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REGULATING RELIGIOUS FREEDOM IN AFRICA

Rosalind I.J. Hackett*

INTRODUCTION

Claims by states that they respect the fundamental right to religious freedom of their citizens may appear misleading when one looks at the evidence.¹ States are capitalizing on the distinction made in international human rights documents between internal beliefs and the external realm or manifestation of those beliefs.² So while the right to hold a particular belief is generally considered to be absolute, outward manifestations of religion may be subject to legitimate restrictions. Yet the question of state-imposed restraints on the right to practice one's religion is beset with a whole set of problems and ambiguities. As Winnifred Sullivan has shown in the U.S. context, the "seeming unanimity at the most general level" over government neutrality toward religion "conceals profound differences with respect to the actual legal regulation of religion."³

Moreover, the general question of when and how governments may legitimately limit manifestations of religion and belief is described by T. Jeremy Gunn as "one of the most complicated and poorly understood areas of international human rights."⁴ Under international law, any limitation must

* Professor of Religious Studies, University of Tennessee. I am grateful to Professors James T. Richardson, Abdullahi Ahmed An-Na'im, and T. Jeremy Gunn for their comments on and support of my work. Professor Ndiva Kofele-Kale also contributed valuable suggestions.

¹ Many of these violations, in Europe and beyond, are tracked by Human Rights Without Frontiers and the Center for the Study of New Religions. See HRWF, <http://www.hrwf.net> (last visited Aug. 26, 2011); CENTER FOR STUDY NEW RELIGIONS, <http://www.cesnur.org> (last visited Aug. 26, 2011). For annual country-by-country reports, see U.S. DEP'T OF STATE ANN. REP. ON INT'L RELIGIOUS FREEDOM, available at <http://www.state.gov/g/drl/rls/irf> (2010) [hereinafter U.S. STATE DEP'T REP.].

² While the preferred language is "freedom of religion or belief," reflecting the inclusion of all belief systems (theistic, non-theistic, and atheistic), I am using here "religious freedom" as my working terminology. This eliminates confusion regarding the distinctions I am making between "belief" and "practice." It also reflects the prevailing usage in my main area of research and discussion here, namely Africa.

³ Winnifred Fallers Sullivan, *Neutralizing Religion or What Is the Opposite of "Faith-Based?"*, 41 HIST. RELIGIONS 369, 372 (2002).

⁴ Jeremy Gunn, *Report of Working Session 2: Restrictions on the Activities of Religious and Belief Communities: What is Permissible in Law and Practice?*, in SEMINAR ON FREEDOM OF RELIGION OR BELIEF IN THE OSCE REGION: CHALLENGES TO LAW AND PRACTICE 41 (Chantal Grotens & Bahia Tahzib-Lie eds., 2001).

be “prescribed by law,” and must be pursuant to one of five purposes: protection of public safety, order, health or morals,⁵ or the fundamental rights and freedoms of others; and finally, the limitations must be necessary in a democratic society. They must be narrowly construed and proportionate to the harm that a government might wish to prevent.⁶

Carolyn Evans, in her study of freedom of religion and belief under the European Convention on Human Rights, argues that “the relatively liberal approach taken by the [European Court of Human Rights] and [European Commission on Human Rights] to the definition of religion or belief is subtly undermined at the manifestation stage.”⁷ Moreover, she claims that nontraditional forms of practice receive little protection from the court and commission because the latter uses tests to determine what is necessary to a religion that favor the dominant (Christian) culture.⁸

James T. Richardson, in his 2004 book, *Regulating Religion: Case Studies from Around the Globe*,⁹ and entities such as the U.S. State Department’s Office of International Religious Freedom and the U.S. Commission on International Religious Freedom are among the individuals and organizations that have highlighted regulation and recognition of religion and religious practices as factors central to the changing patterns of coexistence both between religions and between religions and the state.¹⁰ Similar findings emerged from the important Seminar on Freedom of Religion and Belief in the OSCE Region: Challenges to Law and Practice, convened by the Dutch Foreign Ministry in The Hague in June 2001 (“the Hague Seminar”).¹¹ In focusing on the problem areas of restrictions on the activities of religious and belief communities, namely their recognition and registration, two areas of noncompliance by some European governments with international and OSCE standards were highlighted in the discussions.¹² The first involves discriminatory treatment of nonconventional or unpopular religious groups

⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9(2), Nov. 4, 1950, 213 U.N.T.S. 221.

⁶ Gunn, *supra* note 4, at 42.

⁷ CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 132 (2001).

⁸ *Id.* Though Evans notes the problems of determining legitimate limitations on religious freedom in the abstract, she does seek to extract some general principles from European case law. *Id.* at 134.

⁹ JAMES T. RICHARDSON, REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE (2004).

¹⁰ *Id.*; see also W. Cole Durham, Jr., *Recognizing Religious Communities in Law*, 5 REV. FAITH & INT’L AFF. 27, 27–40 (2007).

¹¹ Gunn, *supra* note 4, at 41. OSCE is the Organization for Security and Cooperation in Europe.

¹² *Id.* at 42–43.

because of fears of growing multiculturalism, and the second surrounds the manipulation of meanings regarding the dissemination of one's religion, or proselytism.¹³ The salience of these particular areas of concern for the African context will receive further discussion in the case studies below.

Africa is generally absent from this attention to the emergence of new possibilities of misusing or reducing the constitutionally guaranteed freedom of religion and belief by governments or by non-state actors, such as religious groups.¹⁴ This is in spite of efforts by international organizations to expose religious (mainly Christian) persecution.¹⁵ Yet there have been a number of contemporary legal and other developments affecting the status of minority religious groups in many African states.¹⁶ These new or proposed limitations generally pertain to fears of untrammelled religious growth and religious extremism.¹⁷ Increasingly, they relate to debates over religious norms and family law. These debates have assumed greater public significance as religious communities struggle with—and at times fight over—not only their identities in religiously competitive public spheres, but also their very survival in the context of weakened states.¹⁸

In this Essay, using a wide-ranging set of examples, I wish to provide some background on the emergent discussion on limitations on religious freedom in Africa, especially how these relate to the current debates on family law that are the subject of this Symposium. My general objectives are (1) to consider the legitimate and illegitimate ways in which African state and non-state actors

¹³ *Id.* at 43. Disfavored groups might be accused of “indoctrination,” “mental manipulation,” “improper inducement,” or “fraud” while more favored groups might be left alone. In other words, the groups are regulated based less on their actual manifestations, and more on how familiar or accepted they are to the regulators. *Id.*

¹⁴ One notable recent exception is Symposium, *The Foundations and Future of Law, Religion, and Human Rights in Africa*, 8 AFR. HUM. RTS. L.J. 337 (2008). See also Lourens Du Plessis, *Religious Freedom and Equality as Celebration of Difference: A Significant Development in Recent South African Constitutional Case-Law*, 12 POTCHEFSTROOM ELECTRONIC L.J. 10 (2009).

¹⁵ These groups include the Hudson Institute's Center for Religious Freedom, Compass Direct News Service, the American Anti-Slavery Group, and the International Religious Liberty Association.

¹⁶ See Rosalind I.J. Hackett, *Prophets, “False Prophets,” and the African State: Emergent Issues of Religious Freedom and Conflict*, in NEW RELIGIOUS MOVEMENTS IN THE TWENTY-FIRST CENTURY 151 (Philip C. Lucas & Thomas Robbins eds., 2004) [hereinafter *False Prophets*]; Rosalind I.J. Hackett, *Millennial and Apocalyptic Movements in Africa*, in OXFORD HANDBOOK OF MILLENNIALISM 616 (Catherine Wessinger ed., 2011).

¹⁷ Francophone West African states are more restrictive in terms of Pentecostal church growth. Matthews A. Ojo, *Pentecostal and Charismatic Movements in Modern Africa*, in A COMPANION TO AFRICAN RELIGIONS (Elias Bongma ed., forthcoming 2012).

¹⁸ See M. Christian Green, *Religion, Family Law, and Recognition of Identity in Nigeria*, *infra* this issue, for a discussion of the imbrications of religious identity and conflict in the Nigerian case.

seek to regulate religious practice; (2) to examine how particular religious groups may be disproportionately affected by these measures; (3) to demonstrate how interference with manifestations of religion often leads to abuses of related rights and freedoms (e.g. women's and ethnic minorities' rights, and rights of political participation, expression, and association); (4) to broaden and update the concept of religious practice; and (5) to consider how the African examples of restrictions on and regulation of religious practice challenge Western assumptions about the nature of religion as an essentially private and internal affair. Using two East African examples, I then provide more specific discussion of how attempts to introduce domestic relations bills and Sharia law reflect these changing entanglements of religion and state in neoliberal Africa. Part I provides some background on pertinent religious and legal developments in Africa. Part II examines the dialectics of regulation and recognition of religious freedom in select contexts. Part III discusses other types of restriction, such as land ownership, harassment, granting permits, and media use and access. Part IV focuses on the plight of traditional or indigenous African religions in relation to religious freedom. Part V links the manipulation of religious freedom issues to public and policy debates regarding customary law in Uganda and Kenya.

