 1967 : 95 ff; Dias, 1970 : 544 ff; Anderson, 1978 : 34). The Stoics, Cicero and their jurist successors viewed natural law as providing a standard for making, developing and interpreting law. According to this view, law should be made and developed so that it will correspond to nature. The church later Christianised Roman ideas, based natural law on divine authority, and gave it the quality of “highest law”. Although some of this law was revealed, most of it could be discovered by human beings through the exercise of their God-given “right reason” (Ebenstein, 1968 : 176, 233).

Natural-law theory stressed the duties which God imposes on every human society in an orderly cosmos. As time went on these duties came to be regarded as natural rights for the individual. It was, however, not easy to agree on the content of the early natural rights other than perhaps in the rights of “conscience” – to worship the true God and to desist from unjust acts (Henkin 5).

Although natural-law theory and natural rights have vacillated, they still remain influential on the idea of human rights even today. Yet politically and intellectually present-day human rights derive their authentic origins from seventeenth and eighteenth-century concepts (Henkin, 1978 : 5).

4.3.2 The eighteenth-century thesis

The American and French Revolutions, and the declarations that were based on the principles that emanated from them, took “natural rights” and made them secular, rational, universal, individual, democratic and radical. For divine foundations for the rights of man they substituted (or perhaps only added) a social-contractual base. The following excerpt from the American Declaration of Independence bears testimony to this:

“We hold these truths to be self-evident that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, that ...it is the rights of the people...to institute new government, laying its foundation on such principles, and organizing its power in such form, as to them shall seem most likely to effect their safety and happiness”.

For Paine there is a distinction between “that class of natural rights which man retains after entering society”, because he cannot exercise them personally. For him rights derive from and are retained by the people; they are not special privileges or favours granted to them (Paine, 1978 : 88 –90).

4.3.3 John Locke (1632 – 1704)

The first theoretical design of the idea of human rights was expressed by John Locke. His efforts to define and justify the “natural rights” of man must be considered and evaluated as a product of the seventeenth-century constitutional crisis in England which arose from the autocratic reign of the Stuart kings. In the struggle that ensued, he supported the cause of parliament in protecting the libertarian aspirations of the oppressed people (Van der Vyver, 1979 : 11).

In his *Two Treatises of Civil Government*(1698), published immediately after the Glorious Revolution which marked the end of the regime of the Stuart dynasty, he laid the foundations of the doctrine of human rights. These were calculated to assert the inalienable title of the people, against the claim to unlimited powers of the executive, to certain basic rights and fundamental freedoms. Seen in proper historical perspective, the doctrine of human rights was closely related to the struggle against too much governmental power (Van der Vyver, 1979 : 11). The idea was that some rights could not be subjected to the government even if the people wished, because of the inalienable nature of these rights (Henkin, 1978 : 7).

Locke identified the basic rights of people by constructing an imaginary existence of the human person in a stateless situation of nature which he depicted as “the idyllic coexistence of individuals in peace, goodwill, mutual assistance, and preservation”. Using this framework he constructed the natural rights of human beings to life, liberty and property.

In Locke’s contention, the state of nature suffered from certain inconveniences as a result of the absence of a superior organ to regulate the conflicting claims of individuals living in such a state. As a result the individuals entered into a social compact (*a pactum unionis*) to form a civil society. By means of a second social compact (*the pactum subjectionis*), they formed a government endowed with political power to safeguard their respective human rights. The individual members of the newly-established political community therefore retained their natural rights, but on entering into the civil state they relinquished their natural competency to protect those rights by means of self-help.

The only justification for the existence of political power was, according to Locke, to safeguard the natural rights to life, liberty and property of the subjects. He viewed the government as a trustee to protect the rights of the subjects. Its failure to do so automatically led to the dissolution of the trust which gave the subjects freedom to conclude a new social compact with another sovereign.

Employing this theory to the political turmoil of the time, Locke asserted that King James II (1685-1688), the last of the Stuart kings, had failed to execute the function of the trust, namely that of safeguarding the rights of his subjects, and the Glorious Revolution was simply a manifestation of the king's having forfeited his throne. The English people therefore exercised their natural power to vest the protection of their rights to a new sovereign William III and Mary.

Locke was actually not the original author of many of these ideas, but he took them from English antecedents, the Magna Carta (1215), the Petition of Rights (1628), the Agreement of the People (1647) and the Bill of Rights (1689) (Henkin, 9-10) and he sought to give a coherent theoretical meaning and justification to the rights contained in these documents.

4.3.4 Jean Jacques Rousseau (1712 – 1778)

Although philosophers other than John Locke concerned themselves with the concept of human rights, it is safe to say that the next important contributor to this idea was the French philosopher Jean Jacques Rousseau (The Social Contract) whose ideas inspired the French Revolution and have been influential on modern conceptions of human rights.

Rousseau utilised Locke's analysis. He designed the natural rights of the individual in the light of the hypothetical condition in the idyllic state of nature. Rousseau differed from Locke in that he stated that the individual, on entering into a civil society, subjected his individuality to the general will, undefined and amorphous, of the body politic and exchanged his natural rights to life, liberty and equality for certain civil rights which the government had to protect.

4.3.5 Sir William Blackstone (1723 – 1801)

The ideas of John Locke filtered through to Blackstone (Commentaries on the laws of England in Four Books (1775) (1) 123).. Thomas Paine drew his inspiration from both

Locke and Blackstone. Blackstone supported, besides certain rights, the claim of every citizen to his individual security, personal liberty and private ownership.

4.3.6 Emmanuel Kant (1724 – 1804)

Emmanuel Kant (The Foundations of the Metaphysics of Morals (1995)) distinguished only one basic right, namely “Innere Freiheit” (inherent freedom), which is manifested in the independence of one’s will within the context of the categorical imperative and which leads to every person’s acting in such a way that the volition from which his actions derive would co-exist with the similar volition of all others under a general law of freedom. By this Kant meant that everyone should have the freedom to act as his will directs him as long as he makes an allowance for the equal freedom of others.

4.3.7 The nineteenth-century antithesis

Although the nineteenth century also contributed significantly to the development of human rights, emphasis shifted from the idea of natural rights to utilitarianism or even evolutionism. To the nineteenth-century thinkers, human rights were perceived as necessary for the good life in society and even perhaps for the survival of the human species. During this century strides were achieved in human freedom by the abolition of slavery in many countries and by the international prohibition of the slave trade. This century also produced some apostles of liberty such as John Stuart Mill (Henkin, 1978 : 14).

The emergence of positivism on the other hand, during the early part of the nineteenth century, led to the virtual antithesis of human rights as a result of the decline of natural-law theory. The ideas of the positivists like Jeremy Bentham, John Austin, and even Stuart Mill, were not ideologically hostile to human freedoms and welfare. But positivism is diametrically opposed to natural law in which the idea of human rights is deeply rooted. According to positivism only empirical data reality exists and can therefore “be subjected to truly scientific analysis”. In the sphere of law positivism postulates that positive law, namely the law promulgated such as “natural law” and

“human rights” have been regarded by positivists as arbitrary speculation (Van der Vyver, 1975 : 8; Van der Vyver, 1979 : 13; Henkin 15).

The impact of the nineteenth-century ideas on human rights has been aptly summed up by Henkin in the following words:

“Rationalism, secularism, and humanism in the nineteenth century rejected natural rights based on divine natural law; the foundation of rights in the equality of all men as children of God, descended from the common ancestor, was dealt a stunning blow by the theory of evolution. In jurisprudence, natural law suffered the onslaughts of positivism; and who shall arbitrate between good law and bad law, moral law and immoral law? Law is and can only be the edict of the sovereign; how, then, can there be legal rights against the sovereign?” (16).

Another element of the antithesis to eighteenth-century human rights arose from the “burgeoning socialism”. Although socialism is not hostile to human rights in general, it has a negative effect on them. By its emphasis of society, “the group, subordinating the individual or seeing his salvation in the group” and by stressing duties to society rather than individual rights against society, socialism tends to undercut individual rights. The individual is supposed to sacrifice his rights in the interests of the group or society (Henkin 16 – 18).

4.3.8 The twentieth-century synthesis

The twentieth century has been a turning point in the development of human rights. Since the Second War (1939 – 1945) human rights have had a considerable revival. Positivists could not reconcile themselves with the equal validity of all law in the face of the “lawful” atrocities perpetrated by Hitler’s regime. Consequently, protagonists of democracy have proclaimed the “natural” legitimacy of positive law only when made by representative democratic majorities. This often led to natural law becoming positive law, “higher law” that binds to some extent even the legislature. A further outcome of this was the “internationalisation” of human rights (Henkin 18 – 21).

This was largely due to the efforts of the United Nations to achieve international respect for and observance of human rights and fundamental freedoms. Experience, especially during the Second World War, taught many people that certain values and guarantees, although susceptible to change like all human designs, should be protected from excessive and easy violation or change, because that often leads to conflict and war.

Towards the end of the Second War, the leaders of the allied nations joined hands to establish a formula for lasting peace and to prevent the scourge of war for the future. In 1944 the governments of the Union of the Soviet Socialist Republics, the United Kingdom and the United States of America, met in Dumbarton Oaks, California, U.S.A., and formulated proposals for the establishment of an international organisation that would "facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms" (Van der Vyver, 1979 : 14). These proposals culminated in the Charter of the United Nations which was prepared and opened for signature at the San Francisco Conference. In its preamble the Charter reaffirmed faith in fundamental human rights for achieving lasting world peace. It was believed at the time that if all governments of the world could be persuaded or forced to recognise and respect the basic rights of their citizens, friction and conflict would be obviated, and international peace would be guaranteed. This was the epoch where human rights entered a new phase in which the protection of human rights by national governments came to be regarded as a matter of international concern (Van der Vyver, 1979 : 14; Henkin, 1978 : 93)..

The purpose of the United Nations includes international co-operation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" (articles, 1, 55). Human rights constitute one of the responsibilities for study and recommendation by the General Assembly (article 13) and a Commission on Human Rights is expressly provided for (article 62 (2)). Human rights provisions feature prominently in chapters XI and XII of the United Nations Charter, which deal with non-selfgoverning territories and international trusteeship (article 68). Members pledged themselves to co-operate with the United Nations for the attainment of its human rights objectives (article 56).

The United States, largely because of its past experience, played a significant role during the early deliberations for the establishment of the United Nations for the promotion of human rights as a basis for the peaceful co-existence of the peoples of the world. Ironically, the then South African Prime Minister, General Jan Smuts, was the author of the preamble to the United Nations Charter which affirms the importance of human rights (Van der Vyver, 1979 : 15)..

The various United Nations bodies have devoted years of strenuous effort in the promotion of human rights. Since then human rights have featured prominently on every agenda of every body and have become a staple of United Nations activity (Henkin 93).

When the United Nations was established in 1945, its founders toyed with the idea of providing a bill of rights in its charter. This idea was, however, abandoned because of the fear at the time that divergent opinions on the proper contents of an international bill of rights having binding force would delay the inauguration of the world body. A commission was created with the object of drafting a human rights charter. In 1948 the commission produced the Universal Declaration of Human Rights (Van der Vyver, 1979: 15).

The Universal Declaration of Human Rights provides for a variety of civil-political and economic-social rights "*with equality and freedom from discrimination a principal and recurrent theme*" (Henkin 96). Although the directions of the Declaration are generally not perceived as law, they provide a common standard of achievement for all to aspire to (Henkin 96; Van der Vyver, 1979 : 15).

The United Nations did not abate in its efforts to create an international bill of rights that would give binding effect to the principles stated in the Universal Declaration of Human Rights. It, however, took the United Nations eighteen more years to produce such a charter and ten further years to secure the prescribed number of signatories required for its coming into operation. The ultimate result was the International Covenant on Economic, Social and Cultural Rights of 1966, which became operative on

4 January 1978 and the International Covenant on Civil and Political Rights of 1966 which came into operation on 23 March 1976 (Van der Vyver, 1979 : 15)..

The zealous efforts of the United Nations to propagate the idea of human rights on an international scale have been supplemented by transnational activities of various regional organisations, such as the Council of Europe and the Organisation of American States, and other specialised agencies (Van der Vyver, 1979 : 15).

These developments resulted in the “constitutionalisation” and “internationalisation” of human rights (Henkin, 31ff). They further led to the synthesis between natural law and positive law. Moreover, they resulted in a “*marriage more or less convenient and comfortable, between the emphasis on the individual, his autonomy and liberty, and the emphasis by socialism on the group and on economic and social welfare for all; between the view of government as a threat to liberty, a necessary evil to be resisted and limited, and the view that sees government as a beneficial agency to act vigorously to promote the common welfare*”. (Henkin, 1978 : 24).

This fusion did not come easily, but took serious efforts and compromises. Although there have been widespread steps to protect human rights in constitutions, there has been no uniform pattern. Three approaches to human rights protection are discernible. There is the negative approach of the English, the intermediate approach of the then USSR, France and the European People’s Democracy and the positive approach of the United States of America and the then Federal Republic of Germany (Henkin 33ff; Cappelletti, 1973 : 665-666).

Britain does not provide for constitutional protection of human rights. Fundamental rights have emerged from tradition, education and general behaviour, based on “profound traditionalism and the proverbial Englishman’s pride” (Van der Vyver, 1982 : 569; Van der Vyver, 1985 : 8). From a strictly formal point of view, human rights in England have no juridical significance. Yet it should be remembered that tradition and education can be even more effective instruments in the implementation of these fundamental rights than written constitutions, international documents or legal institutions devised for their enforcement. But it has (in England) been debated

whether these precarious traditions can continue to be effectively safeguarded by reliance on the ordinary legislature.

Calls for the adoption of a bill of rights even for Britain have gone out (Jaconelli, 1976 : 225). They were based on the grounds that the United Kingdom assumed international obligations under the European Convention on Human Rights in 1953 and by entering into the European Economic Community in 1973. This obviously implies that the idea of parliamentary sovereignty espoused in Britain has been modified. Moreover, the argument goes, it is necessary to restrain excess or abuse of power on the part of public *authorities and officials, to provide a forum for the judicial enforcement of rights* contained in the European Convention rather than that complaints should be brought by individuals against Britain before European tribunals, and to provide moral and educational force for the moulding of public opinion.

The socialist countries have adopted written constitutions, with elaborate provisions for fundamental rights, which are more elevated than and binding upon ordinary legislation and for which special procedures and majorities are required for their amendment. These constitutions, however, reveal fundamental differences from the constitutions of libertarian countries like the United States of America. The constitution of the then Soviet Union for instance, appeared to be essentially descriptive and not prescriptive. It did not set forth legal prohibitions ordained by the people upon its government, but was rather, "an ideological statement, a declaration by the government to the world (and perhaps to the people) describing the condition of human rights in the Soviet system and perhaps indicating also the Soviet Union's compliance with international obligations it has assumed (Henkin 64).

This type of constitution, however, should not be regarded as valueless. It may be a goal or ideal to which the government has to aspire. A prescriptive constitution on the other hand may not be accurately reflective of the system of rights already existing. Constitutional descriptions or promises, moreover, tend to deter deviations and serve as a basis for domestic protection (Henkin 65).

According to the third positive approach of the United States and the Federal Republic of Germany, there is both a rigid constitution entrenching fundamental rights and a system of judicial review of the constitutionality of legislative action. Judicial review in the United States is, however, not derived from the constitution, but is to be traced to the decisions of *Marbury v Madison*. (Cranch, 1980:137). This approach affords maximum juridical significance to the constitutionalisation of fundamental rights. Statutes, which violate these rights, are null and void (Cappelletti 56).

Although international concern for human rights has cut across ideological boundaries, socialist societies exhibit differences of perspective and emphasis from the Western democracies. Whereas Western democracies still emphasise individual freedom, which implies limited government, socialism accentuates the society and is averse to limitations on a socialist government's freedom to act for the common good even at the expense of some individuals (Henkin 65). The demise of socialism in many former socialist countries means that individual liberty is again emphasised.

4.3.9 Interim evaluation

From the foregoing, it is clear that the idea of human rights has become universally accepted. This does not mean that human rights flourish everywhere and are observed effectively in all states by virtue of a bill of rights or by adherence to the international law of human rights. Nor does it imply that human rights have been incorporated into all cultures and are coveted by all governments. It only means that philosophical and political objections to the idea of human rights have been discredited and become irrelevant. Philosophical thinkers and the United Nations have propagated the idea of human rights. There has, however, been no consistency or uniformity of practice. Human rights are today finding place in contemporary political, ethical and moral philosophy, now again preoccupied with 'justice', 'liberty' and 'rights'. They have become the focus of national law and not any other un-enterprising consideration. The idea of human rights is pervasive in national and international law. It has been accepted by governments with differing ideologies. Although this universal acceptance may only be formal or superficial, and although emphasis differs, some stressing

individualism and others fraternity and community, no government today can seriously contest the ideology of human rights (Henkin 27-28).

It is accepted that every individual has claims against his society which entail freedom from too much governmental interference and support for economic and social welfare. Human rights include an area of autonomy, a core of freedom from majority rule, from official intrusion even for the general good. There has, however, been a shift from the original idea based on the social contract. Today they are based on the "contemporary values that are derived from human psychology and from sociology and that are expressed in positive law, national and international (Henkin 28 – 29).

Although the contemporary idea of human rights developed from the West, it has already been accepted by almost all governments of the world. The activities of the United Nations and other transnational organisations and specialised agencies have so popularised the idea of human rights that they now form part of customary international law.

After this exposition, the scene is set for a more fundamental consideration of the compatibility or otherwise of human rights with Christianity.

4.5 The Christian view of human rights

There is general international and local discussion of human rights. Even in Christian circles there has been a resurgence of interest in the issue of human rights (Marshall, 1995 : 436 ff; Marshall, 1995 : 461 ff; Marshall, 1995: 496 ff; Marshall, 1995 : 518). Apart from the developed Catholic attempts to found natural rights in natural law, most Christian discussions do not give an exposition of the nature, foundation and types of rights (Marshall, 1995 : 441).

In South Africa, especially before the adoption of the new Constitution there was considerable debate even among Christian theologians of the issue of human rights and their compatibility with or basis in Christianity. The overwhelming majority of

theologians supported the idea of human rights as being compatible with Christianity. There were various submissions which were made to the South African Law Commission which supported the idea of human rights although some had reservations and a few others were opposed to it (Interim Report on Group and Human Rights 1991 : 205 ff). There was a serious debate by some Christian legal academics on the compatibility or otherwise of human rights with Christianity. The two Christian legal academics who engaged in this discourse are Potgieter (1989) and Du Plessis (1990). It will be instructive to analyse their views in some details.

4.5.1 Potgieter

Potgieter (1989 : 386 – 408) regards the concept of human rights as a religion which is pursued internationally because that pursuit is based on false assumptions. He says the ideology human rights is strongly supported because it is regarded as causative of peace, prosperity, security and justice. What is disturbing to him is that this view is supported not only by lay people but also by church leaders. He regards this view as misinformed and as reminiscent of the support which in particular the Dutch Reformed Church gave to the policy of apartheid which it justified in terms of scripture but which it now rejects in support of a bill of rights. He therefore cautions against once again using the word of God in support of an ideology which is unchristian and unbiblical.

He points out that the view that the ideology of human rights is based on the bible is false. The bible does not provide for individual rights, but mainly obligations. These are obligations to one's neighbour. He also points out that justification for the ideology of human rights as being Christian or at least as being compatible with Christianity is the mistaken view that a person is the bearer of the image of God, that he or she is made in the image of God and his or her dignity should be protected. To him the view that people are made in the image of God is false and unbiblical. Fall into sin made man to lose that image of God. If people did not lose the image of God, then, as he argues, Christ came in vain. Moreover, it implies that ordinary sinful man has the same image as Jesus who is the real bearer of the image of God.

For him such a view is not only preposterous, but it is also blasphemous. He disputes that man is made in the image of God but argues that natural man is the bearer of the image of the devil whose desires he pursues. He is prone to indulge his sinful nature. The devil sometimes parades as the angel of light where he hides his inherent wickedness behind the smokescreen of holiness. As a result of people's sinful nature there is an increase in the crime rate and other misdemeanours like widespread marital infidelity and the consequent breaking down of marriage and family life.

If human rights were Christian, Christ would have propagated them and his disciples would have claimed them. As a fact they never claimed any human rights but had to obey the secular authorities. They had the life of humility and obedience which was led by Christ himself.

Potgieter further argues that the ideology of human rights is based on secular views. These views are not based on the bible, but they are sometimes in conflict with the bible. Their origin is in humanism and liberalism which emphasise the liberty of the individual. In his opinion people today do not need more freedom or liberty because that only leads to their engaging in sinful behaviour. What they need is more effective control. He also disputes that the basis of rights is the dignity of human beings or that they are God's supreme creation, but he asserts that rights are necessary for the maintenance of law and order because people owing to their fallen nature are prone to harm their neighbours.

One of the manifestations of people's sinful nature is their revolt against the authority of the state. There is too much emphasis on the dignity of the person and consequently the individual's claim to freedom is exaggerated. The depraved nature of people is underrated. Consequently, the need for the state to maintain law and order through effective policing is underemphasised. What is needed is a strong arm of the state, effective legal rules, an independent judiciary and effective police and security forces.

Potgieter further challenges liberation theology as being in conflict with Christianity and at least with the New Testament theology. He points out that Christ himself lived under an oppressive regime, but he never advocated the overthrow of the constituted

authorities. The same applied to his disciples. It was only Peter and John who challenged the priests when they tried to stop them from preaching the gospel of Jesus and declared that they would rather obey God than men.

Potgieter further points out that Christianity is based on love for God and one's neighbour and not on human rights. Similarly the belief that the protection of human rights will result in peace, reconciliation, security, justice and prosperity is not borne by the facts.

There are many who would strongly disagree with the views of Potgieter on the issue of human rights and Christianity. Only the views of Du Plessis in refuting Potgieter's rejection of the Christian nature of human rights are apposite here.

4.5.2 Du Plessis

Apart from questioning the methodology and the hermeneutics of Potgieter, Du Plessis (1990 : 403 ff) challenges the assertions made by Potgieter on the unchristian nature of human rights. He rejects the view by Potgieter that man is not made in the image of God as being unsound and unbiblical. He doubts the accuracy of Potgieter's view and points out that he misconstrues what it means to be made in the image of God. According to Du Plessis to be made in the image of God is not synonymous with being made identical with God. It simply involves an analogy. The model that was used in creating human beings is that of God himself.

Du Plessis also points out that there is no clear scriptural authority for the view that man is not made in the image of God. He attributes Potgieter's views to that effect to a faulty reading and understanding of Calvin on this issue. Du Plessis further rejects the view posited by Potgieter that man is made in the image of the devil. Similarly he points out that there is no clear word of scripture on which Potgieter relies.

That the fall into sin led to the total destruction of the image of God in man is seriously questioned by Du Plessis. He points out correctly that despite the fall into sin men still

retains the image of God. The image of God is not necessarily the same as sinlessness. If people completely lost the image of God owing to their fall into sin, Du Plessis further contends, this would mean that people were completely useless and of no value. There is no word of scripture which supports that. On the contrary the fact that John 3:16 states that "For God so loved the world that he gave his only begotten son that whosoever believes in him should not perish, but have everlasting life", is indicative that the fall into sin is not irreversible but that there is the potential of redemption. To argue otherwise would imply that God's adversary the devil discomfitted God

Apart from being the bearer of the image of God, according to the bible man has God's mandate to be here on earth. Consequently he can claim certain rights for being here. These are not rights against God, but rights against other individuals or even the government.

Du Plessis also questions the reasoning followed by Potgieter in that while he states that human beings are depraved and do a lot of evil, when it comes to the state and its authority, he seems not to have the same reservations. He wholeheartedly and enthusiastically accepts the authority of the state and that what is needed is strong state authority, being conveniently oblivious of the fact that the state can also abuse its authority and oppress people. The purpose of human rights is to protect people from the abuse of power by the state organs. According to Potgieter's reasoning, it is the subject who is affected by the inherent wickedness; the authority and individuals in authority are not affected by such inherent wickedness! Such a view needs to be stated to be believed!

According to Du Plessis this reveals the inarticulate premise on which Potgieter's views are based. He attributes this to reactionary theology which is apprehensive of the new political dispensation and would rather prefer to retain the status quo ante. This has been characterised by the "theological" rejection of the idea of human rights.

In the opinion of Du Plessis, the idea of human rights can be inferred not from one source in the bible, but from many, nor does the fact that the bible does not use that terminology imply that it is against the idea of human rights. When one looks at

various places in the Old Testament there are cases involving the aggrieved and the wrongdoer where the wronged party seeks a remedy. Moreover, if one looks at the law one may see it as a set of legal rules; alternatively one can see it as rights which individuals have.

In spite of this critique by Du Plessis, Potgieter remains adamant that the idea of human rights is unchristian and should be rejected or at least the Christian cloak thereof should be removed. He therefore rejects the arguments by Du Plessis (1990:413-422).

4.5.3 The Christian foundation of human rights

Of the opposing views expressed above, there is no doubt that the views of Du Plessis are more acceptable. It will not be necessary to reiterate most of these views. Suffice it to say that despite man's fall into sin, man still retains the image of God. If man had completely lost God's image, then, it would not have been necessary for God to make laws for people. In the Old Testament we have the laws of Moses and in particular the Ten Commandments. The Ten Commandments were reduced by Jesus into two Commandments, namely, wholehearted love and devotion to God, and love for one's neighbour as oneself? Can completely depraved people be capable of love? Why love then at all? The Ten Commandments can be regarded as giving people rights against those who violated them

The idea of human rights or rights in general implies that if you cannot love your neighbour, then at least do not harm him. The smaller being contained in the bigger implies that dictates of the law and those of Christianity are not in conflict in this respect. It is quite clear that if you love your neighbour you will not harm or kill him or covet his wife or possessions. You will do good to him. The Ten Commandments and other laws were given after the fall of man into sin.

There is also justification for regarding the justification for human rights on the basis that man is God's supreme creation. Even the psalmist declares:

“When I consider your heavens, the work of your hands, the moon and the stars which you have set in place; what is man, that you are mindful of him, the son of man that you care for him?

You made him a little lower than the heavenly beings and crowned him with glory and honour. You have made him the ruler over the works of your hands; you put all things under his feet (Psalm 8:3-6).

This, the psalmist said long after and not before the fall. Even Jesus declared that the law (sabbath) was made for man and not man for the law. He thereby confirmed that man is greater than the law and that the law should serve man and not the other way round. This demonstrates that man is still God's supreme creation.

What needs to be done is to understand what it means to be made in the image of God. Without pretending to be exhaustive, one can say that to be made in the image of God entails at least three things. It entails that human beings have a mind and can distinguish between right and wrong and can act accordingly. They can therefore be held responsible for their actions. It also means that they are not just flesh and blood but that they are also spirits and being spirit implies that they are higher than ordinary animals and they can relate to God. Animals cannot. Man can also plan and execute these plans. Animals cannot do this. Man has retained this even after the fall into sin.

Sometimes the idea of human rights is criticised on the grounds that the bible speaks not of rights but of obligations. This ignores the fact that a right has a corresponding obligation or that a right is the obverse side of an obligation. The reason perhaps why emphasis has been placed on rights in that governments have been culprits in violating the rights of the people or in failing to honour their obligations to the people.

