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# Rights and religion; bias and beliefs: Can a judge speak God?

## Abstract

The *Constitution of the Republic of South Africa*, 1996 guarantees everyone the right to freedom of expression and religion. The *Constitution* also places the power to resolve disputes impartially in the judiciary. The requirement that judges be impartial may, in some circumstances, mean that a judge's beliefs or convictions may appear to be in conflict with one or more *constitutional* principles. This article analyses the relationship and apparent tension between a judge's duty to apply the law in a fair and impartial manner and his/her own personal right to freedom of religion. More specifically, it examines the extent to which a judge may allow his/her religious beliefs to influence his judgment. It argues that judges, like all other citizens, do not surrender their rights to freedom of expression and religion when they are appointed to the bench, and that a judge who publicly expresses his religious beliefs should not be, *ipso facto*, without more ado, criticised for it.

## 1. Introduction

The mention of any relationship between law and religion attracts controversy. Does religion have a valid/justifiable role to play in the judicial law-making processes? If so, where do we draw the line? What is the relationship between the seemingly competing rights to freedom of religion and the right to be free from unfair discrimination? How do the courts go about reconciling these rights? Most of these questions have been subjected to healthy and detailed academic<sup>1</sup> and judicial interrogation,<sup>2</sup> and rightly so. The issues are multifaceted and complex; there are no absolute answers. However, one specific issue that has not been sufficiently debated is the relationship between a judge's personal right to freedom of religion, freedom of speech and his/her role as a judicial officer in delivering a judgment and giving his/her reasoning for that decision. How much leeway does a judge have? Is his/her position unique and, therefore, subject to different considerations?

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- 1 See, for example, Lenta 2009:827; Lenta 2012:231; Lenta 2013:429; Bilchitz 2011:219; Bilchitz 2012:296; Easthorpe 2015:903; Barrie 2005:162; De Freitas 2016:2.
  - 2 Some prominent cases include *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being* 2015 (1) SA 106 (SCA); *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2009) 30 ILJ 868 (EqC); *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC); *Taylor v Kurstag* 2005 (1) SA 362 (W); *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC).

This matter cannot go unattended. After all, if we expect our courts to strike the right balance in adjudicating competing constitutional interests, it makes sense for us to interrogate the court's own attitudes towards these rights, at least to the extent relevant in the context of judging. I say this bearing in mind that judges are human and thus prone to both conscious and subconscious biases. This point was well articulated by Professor John Dugard in a paper titled "The judicial process, positivism and civil liberty".<sup>3</sup> Dugard argued that judges' personal backgrounds influenced their interpretation and application of the law.<sup>4</sup> He added that "as long as the judicial function is entrusted to men, not automatons, subconscious prejudices and preferences will never be completely removed from the judicial process. They will only be concealed."<sup>5</sup> Dugard criticised the lack of appropriate acknowledgement and transparency by judges of what he termed "inarticulate premises".<sup>6</sup> Others have followed in his footsteps in writing about the importance of interrogating judges' personal views on life, and the role these views play within the context of adjudication.<sup>7</sup>

In this article, I interrogate the relationship between religion and judging, having regard to the fact that a judge's personal religious views might often seem in conflict with some provision of the *Constitution of the Republic of South Africa*, 1996. In considering this topic, I discuss some of the following questions: If a judge's personal views are in conflict with a provision of the *Constitution*, must the judge recuse him-/herself from a case involving this conflict? Can we trust judges to distance themselves from their religious views when adjudicating matters? Is there a limit to this disassociation, if it is necessary? Does religion have any role to play within the context of adjudication? If it does, what are the limits? To what extent do a judge's religious beliefs or public utterances in this regard have the potential to negatively impact on his/her obligation to be impartial in delivering a judgment?

I will focus on some criticism that has been levelled against the current Chief Justice, Mogoeng Mogoeng, with specific reference to comments made by eminent legal scholars and commentators regarding various utterances by Mogoeng relating to religion. As the most senior judicial officer in South Africa,<sup>8</sup> it is inevitable that the Chief Justice's political and social views will attract public attention. This is even more so, given that the incumbent's religious associations have attracted more public attention and controversy<sup>9</sup> than any of his predecessors. Mogoeng often courts controversy when he makes public comments about religion.<sup>10</sup> Much of the criticism levelled against Mogoeng has focused on whether

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3 Dugard 1971:218.

4 Dugard 1971:218.

5 Dugard 1971:218.

6 Dugard 1971:218.

7 See Cameron 1998:436.

8 See sec. 165(6) of the *Constitution of the Republic of South Africa*, 1996.

9 Mogoeng 2011a.

10 Poplak 2017.

his utterances are undesirable and unbecoming of a judge. In this context, I particularly consider whether Mogoeng is entitled to hold and express religious views that may seem to be contrary to specific provisions of the *Constitution* or the general spirit, purport, object or values of the *Constitution*. The essence of this article is to determine what judges may say, where and when, particularly when what is said or done is pursuant to their religious beliefs.

## 2. A judge's bias and beliefs: What does this mean?

Before I turn to consider the effects that religious beliefs have on the professional lives of judges, I must first explain what is meant by "judicial bias" or the creation of reasonable apprehension of bias, as a matter of law.<sup>11</sup> Since one of the most important requirements of judicial office is impartiality,<sup>12</sup> being accused of bias strikes a blow against a judge's professional integrity. Reference to judicial impartiality in this context means that a judge must be open to persuasion, without rigidly adhering to personal, and often preconceived views about an issue. A judge is required to bring an open mind to the adjudication process.

In South Africa, the concept of "reasonable apprehension of bias" is often used in the context of determining whether the present or past conduct of a presiding officer compromises his/her position in relation to the fair and impartial discharge of his/her duties.<sup>13</sup> Where a judicial officer creates a reasonable impression that s/he may be biased, a litigant may ask the judge to recuse him-/herself from hearing or deciding the matter.

The test for reasonable apprehension of bias is an objective one, applied on a case-by-case basis. This test was extensively articulated by the Constitutional Court in *South African Rugby Football Association v President of the Republic of South Africa*.<sup>14</sup> In this case, Dr Louis Luyt, a leading figure in rugby administration, challenged President Nelson Mandela's decision to institute a commission of inquiry into rugby affairs in South Africa, following widespread allegations of maladministration within the sport. In the course of his challenge, Luyt applied to have several judges of the Constitutional Court recuse themselves from hearing his matter on the grounds that he had a reasonable apprehension that they would be biased against him. He alleged that some of the judges, including Justices Chaskalson, Langa and Sachs, previously held close ties with Mandela's party, the African National Congress (ANC), and that some of the judges had close personal ties with Mandela.

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11 There is a debate about the meaning of concepts such as 'reasonable suspicion' and 'reasonable apprehension' of bias and whether there is a distinction between the two. See Nwauche 2004:204.

12 See Okpaluba & Juma 2011:659.

13 *Shackell v S* 2001 (4) SA (SCA):par. 9.

14 *South African Rugby Football Association v President of the Republic of South Africa* 1999 (4) SA 147(CC).