I. BACKGROUND AND CONTEXT

A. *Africa's Changing Religious Scene*

My own work on the growth of new religious movements in Africa, particularly Nigeria, has spanned more than three decades.¹⁹ The stakes of religious coexistence have changed radically in postcolonial African states as the new discourses of democratization and development gradually displace the structures of autocratic and customary rule.²⁰ Mainstream religious organizations that have long enjoyed the patrimony of colonial and post-independence governments now find themselves threatened by newer religious formations. The latter are dominated by revivalist Christian and Muslim groups. With democratization and globalization have come new forms of

¹⁹ See NEW RELIGIOUS MOVEMENTS IN NIGERIA (Rosalind I.J. Hackett ed., 1987).

²⁰ See STEPHEN ELLIS & GERRIE TER HAAR, *WORLDS OF POWER: RELIGIOUS THOUGHT AND POLITICAL PRACTICE IN AFRICA* (2004); PAUL GIFFORD, *AFRICAN CHRISTIANITY: ITS PUBLIC ROLE* (1998); JEFF HAYNES, *RELIGION AND POLITICS IN AFRICA* (1996); Jeff Haynes, *Religion and Democratization in Africa*, 11 *DEMOCRATIZATION* 66, 66–89 (2004).

religious competitiveness and militancy (notably among the youth).²¹ The growth of mass-mediated forms of religious expression has opened up new possibilities for religious communication and conversion, providing increased visibility and audibility for minority religious groups. In the case of South Africa, for example, the management of religious pluralism has been integrated with the goals of the new democratic state.²² In contrast, Nigeria has experienced rising tensions in interreligious relations in the last two decades, with considerable loss of life and property damage. These can be attributed to the broader challenges of a weak state, political instability, corruption, and economic hardship, as well as the implementation by several northern Nigerian states, from 1999 onwards, of Sharia as criminal and not just personal and family law. The resultant fierce national debate on the issue and its ongoing ramifications are discussed elsewhere in this Symposium.

In very broad terms, therefore, we can speak of Christianity and Islam as the two dominant religious traditions in Africa, with local forms of indigenous religious belief and practice still prevailing in some areas either as a bedrock or (less frequently) as an independent option.²³ Africa, excepting North Africa, is renowned for its proliferation of new religious movements, both local and imported. Some of the extensive scholarship in this area has documented the contested relationship of several of these movements to the state.²⁴

B. Africa's Growing Human Rights Culture

Coinciding with the upsurge in religious revivalism in many parts of Africa is the growth of a human rights culture. Rights talk is now heard from the

²¹ Rosalind I.J. Hackett, *Radical Christian Revivalism in Nigeria and Ghana: Recent Patterns of Intolerance and Conflict*, in PROSELYTIZATION AND COMMUNAL SELF-DETERMINATION IN AFRICA 246 (Abdullahi Ahmed An-Na'im ed., 1999) [hereinafter PROSELYTIZATION AND COMMUNAL SELF-DETERMINATION]; see also Rosalind I.J. Hackett, *Revisiting Proselytization in the African Context: Nigeria and Uganda Compared*, in CHRISTINE LIENEMANN, WOLFGANG LIENEMANN & STEPHAN-PETER BLUMBACH, CHANGE OF RELIGION, CHANGE OF CONFESSION, AND CONVERSION WITHIN CONFESSION IN RELIGIOUS PLURAL SOCIETIES (forthcoming).

²² See RELIGION AND THE RECONSTRUCTION OF CIVIL SOCIETY (J W de Gruchy & S Martin eds., 1995); RELIGIOUS FREEDOM IN SOUTH AFRICA (J Kilian ed., 1993).

²³ Statistics on religion in Africa are limited, unreliable (due to changing or multiple associations), and often contested for their political manipulation. However, see the important 2010 survey conducted by the Pew Forum on Religious Life, TOLERANCE AND TENSION: ISLAM AND CHRISTIANITY IN SUB-SAHARAN AFRICA (2010), available at <http://pewforum.org/preface-islam-and-christianity-in-Sub-Saharan-africa.aspx> [hereinafter TOLERANCE AND TENSION]; WORLD CHRISTIAN ENCYCLOPEDIA: A COMPARATIVE SURVEY OF CHURCHES AND RELIGIONS IN THE MODERN WORLD (David B. Barrett et al. eds., 2001); and the U.S. STATE DEP'T REP., *supra* note 1 (see the sections on "religious demographics" for each individual country).

²⁴ See, e.g., *False Prophets*, *supra* note 16, at 151–78.

highest levels of government to the humblest nongovernmental organizations.²⁵ At its launch in 2000, the new African Union proclaimed the centrality of human rights.²⁶ Religious and community leaders claim these rights in the new spirit of communal self-determination, constitutionalism, and international human rights awareness. Almost every African state has included a bill of rights in its constitution.²⁷ Religious freedom features prominently in one form or another in those constitutions.

In his useful analysis of this topic, South African legal scholar Johan van der Vyver discovers common standards regarding religious freedom in African constitutions, but also great variety in terms of limitation contingencies.²⁸ Many Anglophone countries in Africa follow the religious freedom directives of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."²⁹ They also follow closely the limitation criteria stipulated in the European Convention.³⁰

However, van der Vyver notes the difference between Senegal, for example, which simply subjects the free exercise of religion to the demands of the public order (Article 19), and Sudan, which is committed to upholding standards of morality, public order, and health as "required by law," in preference to the free exercise of religion (Article 18).³¹ Niger has added to the requirement of public order considerations of social tranquility and national unity (Article 24).³² Togo requires the practice of religious beliefs to be

²⁵ See, e.g., Simeon O. Ilesanmi, *Constitutional Treatment of Religion and the Politics of Human Rights in Nigeria*, 100 AFR. AFF. 529 (2001); Makau Mutua, *Returning to My Roots: African "Religions" and the State*, in PROSELYTIZATION AND COMMUNAL SELF-DETERMINATION, *supra* note 21, at 169; HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES (Abdullahi Ahmed An-Na'im & Francis M. Deng eds., 1990).

²⁶ African Union, African Union Constitutive Act (2000).

²⁷ J.D. van der Vyver, *Religious Freedom in African Constitutions*, in PROSELYTIZATION AND COMMUNAL SELF-DETERMINATION, *supra* note 21, at 109.

²⁸ *Id.* I shall follow van der Vyver's convention in referring to "religious freedom" or "freedom of religion" rather than "freedom of religion and belief" because the majority of cases concern religion rather than nonreligious forms of belief.

²⁹ *Id.* at 128 (quoting European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 5, at art. 9(1)) (emphasis omitted).

³⁰ *Id.*

³¹ *Id.* at 127.

³² *Id.*

conducted with respect for the liberties of others, the maintenance of public order, standards established by laws and regulations, and respect for the secularity of the state (Article 25).³³ In Namibia, the right to enjoy, practice, profess, maintain, and promote any religion must be exercised within the terms of the constitution, and subject to the further condition that the right does not impinge on the rights of others or the national interest (Article 19).³⁴ Not jeopardizing the rights of others or the common good is a limitation in Cape Verde (Article 48), and the Republic of Congo similarly protects “public order and morals” (Article 17).³⁵ Rwanda limits the free exercise of religion only in cases where punishment is imposed for infractions committed in the public exercise of that freedom (Article 18).³⁶

Van der Vyver considers that Ghana has the most far-reaching general conditions for the limitation of constitutional rights and freedoms.³⁷ Tanzania stands out also because it has “subjected the exercise of religious rights (among others) to sweeping limitations that could be applied so as to render the constitutional protection of those rights practically meaningless (arts. 30 and 31).”³⁸ With specific reference to perhaps the most controversial aspect of religious freedom, namely proselytization, van der Vyver states that any government that wishes to suppress freedoms is able to find the “ample constitutional backing” for such measures,³⁹ as has been the case of Angola and Malawi against particularly the Jehovah’s Witnesses.⁴⁰ Their methods of propagating their religion have been seen as violating the rights and freedoms of others, notably their right to privacy. To summarize, van der Vyver believes that “the constitutional protection of religious freedom in many African countries provided cold comfort to religious groups disapproved of by the political authorities.”⁴¹ He attributes this not only to the limitations clauses adumbrated above, but also to the frequency with which constitutional bills of

³³ *Id.* at 127–28.