The idea of human rights is sometimes criticised in Christian circles in that it promotes selfishness by enabling people to insist on their rights than obligations. This view disregards the fact that a person who is a human rights activist is not so simply by insisting on his or her rights but has to be concerned about the rights of others as well. In

any case there is nothing wrong with anybody starting a campaign for people to honour their obligations to others including the governments to their people.

It has been contended that Christ's disciples never claimed any rights. This ignores the fact that Paul was able to insist on his being treated as a Roman citizen when he had been arrested in Jerusalem after a riot. The commander had instructed the centurion to have him flogged. Paul asked the centurion whether it was lawful to flog a Roman citizen who had not even been found guilty. The centurion went to inform the commander about this. The commander was alarmed that they had put Paul a Roman citizen in chains. Those who wanted to question him withdrew immediately. Paul had used his right as a Roman citizen by birth strategically (Acts 22 : 22-29).

4.5.4 The Christian basis of human rights

The fact that man is made in the image of God is not just a meaningless shibboleth. It has certain implications. It means that he cannot or should not be treated anyhow. He must be treated with dignity as God's supreme creation. This is not dignity against God, but dignity as regards other human beings. It also means that one has a right to exist a right to life and a right to be unharmed. As human beings have bodies of flesh and blood, it means that humans have a right to remain whole, not to be harmed, maimed, tortured, molested, placed in hostage or terrorised. The basic needs of individuals to food, nurture, shelter and care are implicit in the right to life (Marshall, 1995 : 453).

Justice demands that there must be an allocation of material and cultural goods in such a way that human life is made possible, protected and enhanced so that humans can realise their God-given tasks. These tasks involve the use of nature and its resources. People also have a right to the use of the earth where God has put them (Marshall, 1995 : 454).

We may also speak of the rights of humans as parents to raise and educate their children for this is what God has commanded us. Similarly we may speak of the right to marry and have family life. As God holds us responsible for the politics of this world may legitimately speak of the rights of citizens to exercise responsibility and authority for the direction of the state. In each area of God's calling to humankind, individually and collectively, we are entitled to speak of the human rights to what is needed to fulfill those callings. The state is called upon to protect these callings. The limits on the state power may be justified by the fact that the state is a creature and servant of God. *Nothing in God's creation can function as the source and centre of all authority.* Such a centre of authority only lies with God. The state must recognise other authorities which are responsible to God, such as the person, the family, the church and others. It is in this mutual delimitation of authority, and its concomitant responsibility which creates rights in general and human rights in particular that we can base them on Christianity (Marshall, 1995 : 545).

4.6 **Conclusion**

From the foregoing exposition it is quite clear that the idea of human rights is not incompatible with and can be justified on the Christian basis. Christianity is not the only source of the idea of human rights; there may be others, but that is not reason enough for rejecting the idea. Even democracy was not created by Christianity and no one today rejects democracy in favour of monarchical rule on the basis of the fact that the bible does not talk of democracy. *The idea of human rights is a further development and refinement of the idea of democracy.* Including a bill of rights in the constitution is necessitated by the need to limit the power of government and to prevent the abuse of power. It is based on the realisation that not only dictators but also democratic majorities can oppress individuals and minorities.

It was made abundantly clear that Christianity cannot be identified with authoritarianism and totalitarianism. It cannot also be identified with the abuse of power. But it is much more compatible with the responsible exercise of political power and the consequent protection and equal treatment of all people. It emphasises fairness and justice which human rights seek to attain. It ensures that all people are protected in the country. It also engenders a feeling that the law is there for the people and is not against them. This is a feeling which was not general in the past.

CHAPTER FIVE

THE EQUALITY CLAUSE IN THE CONSTITUTION AND CHRISTIANITY

5.1 Introduction

In an earlier chapter it was stressed that government has an important responsibility of upholding public justice in dealing with its citizens including Christians. It is important to examine how our Constitution ensures that justice is done among its citizens. There is no provision in the Constitution which stipulates that government must uphold justice. This does not mean that the Constitution and the government are unconcerned about justice. This is done in a different way.

Our Constitution stipulates that everyone is equal before the law and has the right to equal protection and benefit of the law. It defines equality as including the full and equal enjoyment of all rights and freedoms. To promote the attainment of equality, provision is made for legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. In addition to this the Constitution prohibits the state from unfairly discriminating directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Not only the state, but also private individuals are prohibited from unfairly discriminating against anyone on the listed grounds. For this reason the Constitution stipulates that national legislation must be enacted to prevent or prohibit such unfair discrimination. Discrimination on one or more of the grounds listed in subsection (3) is presumed to be unfair unless it is proved that the discrimination is fair (section 9). This section is largely based on its precursor, section 8 of the interim Constitution.

This is an extremely important section in the Bill of Rights. So pervasive and resonant is its theme in the Constitution that it can be regarded as constituting a constitution within the Constitution. Equality is one of the core democratic values on which our Constitution is founded. Even in the limitation clause in section 36(1), it is one of the primary factors to be considered in limiting any fundamental rights, namely, whether the limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The reason for this is undoubtedly that the Constitution ushered in a new dispensation of freedom, equality and democracy which is a departure from the previous order characterised by injustice and inequality. It therefore deals with a matter of seminal importance in the reordering of South African society. This was also the approach followed in the constitutions of most of the African states when they attained their independence. It was also to be expected owing to the adverse effect racial discrimination in particular had had on black people during the colonial era. When black political leaders had the opportunity to control the destiny of their countries, they attempted to remove even the last vestiges of racial discrimination.

5.2 Implications of the clause

Although the implications of the equality provision have been analysed and commented upon in a number of cases and by various commentators, it does not appear that the last word on this issue has been written. Legislation and judicial interpretations of equality will continue to constitute important sites of struggle as regards the pace, nature and extent of transformation. As a result, the search for the real meaning of what equality entails and how it should be interpreted and applied in practice continues. There is no doubt that when the full implications of this provision are considered, they could be far reaching depending on how one interprets it. This provision aims to create an egalitarian society where justice and fairness prevails and where all people are treated as

human beings with dignity and self-worth. It is, however, couched in words which could convey the message that there will be total equality of all persons in every respect whatever the circumstances and that all people will enjoy all the rights fully in the same way. That could be regarded as utopian. But the fundamental question is whether it can really achieve this. Moreover, does Christianity insist on total or complete equality?

A constitution is both a legal and a political document. As a political document it tries to inspire hope by attempting to correct past injustices in order to create a better and securer future. For this reason it has been characterised as a 'snapshot at a moment in time, reflecting the hopes and fears of the nation at a specific moment between its misfortunes of the past and its aspirations for the future'. And in the words of Mahomed J in S v Acheson (1991(2) SA 805 (Nm)813).

"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is 'a mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion".

Because of this, the provisions of a constitution may sometimes be stated in an idealistic and abstract fashion. The purpose thereof is undoubtedly to convey a clear message about the separation between the old and the new orders. And there may be need for that in order to instill confidence in the new dispensation. As a legal document it has to be interpreted in such a way that it can be applied or implemented effectively in practice. Its interpretation must not only make sense, but it must also be seen to capture the new values. It is for this reason that it has been accepted that a constitution has to be interpreted generously. The major reason behind this, as has been said, is that the constitution creates a new dispensation. In S v Makwanyane (1990(3) SA 391(CC) para 262) Mahomed J had this to say:.

"In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different : it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic".

Its interpretation must therefore not be restricted to the way things were done in the past but must be in conformity with the values which the new order seeks to uphold. Any statutory interpretation must obviously take place within a social and historical context. Outside of the social and historical context it can be meaningless or misleading. This is true of the equality provision. Such a view may, however, be seen as restrictive in that it may be perceived as backward looking instead of being forward looking. It is important also to look at the equality clause in the light of Christianity.

5.3 **Equality of justice**

Apart from the question whether total equality can be achieved, another fundamental question is whether the Constitution should seek to realise justice rather than simple equality. The reason for this is that while the ideal of equality which the Constitution guarantees to realise is attractive and commendable, complete equality of all persons in all respects might be a will-on-the-wisp a goal easier longed for than attained. As a result it might be advisable to interpret it in a way that will be in accord with justice and fairness. In the words of Devenish (1999:36).

"It is regrettable that of all the noble principles of democratic philosophy, equality has proved the most intractable to convert from merely an ideal to the hard world of reality. In an ostensibly egalitarian age, inordinate social and economic imbalances still continue to blight the leading political democracies of the world, notwithstanding that policies of social democracy have gradually diminished the range and extent of inequality in them. Pernicious racial inequality in the United States as well as some other countries throughout the world has unfortunately proved itself to be not particularly responsive to reform within a democratic body politic".

Albertyn and Goldblatt on the other hand are firmly of the view that equality can be used as an instrument to bring about radical transformation of our society. They do not regard equality to be so abstract as to be impracticable. The authors regard transformation as entailing a complete reconstruction of the state and society which includes a redistribution of power and resources along egalitarian lines. This further entails "the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality". In addition, it comprises the development of opportunities which enable people to realise their full human potential in the context of positive social relationships. The authors further regard equality, as a value and a right, as being critical to the task of transformation. They are of the opinion that equality as a value gives substance to the vision of the Constitution, and as a right it facilitates the realisation of substantive equality, "legally entitling groups and persons to claim the promise of substantive equality, "legally entitling groups and persons to claim the promise of the fundamental value and providing the means to achieve this" (1998:249).

This instrumentalist conceptualisation of equality as a value and a right aimed at bringing about transformation, while commendable, is not free from problems. Values are themselves not facts but are mental constructs which we place upon certain factual situations. In themselves they have no substance although they provide norms which influence our decision of what is right. In order to use equality for transformation we must adopt a purposive approach the content of which is not based on equality but on something else. Moreover,

creating this equality does not depend on the law alone, but depends on the availability of resources.

The reason for the argument that the Constitution should rather guarantee justice is that when one unpacks equality, as it will appear here below, it becomes all the more elusive and nebulous. Moreover, treating people equally *whatever their circumstances, will not always lead to fairness or justice. But the concept of justice, while elusive, is easier to attain than complete equality.* Sir Norman Anderson is of the opinion that justice is not just a high-sounding ideal of little or no practical significance, but that it is in fact “a concept which is active and relevant in various contexts and systems of law”, and that “although it may not be precise at its edges, it can empirically be demonstrated to possess a core of substance which is tolerably clear and vitally essential to maintain ‘both individual liberty and social cohesion which law seeks to foster’ (1978:8).

It will therefore be necessary to analyse justice and equality separately, to look at the way the Constitutional Court has interpreted the equality clause of the Constitution and to draw the appropriate conclusion. In its interpretation of the equality clause the Constitutional Court has used dignity as a determinant of when discrimination will be unfair. The critical question is whether this approach of the Constitutional Court is the correct one.

It could be argued that to suggest justice as the appropriate concept to use rather than equality is to substitute one vague term for another equally vague one. As has already been said, that is not necessarily so. The reason for the preference of justice is that it contains fewer contradictions and qualifications than equality. Once justice is understood as fairness, it is easier to apply. Although equality may be regarded as an essential ingredient of justice and fairness, equality does not always equal justice and fairness. What perhaps may be necessary is to clarify what type of equality will lead to justice and fairness. Moreover, Christianity is much more practical when it comes to justice as will be shown there below. It does not subscribe to high-Labutin ideas which will have no practical significance

5.4 **The concept of justice**

5.4.1 **The concept of justice in general**

It will not be possible to conduct an exhaustive analysis of the concept of justice within the confines of this inquiry, and it may be otiose (Dlamini, 1987 : 270 ff). Copious writings have emanated from the enterprising pens of more eminent scholars on the subject. Although thinking on what justice entails has exercised the minds of philosophers, theologians and lawyers alike over the centuries, no agreement has been reached on this although the weight of opinion may gravitate towards a particular direction. It is unfortunate that such a fundamental concept to organised society should still be debatable. It will therefore be appropriate to refer to the salient vies of some of these thinkers. The reason for referring to these views is not only to confirm that nothing is new under the sun, but also to demonstrate that this subject has to be approached with caution, and no hasty conclusions should be drawn.

Thinkers on justice over the years may broadly be classified into two main categories, namely, those who define justice as meaning equality and those who circumscribe it as freedom. What is clear, however, is that justice may not be equated with equality or freedom; it may rather be the product of equality under certain circumstances. Freedom may also be regarded as a separate value. That the same concept could be defined in terms of two sometimes contrasting phenomena may be intriguing. Although both freedom and equality underpin the vision of democracy, and although there are demands of equality which may limit absolute individual liberty and instances where the dictates of freedom may inhibit the pursuit of equality (Albertyn & Kentridge, 1994 : 150). The reconciliation of liberty and equality has been regarded as the dilemma of democracy (Ebenstein, 1969 : 532).

5.4.2 **Plato**

Perhaps the oldest theory of justice is that of Plato (1994 : 180 ff). Plato regards justice as consisting of a harmonious relationship between the various parts of the state. Every individual must do his duty in his specific place and do the thing for which he is best suited without meddling into the affairs of other members. Plato's state is a class state consisting of rulers and subjects. In his view some people are born to rule, some to assist the rulers in the performance of these duties, and others are supposed to be farmers or artisans or traders. Any person who does a job for which he is not suited is, to him, not just acting inefficiently and ineffectively, but also unjustly. It is the function of the rulers of the state to see to it that each person is given his appropriate station in life, and that he properly performs the duties of his station. This theory of justice has not had significant following and impact and it is doubtful whether it does contribute to the understanding of justice, although some might hold a contrary view (Domanski, 1999 :335; Domanski, 1999 : 473 ff).

5.4.3 **Aristotle**

Aristotle, in his Nichomachean Ethics (1971 : bkiv) on the other hand, approached the problem of justice differently. Justice, in his opinion, consists in equality of treatment. It entails an equitable distribution of the goods among members of the community, which just distribution must be maintained by law against any violation. He distinguishes between distributive, commutative and retributive justice. Distributive justice involves the distribution of offices, rights, honours and goods to members of the community on the basis of geometrical equality, which takes into account the peculiar inequality of the subjects considered for the distribution. The criterion which should be used to determine equality is personal worth or merit. Equals must be treated equally and unequals must be treated unequally. And, in Friedmann's paraphrase "injustice arises when equals are treated unequally, and also when unequals are treated equally" (1967:21).

The challenge has always been to establish who are equals and who are unequals, or put differently who are alike and who are unlike. This is not an easy task. Perhaps at the time when Aristotle propounded this view, it was easy to distinguish between equals and unequals. Today some of those distinctions may not be valid especially in the light of the universal acceptance of the equality of all human beings. It has been suggested that the answer to the question of who are equals consists of two components, namely, a determination that two people are alike, and a moral judgment that they ought to be treated alike. That people are alike or equal may be interpreted differently. It could mean people who are alike in every respect, which is highly doubtful, or people who though not alike in every respect are alike in some respects. This in itself is not conclusive and could lead to some absurd consequences (Western, 1982:544-5).

Commutative justice is based on arithmetical equality, which is different from geometrical equality in that it disregards subjective inequalities and requires strict equality irrespective of any subjective attributes of the parties concerned. Corrective or retributive justice, according to Aristotle, guarantees, protects and maintains the distribution against illegal attacks and restores the disturbed equilibrium. If harm has been suffered, it must be compensated. Here the equality postulated is arithmetical, being unconcerned with the subjective qualities of the persons, but merely concerned with the computation of losses suffered.

Although the Aristotelian concept of justice is not free from anomalies, equality of treatment as the central notion of justice has become the cornerstone of modern theories of justice. A pertinent question is whether equality and justice are synonymous. It would appear that these are not synonymous. Equality may be an ingredient of justice, but justice does not mean equality under all circumstances. Western on the other hand feels that they are synonymous. As he puts it: "Just as justice can be reduced to equality, equality can be reduced to a statement of justice; one simply reverses the sequence of steps" (Western, 1982:557). This view of Western is obviously not accurate.

5.4.4 Justinian

Justinian, (Inst. 1.1. pr; Dig 1.1.10) the Roman jurist, defines justice as “the set and constant will to give every man his due”. This definition is attributed to the other Roman jurist Ulpian, and it is to some degree related to the Aristotelian idea although it differs in formulation (Bodenheimer, 1962 : 181). It differs in that it emphasizes the element of desert rather than equality. Desert can be an element of justice, but it does not completely define justice. This definition has also been regarded as begging the question as there is no prior determination of what is man’s due. For this reason it has been said that “to render justice meaningful one must look beyond the proposition that every person should be given his due to the substantive moral or legal standards that determine what is one’s due” (Western, 1982:556-7). It could be argued that this implies equality of treatment for those in similar circumstances or that people should be treated fairly as human beings with dignity.

The test of those who are similarly situated has been trenchantly criticised as being unhelpful (Albertyn & Kentridge, 1994 : 153 – 4). Although this test has been criticised, it is submitted that it nonetheless still has a role to play (Tussman & ten Broek, 1949 : 344, 346; De Waal *et al.*, 2001 : 198). The criticism levelled against “the similarly situated” test, is that it is inadequate as it does not provide criteria by which to establish “(a) when a person is similarly situated and to whom; (b) when a person should be treated in the same way, or differently; and (c) what kind of different treatment is appropriate” (Albertyn & Kentridge, 1994:153). Moreover, it fails to differentiate between legitimate and illegitimate legal differentiation (Albertyn & Kentridge, 1994 : 153-4). Notwithstanding these cogent criticisms, there will be instances where those who are similarly situated must be equally treated, and where they are differently treated, the one adversely affected by such treatment may challenge the discrimination. The reason why this test still has a role to play demonstrates that the equality provision has to be contextualised; it cannot be applied in abstract. Equality generally entails a comparison. It will therefore be denied if one

category of people is entitled to benefits to which another group may not be entitled without any justification (Murray & Kaganas, 1991:127).

A further complication is that equality of treatment does not mean that all people should be treated alike whatever their peculiar circumstances, because that could lead to absurd consequences. It should rather be interpreted to mean that if there is disparity of treatment, it should not be motivated by arbitrary or capricious considerations, but should be based on objectively justifiable and acceptable ones (Hahlo & Kahn, 1968 : 35; Western, 1982 : 556 -7; Tussman & ten Broek, 1949 : 344). This is because differences in the conditions of persons may no doubt necessitate legal differentiation (Hahlo & Kahn, 1968 : 35; Western, 1982 : 570) and to summarily treat them equally would lead to unfairness. The distinction between justifiable differentiation and invidious differentiation is often expressed by the use of the terms "differentiation" which is devoid of negative undertones and "discrimination" which has some negative connotation. But this distinction may be an oversimplification of the situation. The greatest weakness of the equality-of-treatment theory is that it contains this inherent contradiction of equality that may not mean real equality in all cases. Moreover, it may in some cases be difficult to decide when cases are alike and when they differ. The law itself does not always provide a yardstick to establish this. Experience has taught that it is rather the moral outlook of the people in a particular society at a specific time which is generally decisive. This accounts for the somewhat relative nature of justice, (Hart 1962 : 155-158; cf Friedmann, 1967 : 346) although it is more one's conception of justice which is relative than justice itself.

5.4.5 **Herbert Spencer**

Herbert Spencer (1897 : 61-62) adopted a fundamentally divergent view of justice. For him the underlying ideal of justice is not equality, but freedom. As he postulated it, every individual is entitled to acquire whatever benefits he can derive from his nature and capabilities. Although he is allowed to acquire

various rights and freedoms, he is only limited by the consciousness of and respect for the unhindered activities of others who have similar claims to freedom. "The liberty of each is to be limited only by the liberties of all". As he further puts it:

Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man (1897: 62).

5.4.6 **Emmanuel Kant**

A similar approach to justice was adopted by Emmanuel Kant. According to Kant liberty is the only original, natural right belonging to each person in his capacity as a human being. For him therefore justice and law represent all "the conditions under which the arbitrary will of one can coexist with the arbitrary will of another under a general law of freedom" (Kemp, 1968 : 85; Bodenheimer, 1962 : 181).

5.4.7 **Hart**

Hart (1962 : 154 ff) on the other hand, reverted to the Aristotelian idea of justice as the treatment of like cases alike although he does not answer the question of who are alike or who are unlike. He elaborates on the idea of distributive and retributive justice. Justice, as he puts it, is the equivalent of fairness, which he does not regard as necessarily co-extensive with morality in general, but as only relevant to the assessment of conduct not of a single individual, but of the manner in which classes of individuals are treated when some burden or benefit falls to be distributed among them, and when compensation or redress is claimed for injury suffered. Although the terms "justice" or "fairness" can be used in other contexts, he regards those contexts as derivative applications of the notion of justice as equality of treatment which can be adequately explained once the primary application of justice to matters of distribution and compensation is understood (1962:154).

5.4.8 Rawls

Another thinker who contributed to the elucidation of the concept of justice is Rawls (1971 : 12 ff). Rawls, does not define justice as fairness because he does not regard the two terms as synonymous, nor does he regard it as equality. In his opinion, justice comprises principles which rational beings would rationally adopt as fair if they had to decide what is fair in general without knowledge of their own particular position in society, or, as he puts it, principles which would be chosen by an individual "situated behind a veil of ignorance". These entail, in broad outline, that every person must have the largest political liberty compatible with a like liberty for all, and that inequalities in power, wealth, income and other resources must not exist except in so far as they work to the absolute benefit of the worst-off members of society. The greatest weakness in Rawls's theory of justice is that it appears a bit complicated. The merit of any theory is that it must make complex issues simple. After all it has to apply to the ordinary affairs of people.

5.4.9 Dworkin

Rawls's theory has elicited considerable favourable and adverse comment (Barry, 1973 : 1ff; Wolff, 1977 : 1ff; Dworkin, 1977 : 151 ff; Davis, 1999 : 8 ff). Dworkin, however, points out that many of Rawls's critics dispute that men and women in the original position would unavoidably choose these two principles. Owing to the conservative nature of the principles, they would only be chosen by conservative people and not by those who are natural gamblers. Dworkin does not regard this criticism as valid. He assumes that the critics are wrong although he does not pursue this issue any further. He argues that his main concern is to establish why men and women in the original position would choose Rawls's two principles as being in their best interest (Dworkin, 1977 : 150 ff). Dworkin distinguishes between antecedent interest and actual interest (1977 : 153). He is of the opinion that Rawls's men would inevitably choose conservative principles because this would be the only rational and fair choice

to make in the circumstances. He further points out that the technique of equilibrium plays an important role in Rawls's argument. This technique of equilibrium assumes that Rawls's readers have a sense of intuition that certain particular political arrangements or decisions are just and others are unjust. These intuitions and convictions are arranged by each in an order that designates some of them as more certain than others. It is the task of moral philosophy to provide a structure of principles that supports these immediate convictions (1977:150 ff).

Dworkin conducts a comprehensive and complex analysis of reflective equilibrium, social contract and original position as indicators of a deeper theory of justice. He concludes that justice as fairness is based "on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or merit or excellence but simply as human beings with a capacity to make plans and give justice" (1977:182).

5.4.10 **Hahlo and Kahn**

Hahlo and Kahn (1968 : 31) circumscribe justice as "the prevailing sense of men of goodwill as to what is fair and right – the contemporary value system". Much as this definition is commendable for its flexibility, it seems to create the impression that justice is no more than the transient views of particular persons at a particular time. Yet it does illustrate an important point, namely, that *justice is influenced by the society's sense of values. Values change. As a result, what is regarded as just today may not be considered just tomorrow. Moreover, ideas of justice vary according to societies owing to the different value systems in various societies. Yet it is more correct to distinguish the concept of justice from its practical application.*

5.4.11 **Bodenheimer**

From the above, it would appear that justice is sometimes more a reconciliation of freedom and equality (Bodenheimer, 1962 : 183). The greatest difficulty, however, has been the practical application of the idea of justice to the everyday affairs of people whether in the distribution of goods and benefits or in the compensation for harm suffered. history does not provide one egalitarian pattern. In the words of Bodenheimer:

“Recorded history has furnished no proof so far that one particular conception of justice in human social affairs must be looked upon as so superior to all rival conceptions that the latter are a priori condemned to failure or bankruptcy” (1962:184).

What is indisputable is that justice is often identified with a certain attitude or disposition of the mind. It requires an impartial, objective and considerate attitude towards others, “a willingness to be fair, and a readiness to give or leave to others that which they are entitled to give or leave to others that which they are entitled to or retain”. This is evident from the theory of Rawls. As Bodenheimer graphically explains:

“The just man, either in private or public life, is a person who is able to see the legitimate interests of others and to respect them. The just father does not arbitrarily discriminate between his children. The just employer is willing to consider the reasonable claims of his employees. The just judge administers the law with even-handed detachment. The just lawgiver takes into account the interests of all persons and groups who he is under a duty to respect. Thus understood, justice is a principle of rectitude which requires integrity of character as a basic precondition” (1962: 185).

Justice, as a principle of rectitude is the opposite of selfishness. It militates against inconsiderate claims made with disregard for the justified claims of others. For this reason justice, although it is more limited in scope than rationality, has been regarded as synonymous with rationality, which entails the ability to abstract one's ego and place oneself in the position of the other person, and while generalizing one's sentiments and reactions, project oneself into the person of

another. This capacity to think with detachment makes one realise the importance of certain legal and moral restraints in the process of adapting one's needs to the needs of others in order to make life tolerable in the community. This quality to think with detachment on the inevitable or most desirable condition of social co-existence has been regarded as rendering human beings capable of framing generalized ethical systems and codes of law (Bodenheimer, 1962 : 185).

5.4.12 The biblical concept of justice

Although the bible does not define justice by name, certain principles in the New Testament can be equated with justice. Treating others in exactly the same manner you would like them to treat you under similar circumstances, can be regarded as an enunciation of the biblical concept of justice (Matt 7:12; Luke 6:31). It is reinforced by the commandment of loving one's neighbour as oneself. This is based on the assumption that a person will always act in his or her best interests. Acting in another's best interests is obviously the most desirable thing to do. It prevents conflict and fosters harmony. This concept of justice eschews the problem produced by the equality-of-treatment principle. The notion of justice as equality of treatment suffers from two shortcomings, namely, that if people who are in the same circumstances are mistreated equally, it does not mean that justice has been done. Thus the fact that blacks were in the past mistreated as a group and equally, did not mean that justice was done. It also fail to articulate that justice is not simply confined to be comparison of individuals, groups and legally relevant situations for the purpose of establishing the similarity or dissimilarity, but is much more concerned with the proper judicial treatment of peculiar situations and uncommon combinations of events which cannot easily be compared. It is for this reason that it has been suggested that the conception of justice as equality of treatment must be complemented by the other conception of justice which is that everyone should get what he or she deserves (Bodenheimer, 1962 : 194-195).

From the foregoing discussion, the preponderant view is that justice entails fairness which may imply that people should be treated on the basis of equality. But equality is not the only consideration when it comes to justice. Justice may be done by treating people differently if they are not in the same circumstances, or if it is objectively justifiable to do so. It may also entail that people, apart from their basic humanity, should be treated according to individual merit or desert. Obviously justice militates against any form of invidious discrimination. It is for this reason that justice is preferred to equality. If equality is a predominant element of justice, it is therefore imperative to analyse it in some depth.

5.5 Equality considered

The issue of inequality of treatment is an old one. From time immemorial people have used all sorts of attributes to justify why they should be entitled to more rights and privileges than others, and why others should be discriminated against with impunity. We have had people being treated unequally and unfairly owing to race, colour, social class, birth, sex, culture, religion and many others. This has often resulted in bitterness, resentment and hardship for those discriminated against, as they perceive this as unjust and unfair. Such treatment has led to discontent and rebellion. This was in particular the situation in South Africa owing to the policy of apartheid which provided for inequality of treatment on account of race and colour. The idea of human rights was in particular evolved to deal with situations like this.