In dealing with Luyt's application, Chaskalson P noted that judges are always presumed to be impartial, although this is a rebuttable presumption.<sup>15</sup> Proof that a judicial officer may be biased requires one to provide cogent evidence, which shows that a person of ordinary intelligence would be justified in assuming that a judge may be biased against a party.<sup>16</sup> He noted that total neutrality is impossible to achieve, adding that it is perfectly permissible for judges to have political views or preferences:<sup>17</sup>

A judge who is so remote from the world that she or he has no such views would hardly be qualified to sit as a judge. What is required is that they should decide cases that come before them without fear or favour according to the facts and the law, and not according to their subjective personal views. This is what the Constitution requires.<sup>18</sup>

In summarising the nature of the test, Chaskalson P added:

The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.<sup>19</sup>

Furthermore, in *Bernert v ABSA Bank*,<sup>20</sup> the Constitutional Court buttressed its approach to allegations of judicial bias by adding that "the law will not suppose a possibility of bias or favour in a judge, who [has] already sworn to administer impartial justice, and whose authority greatly depends upon

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15 *South African Rugby Football Association v President of the Republic of South Africa*:par. 40.

16 *South African Rugby Football Association v President of the Republic of South Africa*:par. 40

17 *South African Rugby Football Association v President of the Republic of South Africa*:par. 70.

18 *South African Rugby Football Association v President of the Republic of South Africa*:par. 70.

19 *South African Rugby Football Association v President of the Republic of South Africa*:par. 48.

20 *Bernert v ABSA Bank* 2011 (3) SA 92 (CC).

that presumption and idea”.<sup>21</sup> In *Locabail (UK) Ltd, Regina v Bayfield Properties Ltd*,<sup>22</sup> the England and Wales Court of Appeal discussed guiding principles in dealing with claims of judicial bias. Importantly, it dealt with the question of whether the religious beliefs of a judge have any role to play in the issue of determining bias. The court stated:

It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge.<sup>23</sup>

It is clear from these authorities that, although a complainant needs only to show a reasonable apprehension rather than actual bias, courts will not easily accede to such a claim, unless it is clear that the interests of justice require that a judge not preside over a matter.<sup>24</sup> Importantly, the evaluation of a claim of bias must not only be done from the perspective of a reasonable person, but the perception of bias must itself also be a reasonable one.<sup>25</sup> Moreover, courts will always begin the enquiry by presuming that judicial officers are impartial.<sup>26</sup> This presumption is not easily dislodged, so that anyone who seeks to rebut it must provide “cogent and convincing evidence”.<sup>27</sup>

### 3. The permissibility of public utterances and expressions

Having outlined our courts’ approach to bias, I will now consider the permissibility of judges making public utterances when such utterances relate to controversial subjects such as religion and politics, to some minor degree. I consider whether Professor Devenish is correct in stating that judges are not permitted to publicly air their views on these topics, with specific reference to Mogoeng.

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21 *Bernert v ABSA Bank*:par. 32. Although I say “reaffirmed”, the court in this case appears to have used an *actual bias* test, rather than the ordinary *reasonable apprehension* of bias test.

22 EWCA Civ 3004. This decision has been cited with approval by South African courts. See *Ndimeni v Meeg Bank Limited (Bank of Transkei)* 2011 (1) SA 560 (SCA):par. 19.

23 *Ndimeni v Meeg Bank Limited (Bank of Transkei)*:par. 25.

24 *S v Basson* 2007 (3) SA 582 (CC):par. 31.

25 *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) 705 (CC):par. 12.

26 *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*:paras. 15-19.

27 *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*:paras. 15-19.

Devenish terms Mogoeng's public statements in relation to religion as a show of impermissible bias toward Christians.<sup>28</sup> He argues that Mogoeng's conduct is unbecoming of a judicial officer. In this instance, we are talking about comments not directly related to the adjudication process. The Chief Justice is criticised, not because he has mentioned religion in the context of a judgment, but rather because he gave a speech at a public gathering that suggested a strong preference for Christianity, and showed a yearning for the infusion of Christian and other religious principles into our law.

Devenish forcefully argues that Mogoeng's speech was improper, for it created a reasonable apprehension that he may be biased against non-Christians.<sup>29</sup> He attacks the Chief Justice's views calling them "disingenuous" and "unwise".<sup>30</sup> Devenish argues that the Chief Justice, and all other judges, should in public pronouncements maintain a neutral stance in relation to religion.<sup>31</sup> He argues that this goes to the core of the principles of judicial independence, adding that, in publicly showing a particular preference with regards to religion, Mogoeng created the reasonable apprehension that he may be biased against non-Christians: "Judges, like all other persons, are entitled to religious and political views, but these should remain essentially private. When persons assume the high office on the bench, they are required to make certain sacrifices in relation to their freedom of expression."<sup>32</sup>

This begs the following question: Does the mere fact that a judge is a devout Christian, who publicly speaks in favour of Christian principles, some of which may seem contrary to the *Constitution's* provisions, constitute judicial impropriety? Should this be cause to argue that such utterances create a reasonable apprehension of bias against non-Christians, so much so that this compromises the judge? I do not think so. The rule of law requires that judges, like all other people, including those who hold positions of authority requiring high moral standards, be regarded as equal before the law. In this regard, the rule of law knows no caste or class. Mogoeng, like all other citizens, is entitled to his views and to express them accordingly. The right to express his views is guaranteed by sec. 16 of the *Constitution*, which is the freedom of expression clause. Importantly, sec. 16(2) also states the circumstances in which such a right may be limited.<sup>33</sup> The Constitutional Court has consistently emphasised that freedom of expression is an important right in our constitutional democracy,<sup>34</sup> which must only be limited in compelling circumstances. In *Democratic Alliance v African National Congress*, Cameron J, in reminding us of the importance of this right, states:

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28 Devenish 2014.

29 Devenish 2014.

30 Devenish 2014.

31 Devenish 2014.

32 Devenish 2014.

33 *The Constitution of the Republic of South Africa*, 1996.

34 See *Khumalo v Holomisa* 2002 (5) SA 401 (CC).

For freedom of expression is the cornerstone of democracy.<sup>35</sup> [B]eing able to speak freely recognises and protects ‘the moral agency of individuals in our society’. We are entitled to speak out not just to be good citizens, but to fulfil our capacity to be individually human.<sup>36</sup>

As stated earlier, the right to freedom of expression must be read with other similar and complementary rights, primarily the right to freedom of religion,<sup>37</sup> in particular “the right to declare religious beliefs openly and without fear of hindrance or reprisal”.<sup>38</sup> The need to emphasise that the importance of these rights is made paramount by the fact that there appears to be an increasing tendency in the liberal and western world to marginalise religious freedom through, *inter alia*, removing any and all semblance of religion in public life. As Judge Robert Bork observed, anti-religion activists have used the courts to fulfil their objective.<sup>39</sup> Bork observed that liberal activists influence judicial reasoning, *inter alia*, by praising judges who exhibit some hostility towards religion, while criticising and even ridiculing judges who show any sympathy towards religion.<sup>40</sup> Indeed, the ridiculing of judges who publicly express their religious views has occurred in South Africa. For example, academic Pierre de Vos assailed Mogoeng for expressing his views on law and religion, calling the Chief Justice’s views “intellectually incoherent [and] nonsensical”.<sup>41</sup>

A potential consequence of all this is that religious judges may be forced to refrain or shy away from openly declaring their religious belief, for fear of being criticised or verbally lynched. As Collet worrisomely notes, in the United States, some public officials, including judges, have been forced to disavow their religious beliefs, merely to comfort and assure (critics) that they are morally suitable for a position.<sup>42</sup> This is undesirable, since Judges have the right to exercise their basic human rights.