³⁴ *Id.* at 129.

³⁵ *Id.*

³⁶ *Id.* at 127.

³⁷ *Id.* at 125.

³⁸ *Id.* at 129.

³⁹ *Id.*

⁴⁰ See, e.g., Tony Hodges, *Jehovah’s Witnesses in Africa*, 29 MINORITY RTS. GRP. 3 (1985); Ken Jubber, *The Persecution of Jehovah’s Witnesses in Southern Africa*, 24 SOC. COMPASS 121 (1977).

⁴¹ Van der Vyver, *supra* note 27, at 140. Compare this to the reflections of the late Congolese scholar, Tshikala K. Biaya in his study of Zaire, where he stated, “[r]eligious freedom becomes an issue when its exercise questions political interests, notably the politics of national integration.” Tshikala K. Biaya, *Postcolonial State Strategies, Sacralization of Power and Popular Proselytization in Congo-Zaire, 1960–1995*, in PROSELYTIZATION AND COMMUNAL SELF-DETERMINATION, *supra* note 21, at 144.

rights are suspended or amended,⁴² and the often close relationship between political divides and religious affiliation. Inefficient and poorly funded court systems may also be to blame.⁴³

C. Religion–State Relations in Africa

Africa may be closer to Europe and Scandinavia than to the United States in its approach to religion–state relationships.⁴⁴ There is a far greater acceptance of state involvement with religious affairs as long as this is done in a fair and transparent way, as in Nigeria’s state sponsorship of pilgrimage for Muslims and Christians.⁴⁵ Many African states, notably Anglophone states, prefer the designation of “multi-religious” rather than “secular” states. This is not only because of Muslim suspicion of the Western underpinnings of secularism, but because of a more general conviction that morality is closely tied to religious commitment.

It is true that with the development of greater democratization and rights awareness, political leaders have been keen to emphasize pluralism and freedom of choice. They may also have elections in mind and not want to offend voters by interfering in religious affairs, especially regarding taxes for religious institutions. However, the promotion of vigilant social control by government is still paramount, and can be linked to a number of factors: (1) lack of differentiation between religious and political institutions in traditional African societies; (2) patrimonial and paternalistic styles of governance predicated on traditional styles of authority; (3) influence of colonial rule, notably the French system of “direct rule”; (4) lack of development and inadequate civic education; (5) social and moral dislocation in many African urban centers, high crime rates, economic insecurity, political violence, and international terrorism; (6) emphasis on second-generation economic and social rights by African elites of the “bureaucratic bourgeoisie”⁴⁶ to counter the

⁴² Van der Vyver, *supra* note 27, at 139.

⁴³ See, e.g., Abdullahi A. An-Na’im, *The Legal Protection of Human Rights in Africa: How to Do More with Less*, in HUMAN RIGHTS: CONCEPTS, CONTESTS, CONTINGENCIES 89, 91–92 (Austin Sarat & Thomas Kearns eds., 2001).

⁴⁴ See W. Cole Durham, *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1, 16–17 (Johan D. van der Vyver & John Witte Jr. eds., 1996) (describing a continuum of church-state identifications).

⁴⁵ On South Africa, see J V van der Westhuizen & C H Heyns, *A Legal Perspective on Religious Freedom*, in RELIGIOUS FREEDOM IN SOUTH AFRICA, *supra* note 22, at 93.

⁴⁶ Martin Chanock, ‘Culture’ and Human Rights: *Orientalising, Occidentalising and Authenticity*, in BEYOND RIGHTS TALK AND CULTURE TALK: COMPARATIVE ESSAYS ON THE POLITICS OF RIGHTS AND CULTURE 15 (Mahmood Mamdani ed., 2000).

domination of Western economic institutions and their predilection for civil and political liberties—as well as to sanctify “the increasing sphere of state activity”—which detracts attention from freedom of religion; (7) reluctance to recognize freedom of religion or belief because this would allow new groups access to power and limited state funds; and (8) rapid growth of new religious movements in many parts of pre- and post-independence Africa.

II. THE DIALECTICS OF REGULATION AND RECOGNITION OF RELIGIOUS FREEDOM

The Hague Seminar observes that “the law and practice with respect to recognition and registration of religious organizations has emerged as a crucial test for evaluating a country’s performance with respect to freedom of religion or belief.”⁴⁷ In contrast to the OSCE region countries, for which “it is extremely difficult as a practical matter to make the arrangements for core aspects of religious worship without access to legal entity status,”⁴⁸ many African governments ignore unregistered groups or do not have the means to pursue them for registration purposes. Likewise, many of the religious groups themselves, notably the smaller, independent ones, manage to function without gaining official recognition.⁴⁹ But there is a significant difference between the minimal ability to function without registration on the one hand, and the ability to engage in activities such as managing religious property as a group rather than as individuals.

African states employ both legal and non-legal strategies to keep religious groups in check. Ghana and Zaire (now the Democratic Republic of Congo) provide examples of state use of registration to control religious interests.

In Ghana, in June 1989, the People’s National Defense Council (“PNDC”) Law 221 was promulgated requiring all religious bodies to register.⁵⁰ A regulatory body was created, known as the Religious Affairs Committee.⁵¹ According to Rev. Professor Kwesi Dickson, it was “ostensibly a way of

⁴⁷ W. Cole Durham, Jr., *Introductory Paper of Working Session 1: Recognition and Registration of Religious and Belief Communities: What is Permissible in Law and Practice?*, in SEMINAR ON FREEDOM OF RELIGION OR BELIEF IN THE OSCE REGION: CHALLENGES TO LAW AND PRACTICE, *supra* note 4, at 45.

⁴⁸ *Id.*

⁴⁹ See U.S. STATE DEP’T REP., *supra* note 1 (providing a detailed account of this in its country report for Cameroon).

⁵⁰ E.K. Quashigah, *Legislating Religious Liberty: The Ghanaian Experience*, 1999 BYU L. REV. 589, 594 (1999).

⁵¹ Religious Bodies (Registration) Law of 1989, PNDCL No. 221 (1989).

controlling the activities of Christian sects that were multiplying very rapidly.”⁵² However, Justice D.F. Annan, a member of the government, assured them that the purpose of the law was to regulate—not to control—religious activities.⁵³ The law also empowered the PNDC to ban any church “whose activities it deemed incompatible with normal Ghanaian life.”⁵⁴ Two international religious organizations, the Jehovah’s Witnesses and the Church of Jesus Christ of Latter-day Saints (the Mormons) “fell into this category.”⁵⁵

The mainline churches vehemently contested the ban; representatives of the Christian Council of Ghana and the Catholic Bishops’ Conference claimed that it was in direct contravention of the freedom of religion enshrined in the UN Declaration of Human Rights, to which Ghana adhered.⁵⁶ They urged restraint in state control of religious bodies, but interestingly, went on to suggest that the government should vigorously implement existing law on immorality and noise abatement relating to religious groups, and that the attention of the churches should be drawn to any particular issues of concern for the government so that they could take corrective action.⁵⁷ The two Protestant and Catholic bodies essentially ignored the 1989 restriction despite the fact that the government was a military dictatorship.⁵⁸ The matter remained unresolved until the 1992 Constitution entered into force, guaranteeing the “freedom to practise any religion and to manifest such practice”⁵⁹ and rendering the law unconstitutional.⁶⁰ The ban was finally repealed at the inauguration of the Fourth Republic in 1994. Ghana now has a lively religious scene, dominated by Pentecostal and Charismatic forms of Christianity.

Patterns of strict regulation of religious groups can sometimes be traced back to colonial practices or the manipulation of the status of religious groups

⁵² *False Prophets*, *supra* note 16, at 157.

⁵³ *Id.*; Kwesi A. Dickson, *The Church and the Quest for Democracy in Ghana*, in *THE CHRISTIAN CHURCHES AND THE DEMOCRATISATION OF AFRICA* 261, 265–66 (Paul Gifford ed., 1995). Quashigah lists the information that religious groups had to supply to the government (leaders, trustees, finances, constitution, membership, outreach, location, etc.) leaving “no-one in doubt that PNDCL 221 was designed to control religious activity in Ghana.” Quashigah, *supra* note 50, at 595.

⁵⁴ *False Prophets*, *supra* note 16, at 157.

