Traditional African Religions in South African Law

Edited by

T W Bennett

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ABBREVIATIONS

Am J Int L	*American Journal of International Law*
American J Sociology	*American Journal of Sociology*
Berkeley J of International L	*Berkeley Journal of International Law*
Buffalo Human Rights LR	*Buffalo Human Rights Law Review*
BYU J of Public Law	*Brigham Young University Journal of Public Law*
Calif LR	*California Law Review*
CILSA	*Comparative and International Law Journal of Southern Africa*
CSSR	*Centre for Social Science Research*
Eur J of Crime, Crim L & Crim Jus	*European Journal of Crime, Criminal L & Criminal Justice*
Geo LJ	*Georgetown Law Journal*
Harv Women's LJ	*Harvard Women's Law Journal*
J Health Soc Behav	*Journal of Health & Social Behavior*
J Religion in Africa	*Journal of Religion in Africa*
J Southern African Studies	*Journal of Southern African Studies*
NG Teologiese Tydskrif	*Nederduitse Gereformeerde Teologiese Tydskrif*
SA Public Law	*South African Public Law / Suid Afrikaanse Publiekreg*
SACJ	*South African Journal of Criminal Justice*
SALJ	*South African Law Journal*
SAJHR	*South African Journal on Human Rights*
SA Medical J	*South African Medical Journal*
Seton Hall Const LJ	*Seton Hall Constitutional Law Journal*
Stell LR	*Stellenbosch Law Review*
THRHR	*Tydskrif vir Hedendaagse Romeins-Hollandse Reg*
TSAR	*Tydskrif vir die Suid Afrikaanse Reg*
Virginia J Int L	*Virginia Journal of International Law*

INTRODUCTION

Numbers, definitions and prejudices

If statistics were to be taken as an absolute guide, there would appear to be almost no adherents to African traditional religions (ATRs) in South Africa. According to the country's 2001 census,[1] 79,8 per cent of those surveyed belong to one of the Christian denominations, of which the most popular are the independent African Zion Christian churches (accounting for 15,3 per cent of the population or 19,2 per cent of all Christians). Approximately 15 per cent have no religion, 1,5 per cent adhere to Islam, 1,2 per cent Hinduism, 0,2 per cent Judaism and 0,3 per cent traditional African beliefs.

Figures provided by the Pew Forum on Religion in Africa[2] corroborate the great advances made by Christianity and Islam in Africa. In 1900, fewer than 25 per cent of the Continent's overall population were Christians or Muslims. By 2010, however, the number of Muslims in the sub-Saharan region had increased more than twenty-fold: from 11 million to approximately 234 million. The number of Christians grew even more, by seventy-fold, from 7 million to 470 million.[3] Presumably, all of these increases were at the expense of Africa's traditional religions.

While these figures might lead one to believe that the traditional indigenous religions have become irrelevant to what people in Africa now believe, much depends on the way in which beliefs are classified and how religions are defined.[4] Care must obviously be taken to avoid essentialising a phenomenon as complex as religious belief and its social manifestation. In this regard, the first question we should ask is how to determine what constitutes an African traditional religion, as opposed to any other belief system.

Both Nehemiah Nyaundi and Sibusiso Masondo grapple with this question in the opening two chapters of the book. They immediately

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1 These data are derived from the last two censuses held in South Africa in 1996 and 2001. (The next census is in 2011.) See 'Statistics South Africa primary tables: Census '96 and 2001 compared' (2001) at 24–27, available at: http://www.statssa.gov.za/census01/html/RSAPrimary.pdf (accessed on 8 June 2010).

2 Working on estimates from the World Religion Database. See http://features.pewforum.org/africa/ (accessed on 20 April 2010).

3 'Sub-Saharan Africa now is home to about one-in-five of all the Christians in the world (21%) and more than one-in-seven of the world's Muslims (15%).'

4 And, in this regard, the definition of African religions has been largely determined by colonial discourse: Hans Peter Müller 'The invention of religion: aspects of the South African case' (2000) 26 *Social Dynamics* 56 at 64.

concede that there is no universally agreed definition of ATRs, and, like all modern authors on the topic, they note that it is difficult, if not impossible, to generalise about all the African belief systems. Nevertheless, Nyaundi and Masondo identify certain shared features. They note that the African pantheon contains – in common with many other religions – a supreme being, lesser divinities and spirit forces (both malign and benign), as well as a belief in witchcraft and the power of charms and amulets.[5]

What seems to set the African belief systems apart, however, is the importance of ancestral spirits and their veneration according to set rituals.[6] As shown by Masondo, a major feature of indigenous African beliefs is the correct observance of these rituals. It can, in a nutshell, be said that these religions are marked by 'right action, not right belief – orthopraxis rather than orthodoxy'.[7]

Compared with the three main monotheisms – Christianity, Islam and Judaism – traditional African religions do not distinguish between the sacred and secular.[8] They lay no claim to universal validity, nor do they pose, as ultimate issues, the contest between sin and virtue. Believers contemplate no final judgment and no redemption with the possibility of an eternal salvation.[9]

As products of an oral culture, African religions have no canonical texts and no system of theology.[10] They make no attempt to separate religion from everyday life. In fact, few African languages seem to have a special term for religion.[11] All these features contribute to what Nyaundi says is 'the most negative stereotyping of any religious tradition'. By contrast, the

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5 See further John S Mbiti *Concepts of God in Africa* (1970) SPCK 3–16, 114–127 & 220–233.

6 See, in this regard, Fr Heinz Kuckertz (ed) *Ancestor Religion in Southern Africa* (1981) Lumko Missiological Institute especially the chapters contributed by Hammond-Tooke 'Ancestor religion' and Kuckertz 'Ancestor religion in African theology'.

7 Werner F Menski *Comparative Law in a Global Context: the legal systems of Asia and Africa* 2ed (2006) CUP 414 & 415. As shown by W David Hammond-Tooke 'Some Bhaca religious categories' (1960) 19 *African Studies* at 1–13, the Bhaca regard their ancestors as an immediate presence in their lives, a belief that is realised in the observance of certain prescribed rituals.

8 John S Mbiti *African Religions and Philosophy* 2ed (1969) Heinemann 258–260 & 268.

9 See Gananath Obeyesekere *Medusa's Hair: an essay on personal symbols and religious experience* (1981) University of Chicago Press 82–3. Thus, pre-literate religions did not construct systematic theories of sin, virtue, judgment and salvation (a rite of passage whereby the individual attains a transcendent status beyond suffering).

10 W David Hammond-Tooke 'World View I: a system of beliefs' in W D Hammond-Tooke (ed) *The Bantu-speaking Peoples of Southern Africa* 2 ed (1974) Routledge & Kegan Paul at 319.

11 Menski (n7) at 413.

monotheisms have a global spread, and they enjoy the benefits of a long history of literate scholarship which has operated to secure them dominance in the thinking about systems of belief.[12] Indeed, the very definition of religion has been shaped by standards set in the European Enlightenment.[13]

The three words that constitute the title and subject matter of this book, 'traditional African religions' give a clue as to why these beliefs have been overshadowed by the monotheisms.[14] In the first place, the term 'tradition' implies something derived from an immemorial past: a custom, an artefact, a norm or a value that has survived unchanged to the present. This understanding is true to the extent that traditional African religions acted as a force of resistance and social conservatism against the colonial onslaught. Veneration of the ancestors, especially, operated to give people the sense of security they needed from connection with their past. Because ancestors are normally identified with burial sites near the homestead, they function as 'a spiritual anchor', and give families threatened by colonial encroachment a feeling of belonging to specific places.[15]

But, as both Nyaundi and Masondo say, this understanding of tradition is not the only – nor always the most accurate – representation of the beliefs that are being studied in this book. In fact, much postcolonial scholarship has been devoted to showing that people generally invoke tradition as a palliative term for innovation rather than persistence of the past.[16] Masondo's two case studies provide excellent examples of how it can be used to deal with modern social issues. The first deals with the re-introduction of male circumcision among the Zulu, and the other with the use of traditional rituals to consecrate a new dwelling in Cape Town.

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12 The mass production of religious texts following the development of printing in Germany and the Netherlands, for instance, did much to promote the cause of the protestant reformation.

13 Müller (n4) 62–3. The English term 'religion' is derived from the Latin *religio* 'reverence for the gods' or 'piety', and is probably related to the verb *religare* 'to bind': Stanley J Tambiah *Magic, Science, Religion, and the Scope of Rationality* (1990) CUP 4.

14 The idea of posing 'tradition', 'Africa' and 'religion' as the points of entry for a complex and highly contested subject is taken from David Chidester *Religions of South Africa* (1992) Routledge chapter 1.

15 Chidester (n14) at 13.

16 Those who manipulated the idea of tradition were often the colonial powers in collaboration with traditional rulers. Nonetheless, it is also acknowledged that traditions were created in pre-colonial times: Terence O Ranger 'The invention of tradition revisited: the case of colonial Africa' in Terence O Ranger et al (eds) *Legitimacy and the State in Twentieth-Century Africa* (2003) MacMillan 81.

Hence, through the guise of tradition, inconvenient histories can be quietly forgotten, and new ideas can be made to appear more acceptable.[17] Chidester therefore says of indigenous African religions that:

> *the term 'tradition' might better be understood, not as something handed down, but as something taken up, as an open set of cultural resources and strategies that can be mobilized in working out the meaning and power of a human world.*[18]

The second problematic term is 'African'. This word has two meanings, one denoting a geographic region and the other an ethnic identity. For purposes of this book, neither can be accepted without qualification. We obviously cannot hope to do justice to all the religions observed in Africa. The focus is on the sub-Saharan region. But, even in this regard, the concern is mainly with South Africa, although occasional reference is made to religions in other parts of the continent.

Ethnicity is clearly a relevant issue in the book – and the relationship between culture and religion is an area of special interest – but indigeneity is even more important. Indeed, all of the contributors to this book assume that the term 'African religion' implies native to sub-Saharan Africa. A word of caution is nonetheless necessary: it is unwise, even within the confines of a single state, such as South Africa, to make authoritative generalisations about all the indigenous belief systems.[19] While the religions found within the country may exhibit certain broad similarities, they differ considerably in particulars.[20]

The concept of indigeneity presents a separate set of problems. Who should be considered indigenous to South Africa? Are the KhoeKhoe and San the only true aboriginals, or are all the people predating Dutch rule to be included? And what of the status of the Dutch themselves after the British occupation, not to mention the slaves and indentured labourers imported from the East?

With each newcomer came new beliefs, whether Islam, Hinduism or the various Christian denominations, and new expectations and patterns of behaviour also. However, although Euro-American religions have been

17 Martin Krygier 'Tradition as law' (1986) 5 *Law & Philosophy* 237 at 251ff.

18 Chidester (n14) at 1.

19 For which, see David Chidester et al *African Traditional Religion in South Africa: an annotated bibliography* (1997) Greenwood Press and Martin West *Abantu: an introduction to the black people of South Africa* (1976) Struik 7–11.

20 A useful synoptic account of indigenous South African religions is provided by Chidester (n14) chapter 1.

a dominant force in South Africa, the existing beliefs did not disappear. Instead, they adapted or, on occasion, stubbornly resisted.[21]

This leads to the question: how authentically traditional and indigenous are the modern 'traditional African' religions? Again, there can be no simple answer, and, according to Chidester, much will depend on who responds to the question. He says (somewhat too cynically) that academic versions of traditional religion are generally the work of insecure intellectual elites, looking to receive a 'nod of approval from the West', whereas popular versions are what ordinary Africans do without regard for outsider opinion.[22]

Finally, we have the troublesome term 'religion'. Should this word be used to signify traditional African beliefs? The answer is unfortunately clouded by the effects of misconceptions and the prejudices of colonialism and Christianity. Certain early travellers and missionaries went so far as to say that Africans had no 'religion'.[23] They could make this dismissive statement, however, only because their understanding of the concept depended on their preconceptions.

In the case of South Africa, for example, the missionaries' idea of religion – given their evangelical Christian background – required belief in and worship of God (or gods), or, more broadly, a belief system explaining the existence and meaning of humanity.[24] So began a bias against African beliefs, and a tendency to treat them as if they were no more than an aspect of African culture. As such, indigenous beliefs were interesting, but only as collectable exotica.[25]

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21 James P Kiernan 'African traditional religions in South Africa' and 'The impact of white settlement on African traditional religions' in Martin Prozesky & John de Gruchy (eds) *Living Faiths in South Africa* (1995) David Philip, St Martin's Press and Hurst & Co 15ff and 72ff, provide useful companion pieces for the chronological study of religion in South Africa.