In *Prince v President, President Cape Law Society*,<sup>43</sup> Ngcobo J reminded us of the importance of the right to freedom of religion, when he explained that

[t]he right to freedom of religion is probably one of the most important of all human rights. Religious issues are matters of the heart and faith. Religion forms the basis of a relationship between

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35 *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC):par. 122.

36 *Democratic Alliance v African National Congress and Another*:par. 123. See *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC):par. 7.

37 Sec. 15(1) of the *Constitution* states: “Everyone has the right to freedom of conscience, religion, thought belief and opinion.”

38 *S v Lawrence*; *S v Segal*; *S v Solberg* 1997 (4) SA 1176 (CC):par. 92.

39 Bork 1990:135.

40 Bork 2003:65.

41 De Vos 2008.

42 Collett 1999:1277.

43 *Prince v President, President Cape Law Society* 2002 (2) 794 (CC).

the believer and God or Creator and informs such relationship. It is a means of communicating with God or the Creator.<sup>44</sup>

In the exercise of these rights, the *Constitution* does not *explicitly* set a different standard for judges. In other words, there is nothing in the *Constitution* that expressly or even tacitly suggests that judges ought to be subjected to a different standard, let alone be required to “sacrifice”<sup>45</sup> their rights to free speech in the manner Devenish suggests. Devenish’s arguments also move from an erroneous assumption that, under our constitutional order, religious views should be subordinate to secular views. In a constitutional democracy where the rule of law reigns, religious views are no less constitutionally protected than secular views. Gonthier J articulated this point in the Canadian case of *Chamberlain v Surrey School District No 36*:<sup>46</sup>

According to the reasoning espoused by Saunders J., if one’s moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has “belief” or “faith” in something, be it atheistic, agnostic or religious. To construe the “secular” as the realm of the “unbelief” is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.<sup>47</sup>

Accordingly, it is submitted that judges are free to express their social, political and religious views in any public forum. This is irrespective of whether such views are religious or secular in nature. However, this submission must be understood within the context of sec. 165(2) of the *Constitution*, which states that judges must apply the law “impartially and without fear, favour or prejudice”.<sup>48</sup> This means that the only limitation to judges expressing their views is when they deal with disputes placed before them in the context of discharging their judicial duties. In *National Director of Public Prosecutions v Zuma*,<sup>49</sup> Harms DP explained that:

[j]udges as members of civil society are entitled to hold views about issues of the day and may express their views provided they do not compromise their judicial office. But they are not entitled to inject their personal views into judgments or express their political preferences.<sup>50</sup>

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44 *Prince v President, President Cape Law Society*:par. 48.

45 Devenish 2014.

46 *Chamberlain v Surrey School District No 36* [2002] 4 SCR 710.

47 *Chamberlain v Surrey School District No 36*:par. 137.

48 *The Constitution of the Republic of South Africa*, 1996.

49 *National Director of Public Prosecutions v Zuma* 2009 (1) SACR 361 (SCA).

50 *National Director of Public Prosecutions v Zuma*:par. 16.

This *dictum* illustrates that the limitation to judges expressing their social views is narrowly interpreted and will, in most instances, be limited to situations that involve the adjudication of cases. I would add that the reference to “personal views” and “political preferences” deals with those views that are of no consequence to the determination of a case based on legal principles. Put differently, in my view, outside the judicial function, judges are free to express their social and political views and to act in accordance with them. My view in this regard is reinforced by Justice Zac Yacoob’s recent comment: “Judges should be able to make comments on government and on political parties, say so if government is right, but equally say so clearly and strongly when we feel government is wrong.”<sup>51</sup>

I hasten to add that an additional *caveat* to my submissions would be that, in expressing their views, judges must be careful not to make public pronouncements on matters that may come before them in court. It follows that it is plainly unreasonable to claim that a judge may be biased towards litigants merely because s/he expresses a view on a social or political issue outside that adjudicative process. In my view, no reasonable person can make such a submission, not least because no person can be expected to be a non-religious person publicly and only a religious one privately. Moreover, limiting a judge’s right to publicly express his/her own views on matters such as religion would constitute an unduly wide restriction on a judge’s rights as a citizen.

### 3.1 Examples of justifiable expression

To illustrate my point, I will now detail a few prominent examples of instances where judges’ public comments, however controversial, did not lead to any justifiable and impeachable claims of judicial bias and, by consequence, misconduct.

The first concerns widespread claims that, during a birthday function, the recently retired and former Deputy Chief Justice Digkang Moseneke made statements that were deemed to reflect negatively on the ANC.<sup>52</sup> His comments caused a political storm, which led to an unusual ‘damage control’ meeting between the then Chief Justice Pius Langa, Moseneke and senior ANC leaders. So controversial were the comments that many have speculated that they are the reason why Moseneke was twice overlooked for the position of Chief Justice. Be that as it may, during the remainder of his tenure on the bench, not once did the ANC seek his recusal in a case as a result of those comments. In other words, despite the fact that the alleged comments were clearly of a political nature, they could not

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51 Yacoob 2017.

52 The Deputy Chief Justice’s alleged comments were widely circulated in the print media at the time. He is alleged to have stated: “I chose this job very carefully. I have another 10 to 12 years on the bench and I want to use my energy to help create an equal society. It’s not what the ANC wants or what the delegates want.”. See Calland 2013:270.

disqualify the judge from hearing any matter involving the ANC, because they were made in a non-adjudicatory capacity.

The second example relates to Justice Edwin Cameron, a fervent supporter of Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTIQ) rights. Justice Cameron has been an LGBTIQ and AIDS victims' rights advocate for the better part of his adult life, even during apartheid when homophobia and prejudice against gays was rife. In the course of so doing, Justice Cameron has spent years giving speeches and mobilising societal support for his causes.<sup>53</sup>

It is interesting to note that, during his interview for judicial appointment as a High Court judge, Cameron was quizzed on whether his history as a gay rights activist would not lead him to be biased towards gay people in the course of judicial proceedings.<sup>54</sup> Save for that brief and awkward inquisition, he has successfully presided over a number of gay rights cases.<sup>55</sup> This includes *Fourie v Minister of Home Affairs*,<sup>56</sup> a case that eventually led to the legalisation of same-sex marriage.<sup>57</sup> This was in spite of the fact that, even as a judge, he continues to involve himself in advocating for gay rights, sometimes addressing the public with passion. No one has ever requested his recusal in any of these cases on grounds that his previous public speeches in support of gay rights may have created a reasonable apprehension that he may be biased in favour of gays.<sup>58</sup> In other words, his advocacy for gay rights, often done in his personal capacity, does not have any bearing on his capacity to adjudicate cases involving gay rights. Therefore, it seems hypocritical of liberal activists to suggest that it is permissible for a gay judge to be vocal about LGBTIQ rights, while at the same time suggesting that a religious judge should not publicly air his/her views on religion. Yet, this is an increasing global phenomenon. Indeed, the wide acceptance of Cameron's public activism in relation to LGBTIQ, by liberal commentators, including De Vos – who celebrated when Cameron was appointed to the Constitutional Court, by pointing out that Cameron was a key LGBTIQ activist,<sup>59</sup> – must be contrasted with his antagonistic attitude towards Mogoeng's religious views.<sup>60</sup> This inconsistency in attitudes amounts to unequal preferences

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53 Cameron 2001:642.