⁵⁵ *Id.* Ajoa Yeboah-Afari, *Fear of Persecution*, 1989 W. AFR. 1925. Incidentally, the Ghanaian Mormon community eventually re-established itself and built a temple in the capital, Accra—one of the three granted to Africans to date.

⁵⁶ *Id.* at 1925; *False Prophets*, *supra* note 16, at 157.

⁵⁷ Yeboah-Afari, *supra* note 55, at 1926.

⁵⁸ Quashigah, *supra* note 50, at 595.

⁵⁹ GHANA CONST. ch. 5, art. 21(1)(c).

⁶⁰ Quashigah, *supra* note 50, at 595.

according to the political needs of the postcolonial ruler.⁶¹ In former Zaire, the colonial government set in motion national and provincial mechanisms in 1938 for disbanding “*sectes*” and “*associations indigenes*,” which were considered to be a threat to public order.⁶²

In his extensive efforts to construct an ideologically integrated Zairean state from 1965 onwards, the head of state, Mobutu Sese Seko, launched various laws to restrict the activities of religious groups. The new law of December 31, 1971, regulated public worship and the conditions for recognition as a legal religious institution in Zaire.⁶³ The effect of the law was to break down the historic monopoly of the Roman Catholic Church as a partner of the state according to the agreement that had been reached between King Leopold II and Rome in 1906.⁶⁴ The new law granted legal status to three established churches and ignored the Islamic community. As Tshikala K. Biaya states, “[t]his law granted the state the power and the monopoly of recognition of religious institutions, of control over public worship, and the power to suspend or ban any church when this institution troubled the security or the established order.”⁶⁵ Regular censuses were also instrumental in this regard.

Biaya observes that the newer independent churches were for the most part “docile and submissive,” as compared to the tense relations between the major, established churches and the state. In the early 1970s, several local Pentecostal churches were suspended. Some resisted the law by adjusting their forms and place of worship. Eventually, some succumbed to state pressure and provided legal representatives in 1978. As in other parts of Africa, both the Jehovah’s Witnesses and Seventh-day Adventists suffered years of harassment from the regime. In his efforts to secularize the state through the politics of Authenticity and subvert the power of Zaire’s religious organizations, Mobutu adopted a number of hegemonic strategies, such as forcing the unification of the Protestant churches into one single organization, known as the Eglise du Christ au Zaire (“ECZ”) in 1969, and similarly for the Muslim communities in the form of Communauté Islamique au Zaire (“COMIZA”) in 1972. Both bodies were led by Mobutu allies and their activities were restricted to conversion,

⁶¹ More generally on the politics of recognition, see RIGHTS AND THE POLITICS OF RECOGNITION IN AFRICA (Harri Englund & Francis B. Nyamnjoh eds., 2004).

⁶² Ndombasi Ludiongo, *Rapport Sectes et Pouvoirs Politiques: Aspects Juridiques des Sectes*, 27–28 CAHIERS DES RELIGIONS AFRICAINES 355, 367 (1994).

⁶³ Biaya, *supra* note 41, at 146.

⁶⁴ *Id.* (citing EGLISE CATHOLIQUE AU ZAIRE, UN SIÈCLE DE CROISSANCE (1880–1980) 302–03 (1981)).

⁶⁵ *Id.* at 147.

social welfare, public health, and education. The Catholic Church, demographically and politically more powerful through its school system and youth movements, was more severely treated than the Kimbanguist (Zaire's largest independent church) and Protestant churches.⁶⁶

The Islamic community in Zaire has had its own experiences of repression and manipulation.⁶⁷ Following colonialism, Islam's expansion was restricted by administrative measures, such as indirect rule, refusing visas to pilgrims, employment discrimination, and denying freedom of association. Muslims were obliged to live in isolated areas that resembled refugee camps. They were further forbidden to participate in regional or international pan-Islamic conferences. Once the various Muslim communities and brotherhoods succumbed to state pressure and agreed to form a single community (COMIZA), Islam was raised to the rank of national religion, allowing investments from Arab countries.⁶⁸ In 1982, however, amid fears of a rapidly growing Islamic presence, new restrictions were placed on Muslims and Arab diplomats. Eventually the state severed its support for Islam once it resumed diplomatic ties with Israel.⁶⁹ That notwithstanding, Islam has continued its expansion.

There were subsequent initiatives to tighten controls on Zaire's religious groups in the late 1980s. Stringent conditions were to be met for founders and leaders of religious and nonprofit organizations. In his analysis of these legal developments, Ndombasi Ludiongo observes that, in the end, very few groups that were not Catholic or Protestant (ECZ) were registered, despite the touting by the government of the benefits of official recognition. By the same token, Ludiongo finds it remarkable that virtually no groups were banned (apart from the Jehovah's Witnesses) given the informal complaints that circulated about minority religious groups. Many also managed to circumvent the restrictions and continue functioning.⁷⁰

Zaire, before it became the Democratic Republic of Congo in 1997 under Laurent Kabila, provides an instructive example of the need to understand historical patterns of religious regulation within broader patterns of political repression and human rights abuse.

⁶⁶ *Id.* at 148–49.

⁶⁷ *Id.* at 152.

⁶⁸ *Id.* at 153.

⁶⁹ *Id.* at 153–54.

⁷⁰ See Ludiongo, *supra* note 62, at 373–74.

There are numerous examples from other African states of how restrictions on religious freedom may be reactivated and tightened so that fragile states may bolster their authority.⁷¹ Sometimes state officials target particular types of religious organization. It may be the real or imagined overseas connections of a movement that can provoke government fears or suspicions, and resultant clampdowns. In 1977, Idi Amin proscribed many smaller Pentecostal churches in Uganda for having foreign, rather than nationalist, loyalties.⁷² In Eritrea, this type of religious organization, known as “Pentes,” is frequently harassed and repressed by the state.⁷³

On November 28, 2001, the Kenyan Parliament passed a similar motion seeking to cut back on and restrict non-mainstream religious groups in the interests of public security and morality. One journalist described it as “an unconstitutional crackdown on the growth industry that is religion in Kenya.”⁷⁴

Yet in other settings, Pentecostal and Charismatic churches and para-church movements—with or without American connections—have effectively penetrated several African countries, including their leadership structures.⁷⁵ Their upwardly mobile image, promises of blessings and miracles, and popular gospel music production are nothing short of seductive across the board. Several heads of state have openly declared their “born-again” status or are sympathetic to this type of religious orientation through their spouses and family members. This means that almost within two decades, these once-

⁷¹ For more specific examples, see the country entries in the annual State Department reports on International Religious Freedom, which are available at <http://www.state.gov/g/drl/irf/>.

⁷² Kevin Ward, *The Church of Uganda Amidst Conflict: The Interplay Between Church and Politics in Uganda Since 1962*, in RELIGION AND POLITICS IN EAST AFRICA: THE PERIOD SINCE INDEPENDENCE 72, 82 (Holger Bernt Hansen & Michael Twaddle eds., 1995).

⁷³ See, e.g., *Hearing on Prioritizing International Religious Freedom in U.S. Foreign Policy: Hearing Before the Subcomm. on Africa, Global Health, and Human Rights of the H. Comm. on Foreign Affairs*, 111th Cong. 1–3 (1998) (statement of Brian J. Grim, Dir., Cross-National Data & Senior Researcher in Religion and World Affairs, Pew Research Center’s Forum on Religion & Public Life), <http://foreignaffairs.house.gov/112/grim060311.pdf>; U.S. Bureau of Citizenship & Immigration Servs., *Eritrea: Information on the Persecution of Evangelical Christians in Asmara, Eritrea* (Jan. 28, 2003), <http://www.unhcr.org/refworld/docid/3f5209b84.html>; Tanya Datta, *Eritrean Christians Tell of Torture*, BBC NEWS (Sept. 27, 2007, 10:07 AM), <http://news.bbc.co.uk/2/hi/7015033.stm>; Andrew Wiegand, Jr., *Eritrean Christians and the Eritrean Constitution*, GLOBAL CHRISTIAN (Sept. 2, 2009, 4:02 PM), <http://www.globalchristian.org/articles/3-intermediate/62-eritrean-christians-and-the-eritrean-constitution.html>.

⁷⁴ Mwangi Githahu, *Are MPs About to Choose Religions for Citizens?*, E. AFR. STANDARD (NAIROBI), Dec. 3, 2001, <http://www.allafrica.com/stories/200112030019.html>.