22 Chidester (n14) at 2. With respect to the popular view, we should note that it is extraordinarily difficult to capture such an unselfconscious conception of traditional belief, and that the people concerned are likely to perceive any legal interventions as an intervention of Western ideas.

23 Ludwig Alberti *Ludwig Alberti's Account of the Tribal Life and Customs of the Xhosa in 1807* (translated by William Fehr) (1968) AA Balkema 47, Johannes T van der Kemp 'An account of the religion, customs, population, government, language, history, and natural productions of Caffraria' (1804) *Transactions of the London Missionary Society* at 432 and Eugène Casalis *The Basutos, or Twenty-Three Years in South Africa* (1861) James Nisbet 238.

24 *Christian Education SA v Minister of Education* 1999 (4) SA 1092 (SE) at 1100.

25 Jewel Amoah & Thomas W Bennett 'The freedoms of religion and culture under the South African Constitution: do traditional African religions enjoy equal treatment?' (2008-2009) 24 *Journal of Law & Religion* at 1–2.

The dominance of Western thinking and the prejudices of colonial authors led to a further problem. Because indigenous African institutions were translated into foreign languages for consumption by European audiences, linguistic and conceptual misunderstandings resulted. A classic example in southern Africa was the translation of *sangoma*, and its vernacular variants, as 'witchdoctor'. In consequence, much of the scholarship about traditional religions in the postcolonial period has been devoted to correcting misconceptions and repairing the damage.[26]

While the effect of these misconceptions may at times seem harmless – such as stigmatising a particular belief as a mere 'superstition' or 'magic' – at other times, it is critical. A clear case in point is application of the term 'witchcraft' to the use of spiritual forces to effect physical results. From the perspective of a religious orthodoxy, witchcraft is profoundly malevolent and deserving of severe punishment. From a religiously unengaged, scientific point of view, however, such practices are simply the product of irrational thinking: the practices may be aberrant, but there can be no grounds for their punishment.

The very nature of African religions opens them up to this type of treatment. They have no canons of belief, no clerical institutions and no claims to ultimate authority on spiritual destiny and salvation. As a result, they are susceptible to being considered a collection of esoteric beliefs, with no coherence or system, and thus to being dismissed as something less than a true 'religion' in the sense attributed to the more highly organised and institutionalised monotheisms. Indeed, a central element of African belief – veneration of the ancestors[27] – is put down to simple animism or outright superstition.[28] The temptation is then to deny them equal treatment. At best, the indigenous beliefs qualify as African 'culture', and their legal

26 Okot p'Bitek *African Religions in Western Scholarship* (1970) East African Literature Bureau 7. However, Rosalind Shaw 'The invention of African traditional religion' (1990) 20 *Religion* at 342 shows that, by arguing indigenous African religions were as good as Christianity, African apologists ended up endorsing the Western categories of thought.

27 When described as 'worship', this practice is more subtly denigrated, since (in terms of monotheistic belief) ancestors are a misplaced subject of prayer and reverence. See William C Willoughby *The Soul of the Bantu: a sympathetic study of magico-religious practices and beliefs of the Bantu tribes of Africa* (1928) Student Christian Movement chapter 2.

28 Superstition is a term commonly used to denigrate the supposedly deficient beliefs of others, as when members of one faith label the beliefs of another as mere 'superstitions'. Likewise, of course, atheists and agnostics may denounce the established religious faiths as superstition.

protection must be sought in the right to culture, which is contained in ss 30[29] and 31(1)[30] of the Constitution.

A primary function of culture is to signify difference, and, since the 18th-century Enlightenment, religion has been harnessed to the cause of constructing social identities.[31] Two chapters of this book consider the problem of conflating religion and culture. Christa Rautenbach had to determine whether the slaughter of a bull at a First Fruits Festival in the Zulu Kingdom could be termed a religious rite or a cultural practice. In order to distinguish the two, she seeks to isolate the general characteristics of religion. She decides that, because the act signifies a connection between ritual, explanatory myth and belief in a supernatural power, it can properly be regarded as a religious ritual.

Jewel Amoah, on the other hand, undertakes a detailed analysis of the significance of the relationship of religion and culture. She starts by noting that, from the perspective of those who live within traditional African cultures and practise its religions, the two concepts are one and the same thing. Amoah, however, argues that understanding this relationship is about understanding a nexus between the individual and the community, which are socially separate, but linked, aspects of identity. She nevertheless concedes that, for forensic purposes, we are obliged to distinguish between religion and culture: in human rights cases, religion is taken more seriously.

The Initiated Churches: Schism and fusion

Given the heavy-handed approach of the early missionaries and the suspicions of their African hosts, the small successes won for the Christian mission in southern Africa were nothing short of remarkable.[32] From the outset, most Africans – quite correctly – considered Christianity 'as the

29 'Everyone has the right to … participate in the cultural life of their choice'.

30 'Persons belonging to a cultural … 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 ….'

31 Müller (n4) at 62–3.

32 Although Islam and Christianity are the two main missionary faiths in Africa, the focus of this book is on the latter, because, in South Africa, it has had a much greater impact than Islam. Islam has been confined to the descendants of slaves and political exiles from South-East Asia, and indentured labourers from India. For a brief history, see Chidester (n14) at 158–168.

handmaiden of colonialism and a threat to their culture'.[33] The missionaries' unequal relationship with their converts came about not only because the former had the backing of colonial military power,[34] but also because of the very nature of the competing belief systems: African religions were amenable to accepting alien (and contrary) beliefs, whereas Christianity was quite the opposite.

Notwithstanding the dominant position of Christianity, the traffic of ideas and beliefs was never uni-directional. Sometimes (as Amoah describes in her chapter) mainstream churches used African culture as a medium for communicating the gospel message.[35] Moreover, as Nyaundi observes, many of those, who even now claim to be committed Christians, retain in their daily lives critical elements of African beliefs: they may still sacrifice to their ancestors or resort to the protective power of amulets. But, even more important was the meeting of Christian and indigenous beliefs in the African Independent or (the term preferred here) Initiated Churches.

A major problem in the academic study of these bodies has been terminology. They have been variously described as 'independent', 'separate', 'indigenous', 'initiated' or 'African instituted'. Many of these words are pejorative in that they imply a lesser status than what are termed the 'mainstream' churches.[36] In this book the term 'Initiated' is preferred, as being the least value laden.[37]

According to the 2001 census, of the almost 80 per cent of the South African population considering itself Christian, one third indicated an affiliation to an African Initiated Church. This number continues to grow:

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33 Charles Villa-Vicencio & Peter Grassow *Christianity and the Colonisation of South Africa, 1487–1883* vol 1 (2009) Unisa Press xi. This text and its companion John W de Gruchy *Christianity and the Modernisation of South Africa, 1867–1936* (2009) Unisa Press provide commentary and documents on the spread of Christianity in South Africa.

34 Although not always. See, for example, the chequered career of Bishop Colenso: Villa-Vicencio & Grassow (n33) at 120–128 & 130–132.

35 The policy of inculturation. See Buti Tlhagale 'Inculturation: bringing the African culture into the Church' (2000) 14 *Emory International Law Review* 1249 at 1284.

36 How to describe denominations accepted by the state also poses a problem, especially in South Africa, where, even within the Christian domain, the British authorities obviously favoured the Anglican church over the Catholic and Dutch Reformed Churches. Subsequently, of course, the latter became a bastion of the apartheid state: see Chidester (n14) chapter 5. While the term 'mainstream' is generally used to denote adherence by the majority of the population, this could well apply to the African Initiated Churches.

37 Stephen Hayes 'The African Independent Churches: judgement through terminology' (1992) 20 *Missionalia* at 139ff argues that, more important than the question of nomenclature, is a need to include these churches in the broader frame of belief systems of Africa.

between 1996 and 2001, what is generally conceived of as the Christian group increased by approximately 5 per cent.

The Initiated Churches now number roughly 7 000.[38] Bengt Sundkler imposed a general classification scheme based on a distinction between 'Ethiopian' Churches, which refers to people of the book, and 'Zionist', which refers to people of the spirit.[39] Latterly, a third, messianic, group has been added.[40]

This diverse group of denominations cannot be considered a simple fusion of Christianity and ATRs, since the Initiated Churches differ markedly among themselves. Most combine what might be thought of as the cultural aspects of African life, notably acceptance of polygyny and reverence for the ancestral shades, together with certain Christian rites, such as healing, baptism and observance of the Sabbath. In fact, they are distinguished from other faiths less by retaining traditional beliefs – which some of the Churches expressly reject[41] – than by being an indigenous phenomenon.

The origins of the Initiated Churches lie in a break with the Christian mission stations. One of the first people to sever ties was Nehemiah Tile. In 1884, he left the Wesleyan Methodist Church to found a separate denomination. The immediate causes for his departure were his sense of discrimination – as a black person, he was not allowed to hold a position of leadership – and charges of political dissent – he had allegedly taken up the cause of the Thembu chief Ngangalizwe against the colonial authorities. Another early victim of discrimination, Mangena Mokone, broke with the Methodist church in the Transvaal and went on to found the *Ibandla laseTiyopiya* (the Ethiopian Church).

The next generation of Initiated Churches developed not so much from a sense of exclusion from the established church order, but rather from contact

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38 A synopsis of the history and development of these churches can be found in Chidester (n14) chapter 4, James P Kiernan 'African Independent Churches' in Prozesky & Gruchy (n21) at 116ff. For more detailed accounts, consult Chidester (n14) chapter 4.

39 Bengt G M Sundkler *Bantu Prophets in South Africa* (1948) OUP (2 ed 1961) 53–55. Cf the critique by Norman A Etherington 'The historical sociology of the Independent churches in South East Africa' (1979) 10 *J Religion in Africa* 109 at 108ff.

40 Chidester (n14) at 326.

41 Field work in Soweto, for instance, shows that, although the Ethiopian churches might condemn ancestor belief and ritual, these aspects of traditional religion were maintained by Zionists: Martin E West *Bishops and Prophets in a Black City: African Independent Churches in Soweto* (1975) David Philip chapter 9 and Martin West 'The shades come to town: Ancestors and urban Independent churches' in Michael Whisson & Martin E West *Religion and Social Change in Southern Africa* (1975) David Philip at 185.

with pentecostal and millenarian movements from abroad. These began in Britain and the United States, and spread to South Africa during the 1890s and early 20th century. John Dowie was a forerunner of the new group of charismatic evangelists to preach purity, spiritual renewal and faith healing by immersion.

The pentecostal movement attracted many converts, both black and white, mainly from among the urban poor of Johannesburg and Pretoria. Many of the early African leaders had messianic qualities.[42] For Africans, the attraction of the pentecostal movements lay in a message of the power of the Holy Spirit (as opposed to the power of the state-supported missionaries), a return to the life ordained by the Old Testament (which permitted polygyny) and the imminent return of Christ.

The various names attributed to the African Initiated Churches have exerted a considerable power of attraction. Zion, for instance, signifies the sacred Mount of Zion in Jerusalem, while 'Ethiopian', which was the term used for the first generation of Initiated Churches, contains an implicit reference to the passage in the Psalms – 'Ethiopia shall stretch forth her hands unto God'[43] – and an allusion to Abyssinia (one of the only two states to have resisted colonial conquest).[44]

Many of the churches had holy sites, a practice that complemented the traditional African belief in a link between burial grounds and the ancestors' continued protection of the family. These areas functioned not only as sacred places of retreat but also as bulwarks of resistance to the steady dispossession of Africans in rural areas.[45] Currently, the most famous place in South Africa is Mount Moria, which has associations with the Temple Mount in Jerusalem.[46] Moria is the headquarters of the Zion Christian Church,[47] and the site of an annual Easter pilgrimage for South Africa's largest Christian denomination.

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42 Kevin Roy *Zion City RSA: the story of the church in South Africa* (2000) SA Baptist Historical Society 122–123. Enoch Mgijima, for instance, was a powerful preacher given to apocalyptic visions and dreams. Together with his followers, the 'Israelites', he retreated to his ancestral home at Bulhoek, near Queenstown, to pursue a life based on the Old Testament. In 1921, when the group refused to abandon their holy place, the police opened fire, which led to a massacre – and a commission of inquiry. See, too, Isaiah Sheme and the amaNazaretha: Roy op cit 118–122.

43 *Psalms* 68.31.