It is for this reason that revolutions erupted and wars were fought in order to do away with real or perceived inequality. The French Revolution is a well known example. The slogan for the French revolution was: liberty, equality and fraternity (Van Wijk & Van Zyl, 1984 : 331). It is interesting that equality featured prominently here. There is equally no doubt that although there have been various theories of justice, equality of treatment is the most influential

(Van der Vyver, 1976 : 3). Discrimination or inequality of treatment is therefore generally regarded as unjust and unfair.

The crucial question is: what do we mean by equality? This question may be regarded as redundant because over the years great political thinkers have expressed themselves on this (Aristotle, 1969 : 97 102; Hobbes, 1969 : 373; de Tocqueville, 1969 : 551) and there have been declarations which assert the equality of people. The well known American Declaration unequivocally states: "We hold these truths to be self-evident, that all men are created equal...". The Virginia Declaration of Rights similarly proclaims: "That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity". Article 1 of the Universal Declaration of Human Rights of 1948 equally declares as follows:

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

These are indeed solemn declarations. But what do they really mean? The problem, as has been said, is that people are both equal and in some respects unequal. As human beings, they are equal. There is no lesser human being; but all are human beings, and they are made in the image of God and descended from the same ancestors, Adam and Eve. They are the object of God's love worth living, suffering and even dying for. That in itself is evidence of their equality. People have, however, not always been so equally treated and people have been treated differently on grounds that were unfair. And that is why these declarations had to be made. Even today for a variety of material and non-material reasons people are treated differently. This is so not only socially but also legally. The reason why perhaps emphasis has been placed on equality is that in the history of humankind people were treated unequally and unfairly for spurious reasons.

The American declaration is for instance true but it is not the whole truth. That human beings are created equal is true, but what it does not say is that there are a variety of reasons which may lead to differentiation or inequality of *treatment after a person has been created*. The problem with this declaration is that it is a political statement which tends not only to exaggerate but also to be one sided. It is understandable that it should exaggerate because it was a reaction to a certain situation which in many cases led to overreaction. Any reaction tends to lead to overreaction. It needs to be qualified so that it can be a statement of the truth or should come nearer the truth.

The truth, as has been said, is that people are both equal and different in some other respects .It does not mean that in the absence of race, for instance, all black people are equal in all material and non-material respects. Similarly, even in the absence of sex or gender, it does not mean that all men are equal in every respect or that all women are completely equal in all respects. A woman will not agree that she is equal to her domestic helper in all material and non-material respects. This has nothing to do with people being regarded as not human. Admittedly there have been times in the history of humankind when some people were not regarded as human beings and this may account for the sensitivity to any suggestion of inequality. Slaves are a classical example. In various societies where slavery was practised, a slave had no rights but was regarded as an object of a right; he or she could be sold or disposed of like a chattel. He could also be killed with impunity (Buckland, 1963 : 62 ff). It is interesting to realise that when the American declaration was made, slavery was widely practiced in America and yet those who made the declaration were most probably oblivious of this fact. When they declared that all men are created equal, they did not include slaves or even women.

Apart from slavery people have also been regarded as inferior because of their race, colour, class, sex, or gender and other attributes and were consequently treated unfavourably. One of the ancient examples was that of the discrimination among the Romans between patricians and plebeians (Robinson, 1932 : 28 ff). The French had their noble and lower classes. The South African

policy of apartheid was the most recent example. It can be safely said that the perennial problem of human beings is their failure to treat others as fellow human beings, with fairness and justice and with love. This continues even in the presence of Christianity. They always find pretexts for treating others differently. Unless restrained by some rule or tradition, they tend to treat others who may differ from them unfairly and unfavourably especially those who are not in a position to retaliate. Most thinkers are, however, agreed that most of the attributes which were used in the past for meting out unequal treatment do not qualify for treating people unequally today.

Even if you eliminate these factors which have been used to mete out discriminatory treatment, there will always be some form of inequality. It is perhaps for some of these reasons that some commentators have regarded the equality provision as meaningless or useless. In the words of Western, "(e)quality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless a formula that can have nothing to say about how we should act. With meaningless a formula that can have nothing to say about how we should act. With such standards, equality becomes superfluous a formula that can do nothing but repeat what we already know" (1982 : 543) Similarly, in the words of Devenish: "Regrettably, equality before the law is frequently a myth even in ostensibly democratic countries with rigid constitutions incorporating justiciable bills of rights, since affluence, race and political power inevitably influence the administration of justice to a greater or lesser extent" (1999:39).

Should we therefore jettison equality as useless? Not necessarily. What we need is an understanding of what equality entails. This is that all people should be treated equally as human beings. Nobody should be treated as not being human or as being inferior and therefore deserving of unequal treatment owing to his or her race or colour or gender or religion or belief or other irrelevant attribute. The reason for this is that these are attributes about which a person can do little or nothing. They do not derogate from the common humanity even if they are intimately connected with a human being, or they entail

certain choices that are so fundamental to self-definition as to merit protection (Albertyn & Kentridge, 1994 : 168; Tussman & ten Broek, 1949 : 353). To use them to mete out discriminatory treatment is therefore unfair and unjust. As the saying goes ,the leopard cannot change its spots. These are the grounds listed in section 9(3) of the Constitution. But having accepted that all people are human beings and therefore worthy to be treated as such, with dignity and respect, this does not mean that for all practical purposes they will be treated identically whatever their individual circumstances. This is a result of a number of social, economic, political and other factors which may necessitate differential treatment. For this reason it has been said that “the demand for equal protection cannot be a demand that laws apply universally to all persons” (Tussman & ten Broek, 1949:33).

Although the term “equality” may generally be used, what is meant thereby differs according to circumstances. Sometimes the conceptual confusion arises from the inability to realise that equality does not mean just one thing. There is what one could call basic equality as opposed to simplistic equality or even formal equality. Basic equality entails that all people are equal as human beings with dignity and should not be discriminated against on any of the grounds mentioned in section 9(3) of the Constitution because these are not relevant to the way people should be treated, but “are irrelevant accidents in the face of our common humanity” (Tussman & ten Broek, 1949:353). Discrimination based on these grounds detracts from basic humanity or equality and is therefore unfair invidious and unacceptable. From there equality becomes relative and sometimes sectional and differentiation may be justified on various grounds which may include those who are similarly situated and other grounds which are not regarded as unfair.

Society in general, accepts some of these inequalities or differentiations in treatment. It is for instance, accepted that although a child is a human being for all practical purposes, it is not equal to its parents or other adults. A child below the age of eighteen years may not be allowed to vote. Such discrimination is permissible not because it is benign; but it may be based on the

grounds that such a child does not possess enough knowledge to be able effectively to exercise the vote although such a generalisation may be arbitrary. There may be children who are fourteen or fifteen who may be sufficiently politically aware and informed as to be able to exercise their vote. But the law is not based on exceptional cases but on average ones. The average child may not possess that competence or knowledge and may be easily influenced. Moreover, such prohibition from voting is temporary and not permanent and it does not derogate from the basic humanity of the child. Children themselves may not feel they miss much if they do not vote. There are also adults who because of a lack of education may not be adequately informed about issues of government and yet they are entitled to vote.

An employee is for all practical purposes equal to his or her employer as a human being, but for other purposes is not equal to the employer. There will therefore be instances where the law treats them equally and for other purposes differently. The employer is in a superior position for certain purposes. He or she has greater wealth and therefore can acquire more things than the employee. He or she can even afford to pay the employee for the work done. But this does not mean that he or she is entitled to exploit or treat the employee anyhow. The employee is entitled to be protected from the exploitation by the employer, and to be paid reasonable remuneration for the job. But any law which says that an employee has to have the same rights and privileges as the employer would lead to absurd consequences. For this reason there is inequality which society tolerates and which it accepts. The justification for this discrimination is that the employer and the employee are not in the same position or similarly situated.

Although all citizens of the country are regarded as equal and as having equal rights, some of them have, for a variety of reasons, more rights, powers and privileges than others. The President of this country for instance, has more powers and privileges than any other citizens of this country. Those are not just social in nature, but they are also legal. While as a person he is equal to them, he or she may be treated *unequally with them for other purposes*. This may be

ascribed to the need to give him or her effective power for providing leadership in the country. Therefore the law allows a form of permissible differentiation. Similarly judges have certain immunities which ordinary people do not have. They also have salaries and other benefits which are protected differently from those of other people. This may be justified on the grounds that as judges you need competent and highly skilled people. You have to not only pay them adequately in order to attract them to these positions, but you also have to give them certain benefits and immunities to ensure that they are not susceptible to corruption and to guarantee their independence so that they can dispense justice fearlessly and with even handedness. They have to deal with sometimes complicated cases and you have to reward them for that. Certain jobs demand high skills, intellect and ability. Those who do them have to be remunerated differently from those who do "ordinary jobs". This is sometimes based on practical considerations. If a judge were to be paid the same salary as a clerk or a rector of a university as a junior lecturer, why would one bother to become a rector or a judge? The implications thereof are quite obvious. Treating judges differently as a group therefore is permissible. What will not be permissible is to treat some judges differently from others because of their race, colour, sex or gender for instance.

Even at birth people may not be born with the same talents. And in many cases this will result in inequality of treatment in later life. One person may be born beautiful and another one not so attractive. One person may be born highly intelligent and another one dull. The beautiful person will always enjoy greater attention when she is older. She may be entitled to become a beauty model and to enter a beauty contest. The other one who has not been endowed with such beauty may not enter such a contest or even if she enters the contest stands no chance to win. And if she does not win she may not complain that she has been treated unequally and discriminated against. She cannot claim to be equally beautiful as the other models. Obviously her beauty or lack of it should not lead to her being treated as less than human.

Even if these women do not become models, a more beautiful woman will attract more men for favours and for marriage than the one who is not beautiful although marriage is not the exclusive preserve of beautiful women. *Beauty sometimes is more than skin deep. There are other qualities which may make an unattractive woman attract a man to marry her.* The one who is not beautiful cannot complain anywhere that because she is not as attractive as others, she is discriminated against because she does not enjoy the same favours as the more beautiful one. The law will not assist her to get a man of her choice to marry.

Similarly two people are born at the same time. The one is a genius and the other is dull. They may be born of the same parents. Although these people are equal as human beings, they have unequal talents which will lead to differentiation and inequality in later life. The one will become a whiz kid in science and mathematics and will therefore be an engineer or leading scientist, but the other one will only be able to be a street sweeper. Can they be treated equally in all respects? The answer is that if they are treated in the same way, that would be unfair. In fact, it would lead to absurd consequences. There are many other examples one can mention.

What inference can be drawn from this? The inference to be drawn from this is that there are permissible and impermissible forms of differentiation. *What is necessary is that if there is a need for differentiation this differentiation should be based on objectively justifiable criteria and not on capricious and arbitrary ones.* In the few later examples mentioned above, the justification will be individual desert. The discrimination will be based on the ground that either the one deserves what he or she gets or does not deserve what he or she does not get. But these attributes or lack of them will not mean that they are not entitled to be treated as human beings with dignity.

It could be argued that some of the examples given above are not particularly apposite. There is no one law for beautiful and intelligent people and another for ugly and dull people. While this may be so, under the guise of equality

certain attributes of people affect their enjoyment of certain rights .Similarly citizens who are illiterate, uneducated or semi-literate cannot be regarded as being in the same position as those who are properly educated so as to enjoy the rights of freedom of expression or the right to participate meaningfully in the political process. Even from a Christian perspective, Christianity does not insist that all people should be treated equally whatever their circumstances.

The fact that forms of discrimination are permissible is based on the fact that our society encourages certain practices or values as being in the overall interest or benefit to society. These forms of discrimination cannot be regarded as unfair. Our society not only condones but it also encourages and rewards hard work, industry, development in science and technology, and therefore research and invention, economic development, the creation of jobs and the consequent improvement of the quality of life of people to mention but a few. Anybody who does these things is encouraged and rewarded. This is in line with Rawls's theory that inequality in wealth, power, income and other resources should not exist except in so far as they work to the absolute benefit of the worst-off members of society (Rawls, 1972 : 75). Therefore what a person who does some of these things gets, apart from the ordinary person, is based on individual desert. This is so because one of the things for which people have to strive is not only to survive, but also to live life to its fullest (Hart, 1962 : 81 ff). Any person who does things which will have the effect of improving the quality of life of society is therefore not only encouraged but also rewarded therefor. Society is interested that there should be order and that there should be justice and fairness. That is why those who are engaged in the administration of justice or in the running of the country or institutions are not only given more powers than the ordinary person, but they are also rewarded for the difficult task of maintaining order and justice and for running the country or institutions. Although they are given power, it is also necessary that they do not have absolute power because absolute power leads to abuse.

There is equally no doubt that people do not like that there should be great disparities between individuals. That is why society, while it may applaud intelligence and expertise, appreciates an intelligent person who is humble, who while he or she is capable of doing more than others are able to do, yet does not always remind them of this. Similarly, while people respect a person who is either a judge or politician of a country, they appreciate him or her all the more if he or she is humble, approachable or shows a caring attitude. The same can be said of the rich and the beautiful. That is why people will applaud a rich person who gives generously to charity, and thereby minimizes the gap between the rich and the poor. Moreover, society does not do away with rich employers, but it will always appreciate an employer who pays his or employees well and does not exploit them (Bodenheimer, 1962 : 185).

An interesting question relates to the differentiation between the rich and the poor. Although the law may claim to do away with the discrimination between the poor and the rich, it cannot completely do away with this. As long as that differentiation is not based on entrenched additional grounds like race, colour, sex or gender, it may be difficult to completely eliminate it. Chaskalson comments that "No society can promise equality of goods or wealth. Nor could it reasonably be thought that this is what our Constitution contemplates" (2000:202). Admittedly the state has an obligation to try to bridge the gap between those who have adequate means and those who are needy by taking reasonable steps to provide for basic needs such as food, water, housing, health care and social security (section 26 and 27 of the Constitution). Apart from these disparities in wealth will continue and this has legal implications.

An example will illustrate this point. A poor man has a case against a rich one. From the start the odds are against the poor man. They may both engage lawyers or if the poor man cannot afford a lawyer, he may obtain legal aid. But complete equality will not be realised that way. The lawyer who may represent the poor man may be an average lawyer whereas the rich man will employ the services of a distinguished silk because he can afford it. The poor man cannot insist on the same nor can he insist that the rich man should have a similarly

average lawyer in order to conform to the dictates of equality. Although a silk will not guarantee success, the rich man has an advantage: the judicial officer will listen more carefully to what is said by a silk than by the lawyer obtained through legal aid. Apart from that the silk may be more skilled and articulate than the ordinary attorney or junior advocate. The results may then be shaped accordingly. Thus there will be formal equality but not complete substantive equality (Albertyn & Kentridge, 1994 : 152; Devenish, 1999 : 38 – 39).

This means that society will never completely do away with differences and in some cases inequalities. If a rich man were to be forced to have the same calibre of lawyer as his adversary, he might regard this as being unfair and might even contemplate leaving that country to live in a place where have freedom of choice. This will be so because he believes he can afford it .Moreover, equality is not the only consideration. Freedom is equally important. Treating lawyers differently, according to their deserts, motivates some of them to work harder and to become silks for instance. That has its own rewards. Competition may be healthy. Obviously this is a mark of a capitalist society. In a socialist society things may be different. Those who believe in communism for instance espouse a classless society and consequently complete equality. As a result they would want to eliminate all forms of inequalities or differentiation, because they regard differentiation as the source of all evil. In the words of Marx and Engels: “The history of all hitherto existing society is the history of class struggles” (1968:723). And the purpose of Marxism has been to eliminate these classes and to produce a classless society. The challenge for communism has, however, been how to achieve this ideal of absolute equality in a way that is acceptable and upholds human freedom and dignity (Ebenstein, 1969 : 698 ff). A further challenge has been to maintain complete equality through state control of the means of production and to provide incentives for advancement. Even in socialist countries total equality in all material and non-material aspects has not materialised. In fact one of the tenets of Marxism is that “from each according to his ability, to each according to his work” (Ebenstein, 1969:694) which in any case implies some consideration of desert and consequently inequality.

From an aesthetic point of view, if all people were therefore the same and having all attributes in equal measure, life would not only be monotonous, but it would be dull. Everyone would be self-sufficient and every person would be independent and an island. This, however, should not be regarded as support for invidious discrimination based on the listed grounds in the Constitution. It is simply to assert that complete equality in every respect is not necessarily an ideal. What is important is that people should be treated fairly whatever their position in life.

From the above discussion it is clear that any statement relating to equality may not simply be a statement of fact, but may be aspirational. As Chaskalson puts it "The Constitution offers a vision of the future. A society in which there will be social justice and respect for human rights, a society in which the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another" (2000 : 205). Apart from basic equality, there is no fixed content of equality; it depends on context and comparison and there are impediments to the attainment of complete equality. The suggestion therefore that it can be used as a tool to facilitate transformation while commendable may have its limitations. This, however, should not detract from people being treated with equal respect and equal concern. This implies that equality and dignity are clearly inseparable (Chaskalson, 1999 : 202-3).

The weakness of the equality principle is that it may create a false sense of complacency in that people may feel that all people are equally protected and treated equally by the Constitution and the law whereas in practice there may be many inequalities. That is why the Constitution provides that the Human Rights Commission should monitor the realisation of socio-economic rights (section 184 of the Constitution). Even if there are glaring inequalities the state may not be in a position to do away with those inequalities because doing away with them may not depend on the law, but on the availability of resources (Soobramoney v Minister of Health, KwaZulu-Natal 1988 (1) SA 430 (D & CLD); cf Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)). The positive aspect of the equality provision is that it draws

attention to unwarranted inequality and enables those people who are unequally and adversely treated or discriminated against to challenge such discrimination especially if it violates their basic equality. It also enables the state to take steps to eliminate such inequality. Thus it can be used as a leverage to bring about more substantive equality (Promotion of Equality and Prevention of Unfair Discrimination Act of 2000). A further weakness of the equality provision is that it promises more than it can deliver. Although it promises equal enjoyment of all the rights, it does not guarantee it. This is more glaring in the area of socio-economic rights (Pieterse, 2000 : 51; De Vos, 1997 : 67 ff; De Vos 2001 : 258 ff; Liebenberg 2001 : 232 ff).. What does equality mean for a person who is illiterate, unemployed, lacks a decent shelter, cannot afford adequate food or health services and is disabled? What does equality mean in the face of massive poverty and deprivation in our country? In the words of Chaskalson P in the case of Soobramoney v Minister of Health, KwaZulu-Natal (1998:1) SA 765(CC) para 8).

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty..... These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring”.

A poor person therefore cannot enjoy those rights equally with the rich because he or she may not have the means to acquire those rights. This can also be seen from the way these rights are couched. Although in our Constitution provision is made for the Human Rights Commission to monitor the observance of socio-economic rights, that role is limited. The Commission cannot compel the government to implement those rights. It merely makes recommendations.

The importance of the equality clause on the other hand is that it focuses on basic equality and on the interdependence of human beings. The rich are still human beings and they to a large extent depend on the poor who may provide

the labour to further the aims of the rich. The poor cannot completely do away with the rich because they need the rich. They need jobs which the rich can provide so that the poor can earn a livelihood and survive. The powerful need the weak and the weak need the powerful. It has been said that even the powerful need to sleep at times and when they are asleep they are as vulnerable as the weak, albeit temporarily (Hart, 1962 : 191). The privileged depend on the underprivileged and vice versa. Men depend on or need women and women depend on or need men for a variety of things. No one can go it alone; no one is an island. Whites need blacks and blacks need whites. The challenge is not to do away with these differences completely, and in some cases it is not possible to do away with them, but to strike a balance which will demonstrate the interdependence of human beings. It is to prevent those who may be advantaged or powerful or rich from abusing their power, or riches or privilege because it is ultimately in their interest and that of the larger society that they be restrained. There should also be the removal of structural or systemic forms of disadvantage based on certain groups occasioned by race, gender, socio-economic status and a number of other factors which may inhibit a person's ability to compete equally with others .Democracy needs and can function well when there is this approximate equality (Hart, 1962 : 191). A brief analysis of the equality provision in the Constitution is therefore appropriate.

5.6 The equality provision in the Constitution analysed

The equality provision has two dimensions; the one dimension is concerned with the guarantee and promotion of equality and the other one deals with the prohibition of unfair discrimination. The dimension that relates to the guarantee and promotion of equality is the one that stipulates that every person has the right to equality before the law, the right to equal protection and benefit of the law, the right to full and equal enjoyment of all rights and freedoms and affirmative action. The other dimension, as already stated, is concerned with the prohibition of unfair discrimination, which entails the right not to be unfairly discriminated against on grounds including those listed.

Our equality provision is largely modelled on and closely resembles the Canadian equality provision. The phrase “equal protection of the law” is similar to the 14 Amendment of the United States Constitution, although it also differs from it in that the 14th Amendment is not amplified by discrimination and affirmative action like our equality provision (Albertyn & Kentridge, 1994 : 158). Although reference will be made to foreign jurisprudence in the interpretation of our equality provision one must bear in mind the South African historical context (Brink v Kitshoff No 1996 (4) SA 197 (CC) 216).

Broadly put, the equality provision entails that no one should for any reason be above or beneath the law, but that everyone should be subject to the same law and that no one should be denied protection of the law. In the South African historical context this is particularly significant because we have had a past where certain categories of person were denied the protection and benefit of the law. The purpose is to do away with this. Seen against this background it has been said that “equality before the law” entails equality of process which requires that persons be equally represented on the legislative bodies and that each person is granted equal concern and respect when the law is formulated or applied. Equal protection of the law encompasses laws which give benefits and prohibit people being subordinated by or disadvantaged through the law. It also entails that legislative and other steps should be taken to realise this equality especially for categories of persons who were disadvantaged by years of unfair discrimination. (Albertyn & Kentridge, 1994 : 160; De Vos, 2000 : 63). Equality, however, does not mean that all person should be treated equally whatever their individual circumstances, but that unless there are compelling and objectively justifiable reasons people should be treated equally by the law and should be able to enjoy the same rights. There should not be one law for Peter and another for Paul. Moreover, there should be no unfair discrimination based on any of the listed and related grounds. Classification will nonetheless take place. Even in the Constitution certain distinctions are made based on language, culture, religion and others. This demonstrates that equality does not mean that people should be treated as identical individuals, eating the same

food observing the same cultures and speaking the same language. But none of these should be used to mete out unfair discriminatory treatment.

Although it has been observed above that the equality clause has two dimensions, it does not mean that in practice these are kept separate. For this reason legislation to promote equality has been passed and it also deals with the prevention of unfair discrimination (The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000). Similarly the Employment Equity Act (55 of 1998) was also passed to redress past and present imbalances and to ensure employment equity in the work place. While it deals with affirmative action it also prohibits unfair discrimination based on the listed grounds.

The Constitution proscribes unfair discrimination based on listed grounds. The use of "unfair" to qualify discrimination underscores the fact that what is prohibited is not simply differentiation, but differentiation which is invidious or inequitably benefits certain groups or individuals. The addition of "unfair" to the word "discrimination" which already has a pejorative connotation, has been attributed to the concerns expressed by the drafters especially of the interim Constitution that discrimination has both a benign and pejorative meaning (Albertyn & Kentridge, 1994 : 161; Cachalia *et al.*, 1994 : 28 – 29). The implication of this, however, is that it can have an impact on the anti-discrimination legislation which should adopt the "unfair discrimination" label, failing which it could give rise to problems if the question is posed as to what the difference is between the conduct prohibited by the Constitution and that proscribed by legislation (Albertyn & Kentridge, 1994 : 161). Moreover, the use of "unfair" is either tautologous or provides for too strong a text.

Section 9(3) prohibits not only direct, but also indirect unfair discrimination based on the listed grounds. Direct discrimination involves the direct use of the attributes listed in section 9 to mete out discriminatory treatment. Indirect discrimination is wider and is concerned with the effects of apparently neutral laws that have a disproportionate impact on a certain group (Albertyn &

Kentridge, 1994 : 165). The use of the phrase “directly or indirectly” was aimed at providing comprehensive protection against unfair discrimination (Albertyn & Kentridge, 1994 : 164; Cachalia, *et al.*, 1994 : 30).

The grounds listed in section 9 are the grounds commonly used in the past to mete out discriminatory treatment. Their common feature is that they are human attributes which are either immutable or extremely difficult to change or are intimately part of the human personality and are generally subject to stereotyping and prejudice. Their negative use therefore adversely affects the individual. The listed grounds are not exhaustive but the list is open. Not only the listed grounds but also those analogous to them are included. The use of the phrase “without derogating from the generality of this provision” in the interim Constitution which implied that the list remained open although it should not have been regarded as an open invitation to admit any ground or classification, was left out in the final Constitution. This is aimed at forestalling the courts from being inundated with claims from persons adversely affected by legislation (Albertyn & Kentridge, 1994 : 166 – 167).

It has been said that the addition of the word “unfair” to discrimination is designed to ensure that the door to affirmative action is kept open in cases where the application of affirmative action policies prejudicially affects individuals who are not “persons or groups or categories of persons disadvantaged by unfair discrimination” (Cachalia *et al.*, 1994 : 27). Owing to the commitment to substantive or real equality, the drafter had in mind that the affirmative action programmes should be seen as indispensable to and a part of the attainment of equality and not to be regarded as a limitation or exception to the right to equality. Any person challenging such programmes bears the onus of proving that the programmes are illegal (Albertyn & Kentridge, 1994 : 162; Govender, 1997 : 265 – 266). It is necessary to look cursorily at how the Constitutional Court has interpreted the equality provision.

5.7 The Constitutional Court and the equality provision

The Constitutional Court had on a number of occasions an opportunity to pronounce itself on the equality provision. Initially the court was cautious in its interpretation of the provision and avoided any “sweeping interpretations” of section 8 of the interim Constitution, holding the view that our equality jurisprudence should be allowed to “develop slowly, and hopefully surely” and on a “case-by-case basis with special emphasis on the actual context in which the problem arises”. In a trilogy of cases, however, the court had to grasp the nettle and to come out clearly and express itself on the meaning of this provision. These cases can be regarded as the ground-breaking cases in the history of the equality provision in South Africa. These cases are Prinsloo v van der Linde (1997 (3) SA (CC) 1012, The President of the Republic of South African v Hugo (1997 (4) SA 1(CC); and Harksen v Lane (1998 (1) SA 300 (CC). This interpretation was based on section 8 of the interim Constitution. Owing to the similarity between section 8 of the interim Constitution and section 9 of the final Constitution, albeit with some differences, this interpretation is regarded as applicable to section 9 of the final Constitution as well.

In Prinsloo v Van der Linde the court held that it was not the intention of section 8 of the interim Constitution that every differentiation made in terms of the law be reviewed for justification of unequal treatment. It held this view because it felt that if that was the case, the court would be called upon to review the reasonableness or fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. The court was of the view that this is not the purpose of our equality provision. The purpose of this limitation is to prevent the opening up of the floodgates to cases of claims for constitutional scrutiny of legislation. What is necessary is to identify the criteria that distinguish legitimate differentiation from differentiation that is unconstitutional. The court drew a distinction between differentiation which does not involve unfair discrimination, and differentiation which does entail unfair discrimination. In doing this the court said:

"It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classification which treat people differently and which impact on people differently... Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element" (1024).