⁷⁵ See generally PAUL GIFFORD, GHANA’S NEW CHRISTIANITY: PENTECOSTALISM IN A GLOBALISING AFRICAN ECONOMY (2004); PAUL GIFFORD, CHRISTIANITY, POLITICS AND PUBLIC LIFE IN KENYA (2009) [hereinafter GIFFORD 2009].

marginalized groups are now enjoying less discrimination and in some cases, considerable political influence.⁷⁶

III. ADDITIONAL AREAS OF RESTRICTION ON RELIGIOUS FREEDOM

Closely connected to questions of official recognition and the ability of religious groups to function is land allocation. This constitutes a strategic way for local and national governments to control both the expansion and activities of minority religious groups. A number of important examples of this strategy comes from contemporary Nigeria. In the north, where Islam is the majority religion and many states have recently imposed full Sharia law, thereby claiming it as state law, Christian groups complain of the discriminatory treatment they receive in trying to obtain land for church or school expansion. In some cases, preexisting buildings are displaced or destroyed if they are deemed to be too numerous or too close to Muslim places of worship. Under restrictive or inequitable conditions for land use, it is not uncommon for religious groups to creatively utilize school and university buildings, private homes, hotels, and cinemas.

As a less stringent measure than registration or deregistration, or restrictions on land use, a common tactic is to control the freedom of association of religious groups. In this way, authorities can operate not only a process of selective control, but also surveillance. If done with obvious bias, there can be violent public backlash. This occurred in the northern Nigerian city of Kano in 1991 when authorities banned a visit from the controversial South African Muslim preacher, Ahmed Deedat, but allowed Reinhard Bonnke, the equally controversial German Pentecostal evangelist, to come and lead a crusade.⁷⁷ He never actually made it on to the stage because Muslim youths launched a violent attack on the Christians and several hundreds were killed. Charges of illegal activities, such as drug smuggling or human trafficking, can create the leeway for the authorities to harass particular groups and disrupt their activities—raising public doubts and concerns about the integrity of a movement.

⁷⁶ See, e.g., RUTH MARSHALL, *POLITICAL SPIRITUALITIES: THE PENTECOSTAL REVOLUTION IN NIGERIA* 1–3 (2009).

⁷⁷ Umar M. Birai, *Islamic Tajdid and the Political Process in Nigeria*, in *FUNDAMENTALISMS AND THE STATE: REMAKING POLITICS, ECONOMIES, AND MILITANCE* 184, 199 (Martin E. Marty & R. Scott Appleby eds., 1993).

Milder forms of perceived harassment and restrictions on religious practice may come also from laws that privilege the majority religion. For example, Muslims frequently complain about the choice of Sunday as the work-free day as this privileges the Christian community (except for Sabbatarians). More indirectly, it may come from the government's privileging of certain religious groups at civic ceremonies or on government committees.⁷⁸ For many religious groups, prayer constitutes an important element of their activities, which may include public intercessions for presidents and politicians. Depending on whether public leaders see themselves as neutral and as representing all religious traditions in their constituency or as defenders of one in particular, access may be limited.⁷⁹

Outside of Nigeria, scholars have also noted the creation of monitoring groups to restrict religious freedom. For example, in 1994, the Kenyan government decided to establish a Presidential Commission of Inquiry into Devil Worship in response to public concern, mainly voiced by Christian clergy, about fears of "devil worship" being rife in the wider society.⁸⁰ Its report was presented to Parliament in August 1999. The stigmatization of minority religions in this report arguably restricts their ability to expand and function in the public sphere. The excellent section on this Kenyan initiative in the U.S. State Department 2000 Annual Report describes how, in the Kenyan report, "Satanists" were alleged to have infiltrated non-indigenous religious groups such as Jehovah's Witnesses, Mormons, and Christian Scientists, as well as the Freemasons and the Theosophical Society.⁸¹ The Christian Churches Education Association ("CCEA") of Kenya also set up its own commission in January 2001 to investigate "devil worship" in learning institutions countrywide.⁸²

⁷⁸ Quashigah criticizes this practice in Ghana. Quashigah, *supra* note 50.

⁷⁹ Rosalind I.J. Hackett, *Nigeria's Religious Leaders in an Age of Radicalism and Neoliberalism*, in *BETWEEN TERROR AND TOLERANCE: RELIGIOUS LEADERS, CONFLICT, AND PEACEMAKING* (Timothy Sisk ed., 2011).

⁸⁰ "Devil worship" refers to a more modernized, global type of witchcraft, with its conspiratorial connotations. It is believed to account for the child kidnapping and killings that continue to plague Kenya and other African countries. It is also linked to serious corruption and illegal land transactions. Any organization that is remotely secretive can become linked to these accusations, as in the case of the Freemasons. See Refugee Documentation Centre of Ireland, Kenya—Researched and Compiled by the Refugee Documentation Centre of Ireland on 10 March 2009: Information on the Practise of Devil Worship in Kenya, (containing an overview of press reports).

⁸¹ U.S. STATE DEP'T REP., *supra* note 1.

⁸² *Religious Association Launches Cult Probe*, PANAFRICAN NEWS AGENCY (Dec. 10, 2000), <http://www.hartford-hwp.com/archives/36/254.html>.

Education is another area that has the potential for including or excluding minority religious groups. As noted by van der Vyver, “[e]ducation may be utilized as a powerful medium for the promotion, propagation, and spread of religion.”⁸³ It is also described as a location for segregation, victimization, and harassment, and as “a point of conflict.”⁸⁴ Within the context of Christian fears of the Islamization of Nigeria because of the moves to strengthen the implementation of Sharia law in several states, education has become a very sensitive issue, even leading to conflict.⁸⁵ In contrast, South Africa has moved from teaching Christianity as the sole faith in schools to working out the best way to accommodate the religious needs of students.⁸⁶ Several states recognize the right of parents to develop private, religiously based schools, although, as in the case of Nigeria, these may be subject to conditions and even takeovers by the state.

Space precludes any detailed discussion of the various disabilities imposed on women in the African context that violate their rights to express and practice their religion, as determined by international human rights documents. There are many examples of segregation and exclusion (notably in Islam and traditional religious systems) as well as limitations on their ability to exercise leadership roles in their respective religious traditions.⁸⁷ There may also be imposition of styles of dress and behavior. In the much under-researched case of African women’s religious freedom, there is a clear interplay of legal, social, and theological forms of discrimination.

The rapid growth of information and communication technologies in Africa and the appropriation of the new media by many religious organizations for the purposes of self-representation and propagation⁸⁸ have become increasingly critical regarding limitations on religious freedom. While it has yet to be

⁸³ Van der Vyver, *supra* note 27, at 132.

⁸⁴ FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 44 (Kevin Boyle & Juliet Sheen eds., 1997).

⁸⁵ See Rosalind I.J. Hackett, *Conflict in the Classroom: Educational Institutions As Sites of Religious Tolerance/Intolerance in Nigeria*, 1999 BYU L. REV. 537.

⁸⁶ FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT, *supra* note 84, at 69; David Chidester, *Religion Education in South Africa: Teaching and Learning About Religion, Religions, and Religious Diversity*, 25 BRIT. J. RELIGIOUS EDUC. 261 (2003).

⁸⁷ See, e.g., Rosalind I.J. Hackett, *Power and Periphery: Studies of Gender and Religion in Africa*, in PERSPECTIVES ON METHOD AND THEORY IN THE STUDY OF RELIGION 238 (Armin W. Geertz & Russell T. McCutcheon eds., 2000).

⁸⁸ Rosalind I.J. Hackett, *Charismatic/Pentecostal Appropriation of Media Technologies in Nigeria and Ghana*, 28 J. RELIGION AFR. 258 (1998); Rosalind I.J. Hackett, *Mediated Religion in South Africa: Balancing Air-Time and Rights Claims*, in RELIGION, MEDIA, AND THE PUBLIC SPHERE (Birgit Meyer & Annelies Moors eds., 2006) [hereinafter *Mediated Religion in South Africa*].

cogently argued that mass-mediated religious expression is central to a group's identity and constitutes a valid form of religious practice, it raises important questions regarding discrimination and protection of religious feelings.⁸⁹ Research has shown that government and legal authorities can be influenced by negative portrayals of non-mainstream groups.⁹⁰ In his analysis of early press coverage of the Sharia debate in contemporary Nigeria, Matthews Ojo observes that "the press considered itself as the protector of the religious rights of Nigerians against the intolerant onslaught of the Sharia."⁹¹ Bias and misinformation affect whether recognition or resources may be granted to minority groups.⁹² Nationalized media can support a government's repression, or even encourage a government's persecution, of an unpopular religious group, as in the case of the Baha'i faith in Egypt.⁹³ With the growth of commercial media in the context of liberalization, there is also ample opportunity for inequities in media ownership, production, transmission, and program content.⁹⁴

South African legal scholars J.V. van der Westhuizen and C.H. Heyns emphasize the particular importance of avoiding discrimination in the media sector.⁹⁵ They suggest that the government must exercise care in balancing competing claims among religious groups for airtime, and also take popular demands into account. They emphasize that money, facilities, and broadcasting time are "non-exclusive." Even where the methods of promoting a religion are more exclusive, such as in the constitution or the national anthem, they argue

⁸⁹ See van der Vyver, *supra* note 27, at 137.