44 As a result, Ethiopia became a key symbol of African unity and freedom during the course of the 20th century. See Sundkler (n39) at 57–59. See, too, Kiernan 'African Independent Churches' in Prozesky & Du Gruchy (n21) at 116.

45 Chidester (n14) at 326.

46 Moreover, the pentecostal message brought to South Africa by John Dowie was based in Zion, Illinois.

47 A church founded by Engenas Lekganyane in 1910: Roy (n42) at 116ff.

Attitudes to the Initiated Churches – and, indeed, scholarly work on them – have all too often been dictated by the perceptions of the mainstream Churches.[48] In terms of orthodox Christian doctrine, the breakaway movements were heretical, largely because of their incorporation of aspects of traditional African beliefs and practices,[49] typically reverence of the ancestors.[50] Even a relatively sympathetic scholar, such as Bengt Sundkler, described the Zionist movement as a 'syncretistic sect [which] becomes a bridge over which Africans are brought back to heathenism'.[51]

As far as the state was concerned, the African Initiated Churches were initially objects of suspicion. While they were ostensibly apolitical,[52] it could not be denied that most of the leaders were rebels against the racism of the mainstream churches.[53] What is more, many of the breakaway movements identified with African nationalism – a particular feature of the Ethiopian churches[54] – and they appealed to a growing proletariat in the South African cities – a feature of the Zionist churches.[55] Inevitably, members of the Initiated Churches often had trade union associations.[56]

In her chapter of this book, Willemien du Plessis explores the relationship of these churches with both the mainstream churches and the state. She confirms that, for reasons of racism, doctrine and the many issues of South Africa's colonial past, the Initiated churches are neither accepted by the mainstream faiths, but nor are they – by their own claims – modified versions of the indigenous religions. Before Union in 1910, the Cape, Natal, Transvaal and Free State each had their own policies towards the Initiated Churches.

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48 Etherington (n39) at 109.

49 A detailed study of this topic among Xhosa-adherents to both mainstream and African Initiated Churches was made by Berthold A Pauw *Christianity and Xhosa Tradition: belief and ritual among Xhosa-speaking Christians* (1975) OUP.

50 Which, as Berthold A Pauw 'Ancestor beliefs and rituals among urban Africans' (1974) 33 *African Studies* at 99 argues, is in part an adaptive mechanism of survival in an urban environment.

51 A view he was to withdraw in the second edition of *Bantu Prophets in South Africa* (1961) at 297, when he conceded that these were indeed Christian churches.

52 Cf Jean Comaroff *Body of Power, Spirit of Resistance: the culture and history of a South African people* (1985) University of Chicago Press, whose work on Zionist churches disclosed their inherently subversive qualities.

53 See Allen Lea *The Native Separatist Church Movement in South Africa* (1926) Juta, for an early account.

54 Which extended beyond the borders of South Africa to the African diaspora in the United States. In this regard, the government was highly suspicious of links to such bodies as the African Methodist Episcopal Church: Chidester (n14) 117–122.

55 See Archie Mafeje 'Religion, class and ideology in South Africa' in Whisson & West (n 41) at 164ff.

56 Chidester (n14) at 129–130.

The Cape and (surprisingly) the Transvaal were relatively tolerant,[57] whereas Natal and the Orange Free State refused any official recognition.[58] After Union, suspicions lingered, although in 1925 a Church could apply for state recognition, provided that it could prove a continuous and separate existence for a period of ten years, a constitution, buildings, schools and other insignia of proper organisation.[59] With recognition, came inter alia the right to act as marriage officers, freedom of movement, allotment of church and school sites, tax exemptions and education subsidies.[60]

During the struggle against apartheid, the African Initiated Churches had ambivalent relations with the State. While ideologically the lot of the Ethiopians was inevitably cast with the black consciousness movement and the Pan Africanist Congress, a major Church, the Zion Christian Church, advocated obedience to white authority.[61] Since 1994, the ANC has sought to woo the support of the Initiated Churches, but most still remain aloof from politics.[62]

The analytical framework of anthropology

The discipline of anthropology provides a valuable counterbalance to the prejudices so often found in law and theology. Although no social science can ever claim complete lack of bias, modern anthropology seeks to maintain some degree of objectivity about its subject matter.

Historically, however, the discipline developed in tandem with colonial expansion, and so, at first, anthropology carried with it all the European

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57 In fact, the constitution of the Ethiopian Church acknowledged that Kruger's government 'never interfered with, neither discouraged Church affairs, and was prepared to encourage and grant privileges to all religious work without distinction of race, creed, or colour'. Cited by Johan W Claasen 'Independents made dependents: African Independent Churches and government recognition' (1995) 91 *Journal of Theology for Southern Africa* 15 at 16. See, too, Sundkler (n39) at 75–79.

58 In Natal, the Ethiopian movement was linked with African nationalism and resistance to colonial rule (which erupted in the Bambatha rebellion of 1906–1907): David Welsh *The Roots of Segregation: native policy in colonial Natal 1845–1910* 2 ed (1973) OUP 309–310.

59 Sundkler (n39) at 65.

60 Claasen (n57) at 20–21.

61 Chidester (n14) at 242–243 and 137, respectively. See further Sundkler (n39) at 295 and James P Kiernan 'Poor and puritan: an attempt to view Zionism as a collective response to urban poverty' 1977 (36) *African Studies* 31–41.

62 Barbara Bompani 'African Independent Churches in post-apartheid South Africa: new political interpretations' (2008) 34 *JSAS* 665–677, however, argued that the Initiated Churches have always been concerned with political, though not necessarily politically partisan, issues.

biases and preconceptions of the 19th century.[63] In this respect, the early anthropological views were shaped by evolutionary theory, notably the writing of E B Tylor. He classified belief systems according to a progression from animism, to ancestor worship, to polytheism, and, finally, to the supposed pinnacle of development, monotheism.[64] African religions were situated at the lower end of this scale, and, in consequence, were deemed primitive.

In Western terms, such belief systems were typified by the use of magic, because they operate on an assumption that the individual can control and predict physical phenomena through supernatural means. When understood in this way, magic has sinister connotations, for it suggests a link with witchcraft and sorcery,[65] both of which might constitute criminal offences.[66] Magic nevertheless has a close link with religion, deriving from the fact that the two operate in much the same way,[67] since they both use the same rites and materials to accomplish their aims.[68]

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63 Thus, in the search for a definition of traditional African religions, while one approach constructed an inventory of characteristics, another sought to show that the African belief system was the product of a specific type of mentality: Chidester (n14) at 10–11. According to the latter, 'religious life was not simply a distinctive system, but rather a way of thinking: irrational and pervaded by fear and superstition'. This approach is represented by Henri P Junod *Bantu Heritage* (1938) Hortors chapter 6, who contended that the 'unscientific' African mentality was evidenced in totemism, divination, traditional healing, belief in witchcraft and magic, and spirit possession.

64 This scale of development derives from Edward B Tylor *Primitive Culture; Researches into the development of mythology, philosophy, religion, language, art and custom* vol 1 4 ed (1920) John Murray 417. See Nehemiah M Nyaundi *Introduction to the Study of Religion* (2003) Zapf Chancery Publishers 139ff.

65 In fact, magicians often used to be referred to as sorcerers. Witches, however, were usually thought to be born with their powers, whereas sorcerers (and magicians) learned theirs. See Edward E Evans-Pritchard *Witchcraft, Oracles and Magic among the Azande* (1937) Clarendon Press 398.

66 Which are explored by Nelson Tebbe 'Witchcraft and statecraft: liberal democracy in Africa' (2007–2008) 96 *Geo LJ* 183–236.

67 Marcel Mauss *A General Theory of Magic* (1903) (translation by R Brain) (2001) Routledge 64–65.

68 Mauss (n67) at 174–175, however, says that:

> Magic has no genuine kinship apart from religion ... [they] contain more than an external similarity: there is a functional identity ... since they both have the same aims. While religion is directed towards more metaphysical ends and is involved in the creation of idealistic images, magic has found a thousand fissures in the mystical world from whence it draws its forces, and is continually leaving it in order to take part in everyday life and play a practical role there.

Even so, in certain respects, magic may work as the very antithesis of religion.[69] In order to preserve occult knowledge, for example, it is practised secretly and in isolation, whereas religion is usually practised openly, as a public institution;[70] magic seeks only to accomplish specific, tangible results for individual benefit, whereas religion seeks to satisfy general moral and metaphysical ends; magic relies on faith in the personal power of the individual, whereas religion insists on the supremacy of a god or higher spirit forces.[71]

In today's scientistic world, however, magic is considered so naïf as to be treated only as a form of popular entertainment. To the extent to which aspects of traditional religion are written off as a species of magic, they are subject to a double prejudice. In the first place, the established faiths must deny the possibility of anything happening outside God's purpose; magic may therefore be considered blasphemy. In the second place, although magic may resemble an early species of technology or science, it is based on a priori belief rather than logic and experimentation,[72] and, in a scientific culture, it is difficult for any apparently irrational system of thought to compete with science.[73]

Of course, once experimentation and rationality become the legitimating basis for a system of understanding the world, then not only magic but also religion suffers. Although this is all too often the judgment of the modern world, the more disinterested view of anthropology will concede a certain quality of rationality to the two thought systems.[74] Like science, religion and magic specify particular protocols for achieving their goals. Moreover, they serve a similar function to science in society – control over the environment – and all three are based on specialised knowledge, although it must be conceded that magic and religion are based on a priori knowledge.

The point of this exposition of magic, religion and science is to show that attitudes have changed markedly as a consequence of shifts in politics and

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69 Tambiah (n13) at 3.

70 Mauss (n67) at 29. See, too, Bronislaw Malinowski *Magic, Science and Religion* (1948) The Free Press 57.

71 From the point of view of a religion, God is responsible for the direction of the world and may be deflected from this purpose by prayer and supplication: Mauss (n67) at 27.

72 Mauss (n67) at 114.

73 James G Frazer *The Golden Bough: the magic art and the evolution of kings* part 1 (1911) Macmillan & Co 420–421 could therefore dismiss magic as simple fallacy.

74 Malinowski (n70) at 87. Mauss (n67) at 174 also regarded magic as a social phenomenon akin to religion and science, although in a distinct category: while science can be revised and developed through rational thought, magic is less considered and systematic, making it less respected than either science or religion.

ideology.[75] During the European Middle Ages and Renaissance, alchemy and astrology – close partners of magic – verged on being respectable sciences.[76] The Reformation, however, opened the way for freedom of thought and a new, empirical understanding of the world, in which there was no room for supernatural systems of cause and effect.[77] The Enlightenment, in its turn, deepened the distinction between the empirical sciences and belief-based thought systems.[78]

By working with observation and logical argument, science encouraged progressive development, because each proposition was open to challenge, elaboration, and thereby change. As a result, the store of knowledge could be constantly extended. By comparison, religious knowledge remained fixed and absolute. Science had the attraction of giving individuals the means to gain greater personal control over their environment.[79]

This is not to say that the belief systems of traditional cultures bear no comparison with Western scientific thought. Horton, for one, argues that all these systems are applications of 'theoretical thinking', but that they differ in the idiom in which they are expressed.[80] He begins his account by showing that every culture uses common sense to explain human experience. In order to explain the forces that operate behind and within the common-sense world, however, it becomes necessary to select certain forces as causes of observable effects. Theory – or the imposition of an intellectual, rational order on everyday life – is then born.[81]

By establishing events in a new causal context, theory has greater explanatory value than common sense, because the latter is limited by what we actually see and experience. A theoretical formulation therefore functions as an intermediate link between natural causes and natural effects.[82] In everyday life, however, common sense is not abandoned.[83] In fact, we always continue to rely on common sense, because it is generally more readily to hand, and it is perfectly adequate for explaining a wide range

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75 Notably during the Reformation and Enlightenment: Tambiah (n13) at 2 and 4–5.

76 Newton himself began his work in mathematics because he wanted to see 'whether judicial astrology had any claim to validity': Tambiah (n13) at 28.

77 Tambiah (n13) at 31 and Keith Thomas *Religion and the Decline of Magic* (1971) OUP 80.

78 Tambiah (n13) at 11–15.

79 Tambiah (n13) at 8.

80 Robin Horton 'African traditional religion and Western science' (1967) 37 *Africa* 50–71 (reproduced as 'African traditional thought and Western science' in B R Wilson (ed) *Rationality* (1984) Blackwell).

