Regulating Group-Related Rivalries in Highly Polarized Communities

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In May 2011, I and 10 other so-called international experts accepted an invitation to Kathmandu to address problems encountered by the Constitutional Assembly of Nepal in the drafting of a new constitution for that country. Since its creation in 1768 as a unified state and until not so long ago, Nepal was proclaimed a Hindu state, constitutionally structured as a monarchy. The country's very first meaningful constitution, adopted in 1990, formally endorsed this state of affairs. Dissatisfaction with the constitution prompted a Maoist insurgency which plunged the country into a decade-long civil war that brought about approximately 17,500 casualties. The adversaries concluded a 12-point peace agreement in 2005, an interim constitution took effect, and the king abdicated in 2008 (he now lives in the country as an ordinary citizen, and his palace has become a museum). The first president, Dr. Ram Baran Yadav, took office on 23 July 2008 under the current interim constitution. A Constitutional Assembly was established to draft a final constitution that would address—and seek to overcome—the causes of unrest in the country.

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A major cause of concern in Nepal involves the polarization of its diverse ethnic and religious population. Although the vast majority of the country is Hindu, influential Buddhist and Muslim minorities exist, and the ethnic composition of the population reflects no fewer than 91 different language groups. One of the issues that the assembly asked the "international experts" to address was a proposal—one with wide support among politicians—to apply a federal system of government, based on the ethnic composition of the Nepalese population, as a means of securing internal peace in the years to come. It might be noted that the Maoists most recently proposed 10 federal states for the country while others favor 12 or 14. We cautioned against ethnically defined federal states as a proposed "solution" for the country's group-related tensions. Complete territorial segregation of ethnic varieties in any political community is almost impossible to orchestrate, and consigning regional powers of government to cultural, religious, or linguistic factions could become a recipe for disaster. We know from the gruesome experiences in the former Yugoslavia that attempts to create religiously or ethnically homogeneous states could lead to profound animosity toward others in one's midst and might culminate in a policy of "ethnic cleansing" that could include brutal acts of genocide.

The territorial seclusion and political empowerment of rival ethnic groups are not confined to Nepal. Orthodox Judaism, for example, also favors the segregation of conflicting groups within a particular political domain. Orthodox Judaism does not believe in turning the other cheek—a decree to do that comes from the New Testament. Instead, the Talmud makes the maintenance of peace and security conditional upon the construction of a fence that would separate those who belong from their enemies.

Of course, other constitutional devices have been proposed to maintain peace and security in highly polarized plural communities. Attempts to avoid group-related conflicts in group-conscious communities include a political strategy for the promotion of homogeneity within the body politic. As far as member states of the European community are concerned, one can single out France, Greece, and Turkey (an associate member of the European Union) as countries not favorably disposed to accommodating ethnic, religious, or linguistic diversity within their respective borders. On 15 March 2004, French president Jacques Chirac signed into law an amendment to the French Code of Education that now prohibits, as a principle of the separation of church and state, "the wearing of symbols or garb which shows religious affiliation in public primary and secondary schools."[1] A French law entered into force on 11 April 2011 banning the covering of

one's face in public, clearly intended to outlaw the wearing of a burqa by Muslim women. Greece is particularly unaccommodating of the claim to a distinct identity by people of Macedonian extraction in Florina (northern Greece). A Turkish law banned the wearing of a (Muslim) head scarf in all universities and official government buildings, basing the proscription on the fact that Turkey is a secular state. The Grand Chamber of the European Court of Human Rights—the court of final instance in the European system of human rights protection—upheld the legality of the Turkish law since, in its opinion, the head scarf ban was based on the constitutional principles of secularism and equality; consequently, it did not constitute a violation of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[2]

Article 15(3)(c) of the Nigerian constitution reflects a trend toward promoting homogeneity, placing an obligation on the state to encourage intermarriages between members of different religious and tribal communities for the purpose of "promoting national integration."[3] The truth of the matter, though, is that the Nigerian people are as divided today as they ever were—perhaps even more so.

In 2002 several predominantly Muslim states in northern Nigeria formally adopted Islamic law, including Islamic criminal law, as part of their legal system. As of 2012, nine states have instituted Sharia law (Zamfara, Kano, Sokoto, Katsina, Bauchi, Borno, Jigawa, Kebbi, and Yobe). The imposition of Sharia penalties, which by international standards include cruel and inhuman punishments, attracted media attention (and condemnation) from many parts of the world when in March 2002, a Sharia court sentenced a 30-year-old woman, Amina Lawal, to death by stoning because she was expecting a child out of wedlock. Indeed, in 2004 the Sharia Court of Appeal set aside the sentence, based on the rule against retroactive criminal sanctions because the law incorporating Islamic law was enacted after she became pregnant. However, the case generated wide publicity as a reminder of both unbecoming (and in Nigeria, in fact, unconstitutional) penalties and the sharp divide between the northern Islamic communities and the predominantly Christian population of Nigeria. Religious violence orchestrated by a radical Muslim group, the Boko Haram, has disrupted the country for several months, costing several hundreds of Nigerians their lives and leaving more than 10,000 people displaced. The violence has also caused severe damage to (Christian) places of worship and government buildings.

The postapartheid dispensation of South Africa represents a further constitutional strategy for coping with group-related tensions within a

single state. The "new South Africa" abandoned territorial segregation as a supposed recipe for the peaceful coexistence of racial and ethnic groups and did not attempt to promote the homogeneity of its nation. It opted instead for a system designed to promote national unity on the basis of the internationally acclaimed right to self-determination of peoples.