54 Hodgson *et al.* 2015:579.

55 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); Justice Cameron was an acting judge of the Constitutional Court in this matter.

56 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA).

57 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC). The Constitutional Court largely upheld the decision of the Supreme Court of Appeal, in which Justice Cameron had been involved.

58 Cameron, the most prominent public official in South Africa to publicly declare that he is HIV positive has published articles and given numerous public lectures passionately supporting gay rights. See Cameron 1993:450.

59 De Vos 2008.

60 De Vos 2008.

and treatment of moral and social views, which is inconsistent with sec. 15 of the *Constitution*.

In sum, the examples of Justices Moseneke and Cameron demonstrate that there is nothing inherently wrong with judicial officers' talking publicly about issues that are dear to them, even if such issues relate to religious, political, or other controversial subjects such as homosexuality.

Consequently, claims that Mogoeng's public statements in relation to religion create a reasonable apprehension of bias are, in my view, unreasonable and legally incorrect. This is even more so in light of the fact that Mogoeng has stated, on numerous occasions, that he consciously appreciates that, where there is conflict between his religious beliefs and the law, he must show fidelity to the *Constitution*.<sup>61</sup> His utterances in no way constitute misconduct by a judge.

The proposition that there is nothing amiss about a judge publicly expressing his/her religious or controversial social views is further supported by the reasoning of the Judicial Conduct Committee in 2013, when it dealt with a complaint against Mogoeng launched by Advocate Paul Hoffman SC. Mogoeng had given a fiery speech at an Advocates For Transformation (AFT) function, where he attacked critics of the Judicial Services Commission (JSC). He suggested that critics of the Judicial Services Commission's understanding of transformation were bitter "reactionaries".<sup>62</sup>

Hoffman claimed that Mogoeng's speech amounted to judicial misconduct, because, by descending into the arena and making political comments, the chief justice, *inter alia*, brought the judiciary into disrepute and violated sec. 165(2) of the *Constitution*.<sup>63</sup> This complaint must be understood in the context of the fact that the Helen Suzman Foundation (HSF) had launched court proceedings against the Judicial Services Commission, of which Mogoeng is the chair.<sup>64</sup> The foundation alleged that it had reservations about the manner in which the Judicial Services Commission was approaching the issue of transformation, in particular

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61 During his interview for the Chief Justice position in 2011, Mogoeng made it clear that he would uphold his oath of office, and that he understood that, when discharging his judicial duties, he had to give precedence to the dictates of the *Constitution* over his religious beliefs. In April 2014, Mogoeng went to the extent of penning an article in the *Mail and Guardian*, where he outlined judicial decisions that he had made in which he had shown fidelity to the *Constitution* and not his religious dictates. See Mogoeng 2014a. After his speech at Stellenbosch University, he also issued a statement reaffirming his position in this regard. See Mogoeng 2014c.

62 The transcript of the speech was widely circulated in the print media. See Mogoeng 2013.

63 Chiloane 2016.

64 See *Helen Suzman Foundation v Judicial Services Commission* 2015 (2) SA 498 (WCC); *Helen Suzman Foundation v Judicial Service Commission* 2017 (1) SA 367 (SCA).

its general approach to interpreting sec. 174(2) of the *Constitution*.<sup>65</sup> In this regard, it argued that the Judicial Services Commission's approach to transformation is unlawful in that race has been unduly elevated to a status that overlooks other criteria such as merit.

Hoffman alleged, *inter alia*, that, because of the important nature of the case, it will probably end up in the Constitution Court. Mogoeng had thus implicitly prejudged the matter and shown bias. The fact that the JSC overlooked distinguished White male lawyers for appointment to the bench in favour of what others perceived to be less eminent applicants precipitated the challenge.<sup>66</sup>

The JCC dismissed Hoffman's claim. Relevant to the argument that judges are permitted to publicly express their political or social views was the committee's finding that a discussion of transformation of the judiciary is,

[b]y its very nature, touching as it does on sensitive Constitutional issues of race and gender, the debate was bound to have political connotations. The complainant's contention that by engaging in such a debate, the respondent descended into the political arena is rather disingenuous.<sup>67</sup>

The ruling of the committee affirms the fact that there is nothing wrong *per se* with a judge who engages in public debates, however controversial or sensitive the topic of the debate may be. There is no general obligation for judges to refrain from "descending into arenas"<sup>68</sup> or making "sacrifices"<sup>69</sup> with respect to their constitutional rights, as Hoffman and Devenish suggest.

I, therefore, disagree with those who suggest that judges should not speak on controversial issues merely because they might end up in court. I accept that, in some instances, judges may sometimes have to exercise caution by not taking uncompromising public positions on specific issues, but even then, strong feelings on a topic do not *ipso facto* disqualify one from subsequently hearing a case involving the subject matter. My disagreement with those in favour of unduly restricting judges' rights to speak publicly stems from the fact that, in the past, judges failed to speak out or publicly on matters affecting society, including the injustices of the apartheid system. As Cameron argues, it was the failure to speak openly about these issues that made many in the legal profession "complicit"<sup>70</sup> in sustaining the system of apartheid. In my view, the committee's affirmation of Mogoeng's statements constitutes a justified rebuke of the apartheid-era thinking, which required judges to refrain from publicly speaking

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65 The *Constitution of the Republic of South Africa*, 1996.

66 *Helen Suzman Foundation v Judicial Services Commission* 2015 (2) SA 498 (WCC).

67 Musi & Pretorius 2016.

68 Hoffman 2013.

69 Devenish 2014.

70 Cameron 1998:438.

about important social issues. Furthermore, the committee's ruling affirms judges' rights to freedom of expression and belief.