81 Horton (n80) at 51.

82 Horton (n80) at 53.

83 And, indeed, complements theory: Horton (n80) at 59.

of commonplace events. The shift to theory is required only occasionally, when circumstances arise that can be better explained by reference to a wider causal vision.[84]

Although both traditional belief systems and science share a basis of theoretical thought. Horton nevertheless argues that the differences between them depend on whether they exist in open or closed cultures.[85] He classifies scientifically oriented cultures as 'open', because the people concerned are aware of other modes of thought. Traditional cultures are 'closed', because they are unaware of alternatives.[86]

The restless surge of science and technology in the modern world is constantly diminishing the explanatory power of religion. Its role is confined to playing 'the God of the gaps', namely, to contend with issues left unexplained by science. Hence, notwithstanding the more sympathetic views of anthropology, it is difficult to say whether the reputation of traditional African religions fares any better in the 21st century than it did under the first impact of Christianity and colonialism.[87] On the one hand, the sceptical age of postmodernism is more tolerant of cultural relativism, but, on the other, science, atheism and agnosticism can discount the importance of any belief system.

The Constitution and the law

Devalued and misunderstood, traditional religions may appear the orphans of the new millennium. How is the law reacting – and how should it?

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84 Horton (n80) at 60 says, however, that '[l]evels of theory vary with context'. It breaks up aspects of commonsense events, abstracts them and then reintegrates them into the common usage and understanding (op cit 62). The process of abstraction thereby allows theory to transcend common-sense explanations. Once a theoretical model has been established, it is often modified to explain contradictory data, so that it may no longer represent the analogy on which it was based (op cit 66).

85 Horton (n80) at 70.

86 The varying sources of information in these systems result in differences in form, which, Horton (n80) at 66–67 says, often prevent observers from seeing the similarities between the systems as two applications of theoretical thought.

87 Whether traditional African beliefs are less rational than Western science in seeking to explain gaps in our knowledge of the workings of the physical world, however, must be a culturally determined value judgement. See *R v Bourne* [1939] 1 KB 687 and *Konkomba v The Queen* (1952) 14 WACA 236, together with the commentary by Robert B Seidman *Sourcebook of the Criminal Law of Africa, Cases, Statutes and Materials* (1966) Sweet & Maxwell at 511–512 (and Robert B Seidman 'Witch murder and mens rea: a problem of society under radical social change' (1965) 28 *MLR* 46ff) to illustrate the point.

Lourens du Plessis opens this discussion. Although historically in South Africa the state has leaned heavily in favour of Christianity – and latterly, of course, in favour of the Dutch Reformed denominations – the 1996 Constitution introduced a neutral stance on matters of religion. In the first place, s 9(1) of the Bill of Rights undertakes to ensure that everyone enjoys equality before the law and equal protection of the law. By implication, all religions should be treated equally.

In the second place, the Constitution guarantees religious rights in generous terms.[88] Section 15(1) gives everyone 'freedom of conscience, religion, thought, belief and opinion' and s 31(1) gives people belonging to religious communities the right, together with their co-religionists, to practise their religion and 'to form, join and maintain' religious associations and other such bodies of civil society.

The guarantees given in s 31, however, are subject to a so-called 'internal' limitation clause, ie, the freedoms of religion, culture and language 'may not be exercised in a manner inconsistent with any provision of the Bill of Rights'. In addition to the internal limitation clause, both ss 15 and 31 must be read in light of a general limitations clause in s 36, whereby religious rights may be limited by laws that are 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

Du Plessis undertakes a careful analysis of the four cases that have been heard in the Constitutional Court concerning these provisions. In the secular democracies of the 21st century, freedom of belief and conscience seldom gives cause for dispute, since it has long been accepted that the state may not insist on compliance with any particular belief. Indeed, the Constitutional Court has held that the South African Constitution has no 'establishment clause'.[89] The physical – and especially the public – manifestation of belief, however, is another matter.

In none of the four cases did the Court have any problem upholding the principle of equal treatment. Instead, the issue centred on claiming an exemption from limiting laws to be free to practise the tenets of Christianity, Rastafarianism or Hinduism. In this regard, the most recent decision, *MEC for Education: KwaZulu Natal v Pillay*,[90] established a positive 'jurisprudence of accommodation', which, as Du Plessis says, 'affirms and, indeed, celebrates

88 And fulfils international human rights obligations, notably, art 18(1) of the International Covenant on Civil and Political Rights (1966) and art 8 of the African Charter for Human and People's Rights (1982).

89 Which, in terms of the First Amendment to the American Constitution, is interpreted to be a prohibition on the establishment of a national religion by Congress or the preference of one religion over another.

90 2008 (1) SA 474 (CC).

"otherness" beyond the confines of mere tolerance or even magnanimous recognition and acceptance'.

As yet, the courts have had little opportunity to put this jurisprudence to the test, especially in relation to the right to practise a traditional African religion – which happens to have been argued in only three cases. In each instance, those arguing religious rights sought to effect a ritual – a burial or an animal sacrifice (the rituals most in contention when traditional African beliefs are asserted) – in contravention of another individual's rights or a statutory prohibition. As a result, all of the cases involved a balancing of interests as required in a limitations inquiry.

Christa Rautenbach applies this inquiry in her examination of a traditional Zulu First Fruits Festival (*Umkhosi Ukweshwama*). The proposal to revive the event provoked a public outcry, especially from animal rights activists, since it required the killing and (allegedly) torture of a bull. For Rautenbach, a critical question is whether the festival is simply a cultural event or a religious ritual, and whether local legislation regulating the slaughter of animals should override the constitutional protections offered to religion and culture.

Although an application by an animal rights trust could be dismissed for want of a factual basis, Rautenbach argues that: 'A diverse society such as South Africa's necessitates an approach of legal accommodation.' This type of approach would require the government to allow minorities to carry out their religious obligations.

Willemien du Plessis addresses the more general question of when the state should treat religion as a purely private matter or when it should intervene to impose some form of regulation. She notes that the judicial policy in South Africa is one of 'non-entanglement', namely, that the state should not interfere in matters of doctrine and the day-to-day affairs of religious bodies.[91] Rather, it should exercise its powers to ensure that procedures are correctly followed.

While, according to the case law, South Africa is not a secular state, it is nevertheless obliged to retain neutrality towards religion, in that it must recognise all religions on equal terms. Du Plessis then poses the question whether this policy extends to the African Initiated (or Independent) Churches, given their unhappy relationship with the state and fact that

91 See, in this regard, *Mankatshu v Old Apostolic Church of Africa* 1994 (2) SA 458 (TkA), *Allen NNO v Gibbs* 1977 (3) SA 21 (SE), *Ryland v Edros* 1997 (2) SA 690 (C) at 703, *Worcester Muslim Jamaa v Valley* 2002 JOL 9538 (C) paras 106–111, *Taylor v Kurtstag NO* 2005 (1) SA 362 (W) 39 and *Singh v Ramparsad* 2007 (3) SA 445 (D) para 50.

the mainstream churches refuse to accept them as equals. To this end, she analyses various statutes, which have implications for religious bodies, to determine whether they allow account to be taken of the Initiated Churches: the Income Tax Act 58 of 1962, Nonprofit Organisations Act 71 of 1997, Marriage Act 25 of 1961, Correctional Services Act 111 of 1998, Extension of Security of Tenure Act 62 of 1997, Labour Relations Act 66 of 1995 and the Defence Act 42 of 2002. She concludes that, in all cases, the language used gave no indication of preferring or excluding a particular religion, and, indeed, the constitutional guarantee of equality would ensure that Initiated Churches suffer no discrimination.

Kelly Phelps' chapter turns to consider systems of African belief and the criminal law. After colonisation, the criminal justice system in South Africa was based on standards set by the colonial powers. Hence, if a criminal act led to serious injury, the courts gave short shrift to arguments that the accused acted in accordance with traditional African cultures or beliefs. Phelps now contends, however, that the earlier approach should be revisited in view of the constitutional protection afforded religion and culture.

In this regard, the courts and academic commentators in Europe and North America have argued that the cultural and religious practices of minority groups should be accommodated under a so-called 'cultural defence'. Phelps examines this concept in relation to acts where the accused was motivated by a belief that he was entitled to 'kidnap' a bride, kill in defence of witchcraft or kill to ward off a *tokoloshe*. From her analysis of the standard elements of a crime, Phelps concludes that belief or culture may operate as an exculpatory argument in terms of one of the defences: sane automatism, incapacity, provocation, lack of fault and, especially, mistake of law. (In fact, belief has already been taken into account in the case of *S v Ngang*,[92] which involved the killing of a suspected *tokoloshe*.) As a result of her analysis, Phelps considers that South African law does not need to create a new defence to accommodate religion or culture, since the existing defences already serve this purpose.

Nelson Tebbe undertook a separate study of the South African laws concerning witchcraft. In Africa, as in Europe, witchcraft exerted a powerful and destructive influence on society. The European colonial administrations, however, could not afford to acknowledge its efficacy. From the standpoint of late 19th-century scepticism about magic and sorcery, acceptance of witchcraft beliefs would have appeared primitive and irrational. Thus, the colonial legislatures did not attempt to prohibit

92 1960 (3) SA 363 (T).

the practice of witchcraft. Instead, by way of the Witchcraft Suppression Act 3 of 1957,[93] they criminalised its imputation. This legislation, although reviled for its expression of colonial and apartheid era thinking, is still in force.

Tebbe draws attention to the alarming number of attacks on supposed witches and the many *muthi* killings for body parts in South Africa. He goes on to describe official reactions. These include a national law of 2007, which stiffened punishment for murders related to witchcraft or the removal of body parts,[94] and a bill initiated in Mpumalanga province to outlaw not only accusations of witchcraft but also its 'professed' or 'pretended' exercise.[95]

Tebbe proposes a normative continuum. At one end lies the state's clear duty to punish actions designed to cause grievous harm to others. At the other lies the constitutional freedom to believe in the existence of occult forces, and even to think that others are manipulating those forces to cause harm. Between these two poles lie difficult questions. Do the rights to freedom of speech and religion permit the naming of witches (either in public or private)? How are witches to be identified, given the fact that the process of divination is bound to contravene the right to fair trial? If accusations of witchcraft consistently target women, the elderly and the disabled, would giving effect to these accusations in the judgments of courts and the provisions of statutes amount to indirect discrimination?

Rediscovering the values of African traditional religion

The last three chapters of the book consider the positive contributions that traditional African religions can make to modern South African society. Before this is possible, however, certain misconceptions must be dispelled and harmful practices restrained.

Michael Eastman examines the much misunderstood subject of traditional healing. To the Western mind, this practice is linked to superstition and the more sinister side of belief systems, witchcraft. As was apparent in the earlier account of science and belief,[96] Western ideas of scientific validation mean that biomedicine must be taken as the benchmark for proper healing. Indigenous methods are considered to be quackery or witchcraft.

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93 As amended by Act 33 of 1997.
94 Section 5 of the Criminal Law (Sentencing) Amendment Act 38 of 2007.
95 Witchcraft Suppression Bill of 2007.
96 See xxiii–xxiv above.

In South Africa, biomedicine is statutorily regulated and standardised,[97] while traditional healing has been legislated against.[98] Nonetheless, as Eastman shows, access to biomedicine is financially, culturally and geographically inaccessible for the great majority of South Africans. Traditional healers are, of necessity, a major source of health care. Although figures are hard to come by, approximately 70 per cent of the population consults one of the 150 000 to 250 000 traditional healers, of whom about 22 000 are now registered with the Traditional Healers Organization (an accredited training service provider).

Recently, government policy on traditional healing was changed, in part because of South Africa's rampant HIV/AIDS epidemic. The result has been the Traditional Health Practitioners Act 22 of 2007, in which the state seeks a rapprochement between biomedicine and traditional healing. This enactment provides that individuals wishing to be recognised as traditional healers require proper qualifications (although these have not yet been devised, nor has the definition of traditional healing). While the traditional and biomedical approaches have no formal, institutional overlap, South Africa has at last put the needs of patients foremost.

Loretta Feris and Charles Moitui's chapter on environmental protection recommends a similar rapprochement. Because specific plant or animal species supply the pharmacopeia of traditional healers, and because the healers' services are in increasing demand, certain species are now under threat of extinction. Protection of the environment is a difficult problem to solve, for it involves controlling the activities of harvesters, retailers, buyers (the traditional healers) and the end users.