⁹⁰ James T. Richardson, *Discretion and Discrimination in Legal Cases Involving Controversial Religious Groups and Allegations of Ritual Abuse*, in *LAW AND RELIGION* 111, 125 (Rex J. Ahdar ed., 2000).

⁹¹ Matthews A. Ojo, *Religion, Public Space, and the Press in Contemporary Nigeria*, in *CHRISTIANITY AND SOCIAL CHANGE IN AFRICA: ESSAYS IN HONOR OF J.D.Y. PEEL* 233, 246 (T. Falola ed., 2004).

⁹² The very vocal Ghanaian traditional religious organization, the Afrikania Mission, has on numerous occasions appealed to the government to prevent abusive (Christian) preaching on the airwaves and ensure that guidelines are worked out to regulate preaching and promote peace. Marleen de Witte, *Afrikania's Dilemma: Reframing African Authenticity in a Christian Public Sphere*, 17 *ETNOFOOR* 133 (2004).

⁹³ Johanna Pink, *The Concept of Freedom of Belief and Its Boundaries in Egypt: Jehovah's Witnesses and the Baha'i Faith Between Established Religions and an Authoritarian State*, 6 *CULTURE & RELIGION* 135 (2005); Press Release, U.S. Comm'n Int'l Religious Freedom, Egypt: USCIRF Concerned About Uptick of Incitement in Media and Mosques (Nov. 18, 2010), <http://www.uscirf.gov/news-room/press-releases/3462-egypt-uscirf-concerned-about-uptick-of-incitement-in-media-and-mosques.html>.

⁹⁴ *Devil Bustin' Satellites: How Media Liberalization in Africa Generates Religious Intolerance and Conflict*, in *DISPLACING THE STATE: RELIGION AND CONFLICT IN NEOLIBERAL AFRICA* (James H. Smith & Rosalind I.J. Hackett eds.) (forthcoming) (manuscript at 163–208); J. Kwabena Asamoah-Gyadu, *Reshaping Sub-Saharan African Christianity*, 2005 *MEDIA DEVELOPMENT* 17, <http://www.waccglobal.org/en/20052-christian-fundamentalism-and-the-media/526-Reshaping-Sub-Saharan-African-Christianity.html>.

⁹⁵ Van der Westhuizen & Heyns, *supra* note 45.

that even the dominant religion should not enjoy prevalence. In their words, “[s]uch symbols either have to be entirely secular, or reflect the greatest common denominator between the different religions and nonbelievers.”⁹⁶

Popular Nigerian (as well as some Ghanaian) videos that depict cosmic battles between the forces of good (Christian) and evil (traditional, ancestral, and occasionally Muslim) now circulate widely in Africa with titles such as *Witches* and *The Lost Bible*.⁹⁷ These films—often graphic and violent in nature—play heavily on popular fears of bewitchment and other nefarious, occult forces, and the salvific powers of Christianity are never in doubt. It is hard to envisage someone daring to redeem the image of traditional religions portrayed by these local filmmakers for they would be going against the grain of both market forces and popular culture. Furthermore, the majority of African heads of state and government officials are Muslims or Christians, and generally only acknowledge or recognize traditional ritual experts away from the public eye.

IV. TRADITIONAL AFRICAN RELIGIONS: ABUSE AND AMBIGUITIES

The case of traditional African religions adds additional ambiguity to the state of protection of religious rights in Africa. For some, these traditional religions represent more of a category invented by academics (such as African Traditional Religion (“ATR”)),⁹⁸ and increasingly by organizers of international religious freedom conferences.⁹⁹ Richard Falk’s strong criticisms of the “normative blindness” and “modernization bias” in international human rights law that have weakened protection for indigenous peoples,¹⁰⁰ and Kenyan legal scholar Makau Mutua’s trenchant criticisms about the treatment of indigenous religious and cultural beliefs and practices in postcolonial Africa¹⁰¹ are germane here.

⁹⁶ *Id.*; see also Gary Lease, *Response: Fighting over Religion*, 25 HIST. REFLECTIONS 477, 480 (1999) (discussing the debate over the inclusion of a reference to God in the preamble to the new South African constitution).

⁹⁷ Birgit Meyer, *Popular Ghanaian Cinema and “African Heritage,”* 46 AFR. TODAY 93 (1999).

⁹⁸ See, e.g., Rosalind I.J. Hackett, *African Religions: Images and I-Glasses*, 20 RELIGION 303 (1990); DAVID WESTERLUND, *AFRICAN RELIGION IN AFRICAN SCHOLARSHIP: A PRELIMINARY STUDY OF THE RELIGIOUS AND POLITICAL BACKGROUND* 28–30 (1985).

⁹⁹ See Rosalind I.J. Hackett, *Field Report: The Oslo Conference on Freedom of Religion or Belief, Oslo, Norway, 12–15*, 2 NOVA RELIGIO 299 (1999).

¹⁰⁰ Richard Falk, *Cultural Foundations for the International Protection of Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 44 (Abdullahi Ahmed An-Na’im ed., 1992).

¹⁰¹ Mutua, *supra* note 25, at 170.

A. *Patterns of Exclusion and Discrimination Regarding Traditional Religions*

Makau Mutua traces the current lowly, marginalized state of traditional religious heritage in Kenya to the relentless campaign of the African state to delegitimize African religions. The collusion of the missionary religions—Christianity and Islam—and their inherent claims to superiority have been instrumental to this process, which is not only an assault on the religious freedom of Africans, but also “a repudiation, on the one hand, of the humanity of African culture and, on the other, a denial of the essence of the humanity of the African people themselves.”¹⁰² Mutua reproaches Africa’s postcolonial elites for replicating colonialist laws and policies that, notwithstanding the rhetoric of some demagogues to the contrary,¹⁰³ were detrimental to traditional African cultures and religions. In examining the development of African constitutions in the post-independence period, Mutua notes a “constitutional silence” and “absolute refusal to acknowledge the existence of African religions or cultures,”¹⁰⁴ from which it is possible to infer that the government’s silence in its policies have conferred a “negative meaning” on traditional African religious beliefs and practices.¹⁰⁵

Moreover, even the “liberal generic protection of religious freedoms” is itself inimical to indigenous African religions. Mutua notes that the same protection for proselytization, which is central to both Islam and Christianity, appears in the constitutions of Malawi, Nigeria, Zambia, and Congo. Some African states have gone further in proclaiming state religions. In 1991, President Frederick Chiluba declared Zambia a Christian nation. Several nations (Algeria, the Comoros, Egypt, Libya, Mauritania, Morocco, Tunisia) are either constitutionally Islamic or declare Islam as the state religion.¹⁰⁶

Of particular significance, limitations on religious freedom for reasons of “public morality” and “public health” target the elements of traditional religious practice that many colonial states found problematic, even

¹⁰² *Id.* South African scholar D.L. Mosoma argues that Africans traditionally understand religion to be associated with the “wholeness of life,” rendering coercion and discrimination on the basis of religion unthinkable. D.L. Mosoma, *Religious Liberty: An African Perspective*, in RELIGIOUS FREEDOM IN SOUTH AFRICA, *supra* note 22, at 49.

¹⁰³ Mutua, *supra* note 25, at 177.

¹⁰⁴ *Id.*; see also Makau wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 44, at 434.

¹⁰⁵ Mutua, *supra* note 25, at 178.