The court therefore referred to this as "mere differentiation". As regards mere differentiation the court held the view that the constitutional state is supposed to act in a rational manner and not to regulate the affairs of people in an arbitrary or capricious way or in a way that reveals naked preferences which serve no legitimate government purpose, because that would be in conflict with the rule of law and the fundamental premises of the constitutional state. As the court further pointed out, the purpose of this aspect of equality is to ensure that the state is bound to function in a rational manner in order to promote the need for governmental action to relate to a defensible vision of the public good and to enhance the coherence and integrity of legislation.

For this reason the court held that before it can be concluded that mere differentiation violates section 8, it had to be established that there is no rational relationship between the differentiation in question and the governmental purpose which is suggested to validate it. If there is no such rational relationship, the differentiation would infringe section 8. The existence of such a rational relationship is a necessary but not sufficient condition because the differentiation could still constitute unfair discrimination if a further element is present.

This further element is constituted by the specified grounds enumerated in section 8 on the basis of which no person should be unfairly discriminated against. These include race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

Prima facie proof of discrimination on these grounds triggers the presumption that unfair discrimination has been sufficiently proved until the contrary is established. These specified grounds are not exhaustive. There may be unfair discrimination which is not based on specific grounds. In relation to that discrimination there is no presumption in favour of unfairness.

In further elaborating on what interpretation to give to unfair discrimination based on specified grounds the court had the following to say:

“Given the history of this country we are of the view that ‘discrimination’ has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short they were denied recognition of their inherent dignity. Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin, one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the grounds of sex and gender. In our view unfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings who are inherently equal in dignity” (1026).

The court concluded that where discrimination resulted in people being treated differently in a way which impairs their fundamental dignity as human beings, it will be regarded as clearly violating the provisions of section 8(2). Similarly, other forms of differentiation which in some other way affect persons adversely in a comparably serious manner, could also constitute a violation of section 8(2).

In the case of The President of the Republic of South Africa v Hugo, Goldstone J had the opportunity to enunciate what the purpose of the prohibition of unfair discrimination is. As he stated it:

“The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitution and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked” (at 22-23).

The learned judge referred to the Canadian case of R v Big M Drug Mart Ltd [(1985) 13 CRR 64 at 97] where it was emphasized that the equality provision represents a commitment to recognizing a person’s equal worth as a human being irrespective of individual differences. “Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity”.

The judge further pointed out that it is not sufficient for the appellants to aver that the impact of the discrimination affected members of a group that was not historically disadvantaged, but they must also show in the context of the case under consideration that the impact of the discrimination on the people who were discriminated against was not unfair. Referring to section 8(3) of the interim Constitution, he pointed out that it expressly recognizes the need for measures to ameliorate disadvantages produced by past discrimination. As he further puts it:

“We need therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification, which is unfair in one

context, may not necessarily be unfair in a different context” (at 23).

This interpretation was further expanded on in the case of Harksen v Lane. In interpreting the provisions of section 8 of the interim Constitution Goldstone J, said that it must be determined whether the law or conduct in question differentiates between individuals or groups of people. If the law or conduct in question does differentiate, then “in order not to fall foul of s8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve”. If it is justified in that way, it does not amount to a violation the provisions of section 8(1). But if there is no rational connection between the differentiation and the governmental purpose, then the law or conduct in question violates the provisions of section 8(1) of the interim Constitution. Should there be a rational connection, it is necessary to determine whether in spite of the rationality, the differentiation nonetheless amounts to unfair discrimination in terms of section 8(2) of the interim Constitution. To determine whether differentiation amounts to unfair discrimination in terms of section 8(2) requires a two stage analysis. First, it should be established whether differentiation amounts to discrimination and secondly, if it does, it should further be established whether it amounts to unfair discrimination.

If the discrimination is on a specified ground, then it will be presumed to be unfair in terms of section 8(4). The onus will be on the respondent to rebut this presumption. If, however, the discrimination is on an unspecified ground, the onus will be on the complainant to prove unfairness. If the differentiation amounts to discrimination the question is whether it amounts to unfair discrimination. If it has been found to have been on a specified ground, then unfairness will be presumed. If it is on an unspecified ground, unfairness will have to be established by the complainant. In order to determine whether the discriminatory provision is unfair the impact of the discrimination on the victim's human dignity will be decisive. Goldstone J stated that in assessing the impact of the discrimination on the victim, the court must consider the following factors:

- a) the position of the complainants in society and whether they suffered from past patterns of discrimination. If the complainants are part of a group which has suffered discrimination in the past, then it is more likely that the discrimination will be unfair;
- b) the nature of the provision or power and the purpose which it seeks to achieve. If its purpose is obviously not directed at impairing the complainants' dignity, but is aimed at achieving a worthy and important societal goal, this may have an important effect on whether the complainants have suffered the impairment in question; and
- c) if the discrimination is found to be unfair, then the law or governmental conduct in question will be an infringement of section 8(2). It will then necessitate a determination of whether unfair discrimination can be justified in terms of the limitation clause.

In her dissenting judgment O'Regan J pointed out that the court will weigh the infringement of s8(2) against the purpose and effect of the law or conduct in question. This would entail balancing the extent of the infringement, the purpose of the law in question and whether the relationship between the purpose and the effect has been closely drawn.

The reasoning in the three cases referred to above was followed in a number of subsequent cases. It can therefore be safely stated that the three cases have laid the foundation on how the equality provision has to be interpreted and applied. No doubt there will be modifications in the application of the test but the essence of these decisions will largely remain. The approach of the court in its interpretation of the equality clause has been trenchantly criticised by various commentators. It will be appropriate to analyse some of this critique.

5.8 A critique of the Constitutional Court's approach

The major criticism against the approach of the Constitutional Court is that it has been wrong in placing dignity at the centre of the equality right. While one may agree with some of the criticism of the judgments of the Constitutional Court, this is for different reasons. Before the reasons for this may be advanced, it is necessary to analyse briefly the reasons of the commentators referred to above. It will then be necessary to proceed to point out that although the Constitutional Court may be wrong, it is not totally wrong and then indicate what the proper approach should be.

The criticism levelled by Albertyn and Goldblatt against the Constitutional Court's decisions for instance, is that it is wrong in placing the value of dignity at the core of the equality right. They argue that the right to substantive equality should be given a meaning which is independent of the value of dignity and which is informed by the value of equality (1998 : 254). They further argue that by giving the value of dignity the central place in our equality jurisprudence the court has effectively enhanced the role of dignity and has relegated disadvantage or vulnerability and harm to a position of unimportance. The effect of this is to revert to the liberal and individualised conception of the right which tends to emphasise the individual personality and disregards the systemic issues and social relationships" (1998 : 258).

Similarly, Fagan in of the opinion that the judges of the Constitution Court were wrong in importing dignity as central to unfair discrimination. The purpose of this, it would appear, was to make a distinction between differentiation and discrimination. Discrimination is unfair if it impairs a person's dignity, as they put it. Fagan challenges this (1997 : 225-227) and is of the opinion that the dignity-analysis of unfair discrimination lacks proper foundation. Consequently, it should be seen as purely rhetorical. In his opinion an act unfairly discriminates if "it confers benefits or imposes burdens on some but not on others, and in doing

so infringes either and independent constitutional right or a constitutionally-grounded egalitarian principle” (1997 : 233).

Davis is of the view that equality should be provided with substantive meaning owing to its central position. It does not have to depend on another value, namely, dignity. He bemoans the fact that the Constitutional Court “has so muddied the jurisprudential waters that the meaning of the foundational principle of equality is all but clear” (1999: 90).

While the commentators agree that the use of the dignity-analysis is inappropriate to the equality right, they differ on what should take its place. While Abertyn and Goldblatt are of the view that disadvantage or harm should be the criterion to determine when discrimination is unfair and violates the right to equality, Fagan is of the opinion that discrimination is unfair if there is no morally-relevant reason for meting out disparity of treatment. In this respect he feels that the right to equality is either empty or superfluous in that in order to establish whether it has been violated one has to resort to some other moral right than equality. This criticism is too strong because it ignores the fact that the prima facie violation of the equality clause may not be unfair if there is justification for it. This is not unique. In the law of delict and criminal law for instance the prima facie violation of a rule may not lead to wrongfulness or unlawfulness, as the case may be. The act in question will only be wrongful or unlawful if there is no ground of justification (Snyman, 1989 : 96 ff; Neethling *et al.*, 1999 : 73 ff; Burchell, 1992 : 67 ff). There is therefore no reason why something which approximates a ground of justification in the area of constitutional law should not be recognised and which leads to a prima facie violation of the equality clause not being unconstitutional as being unfair.

It is now apposite to establish what the proper approach should be. But before that is done, it is appropriate to reiterate the rationale for the court’s use of dignity in the equality analysis. The major reason why the Constitutional Court espoused dignity as the rationale for branding discrimination as unfair, as has been indicated above, is because it started from the premise that equality does

not mean that everyone should be treated equally whatever their circumstances. Differentiation or classification per se therefore does not result in unfair discrimination at all times. Whether or not discrimination is unfair, depends on the presence of an additional element. This element is, as the court put it, is the infringement of a person's human dignity. Although this might strike one as "a rather narrow conception of the harm of discrimination", this is somewhat altered by the fact that the court provided a broad definition of "human dignity", where it stated that human dignity would be impaired whenever a differentiation treats people as "second-class citizens" or "demeans them" or "treats them as less capable for no good reason" or otherwise offends "fundamental human dignity" or where it "infringes an individual's self-esteem and personal integrity". In the case of Prinsloo v Van der Linde the court interpreted discrimination also to mean not only the infringement of human dignity, but also "other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner".

Despite this amplification, the use by the Constitutional Court of dignity as the element which turns differentiation into unfair discrimination is not regarded as convincing. Although the use of the dignity-analysis is open to criticism, it would appear that the court did not err greatly. Admittedly, the use of dignity may be open to criticism in that it may exclude cases of discrimination which may not violate dignity but which may nonetheless be unfair. This was so in the Harksen case. The reason why dignity may be regarded as an appropriate element is that equality may not be regarded as an end in itself. It is a means to an end. The reason why it is important to treat people equally is because that protects their dignity and their feelings of self-worth. Equality and dignity are therefore closely related.

The conceptual confusion may also largely arise from the terminology used. The amplification of "dignity" by the court demonstrates that what the court meant is not simply dignity stricto sensu, but basic equality or basic humanity which, of course entails that people should be treated as human beings, with respect and as people having dignity and self-worth. In Christian terms, they should be

treated as people made in the image of God. They cannot be treated anyhow. Seen in this perspective therefore discrimination is unfair if it violates basic equality or humanity. As stated earlier, sometimes commentators fail to realise that equality does not just mean one thing, but that it can be segmented to refer to basic equality, equality of those in similar circumstances and other permutations. Seen in this light therefore, dignity as a justification for regarding discrimination as unfair, is not entirely wrong. It is also more than a rhetorical flourish. This interpretation also took into account the history of this country where people were discriminated against owing to their colour or race or gender and this resulted in their being demeaned or their dignity impugned.

As stated earlier, Abertyn and Goldblatt are of the opinion that harm or disadvantage should be the touchstone of the equality right violation. While this may be true of the majority of cases, disadvantage or harm does also occur to those who may not succeed to impugn an act as being unfairly discriminatory. The typical example is that of affirmative action. There is not doubt that a white person who is omitted in promotion or appointment in favour of a black person in the application of affirmative action will feel aggrieved or disadvantaged.

Admittedly, in an earlier article Abertyn and Kentridge sought to distinguish between harm or disadvantage suffered by already disadvantaged groups and harm or disadvantage suffered by privileged or advantaged groups. As they put it:

“But while the discrimination may take the same form in both instances, and will doubtless cause harm in each case, the kind of harm is different in important ways. The harm caused by measures which disadvantage vulnerable and subordinate groups goes beyond the evil of discrimination. Such treatment is unfair in that it perpetuates and exacerbates existing disadvantage. Measures which disadvantage powerful and privileged groups, on the other hand, may be discriminatory but are not necessarily unfair in the same way. We deliberately use the words ‘not necessarily’ here to make it clear that we are not saying that the Constitution always permits discrimination against privileged groups. What we are saying is that, by using

the word “unfairly” it accommodates the view that discrimination may have a different quality in different contexts, and requires that the specific context is taken into account” (1994: 162).

Notwithstanding this explanation, harm or disadvantage cannot be the appropriate criterion which should distinguish unfair discrimination from legitimate differentiation. As the authors say, it is there in both cases. What may differ is that in one case there is justification for it whereas in the other there is no justification. The justification in the case of affirmative action is that it is aimed at advancing persons or categories of persons who were disadvantaged by years of discrimination. The major criticism against the view of Abertyn and Kentridge is that it tends to place too much emphasis on group disadvantage and to disregard the impact of discrimination on the individual.

The views of Cowen (2001:49) on this issue are much more appealing. She holds the view that key international human rights instruments regard dignity as a foundational value and right that is closely related to equality. It serves both individual and collective interests. The use of dignity can promote rather than frustrate substantive equality. Nor is dignity in conflict with the transformative ideal to which our Constitution is committed. It could even be used to justify the use of government intervention to remove material disadvantage and inequality. Concededly the use of dignity in support of the equality right has some limitations and weaknesses that need to be addressed.

Perhaps some minor criticism against the test used by the Constitutional Court in determining when discrimination is unfair is that it is a bit complex (with various sub-tests) and sometimes repetitive. We need a simple test. To start by saying that an act will not be unfairly differentiating if it is rationally connected to a legitimate government objective which is sought to validate it and still to proceed to establish whether that will still be unfairly discriminatory is unnecessarily repetitive. It is hard to conceive of a situation where an act which is rationally connected to a legitimate government purpose will still be unfairly discriminatory.

A simple test for unfair discrimination should be that an act (legislative or administrative) will be unfairly discriminatory if it violates basic equality, that is based on the listed and analogous grounds, or if there is no objectively justifiable and rational ground or reason for meting out discriminatory treatment. This test avoids the use of dignity which has been criticised by the authors referred to above. Admittedly it will be easy to prove unfair discrimination if the act complained of violates a person's or a group's dignity. The test does not include every form of inequality but inequality which violates basic humanity. It does not exclude discrimination which does not violate basic humanity but which is nonetheless unfair. For such discrimination to be permissible it must be rationally and objectively justifiable. If it is not justifiable, it is unfair and therefore impermissible.

5.9 Conclusion

The purpose of this chapter was establish whether the Constitution seeks to realise equality or justice in section 9 and whether complete equality can be realised at all times and under all circumstances. There is no doubt that section 9 of the Constitution is an important and influential section. It is based on one of the core democratic values which underpin our Constitution, and it guarantees equality and non-discrimination. Bearing in mind our past which was characterised by inequality and discrimination, the provisions of section 9 are therefore trend setting. The way this section is interpreted and applied is of more than passing interest.

Section 9, however, promises more than what it can deliver. It guarantees equality before the law and equal protection and benefit of the law. While this section will be able to protect basic equality and prevent unfair discrimination, it cannot guarantee total and complete equality of all persons in every respect and it will not ensure that all people enjoy all rights equally. For this reason this section may unnecessarily raise expectations which cannot be met especially in

our country which is characterised by massive inequalities and poverty. It may nonetheless facilitate the progressive realisation of all rights.

In interpreting this section, the Constitution Court has had to interpret it to mean fairness or justice rather than complete equality. It has felt that to summarily treat everyone equally whatever their circumstances could lead to injustice. As a result the court has accepted that classification and differentiation are normal in a democratic society and are not necessarily unconstitutional especially if there is a rational connection between the differentiation and a legitimate government purpose. Differentiation will be impermissible only if it amounts to unfair discrimination. What will turn permissible differentiation into unfair discrimination is the impairment of an individual's dignity or feelings of self worth. Although this dignity-analysis has been severely criticised, it simply means that discrimination will be impermissible if it violates a person's basic equality or humanity and in that sense this approach is not so wrong.

The terminology in our Constitution is largely based on the terminology that has been used in foreign countries. While this may have certain advantages, it does definitely have negative implications. One of them is that we may not have what they had in mind. The use of equality although we do not mean total equality is a problem. In those countries where this was developed, they have raised the problems and limitations and yet we want to do the same thing. The American and Canadian jurisprudence has had an effect on the drafting of our Constitution and the decisions of the Constitution of Court.

Relying on foreign jurisprudence is both easy and convenient. That explains why our Constitution is sometimes based on provisions found somewhere else. It prevents reinventing the wheel. After all the problems that we are dealing with are not new or unique. They are the usual problems that people have and grapple with all over the world. The problem of unfair discrimination is a typical one.

In interpreting the equality clause the Constitutional Court has evolved a useful test. This test could, however, be regarded as narrow. It does not lend itself to transformation. It is confined to correcting discrimination that was practised in the past in this country. That is why the court has had to emphasize the importance of our historical context in particular where certain sections of the population were demeaned and where their dignity was impugned. Considering the effect of such discrimination, it cannot be said that that exercise is useless. It creates conditions where people can realise their potential and where transformation can take place. The instrumentalist use of the equality provision to ensure the radical transformation of our society is, however, limited. The role of the courts and of judicial precedent is understandably limited in eliminating social disadvantage, because "the adjudicative model is designed to deal with discrete wrongs and not with systemic inequality". Owing to the fact that judicial review focuses on particular laws, it cannot restructure the overall distribution of benefits in the community. That is a complex political role for which courts are ill-equipped (Galloway, 1993 : 79 – 80).

As already mentioned the interpretation placed on section 9 of the Constitution is more in accord with justice and fairness rather than simple equality. It has been to ensure that people are treated fairly and with justice than to create an utopia. This interpretation is reasonable and credible in the context of the South African situation. The critical question is: if the purpose of section 9 is to see that justice is done why use the term "equality" because although equality may be an element of justice, it is not simply synonymous with justice? There are instances where treating people equally would lead to injustice.

The answer to this seems to lie partly in what has already been said, namely that simply following provisions and decisions which have been made elsewhere is appealing because it is safer and more convenient. The other reason is that our past was pervaded by inequality and to provide for equality in the Constitution would demonstrate that we have a new era which is radically different from the past. Moreover, the use of "equality" may also have a better impact than the use of "justice", which may be regarded as not only nebulous

but also bland. We need to interpret this in the light of our history to bring it nearer the truth.

The fact that section 9 provides not only for equality, but also for non-discrimination on the basis of the listed grounds means that our equality is limited to some extent to the listed grounds. The door is, however, left open for legislation which promotes more substantive equality. Seen in the light of the above our equality provision is comparable to the defence of ignorance of law. As Hall points out one of the reasons is that "the ignorantia juris enters the criminal law theory as a roaring lion in occupation of a vast terrain, but after drastic reduction in current case law it makes it exit as a timid shorn lamb" (Cited in Burchell & Hunt, 1983:163). The same can be said of our equality clause. But taking into account past history the changes it has brought about are regarded as revolutionary (Chaskalson, 2000 : 199).

This is undoubtedly in conformity with Christianity. It was stated earlier that Jesus advocated the creation of an egalitarian society and the removal of inequalities. The challenge, however, is to interpret the equality clause in such a way that it makes sense and is in line with fairness and justice rather than simple or total equality. This is the approach which has been followed by the Constitutional Court. Although the decisions of the Constitutional Court have been criticised, they are entirely justifiable. It can therefore be said that there is no real conflict between Christianity and the equality provision of the Constitution.

The purpose of the equality clause is to ensure that people are treated as human beings and with fairness. It is the role of the state to uphold public justice. Treating people equally provided they are in similar circumstances is aimed at doing justice. By doing justice to individuals and to the church the state plays its rightful role. If the state does justice to its citizens and avoids unfairly discriminating against them it facilitates social stability. In that case there should be no conflict between the church and the state. As pointed out

earlier Christians should be treated preferentially to others but they should be treated on the basis of equality.

CHAPTER SIX

FREEDOM OF RELIGION

6.1 Introduction

In considering the relationship between the state and the church the role of religion has an important place. It is essential to establish how the state should deal with religion. Religion is important in the life of a person. It has been regarded as the Kernel of every human being. This is so because a human being is a religious compact with reality in which they have found their anchor or origin. This origin can be the real one, or it can be one that is mistakenly supposed to be the origin. It can be God or idols" (Schuurman, 1996:202). How should the state deal with this?

Section 15 of the Constitution provides that everyone has the right to freedom of conscience, religion, thought belief and opinion. It further provides that religious observances may be conducted at state or state-aided institutions as long as those observances follow rules made by appropriate public authorities. They must also be conducted on an equitable basis and attendance at them is free and voluntary. The latter provision is to prevent people being forced to participate in a religious exercise against their will.

As stated above, no one should be unfairly discriminated against on the basis of, among other things, religion. This means that while the Constitution protects people's religion and religious beliefs, such religion should not lead to the person being discriminated against on account of religious belief. If that were the case, the Constitution would be contradicting itself. It is necessary to look at the implications of this provision for Christianity.

6.2 **Brief background**

For quite some time Christian theology oscillated between two options. On the one hand commitment of the Christian faith to Christ as Lord and Saviour had the effect of excluding the validity of the truth claims of other faiths. This would be castigated as arrogance, religious imperialism, violation of the equal dignity of all human beings irrespective of culture or creed and as a breach of human rights. On the other hand the modern demand for tolerance seems to undermine the call to a wholehearted commitment of faith which is so typical of the biblical witness.

At its early phases the Old Testament faith did not have a monotheistic creed. Yet there was a powerful demand for an existential commitment of the people of God to Yaweh alone. This is clear from the introduction to the Ten Commandments (Ex 20 : 1). God is described as the liberator of Israel from Egyptian slavery and bondage and Israel is not supposed to serve other gods apart from Him. The prophets generally interpreted the intense suffering of Israel under foreign domination as Yahweh's punishment for idolatry, syncretism and injustice. In their active struggle for the soul of Israel they denied the power and existence of other gods and the images which symbolised other gods were consequently "ridiculed as man-made constructs of wood and stone which represented nothing but the ingenuity of their makers. Existential commitment turned into metaphysical exclusiveness. This is the root of the monotheistic creed in the exilic and post-exilic Judaism" (Nünberger, 1996 : 133-134).

In the New Testament the Jewish expectations of the Messiah were transferred to Jesus. He was to be the eschatological king, and consequently the representative and plenipotentiary of God, the judge of the last judgment and the transformer of the universe. Identifying with Christ and appropriating his sacrificial death was the only way of escaping ultimate condemnation and

gaining authentic and everlasting life and thus the only way of getting right with God. But the history of Christianity especially since emperor Constantine was not rosy. Both the church and state appropriated this heritage to legitimate the pursuit of power interests. The rest of the sorry episode is well known: "The excommunication and persecution of pagans, heretics and Jews; religious imperialism; forced conversions; the crusades; the conquest of Latin America in the name of Christ; the inquisition; the burning of the early Reformers on the stake; irreconcilable conflicts between the various strands of the Reformation; fierce intolerance even within Lutheranism; the religious wars of the 16th and the 17th centuries; the marginalisation of minorities; the seemingly endless fragmentation of the church of Christ; the ruthless or subtle use of religious symbols and commitments for the legitimation of discrimination, domination, oppression and exploitation – and so we can continue" (Nürnberg, 134-135).

This should not have been like this. The fact that we had these contradictions and inconsistencies raises the question whether Christianity was a house divided against itself. Moreover, in the light of these incidents could one have confidence that making Christianity the state religion would lead to peace, justice and stability? The answer to this seems to be that making Christianity the dominant religion would not necessarily lead to justice and fairness.

The apparent inconsistency within Christianity can be ascribed to the fact that when the emperor Constantine made Christianity the state or imperial religion many people who became Christians without conviction and conversion had to follow their own desires and power which were sometimes in conflict with the tenets of Christianity. This civil or national religion could therefore be manipulated by various people to further their selfish interests (Wells, 1998: 25).

Had Christians been continuously true to the teachings of Christ, we would not have had atrocities and injustices perpetrated in the name of Christianity. Commitment to the truth should not necessarily lead to violence and death. Admittedly each religion, including Christianity has truth claims which are in conflict with or different from the truth claims of other religions. According to

Christianity, salvation is through Christ alone and no one can have access to God except through Jesus Christ. For some religions this might seem arrogant and intolerant.

Intolerance, is undoubtedly in conflict with the Christian gospel which declares that we are justified by grace through faith so that no one can boast of it. It has to be accepted in humility. This, however, does not mean that we have to accept everything and believe everything. Christians are particular as to what they believe. That does not preclude them from being tolerant. Being tolerant to other religions, however, does not entail that Christianity accepts what other religions postulate. There may be disagreement. Paul had a lot of disagreements with his adversaries. And yet he maintained that everything should be done in love and that love should predominate over faith, hope and knowledge (1 Cor 13). For Christians the validity of the biblical truth of God's redemptive purposes as manifest in Christ's sacrificial death is non negotiable, otherwise one ceases to be a Christian (Nünberger 136).

Tolerance and acceptance open the way for dialogue which leads to confrontation with demonstrable evil and to mutual exposure to rival truth claims. It also leads to sorting out the validity of assumptions, values and norms and of learning from one another. We can forge a common loyalty or draw up a new agenda. It also means assigning new roles in the struggle for "justice peace and the integrity of creation". "But according to the gospel the expected transformation of the unacceptable is a consequence of acceptance, not its condition" (Nünberger 136).

No one has the monopoly of truth. Moreover, our understanding of the truth is sometimes imperfect. We can never claim to possess the whole truth. It is therefore important and necessary to be honest and humble enough to acknowledge like Paul that we look at life imperfectly as if through the mirror (1 Cor 13 : 12). "The truth is God's truth, not our truth, a truth we can only anticipate and not possess" (Nünberger 137).

Truth cannot therefore be imposed. It must establish itself among rival truth claims in the consciousness of believers and potential believers alike. As a result partners in a dialogue must operate on the same level of dignity. The contrary would be oppression. In a situation of openness both parties must become vulnerable to the respective alternative truth claims : “ they cannot shoot propositions and arguments at each other from behind doctrinal fortresses or entrenched privileges. Truth without love is not the truth of the God Christians have come to know. In sum, it is for the sake of the truthfulness of truth itself that we need an open dialogue” (Nürnberg 137).

In order to ensure this a legal framework which facilitates open dialogue should be provided. People generally are not altruistic. They tend to be dogmatic and to fiercely defend what they have been taught especially during the formative years of their lives. Some of these beliefs they may have accepted implicitly and without questioning. When these beliefs are questioned, they may react naively and negatively. Christians themselves are no exception to this.

6.3 The movement to religious freedom

Religion forms an essential part of human life. It is fundamental to human existence. Even Jesus declared that man cannot live by bread alone but by every word that comes from the mouth of God (Luke 4:4). Consequently the right to religious freedom, which includes freedom of conscience and freedom of thought, is regarded as the most sacred of all freedoms. It is “the basic condition and foundation for all other human rights and the fundamental test for the authentic progress of any society”. Respect for religious freedom is an “acknowledgement that human beings are more than individuals in a market, cogs in a social wheel, or products of various social forces. Their dignity commands respect because it comes from a deeper than human source” (Robertson, 1991: 124). In the words of Schuurman : “The consequence of religion is that all people express their relation to the origin in their belief, or in other words, in their confession of faith. Man is always a believing or faithful person. There is no possibility for man to be an unbeliever, however much the contents

of may differ. Of course, because the religious origin adopted is different, the contents of faith also differ" (1996:202).