Accordingly, the South African constitution of 1996 encourages maintenance of and pride in the ethnic, religious, and linguistic group identities of the country's diverse population. The constitutional preamble thus expresses the belief that all who live in South Africa are "united by our diversity."[4] In its substantive provisions, the constitution proclaims 11 official languages, calls on the state "to take practical and positive measures to elevate the status and advance the use of . . . [the indigenous languages of our people,]" and affords to everyone "the right to use the language and to participate in the cultural life of their choice."[5] The constitution expressly guarantees the right to self-determination of cultural, religious, and linguistic communities in accordance with international directives that apply in this regard.[6]

The Right to Self-Determination: Historical Perspective

In the early twentieth century, proponents of socialism confronted a challenging problem. According to the teachings of Karl Marx and Friedrich Engels, the entire world would in due course be subjected, through a revolution of the proletariat, to a particular economic dispensation known as communism. The subjection of the entire world community to this economic dispensation would not be negotiable, but what status would nation-states have within the overarching and universal structures of communism? In 1913 Joseph Stalin published a treatise on *Marxism and the National Question*, followed in 1916 by Vladimir Lenin's more elaborate theses on *The Socialist Revolution and the Right of Nations to Self-Determination*. Both authors proclaimed that nation-states will retain the right to self-determination. According to Antonio Cassese, Lenin's *Socialist Revolution* constituted "the first compelling enunciation of the principle" of self-determination of peoples at the international level.[7]

The special prominence of the right to self-determination in international law has been attributed to the American president Woodrow Wilson. Robert Friedlander thus accredited President Wilson's "Fourteen Points Address" of 8 January 1918 as "transforming self-determination into a universal right."[8] Wilson included in those 14 points one that proclaimed a "free, open-minded, and absolutely impartial adjustment of all colonial

claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the population concerned must have equal weight with the equitable claims of government whose title is to be determined."[9] In the "Fourteen Points Address," President Wilson never really used the word *self-determination*. It became part of his vocabulary only in an address to a joint session of the two houses of Congress delivered on 11 February 1918, when he proclaimed that "national aspirations must be respected; peoples may now be dominated and governed only by their own consent. 'Self-determination' is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril."[10]

The above citation from the "Fourteen Points Address" has come to be regarded as the basis of the League of Nations policy for dealing with the future dispensation of nation-states that were part of the world empires defeated and dissolved through World War I.[11] The right to self-determination of those nation-states was conditioned by the so-called mandate system of the League of Nations, in terms of which a designated mandatory state would prepare the conquered nations for political independence—or in the case of Southwest Africa (Namibia), for eventual incorporation into the Union of South Africa as a fifth province of that country.[12]

In its infancy, when World War I was drawing to a close, the idea of self-determination emerged to legitimize the disintegration of the Ottoman, German, Russian, and Austro-Hungarian empires.[13] Within that context, self-determination vested in "ethnic communities, nations or nationalities primarily defined by language or culture" and afforded justification to such communities to disrupt existing states.[14] Self-determination here denoted the right of "peoples" in the sense of (territorially defined) nations to political independence.[15] But it did not end here. Over time, the concept acquired different shades of meaning, depending in each instance on the nature and disposition of the peoples claiming that right.[16]

Following World War II, the emphasis of the concept of self-determination shifted to the principle "of bringing all colonial situations to a speedy end."[17] The repositories of the concerned right in this sense were colonized peoples, and the substance of their right denoted the political independence "of peoples that do not govern themselves, particularly peoples dominated by geographically distant colonial powers."[18]

In the 1960s, yet another category of "peoples" came to be identified as repositories of a right to self-determination—namely those subject to racist regimes. Here the concept substantively signified the right of such peoples

to participate in the structures of government within the countries to which they belong.[19] The "self" in self-determination was no longer perceived as territorially defined sections of the population in multinational empires. It not only comprised peoples under colonial rule or foreign domination but also became identified with the entire community of a territory where the social, economic, and constitutional system was structured on institutionally sanctioned racial discrimination.[20]

Finally, the right to self-determination has been extended to a political community's national or ethnic, religious, and linguistic minorities whose particular entitlements center upon a right to regulate their lives according to the traditions and customs of the concerned group. South Africa has come to accept this final meaning of a right to self-determination as a means for addressing sectional interests within the body politic.

The Right to Self-Determination of Ethnic, Religious, and Linguistic Communities Defined

One must not confuse the right to self-determination of ethnic, religious, and linguistic communities with the comparable right of colonized countries or of peoples subject to a racist regime. In terms of the *International Covenant on Civil and Political Rights*, the self-determination of ethnic, religious, and linguistic communities entails the following basic directive: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[21] Similarly, the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* speaks of "the right [of national or ethnic, religious, and linguistic minorities] to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination."[22]

But there is more to the self-determination of such communities. In giving practical effect to the right to self-determination, governments, through their respective constitutional and legal systems, must secure the interests of distinct sections of the population that constitute minorities in the above sense. The *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* clearly spells out that obligation: protect and encourage the creation of conditions for the promotion of the group identities of minorities under the jurisdiction of the duty-bound

state; afford to minorities the special competence to participate effectively in decisions pertinent to the group to which they belong; do not discriminate in any way against any person on the basis of his/her group identity; and in fact take action to secure their equal treatment by and before the law.[23] The declaration further provides that "states shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards."[24]

The Council of Europe's *Framework Convention for the Protection of National Minorities* specifies minority rights in much the same vein. It guarantees equality before the law and equal protection of the laws.[25] States parties promise to provide "the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage."[26] States parties recognize the right of a person belonging to a national minority "to manifest his or her religion or belief and to establish religious institutions, organisations and associations."[27] Finally, the framework convention guarantees the use of "minority language[s], in private and in public, orally and in writing."[28]

The South African constitution is quite explicit in upholding these directives of international law. Section 31 provides that

> (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community
>
> (a) to enjoy their culture, practise their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.[29]

The drafters of the constitution were also sensitive to the duty of the state to promote cultural, religious, and linguistic diversity in South Africa. The constitution thus makes provision for a Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities.[30] It also envisions the establishment, by means of national legislation, of a Pan South African Language Board charged inter alia with promot-

ing and ensuring respect for "Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa."[31] One must note that the right of self-determination of ethnic, religious, and linguistic groups (a) is not an unlimited right and (b) does not include a right to political independence.