My views regarding the fact that there is nothing inherently wrong with judges who hold strong moral views and publicly express them are reinforced by the ratio in *Republican Party of Minnesota v White*.<sup>71</sup> In that case, the United States Supreme Court dealt with a challenge to a provision in the *Minnesota Code of Judicial Conduct*, which stated that "a candidate for judicial office [including an incumbent judge] shall not announce his or her views on disputed legal or political issues".<sup>72</sup> This provision was challenged on the basis that it violated the *First Amendment*, which guarantees the right to freedom of speech.<sup>73</sup> Writing for the court, Scalia J rejected the view that judicial bias can be successfully pleaded in a case where a judge is known to have made public his/her views on a general topic that might be relevant in the case before him/her.<sup>74</sup> In the course of justifying his decision, he observes that:

[s]ince most Justices come to [the] bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to Constitutional issues in their previous legal careers.<sup>75</sup>

The *White* decision is important, because it recognized that judges are human beings who also have the right to express their views publicly and that so doing will not be deemed to constitute inappropriate behaviour.

#### 4. Religion in the context of adjudication

A more complex issue is the role of religion within the context of adjudication. In this instance, I consider whether a judge can allow his/her religious views (even in the slightest manner) to influence his/her judicial duties. Can a judge draw on religious values or principles to decide a case? Are all religious values inconsistent with the *Constitution*? Although there is significant academic controversy on this issue,<sup>76</sup> I do not believe that judges should be strictly disallowed from permitting religion to influence their decisions. There is nothing wrong, in principle, with a judge drawing on religion to influence his/her reasoning in a case, except in circumstances where the religious principle is in direct conflict

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71 *Republican Party of Minnesota v White* 536 U.S. 765.

72 *Republican Party of Minnesota v White*:770.

73 *The First Amendment* reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

74 *Republican Party of Minnesota v White*:788.

75 *Republican Party of Minnesota v White*:777.

76 Greenlee 2000:1; Ashburn 1994:295.

with the *Constitution*. Put differently, religious principles and the law are not inherently incompatible.<sup>77</sup> To this end, I disagree with Devenish who appears to hold a contrary view.

First, I believe that there is an important need to dispel the notion that a mere belief in God is incompatible with the legal norms underlying the notion of a secular constitutional democracy. That the *Constitution* refers to God is in itself sufficient evidence for this.<sup>78</sup> The *Constitution* prohibits the substitution of clear constitutional principles for religious doctrine in the context of adjudication. Notably and perhaps instructively, former Constitutional Court Justice Laurie Ackermann argued that there is a historical link between the concept of a constitutional democracy and religion: “Christendom has prepared the ground for the modern Constitutional state; [and] Christian tradition forms the source of a Constitutional theory that is in accordance with the secular concept of human dignity.”<sup>79</sup> This adds strength to the view that religion, in particular Christianity, is not wholly incompatible with constitutionalism. Lord Denning also complained about the increasing hostility towards religion in the legal world. He also argued that religion and law should not be viewed as enemies. On the contrary, Denning argued that most of the principles of law, which we value, had their roots in religion. He pointed out that:

the common law of England has been moulded for centuries by judges who have been brought up in the Christian faith. The precepts of religion, consciously or unconsciously, have been their guide in the administration of justice ...<sup>80</sup> the intermingling of religious, moral and legal precepts was typical of early society. But now these precepts have become severed. This severance has gone much too far.<sup>81</sup>

Denning argued that Christianity had a positive role to play in law. He took cognisance of, but reflected negatively on the fact that Christian principles were being “challenged by a changing world which knows no religion, or which at best treats religion as something which is of no moment in practical affairs”.<sup>82</sup> No doubt, Mogoeng would relate to this assertion, having regard to the fierce criticism that his speech received, with some suggesting that his views were contrary to the modern South African society, governed by a fairly modern *Constitution*.

Furthermore, for some people, including judges, religion is not something that can be separated from their beings. Put differently, they cannot deny

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77 Beneke 1999:1437.

78 See the Preamble to the *Constitution*.

79 Ackermann 2012:31. Ackermann 2012:34 also notes that numerous constitutional scholars have argued that there is a close relation between rights such as equality and the idea that “all human beings are created in the image of God and must therefore reflect this image equally.”

80 Edmund-Davies 1986:42.

81 Edmund-Davies 1986:42.

82 Edmund-Davies 1986:42.

or completely disassociate themselves from their religious principles, even in the context of adjudication. Religion constitutes an inherent part of who they are.<sup>83</sup> In other words, the belief that judges should and must, when it comes to adjudication, completely disabuse themselves of their religiously derived outlook on society is at best idealistic. All they can do is try their best. Moreover, there is something to be said for the view that there is no such thing as a completely neutral person, or judge – since everyone is a believer, in one sense or the other. Thus, as Benson points out, even an atheist or agnostic judge is guided by certain moral beliefs, in the same vein as a religious judge.<sup>84</sup> Benson articulates this point as follows:

So atheists are men and women of faith in many ways like the rest of us. Their dogmas are different but they are dogmatic (in that their beliefs emerge from the first principles of their faiths). True, in many things their faiths are different but they are still faiths and their beliefs are still beliefs no matter how much Hitchens and those like him wish it was different. Humans are stuck being believers and that is all there is to it. Being dogmatic does not necessarily mean being rude and it certainly does not equate to understanding what dogma is. That is why so many atheists and men and women on the street, think, like Hitchens, that they don't believe anything: but they do.<sup>85</sup>

We must thus accept the fact that we have judges whose professional conduct is, in fact, guided by their religious views, although the degree of this influence may differ depending on the individual.<sup>86</sup> Many judges in the United States, for example, are known to admit that their religious beliefs influence their work. Some have openly argued that it is near impossible to completely debunk one's religious outlook, even in the context of judging.<sup>87</sup> One such jurist is former Texas Supreme Court Judge Raul Gonzalez who, after citing a few of his decisions, stated:

In each of the above cases, my relationship with God impacted the way I considered and wrote about the issues presented. How we experience God and our level of religious commitment (or lack of commitment) impacts our work. One's views on how the world began, sin, forgiveness, and redemption influences our attitudes, behaviour, and everything that we do.<sup>88</sup>

In *Minister of Home Affairs v Fourie*,<sup>89</sup> Sachs J explained the potential difficulty in assuming that people can sever their religious beliefs (even if temporarily) from their socio-intellectual being, as follows:

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83 Some argue that there is evidence to show that there is a nexus between some judges' religious beliefs and judicial outcomes. See Bornstein & Miller 2009:112.

84 Benson 2013:14.

85 Benson 2013:15.

86 See, for example, Gonzalez 1996:1157.

87 Gonzalez 1996:1157.

88 Gonzalez 1996:1157.

89 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity that form the cornerstone of human rights. Such belief affects the believer's view of society and *founds a distinction between right and wrong* ... For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation.<sup>90</sup>

I wish to pay attention to two issues arising from Sachs J's pronouncement. First, he observes that, for certain people, God is central to *all* their activities. Taken to be true, this includes judges whose sense of fairness or justice, or as Sachs J put it "foundations between right and wrong"<sup>91</sup> are rooted in religious doctrine. Is there anything inherently wrong with this? Not necessarily. There will definitely be instances where religion influences a judge's way of reasoning, directly or otherwise, without such influence being constitutionally offensive.