The movement to achieve religious freedom is one of the oldest, dating back to the sixteenth century, if not to the Roman Empire. Although this right was one of the first to gain international recognition, it remains one of the weakest as regards general recognition and enforcement. Throughout history people have been persecuted for their faith. The reason for this is that people are generally not content with trying to persuade others to their way of thinking by reason, preaching, dialogue, exhortation, or example, but frequently make use of force, and sometimes even torture, murder, or massacre in an attempt to achieve this purpose (Robertson, 1991 : 124). They want others to conform to their way of believing and doing things. Any person who does not do what they do or believe what they believe is liable to be ostracised or harshly treated. This is so because religion is closely intertwined with the emotions of the people.

In spite of this, religion continues to play an important part in the spiritual life of people and in the culture of nations. Any government which attempts to interfere with religion touches the soul of the people and is bound to encounter fierce resistance or rebellion from the people. Religion expresses itself in all kinds of human functions. It is the root of every human activity, and it gives cohesion to life. Owing to the fact that it is both personal and communal, "it also has a radical central and integral power in human communities" (Schuurman, 1996 : 202). The right to religion is a negative right in that it requires the state to tolerate different religions and not to impose any religious belief on its people. Religion is an area where the right to be the same and the right to be different coexist. While all people should be treated on the basis of equality, in the area of belief people should be allowed to differ. This entails the right to believe and for people to organize their own religious communities, to consecrate their own holy places, and their own rituals and dietary practices. At the constitutional level, this raises questions of the right to religious expression, freedom of association, and the rights of privacy or personal conscience in an affirmative sense (Sachs, 1990: 44).

Religious freedom may encompass more than 'religion' in the conventional sense. Religious organisations and followers of certain religions often do not confine themselves to matters of worship. They question injustice or oppression in the pursuit of their religious beliefs and this inevitably brings about a clash between religion and politics. While tyrannical regimes may profess to guarantee freedom of religion in terms of worship, they may be reluctant to extend this to the expression of political or social consequences of religious belief or to allow action to put these consequences into practice (Skillen, 1996:160).

The reason for this dichotomy is that religion and politics embrace in differing ways the whole of human life. Both religious movements and political movements (or governments) hold their own views of what human beings, individually and collectively, should be. They may differ on their point of departure. "While religions stem from and work in areas of inspiration and conviction, political movements are concerned with maintaining the social and legal framework for the human community" (Robertson, 1991: 124; Schuurman, 1996:205).

It is essential that the separation of church and state should be respected, although not in an absolute way. The state and the church have to co-operate and collaborate with each other in certain matters, without the state legislating on matters of religion. In human history there have been serious religious wars. In fundamentalist states religion and politics are so intertwined that the contents of religion are propagated and stimulated by the government of the state. For those who do not share the religion of the state this situation implies suppression and no freedom of religion. Because religion is radical in character, relating to the deepest core of the human heart, if this religious radicalism is identified with radical politics, politics becomes an instrument of religion. Citizens are then compelled to obey such religion whether it expresses their innermost convictions or not. In such a situation, politics is concerned and controls not simply the outer or external aspect of societal life, but also the inner

life of a person. Freedom of religion is no longer guaranteed. "Public justice becomes public injustice" (Schuurman, 1996 : 204).

The rejection of the fundamentalist approach has led to the other extremes where people assert that there should be no relation at all between religion and politics and the state should be neutral in matters of religion. Such a view may be defended as a reaction against fundamentalism. But it may ignore the fact that religion has a pervasive influence over every human activity including political activity. The difference between fundamentalism and neutrality is that according to the neutral approach religion relates to politics in a derivative way. Politics can never and should never force religious convictions (Schuurman, 1996 : 205).

6.4 Comparative international situation

Article 18 of the Universal Declaration of Human Rights provides that everyone has the right to freedom of thought, conscience, and religion. This right is regarded as including the freedom to change one's religion or belief and the freedom, either publicly or privately, individually or in community with others, to manifest one's religion or belief in teaching, practice, worship, and observance. (A similar provision is made in the International Covenant on Civil and Political Rights, 1966). Obviously the idea of complete freedom of religion is in conflict with Christianity. Christianity presupposes that there is only one way of being in contact with God and that is through Christ (John 14). This, however, does not entail that those who do not believe in Christ should be forced to do that. They should rather be preached to or persuaded to believe in him.

Teaching entails the right to give religious instruction, especially to the young, and the right to run educational institutions, including schools, colleges, and universities. Practice relates to the freedom to express the beliefs and instructions of a particular religion. Worship involves the right to assemble, pray and hold religious services in public and in private. Observance entails the right

to fulfil the requirements of one's religion on special days or during special seasons.

The First Amendment of the US Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof". This article guarantees freedom of religion. It was no doubt a product of the experiences of religious suppression which Americans had experienced. Although freedom of religion is guaranteed in the US Constitution, it does not imply that freedom to express one's religious belief is unlimited. A typical example is that of the practice of polygamy. In the case of Reynolds v United States (98 US 145 (1878)) it was held that although polygamy was permitted in the Mormon Church as part of its religious belief, it none the less remained prohibited under the criminal law. Delivering the judgment of the court, Waite CJ posed the question whether those who recognise polygamy as part of their religion are exempted from the operation of the law in terms of the First Amendment. He concluded that if those who did not make polygamy a part of their religious belief would be found guilty and punished, while those who did must be acquitted and go free, this would introduce a new element into criminal law. He stressed that laws are made to regulate actions and while they could not interfere with mere religious belief and opinions, they could do so with religious practices. This narrow interpretation of freedom of religion obviously undermines such a freedom. It surely cannot be argued that the framers of the Constitution intended that the 'free exercise' clause would be subject to the existing criminal law.

In the case of Everson v Board of Education of Township of Ewing (330 US 1 1947) it was said that the First Amendment created a wall of separation between church and state. In this case the court decided that the wall of separation had not been breached when tax money was used to reimburse parents for the transportation by bus of their children to and from Catholic parochial schools. The minority, however, held such use of public money to be a violation by the state of the provision of the First Amendment that no law should be made 'respecting an establishment of religion'.

Another case where freedom of religion was limited to an unwarranted degree is that of Employment Division, Department of Human Resources v Smith (110 SCt, 1595 (1990)). In this case the claimants were private drug counsellors who were dismissed from their jobs for using peyote, a drug with narcotic effect. The claimants argued that the drug was used in conjunction with sacramental rites of the Native American Church. In terms of an Oregon statute and administrative regulation this is an offence and there is no exception for religious use. Because the dismissals were for misconduct, based on the applicants' illegal possession of a drug, they were disqualified from unemployment benefits. The state court twice held that the claimants' 'free exercise of religion' rights had been violated. The US Supreme Court disagreed. According to Scalia J, the 'free exercise' clause 'does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law prescribes (or proscribes) conduct that the religion prescribes (or proscribes)'. The court rejected the claimants' reliance on Sherbet v Verner (774 us 398 (1963)) and similar cases by limiting those cases to the factual context of unemployment compensation. Although the Smith case also involved such a claim, the denial of benefits was based on a generally applicable criminal statute which proscribed the use of drugs. According to the court, the 'free exercise' clause does not automatically allow an exemption from a neutral generally applicable statute.

In referring to precedent the court invoked the prohibition of polygamy and the rejection of draft exemption claims of religious objectors to particular wars. Religious practice had prevailed in the past, the court reasoned, because of the presence of some other constitutional protection, usually free speech, in addition to the 'free exercise' interest. In prior 'free exercise' cases the court had relied on the balancing test, which required governmental actions that substantially burdened the free exercise of religion to be justified by a compelling governmental interest. In the Smith case the court held the balancing test to be inapplicable to 'free exercise' claims because in using the balancing test the court must either evaluate the centrality of the religious practice involved or give all religious conduct, whether trivial or crucial, the same protection.

The decision in the Smith case has been severely criticised because it seriously undermines the free exercise of religion. It shows that although the Constitution protects the free exercise of religion, the courts are not prepared to countenance a practice simply because in using the balancing test the court must either evaluate the centrality of the religious practice involved or give all religious conduct, whether trivial or crucial, the same protection.

In Abington School District v Schempp 374 US 203 (1960) the US Supreme Court declared a statute requiring the reading of verses from the bible and the reciting of the Lord's prayer in public schools to be a violation of the First Amendment. The court ruled that religious exercises of this kind infringed the rights of the plaintiffs in this case and as a result public school officials were prohibited from authorizing religious exercises on school premises. Although the daily devotions were not compulsory and the plaintiffs had the option to leave the classroom during the exercise, the Supreme Court none the less decided that the option to abstain did not provide due process of law.

This decision was another manifestation of the restriction of the "free exercise" provision. It makes the "free exercise" dependent on other people who think differently. The reasons why such a limitation was imposed in the US is probably because no provision was made for state institutions to allow religious practices. In South Africa this would be different because provision is made for religious practices to be performed on the premises of state or state-aided institutions. In the US the limitation of the "free exercise" provision on school premises was seriously criticised by the public.

The European Convention on Human Rights provides in art 9 that everyone has the right to freedom of thought, conscience and religion. It has been decided that art 9 does not place an obligation on state to distribute books to prisoners which they consider essential for their religious and philosophical beliefs. In X v United Kingdom (Application 6886/75; Decisions and Reports of the European Convention on Human Rights No 5 (1976) 100), the Commission held that the

refusal by prison authorities to distribute to a prisoner a book which, although it basically dealt with a religious theme, also discussed the martial arts, was a violation of the prisoner's right to freedom of religion, but was necessary for the protection of the rights and freedoms of others'

The issue of the religious freedom of Jehovah's Witnesses has always been a prickly one. In Grandrath v Federal Republic of Germany (Report of 29 June 1967, Year Book of the European Convention of Human Rights X (1967) 626), a member of the Jehovah's Witness sect refused to undergo compulsory military service on the grounds of conscience and, in addition, refused to undergo civilian service in lieu of military service, in terms of art 4(3) (b) of the European Convention, on the basis that it interfered with his duties as a minister. The question that arose was whether the substituted civilian service constituted an interference with the applicant's right to manifest his religious beliefs in terms of art 9. Under West German law full-time ministers of religion were exempted from all service. However, Jehovah's Witnesses do not have full-time ministers – all members are ministers. The Commission found that the situation would be untenable where numbers of people could evade substituted service on the grounds that they were ministers. As a result the Commission held that this was a case for the application of art 9(2), which limits freedom to manifest one's religion in the interests of public safety and for the protection of public order. For this reason it held that substituted service was not a violation of the applicant's freedom to manifest his religious belief.

Jehovah's Witnesses throughout the world have caused controversy in the manifestation of their religious beliefs. They have challenged governments and other churches on the basis of their belief. They have refused to participate in wars, to do compulsory military service, and to salute a flag. Their children have suffered in some schools because of their belief. In the process they have succeeded in asserting their rights and forced governments to recognise them.

The conflict between manifestation of religious belief and some other public interest is exemplified by the case of *X v United Kingdom*, (Application 7992/77; Decisions and Reports of the European Commission on Human Rights. No 14 234) which related to a UK law which made it compulsory for motor-cyclists to wear helmets. The applicant, a Sikh, contended that the act of removing his turban in order to don the helmet was a violation of his right to religious freedom. Although the Commission agreed with this contention, it pointed out that it was necessary and justified for the protection and safety of the public.

The religious beliefs of employees may conflict with their working conditions. The conflict between religious holidays and work programmes poses particular problems. This usually arises with communities such as Orthodox Jews, the World-wide Church of God, and the Seventh Day Adventists, all of whom observe the Sabbath from sunset on Friday to sunset on Saturday. If an employer allows Christians to observe their Sabbath (which is Sunday as the Lord's Day), but does not allow members of other religions the same right, the practice could be construed as a violation of the right to manifest one's religious belief. Moreover, if an employer recognizes Christian holidays (such as Christmas or Easter), members of other religions can claim the same as far as their religious festivals are concerned. To deny these could similarly be challenged as an infringement of the right to manifest one's religion. The government is under an obligation to treat all its citizens equally. What it allows in respect of one religious group it has to allow in respect of others.

6.5 The current situation in South Africa

South Africa is a deeply religious country. It is a multi-faith country. As already stated it is sometimes referred to as a Christian country. On a closer look, however, it is doubtful whether this appellation is appropriate as sometimes mere lip-service is paid to, Christianity. Although the preamble to the 1983 Constitution professed humble submission to Almighty God, and although section 2 stated that 'the people of the Republic of South Africa acknowledge

the sovereignty and guidance of Almighty God', there is no evidence that the laws of the country were tested against the will of God. On the contrary, many laws that were passed by Parliament in the past were a violation of God's law as revealed in scripture. Moreover, regarding South Africa as a Christian country tends to ignore the existence of other faiths.

Although there has been no religious intolerance of Christianity in South Africa, the same cannot be said of other religions. Moreover, even when it comes to Christianity, the government in the past did not allow the free expression of Christian convictions. Through its policy of apartheid and the laws enacted thereunder it violated the fundamental principles of Christianity – love for one's neighbour and treating others as one would like to be treated. People of colour were singled out for legally sanctioned discriminatory treatment. Those who opposed these policies and practices in the name of Christianity were ruthlessly suppressed. This discredited the government's claim to be a Christian government, although this was not unique as it had happened in the history of Christianity.

Despite this abuse of Christianity on the part of the National Party government, there is no doubt that religion will always form a fundamental part of South African society. The question of how religion should be treated can be approached from various starting points. The most appropriate one is that of having a secular state where there is free interaction between the state and religious organisations. These organisations would be autonomous, although they could collaborate with the state on matters of mutual interest. There is no question of the suppression of religion nor is there a possibility of the creation of one state religion. It is for this reason that the Constitution protects freedom of religion, enabling religious organizations and communities to operate freely and without interference from the government of the day. This is the approach that was followed in the Constitution and which is generally accepted in the international community.

Notwithstanding the protection of the freedom of religion some would still argue that certain practices are still aimed at giving preferential treatment to Christianity. This is evidenced by the retention of holidays of Christian significance while there is no similar practice in relation to holy days of other religions. In *S v Lawrence; S v Negal; S v Solberg* (1997 (4) SA 1176(Cc); 1997 (10) BCLR 1348; 1997(2) SACR 540) the constitutionality of the provisions of the Liquor Act 27 of 1989 were challenged. The Constitutional Court was faced with the issue of whether a statutory prohibition on selling wine on Sunday was in violation of the right of freedom of religion in the interim Constitution. The Court held that the said provisions did not violate the freedom of religion clause.

6.5 Conclusion

The current provisions of the Constitution which protect religious freedom entail that not only Christianity but also other religions must be allowed and protected. As Christians are allowed to worship their God and even to propagate the gospel, this gives them ample opportunity to spread the gospel of the kingdom of God. They cannot ask for more. This does not weaken Christianity, but it can strengthen it. Christianity, as already stated, does not require Christians to be given preferential treatment. Our Constitution is therefore not far off the mark in this respect. Nor is there conflict between what the Constitution provides and what the word of God stipulates.

Religious freedom does not imply that Christians should agree to allow their churches to admit as members people who do not believe in Jesus Christ. On the contrary Christians are entitled to believe that the Christian faith is correct and that atheism, Hinduism, and a great number of other religions are wrong. But Christians have to accept that it is morally right for government to treat all citizens equally regardless of their faith and to accept all as civic members of the body politic. An ecclesiastical judgment should be distinguished from a political judgment just as the separation between church and state is accepted. Neither

judgment is neutral. Each is rooted in a different kind of moral reasoning inherent in the different identity of church and state (Skillen 1996: 159).

Christians should advocate what Skillen refers to as not only structural pluralism, but also confessional pluralism. Structural pluralism entails that government and public law, should do justice to the full range of societal competencies or realms of human responsibility. This means the various institutions, associations, organizations and human relationships of society. Government has its distinct responsibilities and should not attempt to be omniscient. Other societal structures have their own moral integrity and competence. As society become more diverse and complex, the government's task of securing justice entails the recognition of that structural diversity as part of its legal integration of society. A just political order will be characterised by its principled maintenance of structural pluralism (Skillen 1996: 161).

Confessional pluralism entails that a political constitution should compel the government to protect the religious freedom of its citizens. This is so because the government is not competent to define the content of true religion or to delineate all the religious obligations of its citizens. The government should protect the variety of religions in a fair and equitable manner. This is not based on the presumption that every religion is equally correct or true on theological grounds, but simply because the government is not only not competent to define and enforce religious orthodoxy and its role to establish public justice lead to the conclusion that the government should uphold confessional pluralism.

Upholding confessional pluralism means that people's religions must not be identified only with their ecclesiastical practices and affiliations. The government is also not competent to assume the right to define as non religious all things outside churches, synagogues and mosques. Religious freedom therefore should not be confined to the freedom of churches. People often ignore the distinction between structural and confessional pluralism when they overlook the religious connections and principles that influence people outside and inside their churches. The tendency is to mistakenly think of the public arena as a single,

undifferentiated community of “similar” citizens who by majority vote, may rule with one will on all things outside churches and synagogues. Consequently every law or court decision will be considered as having an unrestricted secular authority throughout the realm. The public arena is then regarded as one big melting pot without structural boundaries or confessional distinction. This is not only a serious error, but it is also a violation of religious freedom by ignoring the reality of religious expression in all areas of life. People generally express themselves religiously beyond the walls of different churches. Believers of different faiths may be obligated by their faith to educate their children in different ways, to eat different foods, to pursue their occupations with peculiar commitments and to exercise their responsibilities quite distinctively in a variety of professions such as medicine, law, and even politics. If the government confounds confessional and structural pluralism, it restricts religious freedom to churches, synagogues and private conscience. This restriction violates the public exercise of religion for many people. If that happens the inevitable results are that people and the government ignores the important distinction between structural and confessional pluralism.

Restricting religion to churches synagogues and mosques will unmistakably create an impression of a secularised public melting pot which will obscure the reality of societal differentiation. This may then lead to government’s assuming responsibility for instance for education in a manner that overlooks and violates both the structurally different identities of families and schools as well as the *religious convictions that citizens wish to express in education. But if citizens are given the constitutional protection to practise their religion freely, all citizens should be free to conduct family, schools and other societal practices in ways that are consistent with the obligations of their deepest presuppositions and faiths. Maintaining this structural and confessional pluralism is the only way of to do justice to real diversity in societies as complex as South Africa. Only laws which treat all citizens fairly in their actual social and religious diversity will be able to carry the moral force which is necessary to bind them together as citizens in a single republic (Skillen 1996: 162-165).*

As already stated this is not to weaken Christianity but to strengthen it because Christians will be free not only to preach the gospel but also to practise what they preach. They will also have to work for an open society not out of self-concern but also out of concern for the just treatment of people of all faiths and ideologies in all institutions of society. This is consistent with the idea of a just state.

Our Constitution protects freedom of religion. By doing this it provides a broad framework within which people have to exercise their religion. It is the courts and in particular the Constitutional Court that must assist in the implementation of structural and confessional pluralism by the way they interpret and supply the freedom of religion clause.

CHAPTER SEVEN

DOES THE CONSTITUTION PROMOTE EVIL?

7.1 Introduction

One of the major criticisms from the community, and in particular the Christian community, is that the Constitution appears to promote evil, by allowing certain practices and values which are either foreign to our values or in conflict with our Christian beliefs. As examples they mention, among others, abortion homosexuality and pornography. They also complain that by abolishing the death penalty the government seems to be soft on crime and does not care about the escalating crime rate in the country. The escalation of the crime rate especially crimes of violence in the country is largely attributed to the abolition of the death penalty.

It is essential in this chapter to address some of these concerns. Only a few of them will be brought under a magnifying glass. These include abortion, polygamy, homosexuality and the abolition of the death penalty. The purpose of this is to bring light to bear on the proper approach to be adopted towards these practices and issues. They are the issues which were hotly debated before the adoption of the Constitution. They continue to be topical even today. It is also important to assess the implications for allowing these practices.

Before these issues are analysed, it is important to reiterate that the role of government is not an easy one. Many people expect it to take a simple and principled approach in dealing with all concerns. The government on the other hand has to consider a number of factors which the ordinary people do not take into account in pursuit of single issues. It has to consider the conflicting and differing interests of members of society and to try to accommodate and satisfy them. It also has to consider public policy issues, and as a result it has sometimes to follow a "messy" approach, which requires it to adopt compromises. The

critical question is whether these approaches are compatible with Christianity? What should also be borne in mind is that not all people in the country are Christians. Many of them uphold other faiths and others have no faith at all. The question is whether a Christian approach should be pursued in respect of all of them. In any case what is the Christian approach?

Does imposing Christian norms on people who are not Christians make them Christians? Obviously this is not so. Does following the Christian approach lead to justice? Christianity also does not follow the approach that people should be compelled to be Christians. A person becomes a Christian through persuasion and through being preached to and being converted to the Christian way of life. He does not become a Christian simply by being subjected to some Christian rules and principles, however desirable these rules and principles may be. Adopting a Christian approach and imposing Christian norms on society are two different things. Adopting a Christian approach may be used even on people who are not Christian. A Christian approach is based on love for the other person. It entails acting in the best interests of the other person, or treating him or her in the way you would like to be treated. There is no law against that. As already said, imposing a Christian norm on non-Christians is something different. It involves expecting non-Christians to do what Christians are supposed to do. That may not lead to justice. It may indirectly compel people who are not Christians to be subjected to norms without their consent.

A further consideration to bear in mind is that our Constitution is based on certain core democratic values. These are freedom equality and human dignity. In addressing certain controversial issues, the government must approach them on the basis of these values. These values therefore serve as a guide to the appropriate decision the government has to take. Moreover, these are the values which the courts and in particular the Constitutional Court will take into account in coming to a decision on an issue presented to it.

7.2 Abortion

7.2.1 Abortion in general

Abortion is the artificial premature expulsion of an unborn foetus from a mother's womb. This is different from a miscarriage in that a miscarriage is not planned but happens because of some physiological malfunction. Abortion on the other hand is deliberate.

The issue of abortion raises a number of moral religious and legal questions. The main question is whether it is morally justifiable to provide abortion on demand. For lawyers the critical question is whether or not an unborn child is a person with certain rights, like the right to life. According to law a human being becomes a legal person on birth and not before. In Roman-Dutch law, however, a fiction was developed which attributed legal subjectivity to an unborn child. This became known as the nasciturus rule. According to this rule an unborn child is deemed to be born if it is to its advantage and not to its prejudice. This rule was developed to protect the interests of an unborn child. As a result of this fiction an unborn child would be entitled to inherit property even though it was not born at the time of the demise of the deceased. Conception and not birth would become the decisive moment.

The nasciturus rule was extended in South African law to cover situations where an unborn child had been injured before birth. If the child was subsequently born alive, the court decided that it could bring a claim for damages for injuries sustained before birth. This, the court did by extending the nasciturus rule to delictual claims. The court reasoned that if a child's interests could be protected when it comes to property, there was no logical reason why the child's interests could not be protected when it comes to life and limb [Pinchin NO and another v Santan Insurance Co Ltd, 1963(2) SA 254(W)]. The nasciturus rule cannot be extended to abortion because one of the requirements of the nasciturus rule is

that the person must subsequently be born alive. In the case of abortion there is no live birth (Du Plessis, 1976:17).

In Christian League of Southern Africa v Rall 1981 (2) SA 821 (O), an application was brought for the appointment of a curator ad litem to represent the interests of an unborn child, allegedly conceived as a result of rape, in all matters concerning its proposed abortion. The applicant, an organisation the objects of which included the promotion of adherence to Christian faith and practice in Southern Africa and the promotion of adherence to Christian morals and ethics, alleged that the protection of human life and care for the well-being of the unborn were matters pertinent to Christian morals and ethics. It also alleged that the unborn child had no one to protect its rights and required therefore a curator ad litem to represent it in proceedings in terms of the Abortion and Sterilization Act.

The court dismissed the application on the ground that the applicant had shown no real interest and therefore had no locus standi. It also held that there was no legal basis for the appointment of a curator ad litem to represent a foetus in matters concerning the termination of its mother's pregnancy, because in our law an unborn child is not a legal person with rights which can be enforced on its behalf. Nor could the nasciturus rule be applied to a case like this.

7.2.2 Abortion before 1996

Previously, our criminal law allowed abortion only in a few instances (Abortion and Sterilization Act 2 of 1975). These included cases where the continued pregnancy of the mother could endanger her life or the life of the unborn child. It could also be permissible if the pregnancy took place as a result of rape or incest. In other cases abortion was a crime. Abortion on demand was not allowed. The grounds on which abortion could be allowed were regarded as restrictive.

Even then there were those who contended that abortion on demand should be allowed. Those who supported this view were basing their arguments on the autonomy of the woman and on her right to decide on her reproductive capacity. The argument by feminists was that the woman is the one who carries the child in her womb. She should have a choice whether she wants to continue to do this or not. The unborn child is completely dependent on the mother and cannot have any say. After all it is not yet in a position to do that. Impetus was given to this by the American case of Roe v Wade 410 US 113 (1973) which recognised the constitutional right of women to have an abortion during the first two trimesters of the pregnancy. Others would argue from a moral point of view that although the mother has freedom to decide whether to bear a child or not, she does not have unlimited freedom in this regard. Society has an interest in the protection of the productive capacity of women. This cannot be dealt with arbitrarily and by individuals. Obviously this was before rights were emphasised in our society.

It is important to point out that those who espouse this view are not necessarily Christian, but are approaching it from the point of view of morality. They are simply finding the practice of granting abortion on request repulsive. They feel therefore that it should not be allowed because it is not right; it is in fact immoral.

Similarly, most of the Christians are against abortion on demand. They are of the view that this is against God's will. Their contention is that nobody can decide with certainty when life begins. It is therefore necessary to play it safe. Frequently they refer to the book of Jeremiah where God says that before Jeremiah was born God knew him and already had a plan for his life. They also use moralistic arguments like the fact that this child who is aborted could be an important person and would make a big contribution to the welfare of society. Because of this premature death society is robbed of this.

The issue of abortion therefore, like most moral issues, is an emotive one. Some would openly declare that any person who commits abortion is a murderer. Many Christians would even go so far as to declare that if this is allowed on a wide scale it would bring God's curse on the nation.

Some on the other hand argue that here we are not dealing with a question of comparing right and wrong or good and evil. On the contrary we have two evils. It is a question of considering which of the two evils is the lesser. But for many Christians that approach is unacceptable. They feel that abortion should be prohibited with a few exceptions being allowed. Abortion on demand is not one of them.

A practical problem in relation to abortion which is a problem even for Christian medical doctors for instance is that usually abortion is demanded by a woman who is either too scared that her parents will either disown her or will treat her harshly if they find out that she is pregnant or who is just not in a position to maintain the child. Here the question may well be whether we place value on life itself or on its quality. A person may have bare existence and be poor and suffering and yet he or she is alive. Women who are faced with a prospect of a child they cannot afford to support may not have the luxury to consider all the implications of their proposed abortion. All they think of is that they cannot afford to maintain the child and would rather not have him or her live. It is an act of desperation. It may also happen in the case of a married woman who has had an illicit relationship with a man other than her husband from which she has fallen pregnant.