Limitations of the Right to Self-Determination

The *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* excluded from the right to self-determination specific practices of an ethnic, religious, or linguistic community that violate the national laws of a country and run contrary to international standards.[32] The international-standards criterion conditions the national-law limitation, presupposing municipal regulation that remains within the confines of international standards and does not place undue restrictions upon the group interests of minorities.

Current state practice does not uphold to the letter the limitations inherent in the right to self-determination of ethnic, religious, or linguistic communities dictated by the international-standards criterion. For example, almost all of the international human rights conventions and covenants condemn gender discrimination, yet religious institutions that discriminate against women on gender grounds have—thus far, successfully—claimed a sovereign right to conduct their affairs within the sphere of their internal household according to the dictates of their faith. And perhaps rightly so! Does one really want the state to compel the Roman Catholic Church, Greek Orthodox Church, Orthodox Judaism, and others to ordain women as priests or as part of their clergy?

However, one cannot justify practices such as female genital mutilation on the basis of the right to self-determination of peoples. Such a practice amounts to sexually defined physical mutilation of extreme severity and with irreversible consequences. Almost exclusively inspired by male interests (the prolonged sexual pleasure of the male partner), it constitutes sex- and gender-based discrimination of the worst kind. Since this mutilation usually occurs while the victim is an infant, it also implicates the rights of the child. The United Nations *Declaration on the Elimination of Violence against Women* (1993) describes female genital mutilation as an instance of "violence against women."[33]

This raises the question as to an appropriate criterion for separating those violations of "international standards" that do—and those that do not—exceed the limits of the right to self-determination of ethnic, reli-

gious, or linguistic communities. There are no clear answers to this question. It would seem, though, that those customs and traditions that threaten the life or violate the physical integrity of members of an ethnic, religious, or linguistic group clearly exceed the permissible confines of the right to self-determination of the group. Applying these norms in a South African setting is particularly problematic since cultural or ethnic traditions in many African communities include practices incompatible with the human rights ideology of our time and are therefore intolerable.

From a certain perspective, one can divide the systems of human rights protection in the world today into two main categories: those that have grown from the bottom up and those imposed from the top down. In countries belonging to the former category, the values embodied in a Bill of Rights were based upon and kept track with an existing and evolving public ethos. Drafters and law-creating agencies simply endorsed moral perceptions entertained by a cross section of the peoples comprising the nation. The American system of human rights protection offers an example of this state of affairs.

South Africa, though, belongs to that category of political communities that have imposed Bill of Rights decrees from the top down. That is to say, the rights and freedoms protected by the constitution have been dictated by internationally recognized norms of right and wrong, which in many instances do not conform with the moral perceptions and customary practices of large sections of the South African population. From time to time, some of the laws drafted to implement the principles of human rights provoke strong voices of protest from groups within the country whose age-old customs may fall prey to the particular legal-reform measures. In many instances, the lives they live and the customs they observe are far removed from the nice-sounding ideologies written into the constitution and specificities reflected in judgments of the courts. In one of the early judgments of the Constitutional Court, Justice Yvonne Mokgoro referred to the "delicate and complex" task of accommodating African customary law to the values embodied in the Bill of Rights, noting that "this harmonisation will demand a great deal of judicious care and sensitivity."[34]

Effective implementation of the human-rights-based laws and judgments within the entire country will in the final analysis be conditioned by cultivation of a human-rights ethos as the stronghold of all of the peoples and in all of the tribal communities of South Africa. In this respect, that nation still has many more miles to run.

Self-Determination and a Right to Secession

The failure of national systems to provide protection to the sectional interests of the peoples within their area of jurisdiction—or merely the perception of being marginalized—represents an important contributing cause of the tireless aspirations toward the establishment of homogeneous states for sections of the political community with a strong group consciousness. These include the Muslim community of Kashmir and in Kosovo, the Basques in Northern Spain, the Hindu factions in Sri Lanka, the Catholic minority in Northern Ireland, the Kurds in Iraq and Turkey, people of Macedonian extraction in Florina (northern Greece), the peoples of Somaliland in Somalia, the northern provinces of Georgia, the Maoists in Nepal, and many others.

One must emphasize, though, that the right of ethnic, religious, and linguistic communities to self-determination does not include a right to secession—not even in instances where the powers that be act in breach of a minority's legitimate expectations.[35] Three compelling arguments prove decisive in this regard:

- The right to self-determination is almost invariably mentioned in conjunction with the territorial integrity of states.[36] Reconciling the two principles in question necessarily means that one must take self-determination to denote something less than secession.
- The right to self-determination vests in a people; essentially, a new state created through secession is territorially defined.[37] A defined territory, not a people, secedes from an existing state.[38]
- The right to self-determination is the right of a collective group (members of the concerned group, either individually or collectively, can exercise entitlements included in that right), but a right to secede is a right of an institutional group (where permissible, a representative organ of the territorially defined group, acting on behalf of the group as a whole, must make a decision to secede).