An example of reliance on religious principles or analogies is Mogoeng CJ's reference to the Public Protector in *Economic Freedom Fighters v Speaker of the National Assembly*,<sup>92</sup> as the "embodiment of a biblical David, that the public is, who fights the most powerful and very well resourced Goliath".<sup>93</sup> This was not the first time the unrelenting Christian jurist quoted the Bible in his judgment. He cited and relied on Matthew Chapter 12 verse 2 in *The Citizen Pty Ltd v McBride*,<sup>94</sup> where he noted that "*Ubuntu* gives expression to, among others, a biblical injunction that one should do unto others as he or she would have them do unto him or her."<sup>95</sup> What does this tell us about the Chief Justice's approach to adjudication? I propose that, at the very least, it illustrates a man whose religious principles are so close to his heart that, even in the context of adjudication, he relies on them to express himself. For him, the concept of humanity or *Ubuntu* has biblical roots. For the Chief Justice, the concept of *Ubuntu* or humanity is not to be construed as an inextricable part of secularism, and thus an enemy of religion. For Mogoeng, religion is not something that should be viewed as oppressive, but rather as a useful source and mechanism for nation-building consistent with the dictates of our *Constitution*.<sup>96</sup> His almost reflex resort to biblical language and doctrine, even where it is not necessary, demonstrates that religion is something that he cannot completely divorce

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90 *Minister of Home Affairs v Fourie*:par. 88.

91 *Minister of Home Affairs v Fourie*:par. 88.

92 *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC).

93 *Economic Freedom Fighters v Speaker of the National Assembly*:par. 52.

94 *The Citizen Pty Ltd v McBride* 2011 (4) SA 191 (CC).

95 *The Citizen Pty Ltd v McBride*:par. 216.

96 Many judges share this view. See Griffen 1998:513.

from both his personal and professional being. I say completely, because, as his public protestations illustrate, he is conscious that one must always guard against the blurring of legal principles, on the one hand, and religious doctrine, on the other.<sup>97</sup>

As alluded to earlier, a significant aspect of the United Kingdom's lauded jurisprudence has its origins in biblical or religious concepts. One such example is the principle of reasonable duty of care in the law of delict. The law in this regard was expounded in the landmark case of *Donoghue v Stevenson*,<sup>98</sup> where Lord Atkin, drawing on Christian principles of "love thy neighbor", stated:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected in my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.<sup>99</sup>

Having dealt with examples where it is permissible to refer to God or the Bible in the context of adjudication, I propose to give an example or two of instances where reliance on religious principles, language or doctrine is constitutionally impermissible. Perhaps the most famous example is that of *Loving v Virginia*,<sup>100</sup> the case that led to laws prohibiting interracial marriage in the United States to be declared unconstitutional. In that case, a lower court had declared:

Almighty God created the races white, black, yellow, Malay and red and he placed them on separate continents. And, but for the interference of this arrangement, there would be no cause for such a marriage. The fact that he separated the races shows that he did not intend for the races to mix.<sup>101</sup>

Closer to home, a judicial misuse of personal and probably religious beliefs is evident in *Van Rooyen v Van Rooyen*.<sup>102</sup> The case concerned child custody rights and access to children after a divorce. The mother of the children had, subsequent to her divorce, entered into a lesbian relationship. In the case, Fleming DJP constantly referred to lesbianism as abnormal,<sup>103</sup> and clearly used this view within the context of determining the best interests of the children. In responding to a submission that the homosexuality of the mother was of no consequence in terms of the mother's capacity to be a competent parent and role model, and that homosexuality is something normal, the judge was clearly not convinced, openly stating that he

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97 Mogoeng 2014b.

98 *Donoghue v Stevenson* 1932 S.C. (H.L.) 31 (1932) (U.K.).

99 *Donoghue v Stevenson* 1932 S.C. (H.L.) 31 (1932) (U.K.):44.

100 *Loving v Virginia* 388 U.S. 1 (1967).

101 *Loving v Virginia*:3.

102 *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W).

103 *Van Rooyen v Van Rooyen*:329.

preferred to “leave it to the heavenly father to decide”.<sup>104</sup> This decision has been subjected to academic<sup>105</sup> and judicial criticism, and rightly so.<sup>106</sup> In this case, the judge clearly allowed his personal and religious views to negatively cloud his legal judgment. This is a classic misuse of religious principles or views in the context of adjudication.

Invoking biblical language and principles to guide one’s judicial reasoning does not in itself constitute judicial misconduct. Clearly, it is the manner in which one relies on religious principles that will be determinative of the appropriateness of a judge’s conduct.<sup>107</sup> There will clearly be instances where this is inconsequential or even beneficial, but there will also be instances where this is impermissible. Impermissibility will often occur when the judge allows his religious views to override legal principles, or where a judge confuses his religious views for law.

Returning to the Chief Justice: Are his religious beliefs incompatible with constitutional values? I wish to turn to the criticism related to his dissent in *Le Roux v Dey*,<sup>108</sup> and the criticism regarding his alleged views on homosexuality. This relates to his membership of a church that regards homosexuality as a disease that can be spiritually cured. Mogoeng dissented on a part of the judgment that, among other things, stated that it was not actionable delict to call someone gay.<sup>109</sup> Notably, Mogoeng did not give reasons for his dissent, giving rise to the speculation that he objects to homosexuality and believes that it is actionable to call someone gay. For his part, Mogoeng has publicly stated that he subscribes to the biblical view that men shall marry women,<sup>110</sup> a statement often viewed as an indirect criticism of homosexuality.

Be that as it may, the question is: Should we inherently fear or abhor a judge who holds strong religious beliefs about homosexuality? Does this mean that s/he will be less willing to uphold gay rights? Grootes offers a different and interesting view on how Mogoeng’s Christianity could, in fact, be helpful in so far as his constitutional duty to uphold and defend the rights of gays and lesbians is concerned:

Mogoeng has sworn an oath to uphold the Constitution. That oath ends with the phrase ‘So help me God’. For Mogoeng, that matters. He has sworn an oath to the God he worships. It may be that his religion preaches against homosexuality, but he has sworn an oath to God to uphold the Constitution, and that is now his duty, otherwise he would be breaking that oath. In a way, I have to say that I feel the gay people in my life, those I know and love and work with and drink with, may actually be more protected by a person for whom this oath means so much. Certainly, we know of plenty of

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104 *Van Rooyen v Van Rooyen*:327.

105 De Vos 1996:280; Singh 1995:571.

106 See *V v V* 1998 (4) SA 169 (C):188.

107 Conkle 1998:532.

108 *Le Roux v Dey* 2011 (3) SA 274 (CC).

109 *Le Roux v Dey*:par. 182.