At present, the National Environmental Management: Biodiversity Act 10 of 2004 together with a set of Regulations,[99] sets out to deal with the matter. These instruments give the Minister power to list endangered or protected species and to restrict activities concerning them. (The activities include hunting, killing, gathering, importing, exporting, growing, moving and trading.) Anyone wishing to carry out one of the proscribed activities must apply for a permit. Thus, traditional healers may continue to harvest and sell medicines, but these activities are now to be controlled in the long-term interests of biodiversity.

Although the threat of overharvesting rare species is experienced worldwide, legislative initiatives, such as the above, have yet to provide a

97 Principally by the Health Professions Act 56 of 1974 and the National Health Act 61 of 2003.

98 Witchcraft Suppression Act 3 of 1957, as amended by Act 33 of 1997.

99 GNR152 of 23 February 2007.

viable and lasting solution. In this respect, Feris and Moitui suggest that greater recognition of traditional African religions may help to provide an answer. As they say, the values underlying these belief systems have been distorted, misunderstood and marginalised through forces of unrestricted materialism and industrialisation – which are, ironically, the very forces now posing the greatest threat to the environment.

Through respect for the ancestors and sacred sites, together with the regular performance of rituals and observance of taboos on the hunting and killing of certain plants and animals, the practice of traditional religions will conduce to a more harmonious relationship between humans and nature. Hence, Feris and Moitui argue that, according to indigenous beliefs, '[h]umans are not seen as the masters in the universe but, rather, as the centre, the friend, the beneficiary and the user'.

In the final chapter, Tom Bennett and James Patrick deal with ubuntu, the ethical system underlying traditional African religions. Since the advent of the South African democratic constitution, the African cultural heritage, and with it the indigenous belief system, is enjoying a new respect. A key aspect of this heritage is ubuntu.

The courts have already begun elaborating ubuntu into an equitable principle to guide restorative justice and the resolution of disputes. But the concept is much more generous than is implied in the law. It is about 'compassion, compromise, unity, tolerance and empathy', and it emphasises responsibility rather than right. Implicit in ubuntu is the idea that people are to be mutually caring and concerned; they are expected to 'go the extra mile'. As a result, ubuntu cannot be codified or legislated for. It is not legalistic, and, as such, it 'resists the dictate of Western logic and argumentation'.

While this principle of right living has its parallel in the Christian ideal of *agape* and in situation ethics, it is nonetheless, distinctively African. As Bennett and Patrick observe, ubuntu lies at the root of ancestor veneration and provides the ethical standard for traditional systems of African belief. It runs counter to the modern Western view of social atomism, which emphasises individuals as the centre of things. In the African view, 'I participate therefore I am'. In this way, the individual's existence is defined in relation to a whole, although this is not to say that an individual is merely a part of a whole, but rather as a whole in him or herself.

The authors ask whether ubuntu, which is an ideal founded in pre-colonial Africa, speaks to the modern world. Using the examples of how ubuntu can contribute to environmental protection and even accommodate same sex unions, they argue that it can and does. Here they echo Nyaundi and

Masondo's views that the generous spirit of traditional African religions has a definite place in today's society. They conclude their chapter by referring to Mfuniselwa Bhengu: one's neighbours should be viewed as a wealth of knowledge. If we were to accept them, and learn from them, we could accept the differences and concomitantly the similarities. By this we can infer a celebration of the jurisprudence of difference.

To return to the question posed in the opening sentence of this chapter: are traditional African religions already dead or, at best, dying? In a sense, the question itself presupposes Africa as the helpless victim of alien forces. A more reliable answer will be obtained, however, if we were 'to ask not what was done to Africa but what Africa did'[100] – and continues to do.

Traditional religions provide answers to the enduring questions about life: for instance, why do some enjoy good fortune and others suffer evil? Evil can be accounted for: the ancestors may be censuring a lapse of ritual or a violation of ethical duties, or a witch or sorcerer might have been at work. Traditional religion also provides the means for correcting harm – by calling on the services of a herbalist or diviner – or the means for prophylaxis – by performing a ritual to mark a critical change in an individual's life cycle or to ensure fertile land, productive crops and a good rainfall.[101]

The authors of the first two chapters show that traditional African religions have, in Nyaundi's words, a self-preserving power to provide 'a unified system of beliefs and practices' to explain the inexplicable and give meaning to people's lives. Or, as Masondo says, traditional religion provides a 'this-worldly worldview'.

100 Chidester (n14) at 6. See further Rosalind I J Hackett 'Revitalization in African traditional religion' in Jacob K Olupona (ed) *African Traditional Religion in Contemporary Society* (1991) Paragon House at 135–146.

101 More detail about this paragraph can be found in Chidester (n14) at 9ff.

CHAPTER 1

African Traditional Religion in Pluralistic Africa: A Case of Relevance, Resilience and Pragmatism

N M Nyaundi

Thoughts about religion

Religion is as universal as language, and, in one form or another, is found in all human societies. Indeed, because of its universality, it is one of the most examined social activities. In this chapter I show that religion is relevant, resilient and pragmatic, and I argue that this view applies to all religions.

The concept of 'religion' is notoriously difficult to define.[1] Disagreements about its meaning often begin with a debate about the etymology of the term, as the original word may give a clue as to how 'religion' is to be understood. In this regard, scholars differ as to whether it is the Greek – *theosbeia* (reverence for God) – or the Latin – *religare* (to bind together) – that best conveys the connotations.

Although definitions continue to proliferate, no single attempt can be considered conclusive or sufficient. One reason for this failure is that scholars have emphasised in their definitions the aspects of religion relevant to their discipline.[2] Another reason is the problem of capturing the essence of a complex subject in a definition that is expected to be no more than a few lines long.

Definitions concentrating on the relationship between religion and society have been particularly numerous, among them: religion is no more

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1 See, for instance, Max Weber, who is widely regarded as the founder of the sociology of religion: *The Sociology of Religion* (1922) Social Science Paperbacks edition 59.

2 A dictionary definition of religion is 'belief in the existence of a supernatural ruling power, the creator and controller of the universe': A S Hornby (ed) *Oxford Advanced Learner's Dictionary of Current English* (1974) OUP 713.

than an 'opium of the people' (Karl Marx)[3]; religion is the 'feelings, acts and experiences of individual men in their solitude' (William James)[4]; religion is 'a unified system of beliefs and practices relative to sacred things' (Emile Durkheim)[5]; and religion is the 'universal obsessional neurosis of mankind' (Sigmund Freud).[6] Contemporary American sociologists Charles Y Glock and Rodney Stark consider religion to be 'one variety of value orientations, those institutionalized systems of beliefs, symbols, values, and practices that provide groups of men with solutions to their questions of ultimate meaning' .[7]

The multidimensional nature of religion is apparent in the fact that what is religion to one person is not religion to another. Where one believer reveres the Holy Bible, another looks to the *Bhagavad Gita;* when a third reveres the *Quran*, a fourth looks to the *Zend Avesta.* Consider, too, the various manifestations of religious observance: the African who dons special sacred regalia during prayer at a shrine; the Hindu who, for *puja*, burns incense in a dedicated corner of the house; the Muslim who lies prostrate at a busy airport during one of the five daily sessions of prayer; the Christian who goes to the confession box to open her heart to the priest. These are all dimensions of the same phenomenon.[8]

Durkheim underscored the reality of religion by contending that it is a self-existent and firmly grounded phenomenon because it answers real human needs. His argument goes something like this: 'religion is not founded on illusions; feelings of religion answer something which is real.'[9] Another commentator who noted the enduring need of religion for humanity and society was Jules Michelet (1798-1874), a French historian and moralist, who wrote a famous essay on the religious philosophy of the

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3 Karl Marx 'Introduction' in Karl Marx (Joseph O'Malley (ed)) *Critique of Hegel's 'Philosophy of right'* (1970) (translated by Annette Jolin) CUP 131. See also Owen Chadwick *The Secularization of the European Mind in the Nineteenth Century* (1975) CUP 49.

4 William James *Varieties of the Religious Experience* (1961) New American Library 42.

5 Emile Durkheim *The Elementary Forms of the Religious Life* (1915) George Allen & Unwin 236.

6 See David M Wulff *Psychology of Religion: classic and contemporary views* (1991) John Wiley & Sons 275.

7 Charles Y Glock & Rodney Stark *Religion and Society in Tension* (1973) Rand McNally & Co 17.

8 For a discussion of religion as a multidimensional phenomenon, see Nehemiah M Nyaundi *Introduction to the Study of Religion: a study of the phenomenon of religion* (2004) Zapf Chancery Publishers 38–43.

9 Durkheim (n5) at 226.

people.[10] He affirmed the dominance of religion over history in his comment that: 'Catholicism would die, Christianity would die, but men would still be religious.'[11]

In the sociology of religion, the religious phenomenon is regarded as something close to a living organism, albeit one that has defied the passage of time. Religion is believed to be as old as humanity, and, for their adherents at least, the different faiths are regarded as eternal institutions. Religion is alive when a person is born; it accompanies that individual through his or her lifespan and it remains when that person dies. Thus social scientists conceive of religion as a transcendent preoccupation, in the sense that it is a never-ending and timeless activity.

Although scholars may have different approaches to the subject, they are generally agreed on the place of religion in society:[12] it has a prominent position in all cultures, and has a perpetual attraction, which all individuals and all cultures accommodate without prompting. Social life depends on symbols of communication, which may differ from one culture to another. Religion is one of a group of symbols cutting across all cultures. In this sense, it is a social arrangement that serves to integrate society, for it is a force that energises cultural symbols to emit the meaning they are expected to portray, making it a system of authoritative beliefs about the world.

As a social phenomenon, religion has the capacity to exert and to position itself. Sociologists of the subject capture this feature in the Latin term, *sui generis*,[13] which implies that religion can exist in its own right. It is a power that cannot be wished away. One well-known commentator on the authenticity of religion, the German theologian Rudolf Otto (1869-1937), stressed the indisputable place of religion in society, and contended that it is an irreducible actuality.[14] He said that religion is as much a matter of fact as the reality of humanity itself.

It is in this way that religion supplies the same social function irrespective of denomination. We may notice that the feeling enjoyed by a Christian after listening to a stirring sermon from a favourite preacher is the same as

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10 Jules Michelet *Le Peuple* (1846) Hachette et Paulin.

11 Jules Michelet quoted in Chadwick (n3) at 200.

12 Peter Connolly (ed) *Approaches to the Study of Religion* (1999) Cassell, for instance, presents a symposium examining religion from anthropological, feminist, phenomenological, philosophical, psychological, sociological and theological angles.

13 Rudolf Otto *The Idea of the Holy : an inquiry into the non-rational factor in the idea of the divine and its relation to the rational* (1917) (translated by John W Harvey 1923) OUP at 154.

14 Ibid.

that experienced by a Muslim after an articulate discourse from a popular imam, and the same as that experienced by an African after pouring a libation to the ancestors. Moreover, religions all share the common function of regulating society and individuals in a distinctive manner. Because of the promises and sanctions in religion, the believers are socialised to restrain themselves from engaging in self-destructive or anti-social behaviour. And, because religion shapes the thoughts and actions of believers, many people who might otherwise have become thieves, muggers, rapists or fraudsters refrain from so acting because of the religious teaching against crime.

Religion may not be objective reality but it certainly is an activity whose meaning for the faithful cannot be gainsaid or overstated. Sociologists regard it as one of the most powerful and deeply felt forces in society.[15] As such, it is a highly significant component of social structure whose influence shapes inter alia relationships, dietary habits and perceptions of reality.

For the individual believer religion is a powerful force which may be manifested silently, audibly or loudly and outrageously. It is practised for various different reasons: by the trader to implore the deity for success in business, by an athlete to guarantee stamina at the track or by a student to invite success during an exam. In sum, religion is an expressive activity whose manifestation may be found in sacred dance, monastic quiet, ritual song, poetry and pilgrimage.[16]

In this chapter, I proceed from the premise that religion, whatever it may be and wherever it is practised, is the same, because it has the same function for the believer. With this understanding, I now consider a particular religion, African traditional religion (ATR).

The Euro-American view of African traditional religion

In a recent groundbreaking work on Africa, the authors note that: 'It is fair to say that African religions have been subjected to the most negative stereotyping of any religious tradition.'[17]

What I refer to as the Euro-American view is drawn from pioneering studies completed by anthropologists, ethnologists, explorers and missionaries. The study by English anthropologist Edward Burnett Tylor (1832–1917), *Primitive Culture* (1871), established a particular view of the

15 Meredith B McGuire *Religion: the social context* (1992) Wadsworth Publishing Co at 3.

16 Indeed, the variety of its purposes and manifestations is one of the reasons why the phenomenon is so difficult to define.