¹⁰⁶ See van der Vyver, *supra* note 27, at 110–13.

abominable.¹⁰⁷ Mutua cites the case of Kenya, where colonial rulers abolished the recognition of Kamba shrines, the consultation of medicine men, work on Sundays, beer and tobacco consumption, dancing, polygamy, bride wealth, and use of the oath.¹⁰⁸

In Ghana, British colonial rule effectively derogated the religious liberties of the native population who practiced traditional religions through various forms of legislation. According to Ghanaian legal scholar E.K. Quashigah, the authorities “were quick to proscribe any religious or cultural practice that was not in conformity with their own.”¹⁰⁹ He notes that as early as 1892 an ordinance was promulgated that allowed the Colonial Governor in Council to suppress the celebration or practice of any native custom, rite, ceremony, or worship that appeared to him to tend toward a breach of the peace.¹¹⁰ Under the Native Customs Ordinance of 1892, those native customs designated as “fetish worship” were proscribed, while other rites, such as yam custom and “black Christmas” were only celebrated with the written permission of the District Commissioner.¹¹¹

B. Challenges and Opportunities for Traditional Religions

There are some signs of an increasing willingness to recognize the value of traditional African religions and to provide institutional protections for their practitioners. Mutua highlights recognition in the 1996 South African Constitution of the “institution, status, and role of traditional leadership, according to customary law.”¹¹² While not explicitly referring to traditional religion, this provision, according to Mutua, “openly recognizes African values in the governance of the state.”¹¹³ The only state to officially recognize traditional religion is the Republic of Benin, which declared a National

¹⁰⁷ See Mutua, *supra* note 25, at 177.

¹⁰⁸ *Id.* at 178. In a similar vein, Quashigah notes how British paternalism was carried over into the post-independence era in Ghana by the Chieftaincy Act of 1961, which provided that “[f]etish oaths (other than fetish oaths sworn by persons before making an affidavit or prior to giving testimony before a court or a Traditional Council) and oaths sworn for an unlawful purpose are hereby declared to be unlawful; and no person upon whom or against whom the oath is sworn shall be bound by it.” Quashigah, *supra* note 50, at 593. For Quashigah, this provision demonstrated the “scant regard which the political authorities accorded native religions.” *Id.*

¹⁰⁹ Quashigah, *supra* note 50, at 591.

¹¹⁰ *Id.* at 591–92.

¹¹¹ *Id.*

¹¹² Mutua, *supra* note 25, at 179 (quoting S. AFR. CONST., 1996 ch. 3, §§ 211–12).

¹¹³ *Id.* For discussions regarding references to God in the Preamble to the 1996 South African Constitution, see van der Vyver, *supra* note 27, at 117. See also Lease, *supra* note 96, at 480.

Voodoo Day on January 10, 1996. While the state is officially secular, its 1990 Constitution protects “the right to culture” and mandates the state to “safeguard and promote the national values of civilization, as much material as spiritual, as well as the cultural traditions.”¹¹⁴ The use of the term “spiritual” is arguably more inclusive than “religious.”

Mutua is encouraged by the language and provisions of the African Charter on Human and People’s Rights adopted in 1981. He notes that the preamble to the charter states that the instrument claims to be inspired by the “virtues” of African “historical tradition” and the “values of African civilization.”¹¹⁵ In keeping with international documents, it prohibits discrimination based on religion,¹¹⁶ and guarantees the freedom of religion.¹¹⁷ Also significant is the requirement that the state bear the burden of the “promotion and protection” of morals and traditional values.¹¹⁸ Furthermore, the state must “assist the family which is the custodian of morals and traditional values,”¹¹⁹ and support popular struggles against foreign domination.¹²⁰ While he acknowledges that there may be interpretations of tradition and culture, Mutua considers that the African Charter sends a powerful and radical message: “African traditions, civilization, and cultural values must be part of the fabric of a human rights corpus for the region.”¹²¹

While Mutua may possess an overly negative portrayal of African Christian initiatives to incorporate or be integrated into local culture, his analysis of the erasure or omission of traditional African religions from the key texts and institutions of nation-building is highly significant. So, too, is his emphasis on the need for political space and institutional recognition for these indigenous forms of religious expression.

The romanticized allusions to traditional African philosophy, values and spirituality, or even “heritage,” however, may not provide the type of protection needed for such non-institutional forms of religion in a modern, multireligious society. They certainly will not offer any defense against the

¹¹⁴ MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE 124 (2002) (citing BENIN CONST. art. 10).

¹¹⁵ African Charter on Human and Peoples’ Rights pmbl., June 27, 1981, 1520 U.N.T.S. 217, 245.

¹¹⁶ *Id.* art. 2.

¹¹⁷ *Id.* art. 8.

¹¹⁸ *Id.* art. 17.

¹¹⁹ *Id.* art. 18(2).

¹²⁰ *Id.* art. 20(3).

¹²¹ Mutua, *supra* note 25, at 183.

barrage of accusations of Satanism from Africa's ever-burgeoning evangelical, Pentecostal, and Charismatic sector.¹²² Representations of an institution's or region's traditional religious and cultural heritage may be torn down by new, usually born-again Christian leaders anxious to establish new identities and break links with perceived nefarious and regressive powers. The religious beliefs and practices of indigenous peoples may also be decimated by forced conversions—as seen in the case of Sudan's Islamization program in the south of the country.¹²³

The areas where traditional religious beliefs and practices may survive, or even be revived in a new guise, appear to be healing, environmentalism, values education, and the visual and performing arts. For example, the institutionalization of traditional healing practitioners, through regional and international associations and establishment of professional standards, has been instrumental in this regard.¹²⁴ In Ghana and Zimbabwe, there have been concerted efforts to carve out a space for traditional religion in curricula.¹²⁵ Thanks to the efforts of such activists as Nokuzola Mndende in South Africa, more attention is now paid to media representations of traditional African religions in a predominantly Christian country.¹²⁶ President Mbeki's African Renaissance project provided a supportive environment for the traditional arts and performance, and for traditional thought.¹²⁷ As ethnicity gets downplayed in the interests of national integration, other, more publicly acceptable ancestral identities, such as music and dance traditions, and spiritual or traditional (traditional) healing, can be brought to the foreground.¹²⁸

¹²² See Rosalind I.J. Hackett, *Discours de Diabolisation en Afrique et Ailleurs*, 2002 *DIOGENES* 71.

¹²³ This is also a case of the contradiction between the Sudanese government's assurances of respect for the country's religious and cultural diversity and its actual policies and actions. *FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT*, *supra* note 84, at 72. In this connection, see also Francis M. Deng, *Scramble for Souls: Religious Intervention Among the Dinka in Sudan*, in *PROSELYTIZATION AND COMMUNAL SELF-DETERMINATION IN AFRICA*, *supra* note 21, at 191.

¹²⁴ See, e.g., PROMETRA INT'L, <http://www.prometra.org/DurbanAids.htm> (last visited Aug. 28, 2011).

¹²⁵ See KWAME GYEKYE, *AFRICAN CULTURAL VALUES: AN INTRODUCTION FOR SECONDARY SCHOOLS* (1998); *AFRICAN TRADITIONAL RELIGIONS IN RELIGIOUS EDUCATION: A RESOURCE BOOK WITH SPECIAL REFERENCE TO ZIMBABWE* (G. ter Haar, A. Moyo & S. J. Nondo eds., 1992).

¹²⁶ Nokuzola Mndende, *From Racial Oppression to Religious Oppression: African Religion in the New South Africa*, in *RELIGION AND SOCIAL TRANSFORMATION IN SOUTHERN AFRICA* 143 (Thomas G. Walsh & Frank Kaufmann eds., 1999); Nokuzola Mndende, *From Underground Praxis to Recognized Religion: Challenges Facing African Religions*, 11 *J. STUDY RELIGION* 115 (1998); see also *Mediated Religion in South Africa*, *supra* note 88.

¹²⁷ See generally *AFRICAN RENAISSANCE* (William Makgoba Malegapuru ed., 1999).

¹²⁸ For recent levels of engagement, see *TOLERANCE AND TENSION*, *supra* note 23.

V. NEGOTIATING LEGAL AND RELIGIOUS PLURALISM IN FAMILY LAW AND SHARIA: UGANDA AND KENYA

Moving from these historical and comparative discussions of the recognition of or restrictions on religion in the African context, we can now turn to two contemporary East African examples, Uganda and Kenya. These are both instructive for demonstrating the struggle for religious self-determination and social recognition of minority religious groups in relation to public debates over laws regulating marriage, divorce, and inheritance.

A. *The Ugandan Domestic Relations Bill*

In his study of Muslim opposition to the Ugandan Domestic Relations Bill (“DRB”), Abasi Kiyimba, who writes both as an academic and participant, traces the roots of the current conflict to British colonial law that instituted the Marriage and Divorce of Mohammedans Act that allowed polygamy and divorce.¹²⁹ Following independence in 1962, there have been several attempts to reform the law that have provoked disagreement among Muslims. The DRB, which was tabled before Parliament in 2003 and which is currently under debate, represents the latest attempt at reform. It contains a host of provisions to deal with discriminatory laws and practices in marriage, divorce, inheritance, property ownership, and violence and equality within marriage and the family. According to Kiyimba, Muslims view the provisions of the proposed law as an attempt to impose on them Christian conceptions of morality.¹³⁰ In particular, they accuse Christians of being more vocal in their opposition to polygamy than to prostitution and homosexuality.¹³¹ When it reached committee stage in early 2005, hundreds of Muslim women, the majority wearing hijab, took to the streets of Kampala to oppose its passage. The subsequent shelving of the bill for further consultations was a blow to Uganda’s women’s movement.¹³² Another vote appears likely in the next parliamentary session.