Therefore, one should not view general definitions of the right to self-determination as a general sanction of a right to political independence (one finds such a general definition in the *Declaration on the Granting of Independence to Colonial Countries and Peoples* proclaiming the right of peoples to "freely determine their political status" and the right to "freely pursue their economic, social, and cultural development").[39] Rather, they must be limited and understood in the context of the subject matter of the

document from which they derive. Peoples subject to colonial rule or foreign domination do have a right to political independence—ethnic, religious, and linguistic minorities in an existing state do not. Similarly, the definition of self-determination in international instruments, including in that concept the right of peoples "freely [to] determine their political status and freely [to] pursue their economic, social and cultural development," did not intend to undermine the rule of international law proclaiming the territorial integrity of states.[40]

The United Nations' (UN) *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* reiterated that one must not take its provisions to contradict the principles of the UN pertaining inter alia to "sovereign equality, territorial integrity and political independence of States."[41] In the *Framework Convention for the Protection of National Minorities*, the Council of Europe also proclaimed that "nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States."[42]

The UN's *Declaration on the Rights of Indigenous Peoples* of 2007 also proclaims, somewhat inadvertently, that indigenous peoples are entitled to "freely determine their political status and freely pursue their economic, social and cultural development."[43] Lest someone construe this as a right to political independence, the declaration goes on to emphasise that it must not be interpreted as "authorising or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[44]

International law has quite adamantly proclaimed the sanctity of post–World War II national borders and has censured attempts at secession in instances such as Katanga, Biafra, and the Turkish Republic of Northern Cyprus.[45] As explained by Vernon van Dyke, "The United Nations would be in an extremely difficult position if it were to interpret the right to self-determination in such a way as to invite or justify attacks on the territorial integrity of its own members."[46] The Organization of African Unity (now the African Union), sensitive to the chaotic situation that might emerge from any effort to redraw the (quite irrational) national borders established by colonial powers in Africa, played a leading role in emphasizing the salience of the existing frontiers. Its charter of 1963 prompted member states to "solemnly affirm and declare" their "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent

existence."[47] A resolution of the Assembly of Heads of State and Government adopted at its first ordinary session held in Cairo in 1964 called on all member states "to respect the borders existing on their achievement of national independence."[48]

The Supreme Court of Canada issued a judgment pertaining to the legality of the province of Quebec's seceding from Canada (should a majority of the residents of that province through a referendum seek to effect the severance of that territory from Canada?). It summarized as follows the distinction between self-determination (referred to in the judgment as "internal self-determination") and secession (referred to in the judgment as "external self-determination"):

> The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.[49] (emphases in original)

Secession is indeed sanctioned by international law—not under the rubric of a right to self-determination but as a permissible political strategy in its own right. The restructuring of national borders is sanctioned by international law in two instances only:

> (a) If a decision to secede is "freely determined by a people"—that is, a cross section of the entire population of the state to be divided and not only inhabitants of the region wishing to secede.[50]
>
> (b) If, following an armed conflict, national boundaries are redrawn as part of a peace treaty.[51]

The reunification of Germany, the breakup of the Soviet Union, the parting of the constitutional ways of the Czech Republic and Slovakia, and the recent secession of southern Sudan were in that sense "freely determined by the people."[52] The secession of Eritrea from Ethiopia, though, was sanctioned by a peace accord. The disintegration of the former Yugoslavia represents a complicated conglomeration of both principles.[53]

On 17 February 2008, a substantial majority of the Assembly of Kosovo adopted a unilateral declaration of independence from Serbia. The General Assembly responded by requesting an advisory opinion of the International Court of Justice. The court noted that the request did not call upon the court "to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori,

on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it."[54] Instead, the court concluded that this declaration of independence was not precluded by the Security Council resolution that authorized the secretary-general to establish an interim administration for Kosovo with a view, inter alia, to oversee "the development of provisional self-governing institutions."[55] It also concluded, somewhat obscurely, that the declaration of independence did not violate general international law.[56]

One body of opinion suggests that "remedial secession" might be permissible under the rules of international law in instances where an ethnic, religious, or linguistic community within an existing state is subjected to unbecoming human rights violations.[57] Some years ago, the African Commission on Human and People's Rights suggested by way of obiter dictum that Katanga would have been entitled to secede from Zaire if "concrete evidence [existed] of violations of human rights to the point that the territorial integrity of Zaire should be called to question and . . . that the people of Katanga are denied the right to participate in government as guaranteed by article 13(1) of the African Charter."[58] In its declaration on self-determination, the UN World Conference on Human Rights of 1993 reiterated that this right "shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States." Seemingly it made this assertion applicable only to states "conducting themselves in compliance with the principles of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind."[59] The fallacy of this reasoning is that the right to self-determination belongs to a people while statehood is based on a territory foundation. In the final analysis, secession must be sanctioned by general agreement or a peace treaty. Of course it is quite possible that gross violations of human rights could culminate in a referendum or an armed conflict that would eventually constitute the basis for secession. However, the legality of secession of a defined territory will depend on the referendum or peace treaty and not on the human rights violations per se—at least not within the current confines of international law and state sovereignty.

For many compelling reasons, one should avoid at all costs the destruction of existing political communities harboring a plural society:

- A multiplicity of economically nonviable states will further contribute to a decline of living standards in the world community.
- The perception that people sharing a common culture, religion, or language would necessarily also enjoy political compatibility is clearly a myth, and disillusionment after the event might provoke profound resentment and further conflict.
- The movement of people within plural societies across territorial divides has greatly destroyed ethnic, cultural, or religious homogeneity in regions where it might have existed in earlier times. Consequently the demarcation of borders that would include the sectional demography that secessionists seek to establish is in most cases quite impossible.
- Affording political relevance to ethnic, cultural, or religious affiliation carries within itself the potential of the repression of minority groups within the nation. Moreover, it affords no political standing whatsoever to persons who, on account of mixed parentage or marriage, cannot be identified with any particular faction of the group-conscious community or to those who—for whatever reason—do not wish to be identified under any particular ethnic, cultural, or religious label.
- In consequence of the above, an ethnically, culturally, or religiously defined state will more often than not create its own "minorities problem." Because of the ethnical, cultural, or religious incentive for the establishment of the secession state, this "problem" would almost invariably result in profound discrimination against those who do not belong or, worse still, a strategy of ethnic cleansing.

Concluding Observations

South Africa comprises perhaps the most diverse plural composition in the entire world; furthermore, it is known for the polarization of factions of the population.[60] Group rivalries are still rife in South Africa as a feature of the country's demographic divides. Dealing with such rivalries and orchestrating reconciliation are central to social engineering within that troubled land.