17 Kwame A Appiah & Henry L Gates Jr (eds) *Africana. The Encyclopedia of African and African American Experience* (1999) Basic Civitas Books 31.

development of religions[18] by popularising the idea that religion originated with animism, a belief that natural objects have souls. Tylor formulated a classification of religious beliefs, beginning with animism and then progressing to ancestor worship, polytheism, and finally monotheism. Traditional African religious beliefs were consigned to the lower categories, and were described by various derogatory terms, inter alia, 'animist', 'primitive', 'savage', 'heathen', 'pagan' and 'tribal'.

Following from Tylor, a number of studies worked on the assumption that religions could be divided into those of a higher order and those of a lower order. An example of this may be found in the work of the Scottish anthropologist Sir James George Frazer (1854–1941),[19] who surmised that religion featured as the second development in a sequence: magic, religion and science. African religious beliefs were said to fall into the category of magic.

The denigration of African religious beliefs may be one of the enduring legacies of the 19th-century Euro-American mentality, which saw Africa as devoid of the light of Christ, and therefore 'dark'. The expression 'dark Continent' was, in fact, coined during the 19th century at a time when much of Africa was unexplored and unknown to most Europeans, and therefore 'dark' in their thinking. However, what may have started off as a harmless epithet, without condescending sentiments, later came to have insulting and demeaning connotations.

When Christian missionaries arrived, the mood was already strongly opposed to ATR. At home, in Europe and North America, opinion was fixed, so that missionaries arrived in Africa with their minds set against a religion which was perceived as satanic and vain. ATR had no chance of proving its legitimacy.

When colonial governments were established in Africa, they worked with the understanding that ATR was a non-religion. Administrators, settlers, fortune-seekers and other foreigners did not seek actively to suppress ATR, but they paid it little or no regard. The interest of those prepared to study the subject lay in rituals and ceremonies, which, to the outsider, appeared

18 Edward B Tylor *Primitive Culture; Researches into the development of mythology, philosophy, religion, language, art and custom* vol 1 (1871) 4ed (1920) John Murray defined religion as belief in spiritual beings. The term 'animism' (the belief that all objects, such as stones, trees and the wind, have a soul) is associated with Tylor. Elsewhere in the book, the term 'animism' is expressed as the minimum definition of religion.

19 His major work, *The Golden Bough: a study in magic and religion* (1890) Macmillan & Co, was for many years considered an essential reference on religion and magic.

exotic.[20] Many surveys of the so-called major religions of the world omitted ATR from the list, and thus excluded the entire African continent from the religious map of the world. Although erroneous, the error is still perpetuated by certain contemporary and otherwise well-informed students of religion.

Certain church historians of Africa thought that, because pioneer Christian missionaries saw none of the trappings of Euro-American religion (bells, cathedrals and clerical collars), Africa could have no religion. Thus Adam Chepkwony notes with regret that, whenever ATR was included in a book about world religions, it was not accorded the status of a bona fide religion. It was sidelined and labelled a 'primitive form of religion', one that was irrational, and to be considered useful only for comparison with rational beliefs.[21] Although such thinking has since been generally repudiated, the renowned Africanist, Bolaji Idowu, writing in the 1970s, described how easily African religious beliefs were dismissed and noted the hidden resistance to treating them with respect. He said that the world 'still has to be convinced that there is an indigenous religion of Africa and that, by right, it deserves the name of religion'.[22]

What is African traditional religion?

African traditional religion comprises the indigenous faiths of Africa whose origins and founding are not clearly understood. As with the term 'religion', there is no generally accepted definition of ATR, although a number of attempts have been made. Few African languages have a single word that is equivalent to the term 'religion', although they may have expressions which describe the experience. Absence of that crucial term, however, is a possible reason for the lack of a definition.

Two experts on the subject, Idowu and Mbiti, indicate the complexity of the matter. Many thought that Idowu's work of the early 1970s produced a definition, since the title of his book – *African Traditional Religion. A Definition* – suggests this. The nearest Idowu came to a definition, however, is a list of five characteristics.[23] These were: belief in God, divinities, spirits, ancestors and the practice of magic and medicine.

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20 A typical colourful event to attract attention would be the funerary rites for the death of an African king, who might be buried alongside his spear, stool, a gourd of milk and a calabash of cooked meat.

21 See Adam Chepkwony *African Religion in the Study of Comparative Religion. A Case Study of Kipsigis Religious Practices* (1997) unpublished DPhil thesis, Moi University Kenya 77–78.

22 Bolaji Idowu *African Traditional Religion. A Definition* (1973) SCM Press ix.

23 Idowu (n22) at 139.

John Mbiti contended that, although no brief definition would suffice for ATR, it was, for the believers, 'the normal way of looking at the world and experiencing life itself'.[24] He went on to identify what he called 'some wrong ideas about African religion'.[25] He rejected the argument that ATR is ancestor worship, superstition, animism, paganism, magic or fetishism, and argued that it 'is not constructed around magic'.[26] According to Mbiti, the origin of the African belief system can be traced to people's response to 'situations of their life and reflect[s] upon their experiences'.[27]

Unfortunately, much of the early history of ATR is lost, although it is believed to have evolved through the believers' interactions with natural phenomena. As such, it reflects the thinking of Africans in relation to the sacred, their beliefs and practices regarding the cosmos, their view of the world and the individual's place in it.

We cannot be entirely certain whether ATR is a unitary faith or a cluster of religions. In this respect, some scholars write about 'religions', not 'religion'. Of course, the many ethnic groups in Africa all have their own conceptions of religion, and it is wrong to make sweeping generalisations. Even so, there are certain striking similarities.

Belief in the supernatural is one significant point of convergence, and the main focus of this belief is a supernatural being who is one, but served by divinities, spirits, ancestors and ritual personalities. The supernatural is believed to be a being, not a principle. He is masculine[28] with attributes such as omniscience, omnipresence, omnipotence, immutability and eternity. Idowu wrote:

> *[W]e find that in Africa, the real cohesive factor of religion is the living God and that without this one factor, all things would fall to pieces. And it is on this ground especially – this identical concept – that we can speak of the religion of Africa in the singular.*[29]

Worship is directed to the supernatural being, who may be approached directly or through intermediaries. The place of worship is at the individual's dwelling, a sacred grove or a shrine, which may be set up at or near an awe-inspiring natural phenomenon such as a tall tree, a mountaintop, a deep cave, a forest, a waterfall or the bank of a fast-flowing river. At sunrise or

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24 John S Mbiti *Introduction to African Religion* (1975) Heinemann 12.
25 Mbiti (n24) at 16–18.
26 Mbiti (n24) at 17.
27 Mbiti (n24) at 17.
28 Cf Kofi Asare Opuko 'African traditional religion: an enduring heritage' in Jacob K Olupna & Sulayman S Nyang (eds) *Religious Plurality in Africa* (1993) Mouton de Gruyter 67 at 71.
29 Idowu (n22) at 104.

sunset, a prayer may be said in veneration of the supernatural or of the ancestors. This may take the form of a vocal petition, an animal sacrifice, an offering of farm produce or the pouring of a libation at a meal.

Mbiti remarked that Africans are 'notoriously religious'.[30] Following from this statement, contemporary observers have said that, if Africans cannot find God, they will create a god. The contrast with people in Europe or North America is marked: there, valuable time is squandered on argument about the existence of God; in Africa, people argue about whether one God is enough.

ATR has its origins in a non-literate culture. What is known about the religion is preserved in the memory of the elders, and is transmitted by word of mouth. Because we have nothing on record about its past, we cannot be sure that what we know today is what the religion has always been or was even a hundred years ago. It is, of course, possible to refer to what was written in the past, but the record was compiled by non-Africans who had less regard for the authenticity of the beliefs than their adherents.

Africans are presumed to adhere to their traditional religions by virtue of their birth, so that belonging is more a matter of birthright than choice. No conversion experience is required in order to belong. While the fact of being born an African is generally the only qualification, with the proliferation of new religions in Africa, it has become less and less certain whether individuals should be assumed to be adherents of ATR.

ATR has no authoritative sacred texts (or scriptures) and, because rules are not enshrined in documents that can be used to ensure uniformity, it has no dogmatic teachings. The many ethnic groups each have their own understandings of reality and the sacred. Not only may adherents hold divergent views, but they are also sufficiently pragmatic about their beliefs to accommodate the realities of the moment. Thus ATR has a dynamism which allows it to change with the times.

It would be quite wrong, as Mbiti points out, to think of ATR as nothing more than magic, witchcraft and superstition, but it must also be accepted these beliefs are part and parcel of the belief system, indeed, inherent in the very fabric of African cosmology. Hence, many accept that a jealous neighbour can cause disfigurement to a healthy baby through magic, that through witchcraft a rival can use pieces of hair to make someone fail an examination or that a black cat crossing one's path is a bad omen that calls

30 John S Mbiti *African Religions and Philosophy* (1969) Heinemann 1.

for cancellation of a journey. (The word widely used in West Africa to denote all these beliefs is *juju*,[31] which is commonly translated as superstition.)

According to Mbiti, magic is an invisible and mystical force that can be used to achieve good or cause harm.[32] People who have magical powers may inherit them or may be initiated into their use. Because of its potential for harm, magic – and those who control it – is greatly feared. When people know that magic can be used against them, they refrain from socially unacceptable behaviour; conversely, when people are protected by magic charms, they have a sense of security. In this way, magic functions as a form of social control.

Like magic, witchcraft is a manifestation of mystical force, which can be inherited or acquired through training. And witches, too, are able to cause harm by manipulation or mystical power, using rituals, curses, magical objects, the victim's hair, bodily discharges, clothes or other personal possessions.

Superstition, Mbiti says, is a 'readiness to believe and fear something without proper grounds'.[33] In terms of this definition, non-believers might disparage religion as belief on 'improper' grounds, but for believers it is based on well-founded phenomena.[34] On the latter reasoning ATR is clearly not a system of mere superstition, and therefore should not be relegated to one of the lower order beliefs.

The nature of African traditional religion

It would not be far-fetched to say that, in a traditional African society, religious beliefs stand at the centre of life. They detail how life is to be lived, how relationships are to be shared, how natural phenomena are to be understood and, in each case, how the individual can contribute. ATR helps the individual and the community to formulate a world in which events are not random, but have reason and meaning.

ATR may be described as communal, unlike Christianity, which is individualistic. This means that when the senior member of a family performs a religious act, other family members are assumed to have made the same performance. In other words, what concerns the individual concerns the community, and vice versa. By contrast, an individual's failure to perform a religious observance may oblige the entire community to perform it instead, and vice versa. These ideas were noted many years ago by Mbiti, who expressed

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31 Geoffrey Parrinder *African Traditional Religion* (1976) Harper & Row 17 called *juju* a 'hoary term', which should be dropped, because it was imprecise and too general.

32 Mbiti (n24) at 165.

33 Mbiti (n24) at 16.

34 See Durkheim's study cited above (n5).

the emphasis in ATR on social values with the maxim 'I am because we are, and since we are, therefore I am'.[35] The individual is seen in the context of the society, and the society is seen from the perspective of the individual.

A feature of ATR worth noting is that devotion to traditional beliefs is not practised daily, weekly or even monthly. Observance is often performed only with need. Even so, the system encompasses all aspects of life, so there is no moment when an individual lives without religious regulation.

Another distinctive feature is the hospitality implicit in ATR. Belief is not a source of hostility, as may be the case with other systems, where differences in belief are frequently a source of tension. (This is one of the reasons why other religions flourish at the expense of ATR: they are free to exploit its gentle and docile nature.) A fitting description of the tolerance of ATR appears in the Luganda[36] proverb: *Lubaale ddiba lya mbuzi, buli omu alyambala bubwe* (the supernatural is like a goatskin [which is used as attire]; each wearer can use it in his or her own way).

African traditional religion as 'religion *sui generis*'

Many texts on world religions, especially those authored by Euro-Americans, are conspicuously silent on indigenous African religions. As a result, students new to the subject have no exposure to these beliefs, and so the silence is perpetuated. In the circumstances, one can hardly expect Euro-American scholars to promote the study of ATR. However, as more native Africans enter the field of religious studies, they will, one hopes, challenge the prevalent stereotypes of ATR, and begin to broaden exploration of the subject.