The problem is that a medical practitioner may find that abortion is in conflict with his or her convictions. But if he or she refuses to conduct an abortion in a clean and hygienic environment, the woman concerned will resort to back-street abortion. In that case the woman risks losing her life so that not only the life of the unborn child but also that of the mother will be lost. This presents a real dilemma for a medical practitioner even the one who is a Christian. The predicament is: should he/she adopt a principled stand and refuse to conduct the

abortion and the woman consequently resorts to back-street abortion and she dies? Or, should he/she try to advise and counsel her about the moral implications of abortion? She may not be in a position to listen to the well-meaning advice. Alternatively, should he/she assist her with the hope that one day she will realise the wrongness of her deed and repent of her sins? Assisting her in that way, might make her more amenable to persuasion and become a committed Christian. No doubt God is not pleased with the death of a sinner but would rather prefer the sinner to repent of his/her wicked ways. If he/she were to assist her on the other hand he/she might have a guilty conscience that he has been an accomplice to this nefarious deed. These are hard choices to make.

The issue of abortion is not dealt with in the Constitution. At the time of the adoption of the Constitution it was seriously debated (Rudolph, 1994 : 502). Subsequent to the adoption of the Constitution abortion continued to be debated. A law was ultimately passed on this, the Choice on Termination of Pregnancy Act 92 of 1996.

7.2.3 The Choice on Termination of Pregnancy Act

In passing the Act Parliament had to take cognisance of the values of human dignity, the achievement of equality of the person, non-racism and non-sexism, and the advancement of human rights and freedoms. It also had to take into account the fact that the Constitution protects the right of persons to make decisions concerning reproduction and to security in and control over their bodies. Moreover, it considered that both men and women have the right to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice, and that women have the right of access to appropriate health care services to ensure safe pregnancy and child birth. It also had to take into consideration that the decision to have children is fundamental to women's physical, psychological and social health and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy as well as sexuality education and

counselling programmes and services. It also had to recognise that the state has a responsibility to provide reproductive health to all and also to provide safe conditions under which the right of choice can be exercised without fear of harm (preamble).

The Act provides that pregnancy may be terminated upon request of a woman during the first 12 weeks of the gestation period of her pregnancy. It may also be terminated from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with a pregnant woman, is of the opinion that the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality; or the pregnancy resulted from rape or incest; or the continued pregnancy would significantly affect the social or economic circumstances of the woman (section 2(1)). Provision is made for the termination of pregnancy after the 20th week of the gestation period if a medical practitioner after consultation with another medical practitioner or a registered midwife is of the opinion that such termination is warranted (section 2(1)(e)). The termination of a pregnancy may only be carried out by a medical practitioner, except the one which takes place within 12 weeks, in which case a registered midwife who has completed a prescribed training course may carry it out (section 2(2)).

7.2.4 Critique of the Act

Once again many Christians were not pleased with this legislation for the reasons already alluded to. They felt that by doing this the government is promoting evil; it is encouraging promiscuity because girls will know that they can evade the unpleasant consequences of their loose behaviour by obtaining easy abortion. But it is important to put the matter in proper perspective. The government is not necessarily promoting abortion by providing this law; it is not encouraging or promoting evil. It is dealing with a practical problem. It can adopt an ostrich philosophy and a number of women will die as a result of back-

street abortion. In the past many women died because of this. It is also important to point out that what makes the issue of abortion sensitive is that it is only women who suffer because of this. Men who are responsible for the pregnancy are often home and dry. That is why some women feminists feel that men should have no say in this matter. To adopt a general moralistic view on abortion on demand does not solve the problem.

As has been said, the government does not necessarily promote or encourage abortion just as the enactment of the divorce law does not necessarily imply encouraging divorce although this may be so indirectly. The main purpose of providing for legalised abortion is to enable those who insist on abortion to have a safe and hygienic abortion. Moreover, the decision to conduct the abortion is not taken lightly. Provision is made for the counselling of the woman and for drawing her attention to all the implications of her decision. It is only where she is adamant that the abortion should proceed that this is done (section 4)

There will always be differences of opinion on the question of abortion on demand. Support for safe abortion does not make a person any less a Christian than those who are against it. Even in the past the prohibition of abortion was not absolute. Consideration was usually given to the safety of the life of the mother. There is no reason why this should not be considered in the case of safe and hygienic abortion. The role of the Christian should not necessarily be to condemn the government for providing for safe abortion, but it should be to preach the gospel and to teach those who are converted so that they will not be involved in pre-or extra-marital sex which, among other things, leads to unwanted pregnancies .It is also to pray for those women who are faced with this predicament to have the courage to take responsibility for their actions. There is also no compulsion on any Christian to accept abortion. The church may continue to criticise abortion on demand but the state has a responsibility to ensure that those women who want it do have access to safe and hygienic facilities for terminating pregnancy. Most of these may not be Christian.

7.3 Polygamy

7.3.1 The Constitution and the protection of culture

The Constitution not only prohibits unfair discrimination based, among others, on culture, but it also entitles everyone to participate in the cultural life of one's choice (section 30). It also provides for the recognition of marriage concluded under any tradition, or a system of religious or personal or family law (section 15(3)(a)(i)).

The Constitution therefore provides for the recognition of a customary marriage which allows polygamy. The recognition of a customary marriage is, however, subject to consistency with the Bill of Rights (section 15(3)(b)). When the South African Law Commission considered the possibility of the recognition of a customary marriage, questions were raised as to whether the practice of polygamy is compatible with the equality clause which is such a prominent feature of the Constitution.

Other questions which were posed were not new. Similar question had been posed before and especially before the South African Law Commission when it investigated the possibility of the recognition of a customary marriage in 1986 (Marriages and Customary unions of black persons Discussion Paper 116). The question was also asked as to whether or not by providing for the recognition of a customary marriage and by implication the custom of polygamy, the government was not promoting evil.

In order to answer that question one has to consider the background to the Recognition of Customary Marriages Act (120 of 1998). Although the questions which were posed in this investigation were more or less the same as those posed before, that is in 1986, what was different was that now we have a Constitution which upholds equality.

One of the reasons for withholding recognition from a customary marriage in was that it is potentially, if not actually, polygamous in that it allows a man simultaneously to have more than one wife. It must be pointed out, however, that in the context of a customary marriage polygamy was recognised and the special courts always gave effect to all the consequences of polygamous customary marriages. It was only the supreme court that was reluctant to recognise polygamous marriages as legal marriages. In South African law polygamy was considered contrary to public policy (*R v Estate Seedat* 1916 37 NLR 535; *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo*, 1960 2 SA 467 (A); *Ismail v Ismail* 1983 (1) SA 1006 (A); see also Dlamini, 1984:74; Kerr, 1984 477). Strictly speaking it was not public policy that was at stake, but rather state policy which represented the views and values of the white community on what is acceptable behaviour (Kerr, 1984:477).

In evidence before the Commission, the major arguments used against polygamy were its incompatibility with Christianity and that it represented a retrograde step and negation of western values now espoused by blacks. On the other hand, those who favoured the recognition of a customary marriage, with the retention of polygamy—who were by no means in the minority—contended that polygamy has traditionally been a feature of the customary marriage, and to prohibit it by legislation would be a drastic departure from customary law. The Law Commission considered the good reasons which favour the non-recognition of a customary marriage, but chose the better ones that favour its recognition. It considered that while the Constitution upholds non-discrimination, it is also provides for the recognition of cultural rights and that the customary marriage forms part of the African culture to which black people have a right. Moreover, the Law Commission felt that while some of the issues are being debated including the question of same sex relationships, it would be imprudent and premature to close the debate in the case of a customary marriage by not recognizing it (Report on Customary Marriages 92).

The arguments against polygamy can be classified into three broad categories, namely the theological, those based on critical morality, and those which derive from human-rights considerations. It is important to analyse these considerations.

7.3.2 Theological objections

One of the main criticisms against polygamy is that it is incompatible with the Christian idea of marriage. This view assumes that the Christian marriage is monogamic in nature. However, the problem is that there is no clear and unequivocal word of scripture in either the Old or New Testament which condemns polygamy as unchristian (Helander :1968:80; Dlamini, 1985:703 ff). The bible is painfully silent on this institution. Only inconclusive inferences may be drawn. The rejection of polygamy by the churches has been based largely on missionary authority rather than on the clear word of scripture, although the arguments are obliquely based on the bible. The most ludicrous justification was that the bible says you shall not serve two masters. The enforcement of this prohibition has sometimes been ruthless. In some churches polygamy was totally prohibited. For a black polygamous man to be admitted as a member of a church he had to discard all his wives but one. This was a cruel practice adopted apparently in pursuit of a dubious "higher morality." Later, however, certain churches relented.

Although God created one woman, Eve, for Adam, (Gen 2:18-22) there is no doubt that polygamy was widely practiced in the Old Testament. Holy men of God including Moses, Jacob, king David and king Solomon, to mention but a few had more than one wife without incurring divine disapproval; on the contrary there appears to be a tacit acceptance of polygamy. This view is further bolstered by the fact that when David committed adultery with Uriah's wife, and later murdered him, God clearly expressed his displeasure at this and pointed out that He had given King David his enemy's wives and if David had wanted more, God would have gladly given him more (2 Samuel: 12: 7-8). The

question is therefore: why would God give David more than one wife if He was against this? And God loved King David! Except for a few limitations (Deut 17:17; 1 Kings 11:3-4), there is no direct prohibition or restriction on the practice of polygamy in the Old Testament. Understandably, however, the practice was confined to men of means (Neufield, 1949-119). Having more than one wife had its share of problems, but this is no different from many monogamous marriages. Although kings were later to be precluded from multiple marriages as this often led to neglect of their duties, (Deut. 17:17; 1Kings:11:13-14), polygamy as such was not prohibited.

Although in the New Testament there is no clear evidence of the prevalence of polygamy, there is equally no clear word of scripture which proscribes it. The argument that Christ did not refer to polygamy because it was no longer an issue cannot be sustained. There is evidence that it was practiced up to the Middle Ages (Neufield, 1949 : 118-119). Even the marriage in Cana in Galilee where Christ was present, (John 2:1-11) was potentially polygamous according to the prevailing Jewish law although it most probably remained monogamous as was the tendency at the time (Kerr, 1984 : 451). One also looks in vain for a statement which abrogates polygamy like: "Ye have heard of old...but I say unto you..."as is the case in the Sermon on the Mount (Matt :5, 6, 7). Silence on the propriety of an institution like levirate (Luke 20: 28-56) could be interpreted as acceptance of polygamy. Moreover, Jesus would not have made a parable about ten virgins who went out to meet one bridegroom, thereby impliedly accepting polygamy, if at the same time he disapproved of it (Matt 25 : 1 -13).

What cannot be denied is that in the New Testament there is a strong tendency towards monogamy. However, this remains a tendency rather than a clear and unambiguous injunction. There are entirely plausible reasons for this. The elevation of the status of women through Christianity resulted in marriage being

seen not merely from a man's point of view, but also from that of a woman. Women came to be treated with more respect in the Christian church, and a monogamic tendency followed logically (Helander, 1968 : 30).

What may also have contributed to the development towards monogamy was that Romans and Greeks, the leading nations of the empire, were monogamists although they allowed concubinage and easy divorce. The Christian church, on the other hand, censured divorce. The move towards monogamy was further facilitated by the prevailing belief in the imminent return of Christ. Persecutions and the suffering of the church were obviously incompatible with polygamic entanglements. "A polygamic home is firmly rooted on this earth, well-to-do, entangled in earthly matters. It goes with peaceful and prosperous times. Consequently it did not befit the position of the Christian at the time" (Helander :1968:31).

In his teaching Paul tended to discourage polygamy. (1Cor : 7; 1Tim : 3,2, 12). He was concerned that Christians should be free from the worries attendant upon marriage. He regarded marriage to even one wife as a concession owing to immorality. If Paul was cautious on one wife he obviously would not encourage a whole harem. Monogamy developed largely because of the pressures of the time. In their absence the picture might have been different. (Helander, 1968 : 33).

This does not mean that the New Testament advocates polygamy. The main message of the New Testament is the gospel of Christ and the salvation of mankind. Anything which conflicts with this idea could therefore not be recommended. The problem with polygamy in South Africa has been that its proscription has been imposed even on non-Christians simply because when whites came to this part of the world, they brought with them an institutionalised monogamous marriage, and refused to recognise anything different as a legal marriages. (Esplugues, 1985 : 303), Western culture itself has not, however, consistently been based on Christianity.

It is more our socialization rather than Christianity, which limits our perception and encourages the use of pretexts to discourage polygamy. It was convenient for the early missionaries and colonists to emphasise the difference between themselves and the blacks so as to bolster their role as apostles of Christianity and civilisation which blacks had perforce to emulate. There would have been no incentives for blacks to abandon certain of their traditional institutions if these were regarded as the same as those of whites. Compulsory monogamy is far more a product of western civilization than of Christianity pure and simple. The approach of the early missionaries in South Africa in deprecating the marriage system of black people was less tolerant than that of the early apostles who *agreed not to impose onerous Jewish laws on Gentiles except to enjoin them to desist from eating meat sacrificed to idols and unbled meat of strangled animals, and to refrain from immorality (Acts 15 : 19-20)*. This attitude may be ascribed to the fact that polygamy had already been declared illegal after the fifth century AD in continental Europe (Hahlo 1985:5). There is no agreement on the authenticity of cannon law in terms of which this had been done. It had been an attempt to implement unity in the Christian church (Hofman, 1983 : 23) although it is doubtful whether this was based on scripture. In any case it is God alone who can declare something sinful.

The inferior status of women has also been attributed to polygamy. It has been argued that polygamy deprives the wife of the dignity which should be hers as man's partner in life in that in a polygamous union the woman is treated as a servant rather than a partner. "In every race where the practice prevails, the conditions of women is servile" (Joyce, 1933:19), the argument goes. This is a question of giving a dog a bad name and hanging him. In Roman law polygamy was not practiced, but women were not treated as equals with men. In fact women were regarded as needing perpetual tutelage owing to their perceived feeble-mindedness, although this argument was specious because tutelage was for the benefit of the tutor and not for the woman (Thomas, 1976 : 463). Moreover, in western society although polygamy has long since been abolished, the basic inequalities between men and women did not vanish simultaneously. In any case if there is anything which does not advocate equality between a man

and his wife, it is the Bible. Certainly men are enjoined to love their wives (Col : 3:19; Eph 5: 25-26), but wives are strongly admonished to submit to their husbands in all things, as if to the Lord (Eph 5 :22; Col 5 : 18). One must, however, make a distinction between submission and inferiority. Inferiority means that someone or something is lower than another in status or quality .Submission has to do with behaviour. It is conduct that is subservient to another and has nothing to do with inferiority.

If one considers the South African situation, one becomes a little cynical. To assume that polygamy was so evil and unchristian that it merited immediate proscription is, to say the least, hypocritical. If the dictates of Christianity were seriously adhered to, South African law would not have sanctioned discrimination which is patently unchristian and contrary to the brotherly love advocated by Christianity. In fact, many churches supported discrimination directly or indirectly and some of them even tried to find scriptural support for it. This discrimination was not between men and women; it was between blacks and whites. In that discrimination the position of black women was irrelevant. It was regarded as justified. This caused cynicism on the part of some blacks. A newspaper commentator once commented caustically as follows:

It has become part of our colonial political clap-trap, and cant, to connect polygamy with slavery. And to get labour, the evils of polygamy have suddenly awakened pious hostility of men whose zeal and policy would lead to slavery without polygamy (quoted by Welsh: 1969:70).

Others assume that polygamy is objectionable because it discriminates against women and is merely for the selfishness of men. While it is conceded that polygamy does discriminate against women in that only a man is entitled to have more than one wife while a woman is not,(except in few societies where polyandry is allowed) it is not true that only men benefit from it. Today no woman is forced to a polygamous marriage as was thought to be the case in the past. Polygamy continues today in many guises because some women support it. Most married women are against polygamy. Similarly, unmarried women who

have the prospect of marrying single men are opposed to polygamy. But some of those women who are unmarried and who feel they have no chance of marrying a single man, support it. Some other women may have a potential of *marrying single men, but they may not find suitable men*. For that reason they may be prepared to settle for a married man just because he is the right type of man, and no doubt there are men who are not worth marrying.

From the foregoing discussion it is clear that the objections to polygamy are not necessarily based on a clear word of scripture but rather on the morality of western society. Critical morality therefore provides a better explanation and needs to be considered.

7.3.3 Objections based on critical morality

A distinction is often drawn between positive morality and critical morality. Positive morality refers to the morality actually accepted and shared by a given social group. Critical morality means the general moral principles used in the criticism of actual social institutions including positive morality (Hart, 1963:20). This distinction is useful in determining the legal enforcement of positive morality.

The pertinent question is whether polygamy is immoral and if immoral whether it merits criminal punishment. To regard it as immoral we must subject it to critical morality. The criteria for determining immorality are, however, diffuse and controversial owing to conflicting values of different societies. This ambivalence has led some to argue that it is better for the legislature to take the responsibility of determining which conduct should be criminal. By criminalising morally-neutral conduct the legislature can persuade society to view such conduct as immoral "either because the conduct is now associated with other serious crimes and its quality comes to be equated with them, or simply because it is generally regarded as immoral to break the law." By criminalising morally-neutral conduct the legislature can alter the moral views of the community over a period of time (Rabie, 1981:122). The problem, however, is that there is no

certainty that criminalisation necessarily induces this attitude. In some cases it may well do, but other considerations may also play a role. Moreover, breaking the law will not always be viewed as immoral, otherwise every breach of the law would be visited with a criminal sanction.

To ascertain whether conduct is immoral is essential for determining whether it should be punishable. This does not imply that conduct should be criminalised simply by virtue of its immorality. According to the western view, criminal law should not encroach too much on the liberty of the individual. Moreover, immorality is not the only criterion for criminalisation; the other criteria should be taken into account. One of these is the nature and value of the interest protected, and another is the seriousness of the harm threatened by the act in question (Rabie, 1981:123). However, it is generally accepted that immorality is one of the essential criteria for rendering conduct criminal because criminal law invokes society's extreme or drastic sanction, namely punishment. The use of this sanction needs justification. This does not mean that morally-neutral conduct is not sometimes punishable in the public interest. To punish such conduct, however, unless there are some compelling societal interests at stake, is quite contentious and is often seen as an abuse of the criminal sanction which tends to blunt its impact. If conduct is not generally viewed as immoral, this should be a warning to the legislature intending to proscribe it. A prudent legislature should consider other sanctions (Rabie, 1981:123).

Only conduct which is generally regarded as immoral should be treated as criminal because the criminal law involves moral condemnation of conduct as anti-social and the stigmatisation of the individual as a criminal. Punishing an individual for conduct that is morally neutral tends to make people lose respect for the criminal law and consequently weakens the law of which it forms a part. In such a case "the private appeal to conscience is at its minimum," and being convicted and fined may "have a little more impact than a bad selling season" or be regarded as "no worse than coming down with a bad cold" (Packer, 1968: 261).

An objection may well be raised against the view that only immoral conduct should be criminalised, namely that in a pluralistic society like ours it should be difficult for the legislature to determine the prevailing moral views. This objection may be met by a qualification “ whether there exists any significant body of dissent from the proposition that the conduct in question is immoral” (Packer, 1968: 264).

The problem with polygamy is that it is difficult to stigmatise it categorically as immoral. Even Devlin, who regards the enforcement of morals as being the competent field for criminal law, does not view it as outright immoral; all that he says is that monogamy is so deeply ingrained in western society that it would be impracticable to suggest that secular law should recognise any other form of conduct. He regards polygamy or polyandry as degrading to the man or woman, while monogamy provides mutual support and sexual fidelity. “For with promiscuity monogamy would degenerate into unregulated polygamy” (Devlin, 1965:62-63).

7.3.4 Human rights considerations

Considerable influence has been exerted by human rights ideas on contemporary thinking. Any practice which tends to discriminate against a particular group or section of the society is in conflict with human rights notions. At the root of human rights is the idea that people should be treated on the basis of equality and justice or on the basis of individual merit. There has also been a lot of international concern with discrimination against women. The provisions of article 5(a) of the Convention of the Elimination of All Forms of Discrimination Against Women of 1979, in particular, stipulate that the states party to the convention should take appropriate steps to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.

Polygamy is apt to be seen as a practice that discriminates against women. In the light of this, anyone who defends it may similarly be regarded as a male chauvinist who supports discrimination against women. Influential feminist and women's organisations have also strongly advocated the abolition of every form of discrimination against women. Many feminists regard the fact that only a man can have more than one wife while a woman cannot have more than one husband, as perpetuating inequality. This view is, however, spurious because the fact that men can have more than one wife does not necessarily mean that women want to have more than one husband or that it is in the interests of the woman to have more than one husband. Some, when they hold this view, are not thinking of more than one husband, but of a husband and a lover. It is one thing to have a husband and a lover, but something totally different to have more than one husband and it would impose an intolerable burden on the woman (Murray and Kaganas, 1991 : 127).

The problem, is that polygamy cannot be seen as discrimination against women because some women are in favour of it and benefit from it. It is therefore not a form of general indiscriminate and invidious discrimination against women. If a woman voluntarily waives her right, should we prevent her from doing so on paternalistic grounds of protecting her from herself? There is nothing unusual if a woman decides to waive her right to her dignity or autonomy and consents to being part of a polygamous establishment, unless of course the legislature feels so strongly that the right which is involved is so fundamental that even the holder of this right should be precluded from waiving it. Areas are well known in the field of criminal law and the law of delict where the consent of the victim cannot serve as a ground of justification. Thus consent to grievous bodily harm or to bodily mutilation will not exonerate the wrongdoer from liability. The reason behind this is that these are acts which are so objectionable as to be *contra bonos mores*.

The argument of harm does not arise in polygamy. The woman is not only not harmed, but she also stands to benefit from the relationship in a variety of ways unless harm is stretched to its absurd limits. The woman who is prejudiced by the

prohibition of polygamy is the second wife as her relationship is not legalised. Polygamy has been widely practised in traditional black society because it provided an answer to a number of social problems. If the first-married wife feels so outraged by the act she is free to divorce her husband on the ground that he has committed adultery and she finds this irreconcilable with a continued marriage relationship.

Some of those who argue that polygamy perpetuates inequality object to it simply because it allows a man to have more sex than a woman. They fail to realise that a polygamous customary marriage engenders heavy responsibilities. It is not just about sex. They also fail to realise that a man can have more sex outside marriage and many men do that and get away with it because while a man might be having an extramarital relationship with a woman, he might have a pretext that he cannot marry her because the law prohibits it. Polygamy is aimed at protecting women in the sense that all the women are regarded as the man's and consequently have a certain legal status whereas a mistress has no right or status emanating from the relationship. The non-recognition of a customary marriage owing to polygamy in the past, led to the woman being left without a remedy and therefore being in an invidious position. Some of those who were against polygamy and who claimed to support the woman's cause were not aware of this.

Polygamy is not regarded as unfairly discriminatory by women who are involved in a customary marriage. These women do not regard it as demeaning to them. On the contrary, they regard themselves as wives and in African society a married woman, albeit in a polygamous marriage, has a higher status than an old spinster. This does not mean that all women who are married in such marriages are happy, although unhappiness may result from the way some women are treated, than from polygamy itself. In any case happiness is relative in a marital relationship. A monogamous marriage does not guarantee such happiness.

Polygamy is regarded by those who are not involved in it as unacceptable. It is rather their attitude that is demeaning to those involved and it is this attitude which is unacceptable. It is hard to believe that a woman who decides freely and voluntarily to be involved in a customary marriage after taking all factors into account could be regarded as being discriminated against unfairly. If she entered into the marriage out of her free will and violation the state has no business in not recognizing that marriage on the grounds that it makes her unequal to whomever.

For some women it might sound hollow that their marriage is not recognized in order to make them equal with other women or men and to protect their dignity when in fact to attack their marriage is to affront their dignity. Moreover, marriage has the effect of conferring the status of a married woman and a mother whereas lifelong spinsterhood may for some of them be an unattractive option. A marriage, albeit polygamous, provides a stable relationship rather than a loose liaison.

The concept of equality implies comparison. Equality is denied if one category of people is entitled to benefits to which another may not be entitled. To suggest that the fact that the man is entitled to more than one wife while the wife may not be entitled to more than one husband is a benefit which women would also like to have is a hopeless distortion of reality. Moreover, it is a gross oversimplification of the situation to assert that there is something inherently unequal in a family structure which comprises one man and many women (Kaganas & Murray, 1981:127).

The Constitution prohibits unfair discrimination which is based, inter alia, on marital status or on culture. This implies that no person should be unfairly prejudiced because of the form of marital status or because of the cultural practice that he or she adopts. Polygamy is part of the culture of Africans. Moreover, in its interpretation of the equality clause the Constitutional Court held the view that differentiation per se is not unconstitutional unless it results in the violation of the dignity of the person. African women do not regard

polygamy as demeaning to them. It may also be pointed out that by recognising polygamous marriage the government is not promoting evil. On the contrary it is protecting women who are involved in such marriages and who are in an invidious position if those marriages are not recognised.

The assumption in the past was that education and Christianity would lead to the abrogation of polygamy. Although these elements have led to a reduction in polygamous unions, they have not been completely eliminated. To use the law to abolish polygamy would lead to people who are not really criminals being branded as criminals. This is an abuse of the criminal sanction. As stated above the legislature did not abolish polygamy but rather recognised the customary marriage which is polygamous. This decision was indeed a sound one. The objections of certain sectors of the church to the decision are clearly misplaced. They are based on prejudice rather than the word of God.

7.4 Homosexuality

7.4.1 Homosexuality in general

As already stated, our Constitution prohibits unfair discrimination which is based on, among other things, sexual orientation. This means that people who are homosexuals or lesbians are entitled to be treated like all normal people and should not be discriminated against.

For some people and especially Christians, this is unacceptable. They feel that by protecting homosexuality and lesbianism the Constitution is promoting evil. Homosexuality and lesbianism are for them deviant behaviour which should be prohibited. For Christians this is unnatural behaviour and it is in conflict with God's word; it is in fact sinful. Why should it be allowed? Some are even appalled by the fact that homosexuals are today allowed to parade openly as homosexuals, whereas in the past that at least remained a secret. In support of

the prohibition they would refer to Gomorrah and Sodom which were destroyed and one of the major sinful practices there was homosexuality (Gen 19 : 5-8).

Admittedly, homosexuality is according to the bible sinful (Lev 18 : 23; Lev 20 : 13; 1 Cor 6 : 4). But the question is whether it is something which should be subjected to a criminal section. In addition the question is whether it is more Christian to treat homosexuals with hostility and as lepers. Moreover, should the state discriminate against people on the grounds that they are homosexuals?

There is no doubt that homosexuality has always been a bone of contention. There is equally no doubt that views on it have differed and will continue to differ. It is also a fact that there are a number of people who have homosexual tendencies and they also exercise some influence in society. Whether or not homosexuality should be proscribed by law depends on the extent to which we believe the government should regulate the private behaviour of individuals on the grounds that it is immoral. It also depends on the weighing of the countervailing interests of liberty and human dignity.

It must be stated quite categorically that the government does not necessarily want to promote homosexuality. But it cannot wish homosexuality away. As already stated there are ordinary members of the society who have homosexual tendencies. Whether or not it has to treat them differently depends on its approach to the fundamental values of freedom equality and human dignity.

