OPINION

Marriage officers should have the right to object on religious grounds

Shaun de Freitas 4 Aug 2020

'Beliefs and convictions rested on religion should be allowed the freedom awarded by the law to share the public sphere with all the other non-religious beliefs and convictions'

The Civil Union Amendment Bill that has recently been submitted to the president of South Africa for consideration is cause for grave concern. South Africa is regarded as a fully-fledged democracy, which naturally implies a commitment towards the advancement of diversity; diversity in the deepest sense of the word.

The Bill discards the right of state-employed officers and magistrates to object to the solemnisation of same-sex marriages based on their right to freedom of belief. Should the president decide to sign the Bill into law it would mean that state-employed marriage officers and magistrates who conscientiously object against the solemnisation of same-sex marriages would run the risk of, among others, having to find other employment.

The Constitution affords the president the right to refer the Bill to the National Assembly for reconsideration, instead of signing it into law. Why should the latter approach be the preferred choice?

The answer to this lies in the importance of the protection of the right to freedom of religious belief (as is the case with non-religious belief) against the background of the nature of the public sphere, which also substantively overlaps with a proper understanding of the relevance of the advancement of diversity.

A reading of section 15 of the Constitution confirms the right to freedom, not only of religious beliefs but also of non-religious beliefs, and the inextricable relationship between these beliefs and opinions, thoughts as well as convictions. This then also relates to our views on morality and justice.

This, in turn, finds application pertaining to views on, for example, the origin and meaning of human life; the teaching of sexual morality in schools and the purpose of education in general; forms of punishment to be meted out for crimes committed; the parameters of tax exemptions; the redistribution of land to previously disadvantaged groups; trade in pornographic material and modes of entertainment; government subsidisation of private schools; the degree of autonomy to be awarded to religious associations; and restrictions imposed by the authorities during the outbreak of a pandemic.

Accompanying this are the different meanings accorded by persons and groups to freedom, equality, harm, fairness and human dignity. In this regard, it is not only the individual that ascribes to specific views, but also the civil authorities and the laws of the land. This is illustrated in the following example: not providing subsidies to private schools that teach and practise a specific religious ethos (as opposed to public schools who may not formally ascribe to a specific religious ethos) is indicative of a government taking a specific moral stance on the teaching of religion in basic education.

In this regard, the government's interpretation of, for example, harm and human dignity, exudes the view that it does not regard this approach as being profoundly violatory towards the human dignity of a pupil who comes from a religious home. The parents of the said pupil, however, may view this as unfair and constitutive of a gross violation of their right to freedom of religion, which in turn is inextricably related to having an adverse effect on their and their child's human dignity.

This explains the fact that democratic societies (including the civil authorities and the laws of the land) are permeated with a multitude of differing views and related practices on matters of moral importance and the exercise of justice; views that ascribe to some or other platform that rests on belief, whether religious or non-religious, and which guides interpretations of morality, justice, freedom, harm, equality, fairness and human dignity.

The spaces that we enter on leaving the home (spaces that are constitutive of the public sphere) is as much a space for the religious believer to occupy and experience in all sorts of ways as it is for the non-religious believer. Just as the non-religious believer is accompanied by her or his moral convictions and views on justice and allowed the freedom to exercise these accordingly when in the public domain, so then the same should apply to the religious believer. Yet, not only is religion substantively relegated to the private sphere in liberal democracies around the world; it is also dominated by a type of liberalism that propagates a subjective measure (or single morality), a liberalism that philosopher John Gray sternly warns against.

This type of A B C D liberalism understands toleration as an "instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear". An ideal of ultimate convergence on values is typified by this liberalism. In contrast to this, there is a liberalism that views toleration as a condition of peace and that different ways of living are welcomed as features of diversity in the good life and the coexistence of conflicting views is supported.

An example is Gray's, *Two Faces of Liberalism*. It is this latter type of liberalism that signifies the advancement of diversity. This slots in with John Inazu's call for the pushing of the boundaries for freedom of diversity against the background of government and community needing to make concerted efforts to allow for freedom not only of difference, but also of substantial difference, except where extreme disadvantage (such as violence) threatens.

Bearing in mind Gray's cautioning against a type of liberalism that seeks ultimate consensus and convergence of values, cognisance needs to be taken of the risk of having the law assist in this regard. To allow for the law to envelope the whole of society in a specified moral understanding regarding matters that lend themselves to deeply layered moral views is a smack in the face of the advancement of diversity as an essential attribute of an effective democracy.

In the words of Iain Benson, "… we are in danger of the law extending its ambit beyond where it should go to a kind of juristic theocracy if we are not careful. We are at risk of 'comprehensive law' that fails to understand its competence and its jurisdiction and that would thus threaten the various plural goods that a richly federated state needs to nurture".

This does not purport to suggest an absolute exclusion of limitations to be levelled at the right to freedom of religion. Limitations should indeed be warranted in instances where it is, to quote section 18(3) of the International Convention on Political and Civil Rights, "prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" the gist of which is supported by the Constitution.

The preamble of the Constitution includes the following: "We, the people of South Africa … Believe that South Africa belongs to all who live in it, united in our diversity …", and it is especially rights in and of themselves which are included in the Constitution such as freedom of religion, as well as freedom of cultural practices that are indicative of the Constitution's endeavour towards the advancement of diversity.

In addition to the Constitutional Court's affirmation of the importance of religion, for example in *Christian Education South Africa v Minister of Education* 2000, it also emphasises the importance of diversity. Also bolstering the prominence of diversity and the voice of religion in South Africa is the South African Charter of Religious Rights and Freedoms, which was formulated and endorsed by representatives of all the mainline religions in the country (signing of this charter took place in 2010). This initiative flows from section 234 of the Constitution (although it still needs to be passed into law).

The option provided for by the Constitution allowing for the president to refer the Bill to the National Assembly for reconsideration (as alluded to earlier) should therefore be the preferred route to follow. The solemnisation of a marriage constitutes an act that is inextricably related to substantive and deeply layered moral and religious views regarding an intimate (in various ways) relationship between human beings. Also, beliefs and convictions rested on religion should be allowed the freedom awarded by the law to substantively share the public sphere with all the other non-religious beliefs and convictions.

Consequently, the required protection should be awarded to the marriage officer or magistrate who objects to solemnise same-sex marriages, an objection based on a conscientiously prescribed conviction. Related to this, the civil authorities, as tasked by the Constitution itself, "must respect, protect, promote and fulfil the rights in the Bill of Rights".

The final outcome in this matter will clearly indicate the degree of commitment and urgency by the government to truly advance diversity and by doing so, to live up to one of the central doctrines proclaimed by liberal democracies themselves, namely the advancement of the different meanings of freedom itself.

In an article published by the Mail & Guardian on August 4, Ropafadzo Maphosa argues that public officials must treat all marriages equally. Read the article below.

Shaun de Freitas

Professor Shaun de Freitas is head of department in the law faculty at the University of the Free State

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