110 Mogoeng 2011b.

people who do not proclaim to be religious who have made similar oaths to 'uphold the Constitution', some more than once, who have not done that. Mogoeng may actually be different to those people, in that for him this oath really does matter, and so he will live by it, and thus protect the rights of gay and lesbian people in the process.<sup>111</sup>

Indeed, one commentator recently noted how an appeal to the seemingly conservative Mogoeng's Christian beliefs can sometimes yield constitutionally progressive results.<sup>112</sup> The author refers to *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*.<sup>113</sup> This case concerned the constitutionality of laws criminalising consensual sexual conduct by children of a certain age. Noting that Mogoeng's demeanour during oral argument shocked many, he states:

Lawyers familiar with the case called it a 'highly progressive' judgment and noted that Mogoeng had been rigorous in his line of questioning when the matter was heard, 'surprising' many by the manner in which he 'was clearly moved by the notion that consensual sexual behaviour between minors should not be criminalised'. The religiously sensitive issue of underage children having sex is the sort of indicator of whether Mogoeng's social conservatism and religious beliefs colour his jurisprudence. In this case, they apparently did not. There are even suggestions that Mogoeng's core Christian values ... can be used to persuade him during Constitutional Court discussions towards a more progressive legal decision.<sup>114</sup>

These remarks illustrate that deeply held religious views can be constructive to a judge's jurisprudential outlook. Such views should not be viewed as affecting the capacity of a judge to competently preside over any matter.

In the United States, authors observe that most of the applications to have judges recuse themselves in cases based on alleged apprehensions of bias derived from the judge's religious beliefs have often failed.<sup>115</sup> As Collett puts it:

Any argument that characterises deeply held religious beliefs as a ground for judicial disqualification, while exempting deeply held political, economic, or moral beliefs must overcome the Constitutional barrier to laws which impose special disabilities on the basis of religious views.<sup>116</sup> Litigants moving to recuse judges, however, typically allege the appearance of bias or prejudice due to some personal acts of the judge beyond mere religious affiliation. Sometimes the litigants claim bias in fact. These claims have been uniformly rejected. The rejection is explained most often by relying

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111 Grootes 2017.

112 Tolsi 2013.

113 *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC).

114 Tolsi 2013.

115 Collett 1999:1281; Jones 2013:1089.

116 Collett 1999:1282.

on an analogy to recusal motions based on the sex or race of the judge.<sup>117</sup>

These remarks reinforce the point that the mere fact that a judge holds strong religious or even political views, and expresses them publicly, does not constitute conduct unbecoming of judges.<sup>118</sup> Furthermore, the mere fact that a judge feels strongly on divisive issues such as homosexuality, feminism and religion does not mean that such a judge is inherently incapable of deciding matters impartially, even when they relate to topics that are the subject of his/her passions. I wish to conclude this point with an interesting observation. When Mogoeng was criticised for articulating his views on religion, in particular for calling for it to be factored into the lawmaking process, Justice Cameron came out in his defence, arguing that Mogoeng should be allowed to express his views.<sup>119</sup> In so doing, he stated:

We come from an era when members of the judiciary system weren't allowed to express their views on morality and religion, yet abused the law to enforce their beliefs. We now live in a country where we have the right to express ourselves freely and that is what the chief justice did, that is his Constitutional right.<sup>120</sup>

Cameron defended Mogoeng, despite the fact that some of the criticisms of Mogoeng's views were based on the perception that his remarks were another veiled attack on gay rights, of which Justice Cameron is a strong advocate. The point is that judges also have rights to freedom of religion and expression, just like the rest of society. It is, therefore, folly to think that judges should keep these views in closets, regardless of the context.

## 5. Conclusion

South Africa comes from a deep and dark past, where judges abused the law through concealed bigotry.<sup>121</sup> Cameron himself has written that many apartheid judges' reasoning was characterized by 'chauvinism' and racism.<sup>122</sup> This must be true; one need only think of the decision where a lower court took 'judicial notice' of the fact that Black women submit to rape<sup>123</sup> or Rumpff CJ's casual acceptance of the "fact" that Black people will sometimes stab each other for a reason.<sup>124</sup> In this new constitutional dispensation, it is important for judges to lay bare their potential prejudices so that society can examine and reflect on them. As such, Mogoeng's expression and public acknowledgement of his strong religious beliefs should, in fact, be welcomed.

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117 Collett 1999:1286.

118 Shaman 1989:251.

119 Cameron 2014.

120 Cameron 2014.

121 Cameron 1982:380.

122 Cameron 1982:380.

123 *S v M* 1965 (4) SA 577 (N).

124 *S v Augustine* 1980 (SA) 503:506.

In order to further judicial transparency and accountability, social factors that influence judges need to be exposed and critiqued. In this regard, Mogoeng's frankness with regard to his religious beliefs is something that should be celebrated. It is an acknowledgment that judges are people who are no different to the ordinary citizen. Furthermore, I agree with Mogoeng that religion is not the enemy of a constitutional democracy such as ours. I also agree that Gonthier J who criticised a lower court judge, Saunders J, for assum[ing] that "secular" effectively meant "non-religious". As Gonthier J pointed out, "nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy."<sup>125</sup>

In sum, it is submitted that religion can serve as a useful aid in nation-building projects and in appropriate circumstances, as a guide even within the context of adjudication, particularly where its dictates are consistent with the spirit, purport and object of the *Bill of Rights*. It is in this context that I regard the views expressed by Mogoeng's critics, including Devenish, as unreasonable and misconceived. These critics need to remember that we live in an open society where judges may, within reason, enjoy the benefits of democracy, just like the rest of us.

## Bibliography

### ACKERMANN L

2012. *Human dignity: Lodestar for equality in South Africa*. Cape Town: Juta.

### ASHBURN DG

1994. Appealing to a higher authority? Jewish law in American judicial opinions. *University of Detroit Mercy Law Review* 71:295-352.

### BARRIE GN

2005. Judicial review and religious freedom in South Africa. *Tydskrif vir die Suid-Afrikaanse Reg* 2005(1):162-168.

### BENEKE C

1999. The separation of personal religious faith and professional identity – Is this really possible? Is it truly desirable? *South Texas Law Review* 41:1423-1438.

### BENSON IT

2013. Seeing through secular illusion. *Nederduits Gereformeerde Teologiese Tydskrif* 54(4):12-29.

### BILCHITZ D

2011. Should religious associations be allowed to discriminate? *South African Journal of Human Rights* 27(2):219-248.

2012. Why courts should not sanction discrimination in the private sphere: A reply. *South African Journal of Human Rights* 28(2):296-315.

---

125 *Chamberlain v Surrey School District No 36*:par. 137.

**BORK RH**

1990. *The tempting of America: The political seduction of law*. New York: Touchstone Rockefeller Center.

2003. *Coercing virtue: The world-wide rule of judges*. Washington D.C: American Enterprise Institute.

**BORNSTEIN B & MILLER M**

2009. Does a judge's religion influence decision making? *Court Review: The Journal of the American Judges Association* 45(3):112-115.

**CALLAND R**

2013. *The Zuma years: South Africa's changing face of power*. Cape Town: Zebra Press.

**CAMERON E**

1982 Legal chauvinism executive-mindedness and justice L C Steyn. *South African Law Journal* 99:38-46.

1993. Sexual orientation and the Constitution: A test case for human rights. *South African Law Journal* 110(3):450-472.

1998. Submission on the role of the judiciary under apartheid. *South African Law Journal* 115(3):436-438.

2001. Constitutional protection of sexual orientation and African conceptions of humanity. *South African Law Journal* 118 (3) 650.