One of the exponents of liberalism John Stuart Mill felt that individual liberty is so important that it should only be curtailed if certain conduct is harmful to others. As he pointed out "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That is the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant" (On Liberty : 568). This means that the government should only prohibit on the peril of a penalty conduct that is injurious or harmful to others. If

conduct, however unacceptable it may be, is not harmful to others, government should not criminalise it. Obviously this view is not acceptable to all people. There are those who believe that conduct that is immoral should be prohibited by law. It was perhaps this view which led to homosexuality being criminalised as such in the past. Those who follow the liberal view are of the opinion that as long as sexual intercourse takes place between two consenting adults, that should not be punished as an offence.

Mill does not advocate that a person should be an island. What he says is that a person cannot be rightfully compelled to do or to forbear certain things because it will be better for him to do so or because it will make him happier, or because in the opinion of others, to do so would be wise or even right. These would be good reasons for remonstrating with him or reasoning with him, or persuading him or entreating him, but not for compelling him or visiting him with any evil in case he does otherwise. To justify the use of a sanction, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others "In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign" (Mill, 568). Obviously in Christian terms such sovereignty is limited in that a person has to subject himself or herself to God's word.

7.4.2 The Wolfenden Committee in England

The Wolfenden Committee in England relied on Mill's views in deciding to decriminalise sodomy. It stated that the function of the criminal law should be to preserve public order and decency and to protect society from harmful conduct. This committee was appointed in England and completed its report in 1957. The chairman of the committee of enquiry was a certain Sir John Wolfenden.

The committee decided that unless a deliberate attempt was made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is not the concern of the law. The committee recommended that prostitution itself should not be illegal because it did not harm the community. Soliciting by prostitutes in the streets would, however, remain illegal because it did harm the community. The committee also recommended that homosexual acts between consenting adults in private should no longer be a criminal offence.

7.4.3 The Hart-Devlin debate

These recommendations led to a debate between Devlin and Hart. It is not necessary to go into the details of this debate. Only a few salient features of it will be adumbrated here. Devlin in 1959 in his lecture entitled, "The Enforcements of Morals" argued that society has a right to punish any act which a "right-minded" person regards as grossly immoral. There was no need to prove that the act in question would cause harm to an individual or society. This Devlin regarded as being based on shared morality which is a seamless web which underpins society. The major criticism against this view is that the reason for criminalising such conduct is arbitrary and capricious. It also brings into question the decision on the part of the state to interfere with private conduct. The limitation of Devlin's views is that they are confined to relatively homogenous societies where there is shared morality. They do not accommodate societies which are heterogenous.

Hart, on the other hand dismisses Devlin's argument that morality is the cement of society. He also denies that society needs a shared morality, or a single morality which keeps it together. What every society needs is a set of rules restricting violence, theft and deception. He therefore supports a form of pluralistic morality. The views of Hart are much more acceptable. They are much more principled. They do not blur the distinction between the role of the

state and that of the church. In line with this reasoning, it is only forced intercourse, or the abuse of a juvenile that should be regarded as reprehensible.

7.4.4 The current constitutional position.

The approach that is followed in our Constitution is that of upholding the core democratic values of freedom equality and human dignity in respect of all people. In terms of these all people should be treated equally and with respect. They should not be discriminated against on the basis of the listed grounds which include sexual orientation. Homosexuality is not a sufficient ground for treating a person differently. People also have privacy and it is not the role of the government to pry into their private lives. Moreover people should be treated like people with dignity and self-worth. This means that they should not be demeaned or ostracised on account of their sexual orientation.

In the case of National Coalition for Gay and Lesbian Equality v Minister of Justice (1997(1) SA 6 (CC), the Constitutional Court declared various criminal prohibitions against homosexuals unconstitutional. These include the common law crime of sodomy (section 20A of the Sexual Offences Act 23 of 1957; and the inclusion of sodomy as a n item in schedule 1 of the Criminal Procedure Act 51 of 1977 and in the schedule to the Security Officers Act 92 of 1987). The Constitutional Court reached its conclusion on the basis of both the rights to equality and privacy. The reasoning of the Court was that neither anal or oral sex in private between a consenting adult male and a consenting adult female was punishable by the criminal law. Nor was any sexual act, in private, between consenting adult females so punished. The Court regarded this discrimination of punishing only homosexual acts as being unfair and therefore unconstitutional.

The Constitutional Court recognised the serious psychological harm of the criminal law, which reinforces societal prejudice and enforces the stigma. Fear of discrimination leads to the concealment of true identity, which reduces self-esteem. The criminal law directly tells homosexuals that they are less worthy of

legal protection. From the criminalisation follows blackmail, police entrapment, anti-gay violence and further discrimination. By discriminilising homosexual crimes the Court demonstrates why it is important to make the comparisons that equality requires. An examination of the severe impact of the criminal law demonstrates that sexuality is part of personhood. The protection of homosexual personhood as opposed to homosexual acts implies equal respect for homosexuals in other spheres of personhood and entries in legal life.

The Court felt that the punishment imposed by sodomy laws was punishment not of the act but of the sodomite. This punishment tended to ignore that a homosexual person is a person who fits in other categories of life. Homosexuals are therefore subjected to systemic disadvantage.

The fact that the government does not want to interfere with the lives of people, including homosexuals, unnecessarily implies that they are free to lead their own lives. This does not preclude churches from regarding conduct such as homosexuality as sinful. It is, however, not the role of the government to punish sin. In accordance with sphere sovereignty discussed earlier, that should be the role of the church. The government should punish ordinary criminals. The church should preach to homosexuals and tell them that homosexuality is in conflict with God's will and word and those concerned should repent of it. The church must try to assist homosexuals as well. But they should not expect the state to take over that role.

According to liberalism a person is free to choose what to do with his life. He can choose to go to heaven or to hell. He can choose to be a Christian or not to be a Christian. Once a person has chosen to be a Christian he obviously has to conform to the tenets of Christianity and has to subject himself to the discipline of the church. As already stated, the word of God regards homosexuality as sinful conduct (Lev 18 : 22; Lev 20 : 13; 1 Cor 6 : 4). No person can justify that in terms of the bible. But even Christians do not subscribe to the idea that sinners must be hated. Christians always say that God hates sin but loves the sinner. We should always make a distinction between hating sin and loving the sinner however

difficult it maybe. By treating homosexuals on the basis of equality, the government is not necessarily encouraging or promoting homosexuality. It simply upholds the principle of equality enshrined in our Constitution. It also treats these people as human beings with dignity whatever their predilections or inclinations.

7.5 The death penalty

7.5.1 The Constitution and the death penalty

Our Constitution does not declare the death penalty unconstitutional. It simply protects the right to life (section 11). But that right is not absolute because a person may still kill another in private defence (Snyman, 1989 : 97 ff). The Constitution also outlaws meting out cruel in human and degrading treatment or punishment (section 12(1)(e)).

In the Makwanyane case the Constitutional Court declared the death penalty as being unconstitutional on the grounds, inter alia, that it entails cruel, inhuman and degrading punishment, that it violated the dignity of a person and that it violated the equality clause. More of this will be said about the death penalty below. The abolition of the death penalty on the other hand has not been welcomed by many members of the community. They feel that the government is insensitive to the plight of the people who are being harassed by criminals. The impression they have is that the government protects criminals more than the law-binding citizens of the country.

The critical question here is whether the abolition of the death penalty is incompatible with the word of God. Before that question is answered, it is necessary to point out that the death penalty has always been controversial. There have always been abolitionists and retentionist in this respect.

7.5.2 **Reasons for the abolition of the death penalty**

Before the abolition of the death penalty and even before the new constitutional dispensation, those who supported the abolition of the death penalty were of the view that it is a cruel and barbaric form of punishment. Although some of them conceded that punishment entails a retributive element, they felt that the talio principle of an eye for an eye and a tooth for a tooth had been discredited. They contended that although proportionality is important in the imposition of punishment today one does not punish a person who has committed assault for instance, by in turn maiming him. In any case they were of the view that the state should not stoop to the level of the criminal. They also contended that the death penalty did not have a deterrent effect. Moreover, they were of the view that the imposition of the death penalty was always racially biased. More blacks were killed for the murder or rape of whites than whites for the murder or rape of blacks. They therefore felt that the retention of the death penalty was simply based on people's unwillingness to forgive (Van Niekerk, 1969 : 457-475; Kahn, 1960 : 91 ff; Kahn, 1970 : 108 ff ; Didcott, 1980 : 295 ff ; Cameron, 1988 : 243ff; Lund, 1988 : 260 ff; Engelbrecht, 1992 : 1 ff; Jacoby & Paternoster, 1982 : 379 ff; Greenwald, 1983 : 1525 ff; Olmesdahl, 1982 : 201 ff; Van Zyl Smith, 1982 : 87; Bentele, 1993 : 255 ff) .

It is not necessary to comment on all these views. Only a few of them will be addressed. What is important to state is that if the death penalty is not a deterrent, then no punishment can ever be a deterrent. Common sense dictates that the death penalty should be a deterrent because it is the supreme penalty. People are generally afraid of death even those who are not afraid to kill others. The reason for this is that death is final and irrevocable and many people are afraid of what will happen after death. Admittedly, it is not possible to prove whether the death penalty is a deterrent. Some of the abolitionists would argue that criminals often do not consider the consequences of their act. They usually act impulsively and in the heat of the moment. Even before 1990 when the imposition of the death penalty was mandatory for murder unless there were

exterminating circumstances, the courts never imposed the death penalty in the case of murders committed in the heat of the moment. They imposed the death penalty if murder was committed in cold blood or if it was pre-meditated. If it was not committed in cold blood, that served as an extenuating circumstance which precluded the imposition of the death penalty. After 1990 when the imposition of the death penalty was made discretionary, the death penalty would only be imposed if it was the only appropriate sentence (Rudolph, 1994:498 ff; Bekker, 1993 : 57 ff).

7.5.3 Reasons for the retention of the death penalty

The retentionists, among others, felt that the death penalty serves as an important deterrent to the commission of serious crimes for violence. Many of them attribute the increase in crimes of violence which include murder, robbery, rape and car hijacking, today to the abolition of the death penalty. They do not regard this as a sheer coincidence. Many members of society today are agitating for the reintroduction of the death penalty. They have even insisted on the holding of a referendum to decide this. There is no doubt that if a referendum was held the majority of the people would be in favour of the reintroduction of the death penalty. But the likelihood that the government would agree to this is remote. The reason behind this is that the government has argued that the fact that the majority of the people is in favour of the reintroduction of the death penalty does not mean that it is not wrong. Incidentally, it was pointed out earlier that the majority can be wrong.

Even before the abolition of the death penalty, there were those who felt that even apart from the fact that there were reservations that the death penalty was imposed in a racially biased manner, the death penalty was still necessary. The argument was that there are cases where no other punishment is fitting except the death penalty.

There is no doubt that the death penalty is one of those issues that will always be controversial. The death penalty involves too little and too much. It involves too little in the sense that once a person has been executed, it is over. He will no longer serve any sentence. It is too much in that it takes the life of a person and once it is imposed it is irreversible. There is no prospect of repentance or rehabilitation. Moreover, before execution the convicted person while on death row is really tortured by the knowledge that he has been condemned to death and that he will die any day. Obviously the fear of death is compounded by feelings of guilt and regrets. It is indeed a lonely time and the horror which the person on death row experiences is unimaginable.

Because of its seminal importance it is necessary to discuss the Makwanyane case in some detail and to analyse the reasons which the Court gave for declaring the death penalty unconstitutional.

7.5.4 **The Makwanyane decision**

In this case the court was supposed to decide whether the death penalty was compatible with the Constitution. The Constitutional Court analysed the reasons for and against the death penalty in great detail. Chaskalishvili P delivered the unanimous judgment of the Court.

As already stated, the Constitutional Court declared the death penalty unconstitutional for various reasons. It declared the death penalty as an extreme form of punishment which can be imposed on a convicted criminal. Its execution is final irrevocable and irreversible. It puts an end not only to the right to life but also to other rights as well. It only leaves a memory of what has been. For this reason the court regarded the death penalty as cruel punishment. Moreover, after punishment the prisoner would wait on death row, in the company of other prisoners, under sentence of death, pending the outcome of the processes of their appeals and the procedure for clemency to be carried out. During this period they are on death row they are uncertain of their fate, not knowing whether

they would be reprieved or executed. The court regarded death as a cruel penalty which was exacerbated by the legal processes which entail waiting in uncertainty and anxiety for the sentence to be set aside or carried out. The court also regarded the death penalty as inhuman punishment because it entails the denial of the executed person's humanity and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state. The question was whether the death penalty constituted cruel, inhuman or degrading punishment within the meaning of section 11(2) of the interim Constitution.

The main arguments raised by counsel for the accused in support of their contention that the imposition of the death penalty for murder was cruel, inhuman or degrading punishment, were that the death sentence constitutes an affront to human dignity, is inconsistent with the unqualified right to life entrenched in the Constitution, could not be corrected in case of error or enforced in a manner that is not arbitrary, and that it negated the essential content of the right to life. The Attorney General on the other hand had contended that the death penalty is recognised as a legitimate form of punishment in many parts of the world, that it is a deterrent to violent crimes, that it meets society's need for adequate retribution for heinous offences, and is regarded by South African society as an acceptable form of punishment. He therefore disputed that it was cruel, inhuman or degrading within the meaning of section 11(2) of the Constitution.

The court referred to international and foreign jurisprudence on the death penalty. It pointed out that the death sentence is a form of punishment which has been used throughout history by different societies. It was also the subject of controversy. As societies became more enlightened, they restricted the offences for which this penalty could be imposed. The movement away from the death penalty gained momentum during the second half of the twentieth century with the growth of the abolitionist movement. In some countries it is now prohibited in all circumstances, in some it is prohibited save in times of war, and in most

countries, that have retained it as a penalty for crime, its use has been restricted to extreme cases. In most of those countries where it is retained, it is seldom used.

In referring to the case law of the United States on the death sentence the court, inter alia, cited what was said in relation to it in the case of Furman v State of Georgia (1972) 408 US 238 at 306) where Brennan J had the following to say:

“Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person’s humanity. The contrast with the plight of a person punished by imprisonment is evident... A prisoner remains a member of the human family... In comparison to all other punishments ... the deliberate extinguishment of life by the State is uniquely degrading to human dignity”.

Brennan J had further to say on this (at 287 and 288):

“Death is today an unusually severe punishment, unusual in its pain, in its finality and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering.... Since the discontinuance of flogging as a constitutionally permissible punishment..., death remains the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inequitable long wait between the imposition of sentence and the actual infliction of death... The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself” .

Similar sentiments were expressed by Liacos J in the case of District Attorney for Suffolk District v Watson and Others (1980) 381 Mass 648 at 678 – 681).

“The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the cruelty of the death penalty itself, this violence done the prisoner’s mind must afflict the conscience of enlightened government and give the civilised heart no rest... The condemned must confront this primal terror directly, and in the most demeaning circumstances. A condemned man knows,

subject to the possibility of successful appeal or commutation, the time and manner of his death. His thoughts about death must necessarily be focussed more precisely than other people's. He must wait for a specific death, not merely expect death in the abstract. Apart from cases of suicide or terminal illness, this certainty is unique to those who are sentenced to death. The State puts the question of death to the condemned person, and he must grapple with it without the consolation that he will die naturally or with his humanity intact. A condemned person experiences an extreme form of debasement... The death sentence itself is a declaration that society deems the prisoner a nullity, less than human and unworthy to live. But that negation of his personality carries through the entire period between sentence and execution”.

A similar account was given by Gubbay CJ in the Zimbabwean case of Catholic Commission for Justice and Peace in Zimbabwe v Attorney – General, Zimbabwe, and Others (1993 (4) SA 239 (ZSC) at 268) where he said:

“From the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanising environment of near hopelessness. He is in a place where the sole object is to preserve his life so that he may be executed. The condemned prisoner is “the living dead..” He is kept only with other death sentence prisoners – with those whose appeals are still to be heard or are pending judgement. While the right to an appeal may raise the prospect of being allowed to live, the intensity of the trauma is much increased by knowledge of its dismissal. The hope of a reprieve is all that is left. Throughout all this time the condemned prisoner constantly broods over his fate. The horrifying spectre of being hanged by the neck and the apprehension of being made to suffer a painful ..death is...never far from mind”.

The Constitutional Court had also to focus on the argument that the imposition of the death sentence is arbitrary and capricious. The Court felt that this was undoubtedly so. There were a number of facts responsible for this. Of the thousands of persons tried for murder, only a handful is sentenced to death by the trial court. A large number escape death on appeal. At every stage of the process there is an element of chance. The outcome may depend on facts such as the way the case was investigated by the police, the way the case is presented by the prosecutor, how effectively the accused is defended the personality and the particular disposition of the trial judge to capital punishment and should the

matter go on appeal, the particular judges who are selected to hear the case. Race and poverty would also play a role.

The court also argued that most accused who face a possible death sentence are not able to afford legal assistance. They are only defended under the pro deo system. The defending counsel in most cases is young and inexperienced. He may also belong to a different race speaking to his or her client through an interpreter. Pro deo counsel are paid only a nominal fee for the defence, and generally lack the financial resources and the infrastructural support to undertake the necessary investigation and research, to employ expert witnesses, to bargain with the prosecution, and generally to conduct an effective defence. These accused who have the means are able to retain experienced attorneys and counsel, who are paid to undertake the necessary investigations and research. As a result they are less likely to be sentenced to death than persons similarly placed who are unable to pay for such services. There could be exceptional cases where senior members of the bar act as pro deo counsel and do a good job. That is an exception rather than the rule.

The court further asserted that poverty, race and chance often influence the outcome of capital cases. This often is decisive of who should live or die. Sometimes it is contended that this is understood by judges and often taken into account by them. But this does not detract from arbitrariness. It may also introduce an additional element of arbitrariness that would also have to be taken into account. Some accused may be acquitted precisely because such allowances, are made, and others who are convicted, may for the same reasons escape the death sentence.

Chaskalson P summed up the position admirably as follows:

“The differences that exist between rich and poor, between good and bad prosecutions, between good and bad defence, between severe and lenient judges, between judges who favour capital punishment and those who do not, and the subjective attitudes that might be brought into play by factors such as race and class, may in similar ways affect any case that comes before the courts,

and is almost certainly present to some degree in all court systems. Such factors can be mitigated, but not totally avoided, by allowing convicted persons to appeal to a higher court. If the evidence on record and the findings made have been influenced by these factors, there may be nothing that can be done about that on appeal. Imperfection inherent in criminal trials means that error cannot be excluded; it also means that persons similarly placed may not necessarily receive similar punishment. This needs to be acknowledged. What also needs to be acknowledged is that the possibility of error will be present in any system of justice and that there cannot be perfect equality as between accused persons in the conduct and outcome of criminal trials. We have to accept these differences in the ordinary criminal cases that come before the courts, even to the extent that some may go to jail when others similarly placed may be acquitted or receive non-custodial sentences. But death is different, and the question is whether this is acceptable when the difference is between life and death. Unjust imprisonment is a great wrong, but if it is discovered the prisoner can be released and compensated, but the killing of an innocent person is irremediable" (para 54).

The same sentiments were expressed by Mahomed J in his own inimitable style in the following words:

"I also have every considerable difficulty in reconciling the guarantee of the right to equality which is protected by section 8 of the Constitution, with the death penalty. I have no doubt whatever that judges seek conscientiously and sedulously to avoid any impermissibly unequal treatment between different accused whom they are required to sentence, but there is an inherent risk of arbitrariness in the process which makes it impossible to determine and predict which accused person guilty of a capital offence will escape the death penalty and which will not. The fault is not of the sentencing court, but in the process itself. The ultimate result depends not on the predictable application of objective criteria, but on a vast network of variable factors which include, the poverty or affluence of the accused and his ability to afford experienced and skillful counsel and expert testimony; his resources in pursuing potential avenues of investigation, tracing and procuring witnesses and establishing facts relevant to his defence and credibility; the temperament and sometimes unarticulated but perfectly bona fide values of the sentencing officer and their impact on the weight to be attached to mitigating and aggravating factors; the inadequacy of resources which compels the pro deo system to depend substantially on the services of the mostly very conscientious but inexperienced and relatively junior counsel; the levels of literacy and communication

skills of the different accused effectively transmitting to counsel the nuances of fact and inference often vital to the probabilities; the level of training and linguistic facilities of busy interpreters; the environmental milieu of the accused and the difference between that and the comparative environment of those who defend, prosecute or judge him; class, race, gender and age differences which influence bona fide perceptions, relevant to the determination of the ultimate sentence; the energy, skill and intensity of police investigations in a particular case, and the forensic skills and experience of counsel for the prosecution. There are many other such factors which influence the result and which determine who gets executed and who survives. The result is not susceptible to objective prediction. Some measure of arbitrariness seems inherent in the process" (para 273).

The Constitutional Court further held that the right to life vested in every person by the Constitution is another factor relevant to the question whether the death sentence is cruel, inhuman or degrading punishment within the meaning of section 11(2) of the Constitution.

The Attorney General argued that what is cruel, inhuman or degrading depended to a large extent upon contemporary attitudes within society, and that South African society does not necessarily regard the death sentence for extreme cases of murder as a cruel, inhuman and degrading form of punishment. It was disputed whether public opinion properly informed of the different considerations, would in fact favour the death penalty. The court, however, was of the view that what was material was not what the majority of South Africans believe the proper sentence for murder to be, but whether the Constitution allows the sentence.

As the court held, public opinion may be relevant to the enquiry, but it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could be safely left in the hands of Parliament which has a mandate from the public, and is answerable to the public for the way its mandate is exercised. This would, however, be a return to parliamentary sovereignty and a retreat from

the new legal order ushered in by the 1993 Constitution. Moreover, the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of the minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. "Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest among us, that all of us can be secure that our own rights will be protected" (para 88).

The court regarded proportionality as an element to be taken into account in deciding whether a penalty is cruel, inhuman or degrading. For this reason no court would today impose it for the cutting of trees or the killing of a deer which were capital offences in England in the 18th century. But as the court said, murder cannot be equated with such "offences". The willful taking of an innocent life calls for a severe penalty. There are many countries which still retain the death penalty as a sentencing option for such cases. Disparity between the crime and penalty is not the only element of proportionality; other facts like the enormity and irredeemable nature of the death sentence in circumstances where neither error nor arbitrariness can be excluded, the expense and difficulty of addressing the disparities which exist in practice between accused persons facing similar charges, and which are due to factors such as race, poverty, and ignorance and the other subjective factors which have been alluded to, are also factors that can and should be taken into account in dealing with this issue. None would alone be sufficient under the Constitution to justify a finding that the death sentence is cruel, inhuman or degrading. These factors must be evaluated together in order to decide whether the threshold set by section 11(2) has been crossed. They must also be evaluated together with the other relevant factors including the right to dignity and the right to life.

The Court concluded that the carrying out of the death sentence destroys life, which is protected without reservation in the Constitution. After considering all the relevant criteria the court came to the conclusion that the death penalty cannot be justified in terms of the limitation clause.

The Attorney General had contended that the imposition of the death penalty for murder in the most serious cases could be justified according to the prescribed criteria. It was argued that the death sentence meets the sentencing requirements for extreme cases of murder more effectively than any other sentence can do; it had a greater deterrent effect than imprisonment; it would also prevent the worst of murderers from endangering the lives of prisoners and warders who would be at risk if the worst of the murderers were to be imprisoned and not executed; it also met the need for retribution which society demands in response to the high level of crime. It was therefore a necessary ingredient of the criminal justice system of the country.

The Attorney General had put a lot of emphasis on the need for a deterrent to violent crime which was so prevalent in the country. He argued that the countries which had abolished the death penalty were on the whole developed and peaceful countries where other penalties would suffice as deterrents. According to him we had not reached that stage of development. If in future we reached that stage, we could do away with the death penalty.

In responding to these contentions the court conceded the need for a strong deterrent to violent crime. It acknowledged the obligation which rests on the state to protect human life against violation by others. This was legitimate and necessary to preserve and protect society. Law was an indispensable ingredient of society. Without it people had no rights. The level of violent crime in our country had reached crisis proportions and was threatening the transition to democracy. The court also acknowledged the power of the state to impose sanctions on those who flout the law. It was also necessary that respect for the law should be restored and that dangerous criminals should be apprehended and dealt with firmly. The question is not whether or not those who break the law and commit

violent crime should go free, but it is whether the death sentence for murder can legitimately be made part of the law.

The Attorney General had also attributed the substantial increase in the incidence of violent crime to the moratorium on the death sentence. The court disputed the veracity of this contention because the death penalty had not been abolished then. It also felt that the increase in violent crime could be associated with political turmoil and conflict especially between 1990 and 1994. This resulted in no-go areas, random killings on trains, attacks and counter-attacks upon political opponents. This created an unstable environment which was manipulated by political dissidents and criminal elements alike. Homelessness, unemployment, poverty and the frustration consequent upon those conditions exacerbated the crime wave. This was compounded by the fact that the police could not cope with this. The court doubted the cogency of the view that the death penalty would be a panacea for the violent crimes in the country. It felt that there would always be unstable desperate, and pathological people for whom the risk of arrest and imprisonment would not be a deterrent. It is doubtful that the execution of the death sentence would have any impact on the behaviour of such people or that they would increase if imprisonment is the only sanction.

In the opinion of the court the greatest deterrent to crime is the likelihood that offenders will be apprehended, prosecuted, convicted and punished as *expeditiously as possible*. This is lacking in our criminal justice system. The court felt that the debate as to the deterrent effect of the death sentence was superficial. An impression was created that the choice to be made was between the death sentence and the murder going unpunished. On the contrary the choice is between putting the criminal to death and subjecting him or her to the severe punishment of a long term of imprisonment which could be an imprisonment for life. Both are deterrents. The question is whether the possibility of being sentenced to death rather than being sentenced to life imprisonment, has a marginally greater deterrent effect and whether the Constitution sanctions the limitation affected thereby. The court doubted this.

The court further referred to the argument by the Attorney General that if sentences imposed by the courts on convicted criminals are too lenient the law will be brought into disrepute and the members of society will be inclined to take the law into their own hands. The court held the view that what brought the law into disrepute was the failure to punish criminals because the criminal justice system was ineffective. But if criminals were apprehended, brought to trial and in serious cases subjected to severe sentences, the law would not be discredited.

The Attorney General had also argued that if even one innocent life could be saved by the execution of perpetrators of vile murders, this would provide sufficient justification for the death penalty. The court held that the hypothesis that innocent lives might be saved, should be weighed against the values underlying the Constitution and the ability of the state to serve as a role model. In the long run more lives may be saved through the inculcation of a rights culture, than through the execution of murderers.

The court further held that as the death sentence was reserved only for the most extreme cases, the overwhelming majority of convicted murderers are not sentenced to death. Only a small minority was executed. Even the Attorney General was prepared to concede that although common sense dictated that the most feared penalty will provide the greatest deterrent, there is no proof that the death sentence is in fact a greater deterrent than life imprisonment. The reason why this was not capable of proof was that it was not possible to know who have been deterred; one only knows about those who have not been deterred and who have committed terrible crimes.

The court also referred to prevention as another object of punishment. The death sentence no doubt ensures that the criminal will never again commit murders. But it is not the only way of doing so because life imprisonment can also serve this purpose. Although there may be gaol murderers, these constitute a small

percentage and in the overwhelming number of cases imprisonment is regarded as sufficient for purposes of prevention.