The drafters of the South African constitution rejected the segregation of rival ethnic, religious, and linguistic communities as well as the promotion of cultural, religious, or linguistic homogeneity within the nation as a means of counteracting group-related tensions in the country's social construct. Instead,

they opted for creating—in the celebrated words of Archbishop Desmond Tutu—"a rainbow nation." Accordingly, the new constitutional dispensation seeks to promote pride in one's group identities: Be proud of being an Afrikaner or being a member of any of the rich variety of "peoples" within the African, Indian, and colored communities. Be faithful to your membership in the Catholic, Methodist, Dutch Reformed, or Zion Christian Church—or to your membership in the Muslim, Hindu, or Buddhist communities. Find comfort in speaking the language of your cultural extraction, whether Afrikaans, English, Greek, Portuguese, Tswana, Xhosa, or Zulu. The European Court of Human Rights has also singled out tolerance and broad-mindedness as indispensable components of a democratic society.[61]

Pride in one's particular ethnic, religious, or linguistic identity does not elevate one to a superior status in the community. The respect of others for one's cultural values, religious persuasions, or linguistic preferences demands full respect for the culture, religion, and language of others. The constitutional principle that applies in this regard has been reduced to perhaps the most basic moral directive for a "new South Africa," one that finds expression in the concept of *ubuntu* or *botho* ("an idea based on deep respect for the [inner] humanity of another").[62] *Ubuntu* translates into "humaneness" and constitutes "part of our *rainbow* heritage."[63] It stands in sharp contrast to "dehumanising and degrading the individual."[64] Justice Albie Sachs on occasion referred to *ubunthu-botho* in the sense of "civility" as "a precondition for the good functioning of contemporary democratic societies." He noted that "civility in a constitutional sense involves more than just courtesy and good manners. . . . It presupposes tolerance for those with whom one disagrees and respect for the dignity of those with whom one is in dispute."[65]

The constitution therefore subjects the freedom of expression to limitations, which include a prohibition of the "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."[66] Under the Promotion of Equality and Prevention of Unfair Discrimination Act, "no person may publish, propagate, advocate or communicate words . . . against any person, that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred."[67] One must note that South African law does not uphold the almost incontestable sanctity of freedom of speech, as does the American constitutional system. In South African law, "certain expressions do not deserve constitutional protection because they have the potential to impinge adversely on the dignity of others and cause harm."[68] In South Africa, "the right to freedom of expression is not a pre-eminent

freedom ranking above all others."[69] In this respect, it "differs fundamentally from the balance struck in the United States," where freedom of speech constitutes the basic norm—a *Grundnorm*—of the entire rights regime.[70]

Instead, the "new South Africa" is founded on zero tolerance for words and conduct offensive to others. Depicting members of particular population groups as "hotnot," "kaffir," "rooinek," "boer," or "coolie" is therefore strictly forbidden since such names "have for decades been used to bring people of different races into contempt."[71] Refusing to serve a Muslim client wearing a fez in a business enterprise open to the public constitutes unbecoming discrimination based on religion.[72] The media are under legal constraint not to publish cartoons depicting the Prophet Mohammed as a terrorist (as did those that first appeared in a Danish newspaper) because they "advocate hatred and stereotyping of Muslims."[73] A newspaper report that likens homosexuality to bestiality cannot be tolerated under freedom of the press because it promotes hatred against the gay and lesbian communities.[74] The chanting of a "freedom song" that includes the phrase *dibulu iBhunu* (shoot the Boer) is offensive to the Afrikaans-speaking section of the South African nation and as such violates the proscription of offensive language.[75]

As noted by Chief Justice Pius Lange in 2009, "The process of reconciliation is an ongoing one which requires give and take from all sides."[76] "Our democracy is still fragile," said Judge Eberhard Bertelsmann, adding that "participants in the political and socio-political discourse must remain sensitive to the feelings and perceptions of other South Africans when words were used that were common during the struggle days, but may be experienced as harmful by fellow inhabitants of South Africa today."[77]

Notes

1. Loi no. 2004-228 du 15 mars 2004 (encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics) [formulating, in application of the principle of secularism, the wearing of signs or dress manifesting a religious affiliation in schools and public primary and high schools].

2. Leyla Şahin v. Turkey (Application no. 44774/98), *European Court of Human Rights (Judgments and Decisions)* 2005-XI (11 October 2005): 173. See also Kurtulmuş v. Turkey (Application no. 65500/01), *European Court of Human Rights (Judgments and Decisions)* 2006-II (24 January 2006): 297; and Kőse and Others v. Turkey (Application no. 26625/02), *European Court of Human Rights (Judgments and Decisions)* 2006-II (24 January 2006): 339.

3. Art. 15(3)(c), Constitution of the Federal Republic of Nigeria, 1999.

4. Preamble, Constitution of the Republic of South Africa, Act 108, 1996 (hereafter "1996 S. A. Const.").

5. Ibid., secs. 8(1), 8(2), and 30.

6. Ibid., sec. 31; see also sec. 235.

7. Antonio Cassese, *Self-Determination of Peoples: A Legal Appraisal* (Cambridge, UK: Cambridge University Press, 1995), 15.

8. Robert Friedlander, "Self-Determination: A Legal-Political Inquiry," *Detroit College of Law Review* 1 (1975): 71, 73.

9. "Fourteen Points Address Delivered on 8 January 1918 to a Joint Session of Congress by President Woodrow Wilson," point 5, in R. S. Baker and W. E. Dodd, eds., *Public Papers of Woodrow Wilson*, vol. 1, *War and Peace* (New York: Harper and Brothers, 1927), 155–59.