In many respects, and indeed in many scholarly publications, African religious beliefs are regarded as phenomena of the past. More often than not, one is likely to hear conversations which go something like this: 'my grandmother used to tell me that, in her time, a son-in-law did not shake hands with his mother in-law.' The whole sentence is expressed in the past tense, which may very well be an accurate reflection of reality. But, no sooner is the statement uttered, than a thoroughly modern, newly married young man may be seen, waiting for his wife to come home and cook dinner. The same young man who said traditional customs were a thing of the past failed to appreciate that it is the same religious regulation which legitimised the division of labour, ascribing kitchen chores to women, and the 'manly' duties of gathering food and defending the family to men.

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35 Mbiti (n24) at 108. See chapter 11.

36 Luganda is the language of the Baganda people in Uganda.

As I have stated elsewhere, it is questionable whether traditional African beliefs should be relegated to the past. I argue that as a religious system which supplies a plausibility structure, traditional beliefs are in fact alive and doing as well today as they did in the past. Some beliefs and practices do not marry well with modern life, and are thus gradually disappearing. Particular cultural practices, such as widow remarriage, clitoridectomy and the cleansing rituals after burial, may be on the wane, but they have not been entirely abandoned. The essential fabric of the indigenous belief system, however, is still intact.

According to some of the literature, African religious beliefs are irrational, which may well be so. Nonetheless, the bigger question is whether any religion is rational. Freud, for one, considered it to be an 'obsessional neurosis of mankind',[37] but he had mainly Christianity in mind, not ATR. Without taking sides in the debate, one must admit that, when viewed from outside its own cosmology, the African belief system does appear irrational; but those who classify belief systems are unlikely to appreciate and give full credit to the believer's cosmic view.

For a large number of people in Africa, traditional cosmology is the only basis of their societies' plausibility structures. Religion is an essential part of day to day life. It does not exist separately from the general rhythm of life; it is the source of ethics and moral values, which thread through the social, political and economic fabric of society. Rites of passage at times of birth, initiation, marriage and death have their origins in religious beliefs.[38] Many people still believe in the power of symbols, and will go to great lengths to ward off the bad luck associated with, for example, an owl hooting in their homestead.

Hence, for most Africans – statistics are not available – ATR is still very much the basis of their system of meaning and world view. It has survived this long because it is relevant, and its relevance lies in the function it performs for adherents. Idowu made the thought-provoking observation that: 'It is of utmost importance for the scholar to realize that religion is living and organic. Dead or extinct religion is dead and extinct.'[39] With this he meant that no religion is irrelevant; if it is dead, it is dead. African religion has long been taken for dead, but, in fact, it is still alive and well.

Two scholars who studied non-Western religions in the field considered each religious system complete in itself: another belief system was not

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37 For Freud's opinion on religion, see 'Obsessive Actions and Religious Practices' Vol 9 (1907) (translated by James A Strachey) *Standard Edition* (1959) The Hogarth Press 115–127. See also Wulff (n6) at 275.

38 James L Cox (ed) *Rites of Passage in Contemporary Africa* (1988) Cardiff Academic Press at x–xiii.

39 Idowu (n24) at 12.

needed to complement it. The first scholar is Bronislaw Malinowski (1884–1942), who conducted ethnographic field studies in Melanesia. These led him to conclude that the people's religious beliefs of necessity existed in their own right. He therefore emphasised that the beliefs were an end in themselves, not merely a set of abstract propositions.[40]

This is why ATR should not be relegated to the past. It should be regarded as one of the major religious systems of the modern world. Many millions of Africans are neither Christian nor Muslim (the two major non-African religions). Should we therefore say that they are without a religion? Although we lack statistical evidence to support such an argument, a large proportion of the African population knows only traditional beliefs or various blends of those beliefs with other faiths.

The second scholar is Emile Durkheim (1858–1917), who supported the view that religion is timeless. Based on anthropological data collected from aboriginal communities of Australia and New Guinea, he concluded that religion is persistent and never-ending. He stressed its dynamic and self-preserving power to provide 'a unified system of beliefs and practices'.[41]

This is the reason why I argue that ATR is a religion *sui generis*. If it were not so, it would not have survived for as long as it has, despite its bad press and the competition of Christianity and Islam. Today, there is even an upsurge of interest in ATR at all levels of formal education. (At the tertiary level, it is a common graduation requirement for students of the social sciences.) Universities, colleges, seminaries and other institutions of higher learning are viewing ATR as an integral part of the curriculum.[42] Outside Africa, interest is also growing (to judge by the number of institutions of African Studies that are opening).

Sociology identifies one of the main functions of religion as a mechanism of social control, for it humanises the believer. In African cultures, religion stands imposingly at the centre of life and all the people's activities. It provides the believers with a view of the world in which events do not simply happen, but have meaning. Hence, if a rogue elephant were to trample a hunter to death, the tragedy would not be ascribed to random chance. It

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40 Malinowski's views are quoted in J van Baal *Symbols of Communication: an introduction to the anthropological study of religion* (1971) Van Gorcum 169ff.

41 Durkheim (n5) at 236.

42 See, for example, the course curricula at the Moi University in Kenya, available at http://www.mu.ac.ke/academic/schools/sass/diploma.html; the University of Nigeria Nsukka, Nigeria at http://www.unn.edu.ng/index.php/courses/255; the University of Cape Coast, Ghana at http://arts.ucc.edu.gh/religion/programmes/ba_religioninarts and the University of Swaziland, Swaziland at http://www.uniswa.sz/academic/hums/theology/courses.htm (accessed on 30 August 2010).

is believed that there was a reason and a cause for the event. The reason might be that the victim neglected a required ritual; the cause might be the machinations of an envious rival. This type of thinking might lead the victim's kinsmen to make amends with the supernatural, or with the gods, to ward off similar tragedies in the future.

African traditional religion in light of the Semitic religions

Semitic religions are distinguished for their claims of superiority, both to one another and to other religions. Judaism, the oldest of this cluster of religions, prides itself on being the revealed religion of God. It is not, however, a missionary religion, possibly because of its self-image. Christianity, which *is* a missionary religion, sees its origins in Jesus Christ, who is presented as the way to paradise. And Islam, the religion of the Prophet Mohammed, claims to be superior, because it is the last and final religion. ATR makes no such claims to superiority, nor, for that matter, does it have any claims to exclusivity.

Today, there are more Christians and Muslims in Africa than ever before.[43] Any explanation about the rise in numbers must answer a number of crucial questions. Is Christianity or Islam likely to take the place of ATR? Are Africans abandoning their cultural identity en masse?

ATR, some scholars argue, shares some features with the Semitic religions. For example, certain sects of Judaism, Christianity and Islam believe that the spiritual mood is enhanced by use of relics and items which are believed to have spiritual force. In Judaism, the *tefillin*[44] are believed to harness spiritual insight, and the *mezuzah*[45] is taken as symbol of goodwill to God. Similarly, many Christians believe that touching the presumed burial cloth of Jesus, the Shroud of Turin,[46] will boost spirituality. Compare this with an African

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43 The number of Muslims living south of the Sahara has grown from an estimated 11 million in 1900 to approximately 234 million in 2010. The number of Christians has increased even more, from approximately 7 to 470 million. See Pew Forum on Religion & Public Life 'Tolerance and tension: Islam and Christianity in sub-Saharan Africa' (2010) available at http://pewforum.org/executive-summary-islam-and-christianity-in-sub-saharan-africa.aspx (accessed on 6 October 2010).

44 The *tefillin* are small leather boxes worn by Jewish men. One is tied on the arm, the other on the head. Inside the boxes the following words are inscribed: 'Hear, O Israel: the Lord our God is one Lord' (Deuteronomy 6:4–9).

45 The *mezuzah* contains a text from the *Torah*, and is attached to the post of the door leading into a house.

46 The Shroud of Turin, the subject of considerable debate among scientists and theologians, is a linen cloth bearing the image of a bleeding human body, allegedly Christ's. It is kept in the Cathedral of St John the Baptist in Turin. See Brendan Whiting *The Shroud Story* (2006) Harbour Publishing for a general overview of the history and current debates about the Shroud.

traveller who carries a bone from a rabbit's foot to bring good fortune, or the warrior who carries a lion's tooth to muster courage.

The Semitic religions and ATR also converge in the belief that religiosity marks the human as superior to animal life. This explains why the question of animal rights does not arise and animal sacrifice is so common:[47] for example, the Islamic practice of slaughtering a sheep after Ramadhan or the Christian/Jewish practice of serving a paschal lamb. Consuming the flesh of a particular species of animal as part of a religious festival is taken for granted. The faithful do not consider the animal's right to life, since the overriding concern is to celebrate the festival. With the Gusii in Kenya, for instance, animal sacrifices are frequent: a he-goat will commonly be slaughtered as part of a cleansing ceremony after the burial of an adult; less common is the slaughter of a bull during a rain-making dance; a chicken will be slaughtered at dawn to implore quick healing after a boy's circumcision.[48] And, among the Maasai, a regular event is the slaughter of a bull at the *eunoto* celebration.[49]

Christianity is the most widely recognised religion in most African states, and, as a result, it enjoys a privileged position. Thus, the Christian calendar is formally observed, and both Christmas Day and Good Friday are celebrated with much fanfare. ATR enjoys no such recognition. The communal rain-making day or the full moon festival, which are significant days in the traditional African ritual calendar, attract no formal notice from the state.

Given the consistent bias it has suffered, ATR provokes remarkably few conflicts. The occasions when traditional African beliefs collide with other religions to cause public concern are extremely rare. In fact, disputes are usually between Christians and Muslims (or Jews and Muslims), sometimes, as in Nigeria, resulting in violent conflict. Another example may be drawn from Kenya. In 2005, the government set out to overhaul the Constitution. When the proposed draft was made public, the Christian sector of the population was vocal in its objection to a suggestion that Islamic *kadhi* courts be recognised, and the officers be funded by the state. Christians alleged that this provision would give Islam the status of a privileged religion.

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47 This contrasts, for instance, with the status of the cow in Hinduism.

48 On these Gusii rituals, see Robert A LeVine & Barbara B LeVine *Nyansongo: a Gusii community in Kenya* (1966) John Wiley and John S Akama & Robert M Maxon (eds) *Ethnography of the Gusii of Western Kenya: a vanishing cultural heritage* (2006) Edwin Mellen Press.

49 At this ceremony, the leader of an age-set (*olaiguanani*) is chosen from among his age-mates.

Emotions ran high, threatening to cause a national crisis.[50] Followers of ATR, however, were not drawn into the fray.

The place of African traditional religion in contemporary African states

Religion is a serious concern in most states, and, in many, it enjoys statutory protection. The United Nations Declaration on Human Rights (1948), for instance, considers religion a distinctive, inalienable right. Article 18 states in part that: 'Everyone has the right to freedom of thought, conscience and religion.' Many African countries are signatories of this declaration, and are therefore cognisant of the regard given to religion, but ATR enjoys no obvious place in the national order.

Instead, as I mention above, Christianity is a distinctive legacy of colonialism. Through what used to be known as the '3 Cs',[51] it positioned itself as the religion of the rulers, such that, in many colonial towns, the governor's and the Anglican bishop's residences shared a fence. During the colonial era, and indeed through to the present, Christianity assumed a self-proclaimed position of being the 'conscience of the nation'. Due to this heritage, it ascribed to itself the position of the *primus inter pares*. In Africa, ATR did not feature, and it still does not feature.

What should be the role of religion in a democratic African state? This question may not have a ready-made answer. While no African country has an official state church, where church and state are allies, most acknowledge the importance of religion in both the private and public spheres. The relationship between modern African states and ATR, however, may best be described as ambivalent: the state does not openly promote traditional beliefs, nor does it openly oppose them.[52]

During the opening of Parliament in Kenya, for instance, religious dignitaries, including traditional leaders, are invited to pray in the House,[53] and the latter do so in their vernacular tongues. (Much of the traditional belief system is not translatable, and so the thrust of traditional authority

50 Kenya's new Constitution was eventually promulgated on 27 August 2010.

51 This acronym stands for 'Christianity, Commerce and Colonialism' (although some historians use 'Civilisation' as the third C). The three Cs were meant to operate hand-in-hand and to promote each other.

52 A case in point concerns traditional healing compared with modern health care systems. It is questionable, however, whether traditional beliefs will compete successfully in contemporary society, which is coming to rely more heavily on scientifically developed pharmacology. See chapter 9.