In considering retribution as one object of punishment, the court was of the opinion that it carries less weight than deterrence. The righteous anger of family and friends of the murder victim, reinforced by the public abhorrence of vile crimes, is easily translated into a call for vengeance. But the court was of the opinion that capital punishment is not the only way that society has of expressing its moral outrage at the crime committed. It felt that we have long outgrown the literal application of the biblical injunction of "an eye for an eye, and a tooth for a tooth". Punishment should also to some extent be commensurate with the offence. This does not, however, imply that it be equivalent or identical to it. The state does not put out the eyes of a person who has blinded another in a vicious assault, nor does it punish a rapist by castrating him and submitting him to the utmost humiliation in gaol. The state does not need to engage in a cold and calculated killing of murderers in order to express moral outrage at their conduct. A very long prison sentence is also a way of expressing outrage and visiting retribution upon the criminal. The court felt that retribution should not be given undue weight in the balancing process. The Constitution is premised on the assumption that ours is a constitutional state founded on the recognition of human rights.

In the balancing process, the court further held, deterrence, prevention and retribution must be weighted against the alternative punishment available to the state, and the factors which taken together make capital punishment cruel, inhuman and degrading. These are destruction of life, the annihilation of dignity, the elements of arbitrariness, inequality and the possibility of error in the enforcement of the penalty.

The court also challenged the view of the Attorney General who argued that the right to life and to human dignity are not absolute being limited by the right to self-defence. Moreover, one of the limits is that a person who murders in circumstances where the death penalty is permitted, forfeits his or her right to claim protection of life and dignity. In the court's view in terms of the Constitution, such criminals do not forfeit their rights under the Constitution. As regards self-defence the court held the view that where a choice has to be made between the lives of two people, the life of the innocent is given preference over the life of the aggressor. To deny the innocent person the right to act in self-defence would deny to that person his or be right to life. The law solves these problems through the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim and favouring the life or lives of innocent over the life or lives of the guilty. But this has to take place within strict limits. Moreover, there are material respects in which killing in self-defence or necessity differ from the execution of a criminal by the state. Self-defence takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity, and under circumstances in which no less severe alternative is readily available to the potential victim. Killing by the state takes place long after the crime was committed, at a time when there is no emergency and under circumstances which permit the careful consideration of alternative punishment.

Taking all factors into account the court felt that the death penalty constituted cruel inhuman and degrading punishment and could not be justified under the limitations clause.

7.5.5 A brief critique of the Makwanyane case

There is no doubt that the Makwanyane case is an important one in that it declares the death penalty unconstitutional. It underlies the fact that as a constitutional state we cannot punish a person anyhow. Even punishment should be in line with the core values which underpin our Constitution. These are

freedom, equality and human dignity. Some of the rights contained in the Constitution cannot be denied even to convicted criminals.

It was interesting that some members of the court in this case referred to the concept of ubuntu. They held the view that the death penalty is in conflict with the idea of ubuntu which is expressed in the Bill of Rights provisions. Ubuntu entails that people should be treated with humanness .

A criticism of the Makwanyane case is that while the court emphasised the value of human life and dignity, it tended to emphasise and prefer the life and dignity of the criminal rather than the life and dignity of the innocent victim. This might strengthen the perception that the court is overly concerned about the criminal rather than the law-abiding citizen and this would be unfortunate.

It might, however, be contended that two wrongs do not make one right and that the execution of the murderer will not bring back the deceased to life. In any case the state should not stoop to the level of the criminal. What cannot be disputed is that the death penalty does constitute cruel inhuman and degrading punishment.

The court subjected the death penalty to painstaking scrutiny. It is in most cases difficult to find fault with its reasoning. What is more this was a unanimous decision of the court. Some have argued that even if the court had declared the death penalty constitutional, this would have been extremely costly and time consuming in the light of the Constitution which protects fundamental rights (Hintze 1994: 55 ff).

It is now appropriate to answer the question whether the abolition of the death penalty is incompatible with Christianity. There is no doubt that in the Old Testament the death penalty was prescribed for murder. In the New Testament Jesus did away with the eye-for-an-eye and the tooth-for-a-tooth rule was abolished in favour of turning the other cheek. But Jesus said nothing about the death penalty. What is important to note, however, is that Jesus was not

providing rules for the government; he was making rules for his followers. If we could make his commandment of turning the other cheek applicable to all criminal acts, there would be no need for the criminal law. It may well be that Jesus did not envisage a situation where his followers were expected among themselves to deal with serious crimes like murder. It was therefore not necessary to position himself on this issue. But it could be argued that by abolishing the eye-for-an-eye and the tooth-for-a-tooth rule he was by implication abolishing the death penalty which is based on the same principle. This is supported by the fact that He also emphasised that his followers should always forgive and leave vengeance in God's hands.

If the rules that were made for Christians do not apply to society in general, then whether or not the death penalty is compatible with Christianity could be regarded as irrelevant. The government of the country is entitled to take a decision on the type of punishment to be imposed on certain criminals including murderers. The problem is that Christians are also affected by car hijackings, robberies and murders. What should be their attitude?

Karl Barth in his commentary on the Institutes of John Calvin (The Theology of John Calvin 1922 : 21) seems to support the view of Calvin that even in a Christian community the death penalty is needed. In his opinion the death penalty is an unavoidable answer to the fact that in this world the commandment "Thou shalt not kill" (Deut 5 : 17) is always violated. The death penalty is therefore a divine judgment on this transgression. He concedes that the devout must not hurt or destroy. But he does not regard it as hurting or destroying if the unjust suffering of the devout is punished by divine command. He does not regard it as human arrogance to exact this penalty. As God's judgment is concealed in it, he is of the opinion that failure to impose it would be human arrogance. He refers to Moses and David, both lenient and peaceable by nature but who sanctified their hands by the use of force and who would have stained them if they had not used it. They executed the Lord's vengeance which the Lord had committed to them for execution (Barth 21).

Barth acknowledges that kings and judges have to remember that clemency is their supreme ornament but cautions that they must remember that there is a “superstitious softness that face-to-face with the horrors against which they have to protect us is in fact the most dreadful inhumanity” (212).

Barth, however, was not operating in a constitutional democracy or a heterogenous society like ours. He did not consider the inequalities and inequities which ultimately lead to arbitrariness in the imposition of the death sentence. Seeing that the death sentence was instituted by God Himself, it is quite clear that God views the taking of innocent life in a very serious light. One has to pay for it with his own life.

7.5 **Conclusion**

By the government’s allowing or disallowing certain practices the impression is created that it is encouraging or promoting evil. That is not necessarily so. The government is supposed to make laws for the order and good governance of the country. It is not supposed to interfere in the personal lives of the people. This is important to emphasise because if the government were to interfere in the private lives of individuals on other matters there would be complaints from the people. Consistency on the part of the government is therefore to be commended. The government is not supposed to decide for the people whether to pursue a particular religion or not or follow a certain style of life. As long as the conduct does not cause harm to others, a person is at liberty to follow a particular style of life. There are other societal structures which are supposed to deal with the private conduct of the individual. These include parents, schools, universities and the church. The government is not supposed to punish or prejudice a person for that. Other spheres of society have a role to play in assisting a person to decide to follow a higher life. The government is also entitled to decide not to impose a certain form of punishment because of the values it espouses. All these cannot be simply interpreted as promoting or encouraging evil. Nonetheless the government is expected to ensure that all

members of society are protected and that they should be treated equally and without being unfairly discriminated against. This is usually a formidable challenge and not every person will be satisfied with every decision the government takes on various issues. It is not a prerequisite that every person be satisfied with every decision the government makes; what is important is that the decision must be principled and defensible.

The question that we must ask about the government's duty is not "what is good in general?" but rather, "what is the right and good thing that government is called to do in order to uphold justice for all citizens in the political order?" One should avoid what Skillen refers to as the "pragmatic, undifferentiated moralism". Many ignore the question about what government ought to do to fulfil its distinct obligation before God. Instead they enter politics with the aim of trying to get government to do whatever they think is good. This results in all of life being politicized. From that point of view they become used to thinking moral battles in which contenders fight for political power in order to achieve whatever they think is right and good for society in general. They regard politics as the legitimate arena where any and every big question for moral obligation has to be settled. Consequently any and every question about human responsibility might come up in political debate. "Practically or pragmatically, means they feel justified in using almost every possibility to win political power in order to do any number of good things" (Skillen, 1996:155).

This approach is obviously untenable. It results from a misapprehension of the role of government. It results in the formation of single-issue crusades or campaigns which are intent on winning at least a majority to their side so that they can gain political victories that will create the impression that they represent the will of the people. Each faction assumes that its views represent the vast majority of the people and that the views of others (the "bad guys") represent only fringe elements. As a result "politicized moralism among various competing groups leads to exaggerated rhetoric of political demonizing in which each side has to paint itself as God's defender of goodness over against its dangerous and perhaps even satanic opponents" (Skillen, 1996 : 155).

This usually derives from the belief that the government's task is to do the will of the people. The people are regarded as the holders of this right and the government has to defer to the will of the people. For government to be righteous therefore, it has to be under the control of righteous people who represent God's will. Whatever, the righteous people want is therefore what God wants and the government is under an obligation to do it. The only way of avoiding the hypermoralism and demonisation of a politically crusading civil religion is to realise that God holds governments directly accountable and not through the intermediary of the people. He holds government responsible not for everything, but only for fulfilling the responsibilities that properly belong to government. These responsibilities are different from those of parents, teachers, employers and church leaders. Not every moral question is a governmental question and not every good thing should be pursued through politics and be fought by political means. If governments and constitutions do not recognize the distinct non-governmental identities and responsibilities of these other institutions and organisations, public justice cannot be realised (Skillen, 1996:155-157).

It is therefore important to realise that government has to deal with more than isolated issues, one at a time. Many of the issues have to be considered in the context of many other questions where questions of prioritisation and budgetary constraints play a role. Christians in particular should strive to resist the temptation to demonise political opponents and to presume that they have the monopoly of answers to every problem. Moreover, Christians should develop the approach of differentiated moral reasoning. They should not assume that politics is a field for generalised moral combat about everything under the sun in which the majority should have its way. Christians should lead the way to clear thinking about the difference between political moral reasoning and family-moral reasoning or business-moral reasoning. Government should not be made to play the role of a parent or a business manager or a school principal. The kind of moral obligations which bind the government are different from the kinds of moral responsibilities church leaders have for church members, or that university administrators have for students (Skillen, 1996:157-158).

The Bible teaches that no one becomes a Christian by political force .It is not through coercion or through violence but through the Spirit of God that one becomes a Christian. The church has an obligation to preach the gospel. It is not the state's duty to do that. The state ought to guarantee the freedom of the church to bring the gospel. There ought to be a clear distinction between the role of the state and that of the church (Schuurman, 1996: 205).

CHAPTER EIGHT

CONCLUSION AND RECOMMENDATIONS

8.1 Introduction

The purpose of this research was not to eulogise or to condemn our Constitution in as far as it affects the church, the body of Christ. The aim was to establish how the Constitution impacts on the Church and therefore on Christianity as such. It was to consider whether there are inevitable or real conflicts between what the Constitution stipulates and what the church stands for. Here one is not concerned just about any conflict but about unresolvable conflicts. Moreover, it is not conflicts between the provisions of the Constitution and the church as such but rather conflicts between what the Constitution provides and what the word of God stipulates. The reason for this is that the church is sometimes divided on certain issues. If there are no conflicts the purpose was to establish what the implications thereof are to the church and to Christianity in general. Is there co-operation between church and state?

8.2 Major findings

Various findings were revealed by this research. One of the major findings was that there is no major conflict between the Constitution and the church if the role of the Constitution and that of the church are properly understood. The role of the Constitution is to establish the government of the country give the government power as well as establish the limits of that power and guarantee the rights and freedoms of the citizens of the country. The role of the government is to ensure that there is good governance peace order and justice in the country. These are essential for harmony and for people to go about their businesses and to lead a good life.

The Constitution therefore provides a broad framework within which the government has to perform its functions and within which the citizens have to exercise their rights and do whatever is necessary to live life to its fullest. This includes being members of the church or pursuing any religious activity. Religion is the very lifeblood of every individual in society. It is the core that regulates and affects every human activity. That is why the impact of the Constitution on the religious life of the people is important.

The church has an important role to play. It enables believers and in particular the Christians to operate in an organised fashion. Its main role and function is to influence the moral and spiritual life of the people. It also influences the government and the politics of the country although not directly but indirectly by influencing the moral life of the people. The church has also to provide support to its members.

There is therefore a separation between church and state. It is not the role of the government to influence the moral and spiritual life of the people. Nor is it the role of the church to influence people as to what political views to hold although for Christians those political views have to be subservient to the dictates of the gospel of Jesus. The church has to ensure that people lead a morally acceptable life and this will have an impact on their politics.

The separation between church and state which is accepted today did not exist from the inception of the church. It was finally accepted after a protracted period of struggle from the fifth to the seventeenth century. Christianity was during this period used to justify certain atrocities which were perpetrated. This was largely due to the adoption of Christianity as a civil or national or imperial religion especially from the time of emperor Constantine. From this time Christians were given privileges which people of other religions did not have. They were in control not only on ecclesiastical affairs, but also of political and

governmental ones. It was necessary to decide which authority was superior to the other.

Although the separation between church and state has long been accepted there is no doubt that there are still instances where members of the public want or expect the state to play the role that is not rightfully that of the state. Because of some moral crusade they would like the state or government to do something that might violate the rights of certain individuals. It is important that individuals and in particular Christians should have a clear understanding of the role and function of the state on the one hand and of the church on the other.

Another important finding is that both the government and the church derive their authority from God. They are ordained by God to play certain roles. It is therefore important to keep this in mind. Many Christians are not aware of this. When reference is made to the kingdom of this world they summarily conclude that this refers to the kingdom of the devil. The government stands for the kingdom of this world and the church represents the kingdom of God. Although the separation between church and state has its origin in the fall of man into sin there is no doubt that those who are government authorities are servants and representatives of God when it comes to mundane worldly affairs. The bible enjoins not only subjection and obedience to the authorities by Christians but also that the authorities should be honoured and revered. What is ordained by God here is the institution of government. The institution should be respected irrespective of who are the incumbents and irrespective of whether or not they are doing their job properly and effectively. Religious leaders or the church on the other hand represent God when it comes to the kingdom of God. It is the kingdom which was inaugurated by Jesus but which still has to be consummated. But it is nonetheless as real as the kingdom of this world or the political kingdom.

The kingdom of God is established by God himself. No person or authority can purport to establish it by legislation or any other solemn act. Even the attempt to establish Christianity as the religion of the state and thereby purporting to create a Christian state is misguided because of those who think that there is a

person who can establish God's kingdom. Having a Christian state, however, is not far-fetched. What characterises a Christian state is not the appellation by which it is called, but it is the sum total of the conduct of its citizens including those in authority. This is summed up in the commandment which enjoins loving God with one's whole heart and mind and loving one's neighbour as oneself. In that situation there is no harming or injuring one's neighbour. There is also no law in the bible against love for one's neighbour.

A Christian state should not be interpreted to mean a state which imposes Christianity by law on all people. People do not become Christians by compulsion. They become Christians by persuasion and by being preached to and being converted to Christianity. They then live by faith and by virtue of the word of God.

An understanding of this dispels the misconception of those who felt that when the new constitutional and political dispensation was established we should have had a Christian as opposed to a secular state. This was based on the misapprehension of a Christian state. A Christian state, as already stated, does not mean a state where Christianity is regarded as the official religion. Nor does it mean a state where Christians are given preferential treatment or where they are given rights and privileges which other citizens do not have. But it means a state where all people, including Christians and non-Christians are treated equally and fairly. It is a state which does not countenance injustice because it is perpetrated to those who are not Christian.

Our Constitution is based on three core democratic values. These are freedom equality and human dignity. These values are not in conflict with Christianity. Some if not all of them are based on Christianity. Christianity stands for freedom not only from human oppression and bondage but also from spiritual oppression and bondage. It stands for freedom from sin. It also stands for fairness and equality of treatment and is consequently against invidious and unfair treatment or discrimination. As the bible states that people are made in the image of God, this means that they must be treated with dignity and respect.

This is not in conflict with dignity as one of the values on which our Constitution is founded. Treating people with dignity does not imply that they should be treated as above God.

Our Constitution also creates a democratic state characterised by free political activity, regular elections, a guarantee of fundamental rights, a government that is accountable and responsive to the needs of the people, an independent judiciary and the rule of law. This is a constitution which is supreme and is the fundamental law of the country. It is a constitutional democracy. This constitutional democracy vests power in the judiciary to review legislation and government conduct which is in conflict with the Constitution.

Although the bible does not disclose democracy as God's preferred form of government there are indications that democracy in a number of respects is not incompatible with Christianity. The elements of openness responsibility and accountability on the part of the government are compatible with Christianity. Democracy, however, is not perfect. It may lead to disobedience to God's command. Through its emphasis on rule by the majority it can lead to a situation where the majority flouts God's command simply because the majority deems it expedient. Democracy is people's response to the abuse of political power by those in power which leads to the atrophy of the rights of citizens. Democracy is however, in conflict with Christianity through its apotheosis of the sovereign will of the people. The correct view is that as rulers have delegated authority from God this means that God is supreme and they should be subject to him.

Our Constitution also protects the fundamental rights of the people. Although some have challenged the Christian foundation of human rights, there is no doubt that Christianity is not in conflict with the idea of human rights. There are Christian foundation or justification of human rights. These rights are necessary to limit the government from abusing its power. They are necessary because even a democratic government can take a wrong decision. Human rights therefore place a limit on government action. They guarantee an area of freedom from governmental interference. The idea of human rights is more Christian than

leaving everything at the mercy of an unbridled legislatures. The Bill of Rights has been regarded as the most effective protection against political majorities.

Not every right in the Bill of Rights will be supportable on Christian grounds. People may mention homosexuality. That does not detract from the fact that the idea of human rights does have a Christian basis. Nor should the idea of human rights be regarded as promoting selfishness.

Human rights can be justified on the basis that human beings are created in the image of God and have to be treated with dignity. They are also descended from Adam and Eve and treating them on the basis of equality is therefore justified. By virtue of their being human and have a mandate from God to be in this world and to do certain things, human beings can claim rights in respect thereof. God has given people commandments and the observance of those commandments entails rights which people and in particular the government have to respect. The provision of a Bill of Rights in our Constitution can therefore be regarded as a refinement of democracy where the Bill of Rights can even limit the power of democratic majorities.

One of the rights enshrined in our Bill of Rights is the right to equality and non-discrimination. This right has a pervasive influence on the Constitution and it is not in conflict with Christianity. Christianity is for treating others in the same way you would like to be treated. A number of other rights depend on this. This right is important because Christianity is for treating others on the basis of equality. In the South African context this right is important because it marks the departure from a dispensation which was characterised by inequality and unfair discrimination.

Equality is obviously highly abstract and requires to be interpreted. The Constitutional Court in its interpretation of equality has accepted that equality does not mean that in a democracy there can be no differentiation among people. Not every form of differentiation is unconstitutional. What is prohibited by the Constitution is unfair discrimination based on the listed grounds. What

changes benign differentiation to unfair discrimination is the presence of a certain element. The court has interpreted this element as the violation of the dignity of the person which treats him or her as not having self-worth and which demeans him or her.

Although some commentators have criticised the court for using dignity as justification for turning innocent differentiation into unfair discrimination, this criticism is not so convincing. Equality and dignity are closely related. The main reason why people have to be treated on the basis of equality is because the aim is to protect their dignity and feelings of self-worth. What is important is to point out that treating people unequally will be impermissible if there is no valid and objective justification for meting out disparity of treatment. Equality is, however, important in a Christian community because equality is an important element of justice. Justice is regarded as essential in a Christian community.

Another right which is enshrined in the Constitution and which has a bearing on Christianity and the church is the right to freedom of conscience and religion. This right entitles each individual to pursue the religion of his or her choice and prevents the state from interfering with a person's religious belief. Because of this one is entitled to express his or her faith through worship teaching, propagation of the gospel and through being involved in activities of a religions nature. This provision protects not only Christianity, but also other religions. This is not in conflict with Christian teaching. It promotes religious tolerance. This further entrenches the separation between church and state especially because the state is precluded from religious interference. There will nonetheless be instances, where certain things which people claim in the name of religion remain controversial. This is so because both religion and politics sometimes compete for the same territory. Moreover, religion is expressed not only in a church a synagogue or a mosque but also in the political arena in practical life.

This has often resulted in certain issues which are perceived by certain Christian individuals or organisations which claim to stand for Christian values being emphasised by those groups or individuals. They would castigate the

government for doing or not doing what is right. Issues like these include abortion pornography, polygamy or homosexuality. These groups or individuals are of the view that the state should prohibit abortion and homosexuality.

The Constitution on the other hand prohibits discrimination against certain individuals owing to, among other things, their sexual orientation. It provides for equality of treatment. Some feel that the government is therefore promoting or encouraging evil or immorality. This emanates from the lack of appreciation that the role of the state is not to prescribe or proscribe certain forms of behaviour on account of the fact that it is moral or immoral. Moreover, the state does not punish people for their sins. It is the church that must admonish people against sinful conduct. What is essential for people to ask from the government is not what is good in general but what is appropriate for the government to do under certain circumstances.

The role of the state is to protect the life of the people from being threatened or harmed. Anything else belongs to the sphere of operation of the church or other societal structures. As a result it will decide to prohibit certain conduct on the pain of a penalty only if it is harmful to others. If it is not occasioning harm to others, even if it may be regarded as immoral, it is not the responsibility of the state but of the church to deal with. The church should not abdicate its responsibility of propagating the gospel. Nor should it condemn or demonise the government for promoting or not prohibiting immorality. The church should not use or rely on the sword of the state to convert people from unacceptable behaviour. It should use the word of God to do that.

8.3 Way forward

There is no doubt that the South African Constitution is regarded as second to none in the world. It is also remarkable for entrenching the separation between church and state and for protecting the fundamental rights of all the citizens including Christians.

Although our Constitution provides for a constitutional democracy and guarantees human rights, what is important is that in our country we do not yet have a culture of rights and of democracy. Our democracy is still a fledgling one. What we need is the creation and entrenchment of a culture of democracy. This will lead to the separation between church and state being entrenched and made secure. This will not happen overnight but will require a lot of effort.

This culture of rights and of democracy requires a religious commitment by the powers that be to the values that underpin our Constitution. This also requires education of the people on the rights they have and on the role of the church and state as well as on the right relationship between church and state. In this context the words of Cowen are apt when he says;

“In the first place, such constitutions should help to disarm fears about the risks of democracy and the abuse of power. Indeed ... constitutions can do much to tame governmental power and prevent its abuse. They can, of course, never provide complete security. But they can make the way of the tyrant difficult. They are what I like to regard as the outer bulworks, the outer defences, of true freedom.

Secondly, a Bill of Rights should become the basis of the political education of the community, with really profound effects upon the whole character of national life. The values embodied in a Bill of Rights provide a standard to which people can appeal when power is abused. Moreover, were these values properly taught in the schools in civics classes, they would become an important cohesive element in society. Indeed from this point of view, it would be difficult to overestimate the importance of the role which the *United States Constitution* has played in establishing the fact of American nationhood. No one who has studied American society, even for a comparatively short period, can fail to be impressed by the central position of the Constitution in the affection, the thought and the imagination of Americans. No enumeration of the characteristics and qualities which go to make up a “good American” would be complete without a reference to the *United States Constitution and its Bill of Rights*” (1961 : 81).

Although our Constitution guarantees freedom of religion what we need is not only structural pluralism, but also confessional pluralism. Structural pluralism entails that government should do justice to the full range of societal institutions, associations, and human relationships of society. Government should not try to be omniscient and should leave other things to other societal structures. Confessional pluralism entails that government should protect the full range of religious freedom.

Because the Constitution guarantees freedom of religion, Christians are free to propagate the gospel. Religious tolerance does not mean that Christians should accept anything. They should have a principled stand on matters of faith. Upholding confessional pluralism implies that people's religion should not be confined to their ecclesiastical practices and affiliations. The court in interpreting religious freedom should in particular uphold this confessional pluralism.

Christians have ample opportunity to propagate the gospel. They should, however, do this in love and humility. Christians should be more vigorous in promoting Christian values, not by condemning the government or demanding the government to do what is not for the government to do or to do what is good in general, but by seeking to influence government action through appropriate strategies. There are various strategies they can pursue especially within political parties.

The view that Christians should not be involved in politics has been discredited. What it means is that Christians should seek to influence the thinking and views of politicians. When they become involved in politics, their political views should be different from those of ordinary people. They should be the real light and salt of the world by being persons of integrity and not by just pursuing single issues. They should seek a much more pervasive influence by promoting justice in general and by treating others as they would like to be treated. In politics, however, they should be as wise as serpents, but as harmless as doves.

Christians should not only try to influence politicians and the politics of the country. They should also provide alternative Christian theories for democracy, human rights and politics. They should also be more active in writing about these issues and to demonstrate that they take the issue of politics quite seriously. If we pray that God's kingdom should come and that his will be done on earth as it is in heaven, to a large extent of the efforts of the believers will contribute to this.

People in general and Christians in particular complain about the high crime rate and about poverty, unemployment and immorality. This is the challenge to the church. The prevalence of these things could mean that the church is not doing its job effectively. The church should be more active not only in praying about these things, but also in taking practical steps to alleviate them. The church should not look up to the state to do everything.

8.4 Final conclusion

One of the major reasons why certain sections of the church felt that we should have created a Christians state was because of being used to it. In the pre 1993 Constitution both in the preamble and the substantive provisions, the sovereignty of Almighty God was acknowledged. This obviously meant the God of Christianity.

Apart from the fact that these provisions were meaningless in the light of the laws and policies which were a negation of the love and fear of God, they demonstrated that the country was not sensitive to the fact that South Africa had cultural and religious diversity. Moreover, these declarations were difficult to enforce.

The adoption of a Constitution which has a Bill of Rights and which protects the religious freedom of all the citizens is a better way of demonstrating love for neighbour than paying lip service to the acknowledgement of the sovereignty of God.

The major reason why the government should uphold both structural and confessional pluralism is because government is not omniscient. There are certain things it cannot do properly and which can better be done by other structures of society including the church, the family, the school and the university. The government is also not competent to decide on the true religion and to define the correct parameters of religion. This is better left to the individuals.

By treating all people equally the government adopts a principled approach it is difficult to assail. Even when it comes to protecting homosexuals it can defend itself that it is treating all people equally and with dignity. Sinners are also entitled to be treated fairly. The church is nonetheless free to preach against homosexuality. The same applies to abortion and any other issue it regards as sinful. By protecting these the state is not promoting evil. It is simply treating people with dignity and, as in abortion, ensuring that people have access to hygienic ways of procuring an abortion. The church should not condemn the government for doing what it feels it should do without providing an answer on how to deal with the problem of back-street abortion. The separation between church and state should be maintained. As Abraham Kuyper says : "The sovereignty of the state and the sovereignty of the church exist side, by side, and they mutually limit each other" (1931 : 107).

The current South African Constitution is by no means a perfect Constitution. But it is a far cry from what we had in the past. It can be used to promote unity in diversity and it can have the support of all the people in the country through its upholding of equality and fairness. On the whole there is no major conflict between the Constitution and the church. On the contrary there can be more effective co-operation without the one taking the role of the other. After all both have their God-given mandate and they are accountable to God on how they discharge that mandate.

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