10. Woodrow Wilson, "Address to Congress," 11 February 1918, in *A Compilation of Messages and Papers of the President*, vol. 18 (New York: Bureau of National Literature, 1921), 8450. See also the address of President Wilson delivered in Baltimore, MD, on 6 April 1918 on the occasion of the first anniversary of America's participation in the European War and the third inauguration of the Third Liberty Loan, in which he referred to "our ideals, the ideals of justice and humanity and liberty, the principle of the free self-determination of nations, upon which all the modern world insists." Ibid., 8483.

11. Vernon Van Dyke, *Human Rights, the United States, and World Community* (New York: Oxford University Press, 1970), 86.

12. The mandate system was the brainchild of Jan Christian Smuts (1870–1950) of South Africa, a general in the Anglo-Boer War (1899–1902) and a Cambridge graduate, invited by Great Britain to be part of its delegation to the Paris Peace Conference where the Peace Treaty of Versailles (1919) was drafted. In December 1918, Smuts outlined the mandate system in a League of Nations plan under the heading "A Practical Suggestion," which President Woodrow Wilson included in his second draft of the League of Nations Covenant.

13. See Antonio Cassese, *International Law in a Divided World* (Oxford, UK: Clarendon Press, 1986), 131–34, par. 80; Rupert Emerson, "Self-Determination," *American Journal of International Law* 66 (1971): 459, 463; and Friedlander, "Self-Determination," 71.

14. Nathaniel Berman, "Sovereignty in Abeyance: Self-Determination in International Law," *Wisconsin International Law Journal* 7 (1988): 51, 86–87.

15. One should note, though, that even then, secession from existing empires was not a right in itself. The advisory opinion of the International Committee of Jurists in the Aaland Islands Case pointed out that "the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation." "Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question," *League of Nations Official Journal*, supp. 3 (October 1920): [3], http://www.ilsa.org/jessup/jessup10/basicmats/aaland1.pdf. It was only when "the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law" that "peoples" may either decide to form an independent state or choose between two existing ones (ibid., [4]). In such circumstances, when sovereignty has been disrupted, "the principle of self-determination of peoples may be called into play. New aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilisation, may come to the surface and produce effects which must be taken into account in the interests of the internal and external peace of nations" (ibid.).

16. See Johan D. van der Vyver, "Sovereignty and Human Rights in Constitutional and International Law," *Emory International Law Review* 5 (1991): 321, 395–416; van der Vyver, "Self-Determination and the Peoples of Quebec under International Law," *Journal of Transnational Law and Policy* 10, no. 1 (2000): 14–19; van der Vyver, "Self-Determination and the Right to Secession of Religious Minorities under International Law," in *Protecting the Human Rights of Religious Minorities in Eastern Europe*, ed. Peter G. Danchin and Elizabeth A. Cole (New York: Columbia University Press, 2002), 251, 258–61; and van der Vyver, "Cultural Identity as a Constitutional Right in South Africa," *Stellenbosch Law Review* 14 (2003): 51, 53–56, 58.

17. Western Sahara (Advisory Opinion of 22 May 1975), International Court of Justice (1975), 1, 31. See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion of 21 June 1971) International Court of Justice (1971), 16, 31. (The court held that the right to self-determination was applicable to "territories under colonial rule" and that it "embraces all peoples and territories which 'have not yet attained independence.'")

18. Berman, "Sovereignty in Abeyance," 54. See also Cassese, *International Law in a Divided World*, 76, par. 43; Van Dyke, *Human Rights*, 87; L. Berat, "The Evolution of Self-Determination in International Law: South Africa and Namibia, and the Case of Walvis Bay," *Emory International Law Review* 4 (1990): 251, 283 (referring to self-determination and the equal right of peoples as "twin aspects of decolonization"); Emerson, "Self-Determination," 463; O. Schachter, "The United Nations and Internal Conflict," in *Law and Civil War in the Modern World*, ed. John Norton Moore (Baltimore: Johns Hopkins University Press, 1974), 401, 406–7; and Gebre Tesfagiorgis, "Self-Determination: Its Evolution and Practice by the United Nations and Its Application in the Case of Eritrea," *Wisconsin International Law Journal* 6 (1987): 75, 78–80.

19. The link within the confines of the right to self-determination of systems of institutionalized racism and colonialism or foreign domination may be traced to the United Nations (UN) General Assembly's *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty* of 1965, in which the UN demanded that all states respect "the right to self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms." To this end, it proclaimed that "all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations" (par. 6).

20. This development was probably prompted by the claim of South Africa that the establishment of independent tribal homelands as part of the apartheid policy constituted a manifestation of the right to self-determination of the different ethnic groups within the country's African population. Not so, responded the international community. The tribal homelands were a creation of the minority (white) regime and did not emerge from the wishes or political self-determination of the denationalized peoples themselves.

21. *International Covenant on Civil and Political Rights*, art. 1, General Assembly Resolution 2200 (XXI), 16 December 1966, 21 UN GAOR Supp. (no. 16), 27, UN Doc. A/6316, 999 UN Treaty Series 171. See in general Felix Ermacora, "The Protection of Minorities before the United Nations," *Recueil des Cours* 4 (1983): 246.

22. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, art. 2.1, General Assembly Resolution 47/136, 18 December 1992, 47 UN General Assembly Official Records Supp. (no. 49), 210, UN Doc. A/Res/47/135, 1992.

23. Ibid., arts. 1.1 and 4.2, 2.3, 3, and 4.1.

24. Ibid., art. 4.2.

25. *European Framework Convention for the Protection of National Minorities*, art. 4.1., European Treaty Series 1995, 157 (reprinted in *International Legal Materials* 34 [1995]: 35).

26. Ibid., art. 5.1.

27. Ibid., art. 8.

28. Ibid., art. 10.1. See also the *European Charter for Regional Minority Languages*, Strasbourg, 1992, http://conventions.coe.int/Treaty/en/Treaties/Html/148.htm.