2014. "Mogoeng's speech was abused". <http://www.iol.co.za/news/politics/mogoengs-speech-was-abused---cameron-1705605> (accessed on 4 December 2016).

**CHILOANE S**

2016. Secretariat for the Judicial Services Committee. Letter addressed to Advocate P Hoffman, Director, Institute of Accountability in Southern Africa. *Accountability Now*. [http://accountabilitynow.org.za/pdf/Letter\\_to\\_Adv\\_Hoffman\\_SC-JCC.pdf](http://accountabilitynow.org.za/pdf/Letter_to_Adv_Hoffman_SC-JCC.pdf) (accessed on 6 June 2016).

**COLLETT TS**

1999. The King's good servant, but God's first. The role of religion in judicial decision-making. *South Texas Law Review* 41:1277-1300.

**CONKLE D**

1998. Religiously devout judges: Issues of personal integrity and public benefit. *Marquette Law Review* 81(2):523-532.

**DE FREITAS SA**

2016. Doctrinal sanction and the protection of the rights of religious associations: *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (726/13) [2014] ZASCA 151. *Potchefstroom Electronic Law Journal* 2016(19):1-22.

**DEVENISH G**

2014. "Mogoeng 'failed to maintain impartiality and Independence'". <http://www.iol.co.za/sundayindependent/mogoeng-failed-to-maintain-impartiality-independence-17001700> (accessed on 3 February 2017 and 6 June 2016).

**DE VOS P**

1996. On the legal construction of gay and lesbian identity and South Africa's transitional Constitution. *South African Journal of Human Rights* 12(2):265-290.

2014. "Constitutionally speaking". <https://constitutionallyspeaking.co.za/the-law-vs-religion-lets-try-that-again/> (accessed on 13 May 2018).

**DUGARD J**

1971. The judicial process, positivism and civil liberty. *South African Law Journal* 98:181-200.

**EASTHORPE J**

2015. Pride and prejudice – *De Lange v The Presiding Bishop, Methodist of Southern Africa* 2015 (1) SA 106 (SCA). *Tydskrif vir die Suid Afrikaanse Reg* 2015(4):903-918.

**EDMUND-DAVIES H**

1986. Lord Denning: Christian advocate and judge. *The Denning Law Journal* 1:41-47.

**GONZALEZ RA**

1996. Climbing the ladder of success – My spiritual journey. *Texas Tech Law Review* 27:1139-1158.

**GREENLEE M**

2000. Faith on the bench: The role of religious belief in the criminal sentencing decisions of judges. *Dayton Law Review* 26(Fall):1-42.

**GRIFFEN WL**

1998. The case for religious values in judicial decision making. *Marquette Law Review* 81(2):513-521.

**GROOTES S**

2017. "Mogoeng debate: Let's just all calm down to a panic". [http://www.dailymaverick.co.za/article/2014-06-04-mogoeng-debate-lets-just-all-calm-down-to-a-panic/#.VyMXUFR96M\\_](http://www.dailymaverick.co.za/article/2014-06-04-mogoeng-debate-lets-just-all-calm-down-to-a-panic/#.VyMXUFR96M_) (accessed on 4 December 2016).

**HODGSON T, HUNTER M & THORPE C**

2015. Women are not a proxy: Why the Constitution requires feminist judges. *South African Journal of Human Rights* 31:579-606.

**HOFFMAN P**

2013. "Why Mogoeng Mogoeng should be impeached". <http://www.politicsweb.co.za/documents/why-mogoeng-mogoeng-should-be-impeached-paul-hoff> (accessed on 4 April 2016).

**JONES ML**

2013. Religiously devout judges: A decision-making framework for judicial disqualification. *Indiana Law Journal* 88(3):1089-1112.

**LENTA P**

2009. Taking diversity seriously: Religious associations and work-related discrimination. *South African Law Journal* 126(4):827-860.

2012. The right of religious associations to discriminate. *South African Journal of Human Rights* 28(2):231-257.

2013. In defence of the right of religious associations to discriminate: Reply to Bilchitz and De Freitas. *South African Journal of Human Rights* 29(2):429-447.

#### **MOGOENG M**

2011a. "God wants me to be Chief Justice". <http://www.news24.com/SouthAfrica/News/God-wants-me-to-be-chief-justice-20110904> (accessed on 4 April 2017).

2011b. "In defence of my record". <http://www.politicsweb.co.za/documents/in-defence-of-my-record--mogoeng-mogoeng> (accessed on 4 April 2017).

2013. "The duty to transform", address given at Advocates for Transformation Annual General Meeting, Cape Town. <http://accountabilitynow.org.za/chief-justice-mogoeng-mogoengs-speech-advocates-transformation-annual-general-meeting-dinner/> (accessed on 6 June 2016).

2014a. "Upholding Christ and the Constitution". <http://mg.co.za/article/2014-04-16-upholding-christ-and-the-constitution> (accessed on 6 June 2016).

2014b. "Constitution comes before my faith" *City Press*, 4 June. <http://www.news24.com/Archives/City-Press/Constitution-comes-before-my-faith-Chief-Justice-Mogoeng-20150430> (accessed on 23 August 2017).

2014c. "I will not give precedent to my faith". <http://mg.co.za/multimedia/2014-06-05-mogoeng-i-will-not-give-precedence-to-my-faith> (video accessed on 6 June 2016).

#### **MUSI HMT & PRETORIUS C**

2016. "Paul Hoffman's complaint against Mogoeng Mogoeng dismissed – JSC". <http://www.politicsweb.co.za/documents/paul-hoffmans-complaint-against-mogoeng-mogoeng-di> (accessed on 7 April 2016).

#### **NWAUCHE E**

2004. A return to the manifest justice principle: A critical examination of the 'reasonable suspicion/apprehension of bias' and 'real possibility of bias' tests for judicial bias in South Africa and England. *Potchefstroom Electronic Law Journal* 7(2):204-1-42.

#### **OKPALUBA C & JUMA L**

2011. The dialogue between the bench and the bar: Implications for adjudicative impartiality. *South African Law Journal* 128(4):659-685.

#### **POPLAK R**

2017. "Mogoeng Mogoeng wants God to govern. This time he's serious". <http://www.dailymaverick.co.za/article/2014-06-04-mogoeng-mogoeng-wants-god-to-govern.-this-time-hes-serious./#.VwJAZtJ96M8> (accessed on 5 April 2017).

#### **SHAMAN JM**

1989. Bias on the bench: Judicial conflict of interest. *Georgetown Journal of Legal Ethics* 3(2):245-290.

#### **SINGH D**

1995. Discrimination against lesbians in family law. *South African Journal of Human Rights* 11(4):571-581.

**TOLSI N**

2013. "Applause for Mogoeng's judicial cadenza". <http://mg.co.za/article/2013-10-17-applause-for-mogoengs-judicial-cadenza> (accessed on 4 December 2016).

**YACOOB Z**

2017. "Freedom of speech also applies to judges, retired judges". <http://citypress.news24.com/News/freedom-of-speech-also-applies-to-judges-retired-judges-20151210> (accessed on 5 January 2017).