Vanessa M.G. Von Struensee describes the DRB as a “crucial piece of legislation for Ugandan women” that, if passed, would make Uganda one of

¹²⁹ Abasi Kiyimba, *The Domestic Relations Bill and Inter-Religious Conflict in Uganda: A Muslim Reading of Personal Law and Religious Pluralism in a Postcolonial Society*, in *DISPLACING THE STATE*, *supra* note 94, at 240–80.

¹³⁰ *Id.* at 241.

¹³¹ *Id.*

¹³² See Sylvia Tamale, *The Right to Culture and the Culture of Rights: A Critical Perspective on Women’s Sexual Rights in Africa*, 16 *FEMINIST LEGAL STUD.* 47 (2008).

the first countries in Africa to make extensive legal reforms in the name of protecting women in marriage.¹³³ In sum, “the DRB sets a minimum age of marriage, prevents coercion in marriage, defends married women’s property rights, expands grounds for divorce, protects maternal custody, limits polygamy, criminalizes domestic violence, widow inheritance, and unifies national law.”¹³⁴ The areas that have generated the most controversy are polygamy, bride price, property rights, and early marriage. Muslims claim that the proposed restrictions interfere with their freedom to practice their religion. In contrast, it is argued that such restrictions would be acceptable given that the limitations on religious freedom and the non-conformity of such practices with Ugandan constitutional law in relation to gender equality are well established.¹³⁵ A further issue is that some Christian groups object to being included with Hindus, Baha’is, and others while Muslims are given their distinct law.¹³⁶

Kiyimba observes that, up until this point in time, protest against the bill has remained nonviolent. However, because Muslims view the bill as a threat to their identity in Uganda, there is the possibility that it “could trigger widespread identity-based violence rooted in the deep-seated and longstanding fears of the minority Muslim population.”¹³⁷ He considers that the DRB is a test for the Ugandan state in terms of how well it accommodates its minority religious communities and their customary legal systems or allows the nation as a whole to be “governed by a singular and unified general law dominated by Christian ideas.”¹³⁸

B. The Kenyan Constitution and Sharia

Neighboring Kenya, with its majority Christian population, has also experienced recent tensions with its minority Muslim community. At issue was an increase in scope and jurisdiction of Sharia law in the revised constitution. Kenya’s new constitution was promulgated on August 27, 2010.¹³⁹ The

¹³³ See Vanessa M.G. Von Struensee, *The Domestic Relations Bill in Uganda: Potentially Addressing Polygamy, Bride Price, Cohabitation, Marital Rape, and Female Genital Mutilation* (July 2004) (unpublished manuscript), available at <http://ssrn.com/abstract=623501>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Kiyimba, *supra* note 129.

¹³⁷ *Id.* at 243.

¹³⁸ *Id.* at 249.

¹³⁹ *Constitutional Reforms*, REPUB. KENYA, <http://republicofkenya.org/reform/constitutional-reforms> (last visited Aug. 28, 2011).

constitution encompasses a wide range of reforms that promise to ensure a free and just democracy in Kenya. The new constitution protects marginalized groups. It also contains a provision for Muslim Khadis courts. Despite Kenya's religion-state separation, Muslims will be allowed to try minor civil cases (divorce, inheritance disputes, etc.) under Islamic Sharia law in traditional Khadis courts.

This legal provision provoked a strong reaction from many Christian leaders as evidenced in the document, *Entrench Islamic Sharia Law in the Constitution at Your Own Risk*, produced by a group of Kenyan Christian leaders.¹⁴⁰ The section on Kadhis courts reads:

We remain extremely opposed to the inclusion of Kadhi Courts in the constitution. It is clear that the Muslim community is basically caving [sic] for itself an Islamic state within a state. This is a state with its own Sharia compliant banking system; its own Sharia compliant insurance; its own Halaal bureau of standards; and is now pressing for its own judicial system. Such a move is tantamount to dividing the nation on the basis of religion, and is a dangerous trend that will destroy Kenya. We should learn from nations that have moved in that direction and suffered instability.¹⁴¹

These Christian leaders spearheaded a campaign to remove these courts from the constitution, despite their longstanding inclusion. This initiative—which began in 2004—was a response to rising fears about Muslim extremism and perceived Islamization in the post-9/11 context. It was supported by American evangelicals such as Pat Robertson. In contrast, the Obama administration advocated for the constitutional reform. The campaign by the Kenyan Christian leaders eventually failed, but it generated a great deal of negativity toward the Muslim community along the way.¹⁴² Muslims, for their part, have long felt that they are second-class citizens in a predominantly Christian society and complain that they have been discriminated against by the government.¹⁴³ It is

¹⁴⁰ *Statement from Kenyan Christian Leaders: Entrench Islamic Sharia Law in the Constitution at Your Own Risk*, KENYA CHRISTIAN VOICE, <http://www.christianvoice.or.ke/press.html> (last visited Aug. 28, 2011).

¹⁴¹ *Id.*

¹⁴² Sudarsan Raghavan, *Kenya's Constitutional Vote on Sharia Courts Pits Muslims Against Christians*, WASH. POST (July 7, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/06/AR2010070605449.html>; see also *Push for Islamic Courts in Kenya Alarms Christians*, COMPASS DIRECT NEWS (Feb. 11, 2011), <http://www.compassdirect.org/english/country/kenya/15118>.

¹⁴³ See GIFFORD 2009, *supra* note 75.

significant to note that religion played no part in the 2008 riots in Kenya, but was a critical part of the public debates leading up to the constitutional vote.¹⁴⁴

CONCLUSION

The case of contemporary Africa, in all its diversity, illustrates well the interplay of local and global trends of rising religious intolerance, notably toward minority and nonconventional religions. It also demonstrates the range of legal and nonlegal strategies that governments have used and continue to use to restrict the activities of unpopular groups. Numerous instances of overly broad interpretations of the limitations that can legally be placed on the activities of religious groups by governments have emerged from this analysis.

The greater attention to the external manifestations of belief and the restrictions on religious practice provided by a study of the African context challenges Western understandings of religion as essentially private and internal. In fact, this Symposium's focus on religious norms and customary law provides compelling evidence of the high public stakes of family and personal law in debates over democracy and pluralism in Africa today. It also underscores the realities of aggressive and invasive states to which Africans are accustomed, and the close relationship between religious freedom and broader human rights and resource allocation issues.

While there has been less attention in this Essay to remedies, some of the strategies advocated by the Hague Seminar might be appropriate for African conditions. Public debate and opportunities for religious groups to describe their experiences of harassment and restrictions would be more strategic than costly investigative commissions. More attention to these questions from academics, lawyers, and policymakers could generate much needed rethinking of the relationship between communitarian and individualist perceptions of religious freedom. In addition, the relatively strong presence of indigenous or African traditional religions raises important questions about how "religion" gets defined.

The rapid growth of the media sector—notably religious broadcasting and publication—in many parts of Africa, challenges conventional understandings of religious practice and location. Related to this is the emergence of excessive noise—in part occasioned by the use of modern media technologies—as one of the principal reasons given by states for action against minority religions in

¹⁴⁴ *Id.*

defense of “public order.” The African context confirms proselytizing as one of the most problematic areas of religious freedom. Because the problem is likely to increase, given the trends toward political and economic liberalization and resource scarcity, as well as revivalist forms of religious expression, there is an urgent need for interreligious dialogue and cooperation in this regard.¹⁴⁵ States and religious organizations need to be reminded of their obligations in terms of constitutional and international human rights protection for religious freedom. They must recall that religious freedom is not something granted or licensed by governments, but a fundamental human right to be enjoyed by all.

¹⁴⁵ An-Na'im even makes a case for state mediation in this regard. See Abdullahi Ahmed An-Na'im, *Competing Claims to Religious Freedom and Communal Self-Determination in Africa*, in PROSELYTIZATION AND COMMUNAL SELF-DETERMINATION, *supra* note 21, at 1–28. See also the “dialogic politics” regarding religious pluralism advocated by Simeon Ilesanmi for the Nigerian context. SIMEON O. ILESANMI, RELIGIOUS PLURALISM AND THE NIGERIAN STATE 61–63 (1997).