29. 1996 S. A. Const., sec. 31.

30. Ibid., secs. 181(1)(c) and 185–86. See also the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities, Act 19, 2002.

31. 1996 S. A. Const., sec. 6(5)(b)(ii).

32. See the text associated with note 24.

33. *Declaration on the Elimination of Violence against Women*, art. 2(a), General Assembly Resolution 48/104, 20 December 1993, UN General Assembly Official Records, 48th sess., Supp. (no. 49), vol. 1, 217, UN Doc. A/48/49, 1994.

34. Du Plessis v. De Klerk, 1996 (5) S.A. 658 (CC) (South Africa).

35. See Van Dyke, *Human Rights*, 88; Berman, "Sovereignty in Abeyance," 87; and Emerson, "Self-Determination," 464–65.

36. See *Final Act of the Conference on Security and Co-operation in Europe*, for example, par. IV (territorial integrity) and par. VIII (equal rights and self-determination of peoples), *International Legal Materials* 14 (1975): 1292.

37. According to Hermann Mosler, "States are constituted by a people, living in a territory and organized by a government which exercises territorial and personal jurisdiction." Mosler, "Subjects of International Law," in *Encyclopedia of Public International Law*, vol. 7, ed. Rudolph Bernhardt (Amsterdam: North-Holland,

1984), 442, 449. Karl Doehring defines a state in international law as "an entity having exclusive jurisdiction with regard to its territory and personal jurisdiction in view of its nationals." Doehring, "State," in Bernhardt, *Encyclopedia of Public International Law*, vol. 10 (1987), 423. Herman Dooyeweerd defined the foundational function of a state in terms of "an internal monopolistic organization of the power of the sword over a particular cultural area within territorial boundaries." Dooyeweerd, *A New Critique of Theoretical Thought*, vol. 3, trans. David H. Freeman (Ontario: Paideia Press, 1969), 414. He further maintained that the leading or qualifying function of the state finds expression in a public, legal relationship that unifies the government, the people, and the territory constituting the political community into a politico-juridical whole (ibid., 433ff).

38. See Yoram Dinstein, "Collective Human Rights of Peoples and Minorities," *International and Comparative Law Quarterly* 25, no. 1 (January 1976): 102, 109. He notes that peoples seeking secession must be located in a well-defined territorial area in which they form a majority.

39. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, General Assembly Resolution 1514, 14 December 1960, 15 UN General Assembly Official Records Supp. (no. 16) 66, UN Doc. A/4684, 1960.

40. See *International Covenant on Economic, Social and Cultural Rights*, art. 1(1), General Assembly Resolution 2200A (XXI), 16 December 1966, 21 UN General Assembly Official Records Supp. (no. 16), 49, UN Doc. A/6316 (1966), 993 UN Treaty Series 3; *International Covenant on Civil and Political Rights*, art. 1(1); and *Declaration on the Granting of Independence to Colonial Countries and Peoples*, art. 2. See also the first paragraph under the heading "The Principle of Equal Rights and Self-Determination of Peoples," in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, General Assembly Resolution 2625, 24 October 1970, 25 UN General Assembly Official Records Supp. (no. 28), 121, UN Doc. A/8028 (1970); *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, par. 5, General Assembly Resolution 2131, 21 December 1965, 20 UN General Assembly Official Records Supp. (no. 14), 11–12, UN Doc. A/6014 (1965); and *Final Act of the Conference on Security and Co-operation in Europe*, par. VIII.

41. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, art 8.4.

42. *European Framework Convention*, art. 21.

43. General Assembly Resolution 61/295, 13 September 2007. The declaration was adopted with only Australia, Canada, New Zealand, and the United States opposing.

44. Ibid., art. 46(1).

45. Regarding the sanctity of national borders, see Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (London: Oxford University Press, 1963), 104–5; and, for example, *Final Act of the Conference on Security and Co-operation in Europe*, par. III. Regarding attempts at secession, see van der Vyver, "Sovereignty and Human Rights," 403–7; and in greater detail, James Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979), 235–36 (Katanga) and 265 (Biafra); John Dugard, *Recognition and the United Nations* (Cambridge: Grotius, 1987), 86–90 (Katanga), 84–85 (Biafra), and 108–11 (Turkish Republic of Northern Cyprus); and Johan D. van der Vyver, "Statehood in International Law," *Emory International Law Review* 5, no. 9 (1991): 35–37 (Katanga) and 42–44 (Turkish Republic of Northern Cyprus).

46. Van Dyke, *Human Rights*, 102.

47. *Charter of the Organization of African Unity*, 1963, art. III.3, reprinted in *International Legal Materials* 2 (1963): 766.

48. AHG/Res. 16(I), par. 2, Organization of African Unity, Resolutions Adopted by the First Ordinary Session of the Assembly of Heads of State and Government Held in Cairo, United Arab Republic, 17–21 July 1964.

49. *Reference Re Secession of Quebec*, 1998, 2 S.C.R. 217, par. 126, http://www.canlii.org/en/ca/scc/doc/1998/1998canlii793/1998canlii793.pdf. See also van der Vyver, "Peoples of Quebec," 14–19.

50. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States*. Under the heading "The Principle of Equal Rights and Self-Determination of Peoples," the declaration provides "the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people."

51. See Cassese, *International Law in a Divided World*, 359–63.

52. One should specially note that Article 72 of the *Konstitutsiya SSSR* (USSR constitution) expressly guaranteed the right of each republic to secede from the union. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, International Court of Justice General List no. 141, 22 July 2010. The referendum that sanctioned the secession of southern Sudan was confined to residents of that region but sanctioned by legislation of Sudan that authorized the referendum. Regarding elements for legitimizing secession in any given case, Lee Buchheit specifies that the section of a community seeking partition should possess a distinct group identity with reference, for example, to cultural, racial, linguistic, historical, or religious considerations. Those making a separatist claim must be capable of an independent existence, including economic viability (but bearing in mind international aid programs that might help a newly established political entity over its teething problems). Further, the secession must serve to promote general international harmony or at least not be disruptive of international harmony or disrupt it more than the status quo is likely to do. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven, CT: Yale University Press, 1978), 228–38.

53. Art. 1 of the Constitution of the Federal People's Republic of Yugoslavia (1946) authorized secession of its constituent republics. See also the Constitution of the Federal People's Republic of Yugoslavia (1963), par. I of the Introductory Part (Basic Principles) (depicting Yugoslavia as "a federal republic of free and equal peoples and nationalities" united "on the basis of the right to self-determination, including the right of secession"), as well as art. 1; and the Constitution of the Socialist Federal Republic of Yugoslavia (1974), par. I of the Introductory Part (Basic Principles) (referring to "the right of every nation to self-determination" and "the brotherhood and unity of nations and nationalities"). However, the disintegration of the federation did not occur in accordance with the procedures prescribed for the exercise of the constitutional right to secession and furthermore included territorial gains through conquest and ethnic cleansing.

54. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, International Court of Justice General List no. 141, par. 56, 22 July 2010 (hereafter "Kosovo Case").

55. Ibid., pars. 114, 119. Security Council Resolution 1244 (1999), 10 June 1999, par. 10.

56. Kosovo Case, par. 122.

57. See Ernest Duga Titanji, "The Right of Indigenous Peoples to Self-Determination versus Secession: One Coin, Two Faces?," *African Human Rights Law Journal* 9, no. 1 (2009): 52, 68–72, 73–74.

58. Katangese People's Congress v. Zaire, 2000, African Human Rights Law Report 72, par. 6 (African Commission on Human and People's Rights, 1995).

59. "This [definition of self-determination] shall not be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind." World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 25 June 1993, art. 1.2, UN Doc. A/Conf. 157/24, 25 June 1993, reprinted in *International Legal Materials* 32 (1993): 1661, 1665.

60. See S v. Makwanyane and Another, 1995 (3) SA 391, par. 308 (CC) (South Africa) (Justice Mokgoro referring to South Africans having "a history of deep division characterised by strife and conflict"); and Du Toit v. Minister for Safety and Security and Another, 2009 (6) SA 128, 2009 12 *Butterworths Constitutional Law Reports* 1171, par. 17 (CC) (South Africa) (Chief Justice Lange stating that "the South African nation was for decades a deeply divided society characterised by gross violations of fundamental human rights").

61. Handyside v. the United Kingdom [1976] 1 European Court of Human Rights 737, 754. See Islamic Unity Convention v. Independent Broadcasting Authority and Others, 2002 (4) SA 295, par. 28 (CC) (South Africa).

62. Dikoko v. Mokhatla, 2006 (6) SA 235, 2007 1 *Butterworths Constitutional Law Reports* 1, par. 68 (CC) (South Africa). See also ibid., par. 69.

63. S v. Makwanyane, 1995 (3) SA 391, par. 308 (CC) (South Africa) (per Justice Mokgoro).

64. Ibid., par. 250 (per Justice Lange).

65. Masetlha v. President of the RSA and Another, 2008 (1) SA 566, 2008 1 *Butterworths Constitutional Law Reports* 1, par. 238 (CC) (South Africa).

66. 1996 S. A. Const, sec. 16(2)(c).

67. Promotion of Equality and Prevention of Unfair Discrimination Act 4, 2000, sec. 10(1).

68. Du Toit v. Minister for Safety and Security, 2009 (6) SA 128, par. 32 (CC) (South Africa).

69. S v. Mamabolo (E TV Seven Others Intervening), 2001 (3) SA 409, 2001 5 *Butterworths Constitutional Law Reports* 449, par. 41 (CC) (South Africa).

70. Ibid., par. 40; Johan D. van der Vyver, "Constitutional Protection of Children and Young Persons," in *The Law of Children and Young Persons in South Africa*, ed. J. A. Robinson (Durban, South Africa: Butterworths, 1997), 265, 282; and van der Vyver, "Limitations of Freedom of Religion or Belief: International Law Perspectives," *Emory International Law Review* 19 (2005): 499, 508.

71. Decision of the Broadcasting Complaints Commission in P Johnson v. 94.7 Highveld Stereo, case no. 07/2002, 14 February 2002 (South Africa).

72. Woodways CC v. Moosa Vallie, case no. A251/05 (H. C. Western Cape), 31 August 2009 (South Africa).

73. Jamait-Ul-Ulama of Transvaal v. Johncom Media Investment Ltd. and Others, case no. 1127/06 (W.L.D.), 3 February 2006 (South Africa).

74. In South African Human Rights Commission v. Jon Qwulane, case no. 44/EQ JHB (31 May 2011) (South Africa), the Equality Court at the Johannesburg Magistrate's Court demanded an unqualified public apology to the gay and lesbian community from—and imposed a fine of R 100,000 to be paid by—Jon Qwulane (currently the South African ambassador in Uganda) for a newspaper article he wrote under the heading "Call Me Names, but Gay Is NOT OK," in which he compared homosexuality with bestiality.

75. Agriforum and Another v. Malema and Another, 2011 (6) SA 240 (EqC) (South Africa). The matter was taken on appeal by Malema and the African National Conference but was settled on the basis of the appellants agreeing "that certain words in certain freedom songs may be experienced as hurtful by members of minority communities" and "to act with restraint to avoid the experience of such hurt." The settlement was made an order of court. Malema JS and Another v. Agriforum and Others, Case no. 20968/10 (2 November 2012).

76. Du Toit v. Minister of Safety and Security, 2009 (6) SA 128, par. 28 (CC) (South Africa). See also Agriforum and Another v. Malema and Another, par. 11.

77. Agriforum v. Malema, 2010 (5) SA 235 (GNP) (South Africa).