53 Many ethnic groups, such as the *Laibon* of the Maasai, the *Nchuri Ncheke* of the Meru and the *Ker* of the Luo, still rely on traditional forms of leadership.

is captured better when spoken in a vernacular.) In the heyday of the socialist states, religion was discouraged in the public life of the nation, but the prohibition did not entirely succeed. Public universities, for example, which enjoyed public funding, did not have departments of religion, but, in one such case, the discipline was taught as part of social behaviour in the department of sociology.[54]

The future of African traditional religion in a pluralistic, secularised society

For more than two centuries, ATR has been unduly denigrated by anthropologists, ethnologists and theologians. The assault began with anthropology, which consigned traditional religious beliefs to the categories of animism, paganism, savagery, heathenism, primitivism and tribalism. Christians concluded that ATR was (among other derogatory terms) a religion of the devil. During the last 50 years or so, however, scholars have been using less pejorative language, resorting instead to more positive, non-judgmental terms. The word that has now come into vogue, and has been embraced with enthusiasm, is 'primal', ie 'that which is basic'.[55]

However much traditional religious beliefs are disparaged, they remain the single provider of religious socialisation for millions of Africans. In addition, there is overriding evidence that many African Christians still retain their traditional beliefs,[56] and turn to them in search of ways for coping with the modern world.[57] Writing during the late 1960s about what he saw as the predicament of the church in Africa, Idowu described a long-standing tendency: African Christians may shift from Christian teaching to traditional beliefs, and back again, without any sense of having violated their beliefs.

> *It is possible for an African to sing lustily in church, 'other refuge have I none' while still carrying an amulet somewhere on his person, or being able to go*

54 In Tanzania, during the premiership of Julius Nyerere, although religion was discreetly marginalised, traditional beliefs flourished. During the reign of Idi Amin in Uganda, the government attempted what may be called religious regulation by proscribing some religious organisations in 1977. ATR nevertheless continued to flourish. See Loyal Gould & James Garrett Jr 'Amin's Uganda: troubled land of religious persecution' (1977) 19 *Journal of Church & State* at 436.

55 Cox (n38) at 17.

56 See Pew Forum (n43).

57 The fact that churches may cast out members because of participation in traditional practices is proof enough that Christians do not disengage completely from their birthright.

out of church straight to his diviner, without feeling that he is betraying any principle.[58]

Similarly, Mbiti observed that, even if Africans convert to Christianity or Islam, they do not immediately or completely abandon traditional beliefs.[59]

The use of amulets, for example, is still prevalent, but with some adjustments to accommodate the needs of contemporary society. The traditional amulet bearing an assortment of charms is still in use, but non-traditional needs are being served. The user seeks to obtain good luck to pass an exam, secure a job, win an election or athletic competition, or attract customers. In similar ways, many Christians turn to their traditional beliefs to manage their mundane and existential concerns, whether the need for healing, a solution to marital problems, worries about their careers or protection against the evil eye. Protective charms are still widely used to ward off potential bad luck, potions are used to attract love, and medicine is used by aspiring politicians to endear themselves to the electorate.

On the other hand, once cherished practices are widely condemned. Clitoridectomy is a good example. At one time, a much valued rite of passage, clitoridectomy is no longer considered acceptable. Instead, it is now seen as a source of shame. It has been vigorously denounced by women's pressure groups campaigning against female genital mutilation. Hence, while the previous generation saw it as a source of pride, their daughters now view it with disdain. Among their peers, girls who have undergone the ritual are considered backward and old-fashioned, and, afraid of the stigma, they have little wish to be identified with it.[60]

It is evident that contemporary African society is becoming more and more secular, individualistic and impersonal, qualities that do not augur well for the future of any religion. The changes are consonant with global trends: the constant migration from rural to urban areas, increasing consumerism, the impact of the mass media, and the widening rift between the young and old. This chapter argues that, as a phenomenon, a people's religion is still relevant, in the sense that it is not an empty feeling for the believers; it supplies a plausibility structure from which they can interpret

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58 E Bolaji Idowu 'The predicament of the Church in Africa' in C G Baeta (ed) *Christianity in Independent Africa* (1968) OUP at 433.

59 Mbiti (n24) at 13.

60 See Kay Boulware-Miller 'Female circumcision: challenges to the practice as a human rights violation' (1985) 8 *Harv Women's LJ* 155 at 155–158; Rose Oldfield Hayes 'Female genital mutilation, fertility control, women's roles, and the patrilineage in modern Sudan: a functional analysis' (1975) 2 *American Ethnologist* at 617–633; Alison Slack 'Female circumcision: a critical appraisal' (1987–1988) 10 *Human Rights Quarterly* at 437.

reality.[61] Moreover, religion is resilient, in the sense that it has the inherent capacity to reinvent itself, and to bounce back, even under circumstances where it might be expected to disappear. Religion is also pragmatic, in that it can adjust to circumstances without losing its role and authority.

I argue that ATR, being the religion of Africa, deserves recognition, acknowledgement and constitutional protection. Even in a secularised, pluralistic continent, ATR has stood its ground admirably well. Many religions are 'natives' of the cultures from which they originated. As such, they become the only way for members to interpret reality. (This is why a specific religion may be popular in one culture, while another is unpopular.) The traditional African religious system is a native of Africa, which explains its relevance and persistent popularity on the continent.

An evaluation of how ATR is faring now reveals that, even in an increasingly pluralistic society, it has not lost the battle. It has not become redundant or even obsolete. If anything, it has remained thoroughly relevant to a people who are finding their epistemologies challenged by a secular, scientific world view. Africa has changed a great deal; people have moved from a rural village community to an increasingly urbanised, complex society. They have left behind their oral cultures in favour of some form of literate education; they have moved from a community-based mentality to an individualistic, self-centred one; they no longer live in extended families, but rather in the skeletal nuclear family.

These changes have shaken the key social structures supporting ATR, and they no doubt have an effect on traditional beliefs, such as belief in the existence of a supernatural, invisible world and its incumbent spirits. Inevitably, then, the basis for the traditional system is changing. Old people who had beliefs and practices 'written' in their memories are dying, leaving behind a generation more or less ignorant of the past. Nevertheless, the traditional belief system has sufficient flexibility to navigate the twists and turns of modernity – and postmodernity. It remains up to date and pragmatic, giving credence to what is claimed above: that ATR is still alive and doing well at a time when it was expected to be at worst dead or at best moribund.

Future research should examine what keeps ATR alive. Why is it still so versatile and resilient? What are its buoyant and pragmatic qualities? In this volume, however, we undertake the more modest task of exploring the legal conditions necessary for people to continue with the belief and practice of Africa's ancient belief systems.

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61 Peter L Berger *The Sacred Canopy. elements of a sociological theory of religion* (1967) Anchor Books at 47. A plausibility structure is like a modern 'password', which may consist of a few letters, but is necessary for a bank to allow access to deposits of money.

CHAPTER 2

The Practice of African Traditional Religion in Contemporary South Africa

Sibusiso Masondo

Introduction

African traditional religion (ATR) has ancient origins but contemporary significance. It is, indeed, a religion of the past and the present. As Stephen Ellis and Gerrie ter Haar write:

> *There is widespread evidence that many Africans today continue to hold beliefs derived from traditional cosmologies which they apply to their everyday activities, even when they live in cities and derive their living from jobs in the civil service or the modern economic sector.*[1]

This is a clear indication that ATR has the ability to adapt to change and continue to influence ways in which people make decisions about their lives.

Both in religious practice, as well as in the academy, ATR has suffered discrimination. Because of colonialism it was all too often undermined and its adherents sidelined. In most of sub-Saharan Africa, this trend continued after independence. The public profile of African knowledge systems thus declined, and African religion became an 'underground praxis'.[2] ATR has thus been used by both the oppressors and the oppressed.

The various theories of religion and the methodologies employed in its study have been affected and informed by ethnocentrism. As a result, Western epistemologies were imposed, creating distortions in our understanding.

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1 Stephen Ellis & Gerrie ter Haar 'Religion and politics in sub-Saharan Africa' (1998) 36 *Journal Modern African Studies* 175 at 177.

2 Nokuzola Mndende 'From underground praxis to recognised religion: challenges facing African religions' (1998) 11 *Journal for the Study of Religion* at 115.

Africa has a rich religious heritage. Historian and philosopher Ali Mazrui put together a documentary called *Africa Triple Heritage*. Mazrui's central argument is that Christianity and Islam can be regarded as part of Africa's religious heritage, since large parts of the continent inherited the two Abrahamic religions – although, when they were introduced, they had different responses from indigenous people.[3]

This chapter gives a broad overview of ATR, how it has adapted to change and how it continues to influence the way people make decisions. Various aspects of the religion are highlighted, and two case studies are presented – the re-introduction of circumcision as part of the initiation rituals of the amaZulu, and a house opening ritual in Cape Town – to demonstrate the contemporary relevance of ATR and how its practitioners draw on resources from various cultures to deal with contemporary challenges.

African traditional religion: A description

The advent of the new South Africa has provided space for African traditional religious and cultural self-expression. Jacob Olupona, a leading scholar in ATR, says: 'African spiritual experience is one in which the "divine" or the sacred realm interpenetrates into the daily experience of the human person so much that religion, culture, and society are imperatively interrelated.'[4] In other words, there is no clear-cut distinction between the sacred and the secular.

Elizabeth Isichei has pointed out that there is no word for religion in African languages; the closest is the 'way of the ancestors'.[5] ATR is more ancient than the religions of the Book, although it has no records other than historical and ethnographic information of the twentieth century. Other information can be gleaned from the accounts of missionaries and travellers, most of which were biased, presenting African practices in a negative light. Such presentations were motivated by or were the result of the authors' missions or worldviews. Indeed, at this time, Western approaches to knowledge and knowledge construction were informed by the idea that the Western view of the world was the truth and the only truth.

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3 Lamin Sanneh *West African Christianity: the religious impact* (1983) Orbis Books 210–241 has also argued that these two religions would not have had the impact they did, were it not for the indigenous religious infrastructure, which was used to explain the foreign concepts.

4 Jacob K Olupona 'Introduction' in Jacob K Olupona (ed) *African Spirituality: forms, meanings and expressions* (2000) Herder & Herder xv at xvii.

5 Elizabeth Isichei *A History of Christianity in Africa: from antiquity to the present* (1995) Africa World Press.

ATR has no founders, real or mythological. It has no sacred texts containing a revealed wisdom. Rather, it is a tradition that has been handed down by one generation and taken up by the next orally and experientially. The idea of being 'taken up' implies that subsequent generations do not passively receive what is given, but process and modify it within their context. Such an understanding of transmission allows for a social dynamism and for external and internal influences to determine the direction of received information. The recipients of this received wisdom thus become active agents who are able to shape their own futures.

As a consequence of the trans-Atlantic slave trade, ATR is not confined to Africa but can also be found in various forms across the Atlantic, mainly in Latin America and the Caribbean.

As the African theologian John Mbiti has observed, African traditional religion seeks no converts.[6] It also supports pluralism, since ATR is always open to other interpretations of reality. In developing this idea, Kofi Asare Opoku (1993) quotes an Akan saying that 'wisdom is like a baobab tree, a single man's hand cannot embrace it'.[7] This simile acknowledges the vastness and complexity of reality and that no one person or single group can claim to understand it all.

Similarly, the Supreme Deity is unknown and unknowable. He does not interfere with people's daily lives. Each people has its own way, free from elaborate codes of behaviour and decorum, for approaching and worshipping Him.

ATR is a this-worldly worldview. Humans are central to it; thus the dictum 'I am, because we are; and since we are, therefore I am'.[8] The focus is on blessings offered in this life, such as long life, good health, children, and prosperity. For Laurenti Magesa religion for Africans is a way of life or life itself. There is no distinction between religion and other aspects of life.[9]

Revelation or inspiration is not to be found only in a book or even in an oral tradition, but in the lives of the people themselves. Sacred knowledge, however, is often secret, to be acquired by initiation and apprenticeship. According to Terence Ranger, African religious ideas are about relationships

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6 John S Mbiti *African Religions and Philosophy* (1969) Heinemann 2.

7 Kofi Asare Opoku 'African traditional religion: an enduring heritage' in Jacob Olupona & Sulayman Nyang (eds) *Religious Plurality in Africa: essays in Honour of John S Mbiti* (1993) Mourton De Gruyter at 67.

8 Mbiti (n6) at 106.

9 Laurenti Magesa *African Religion: the moral traditions of abundant life* (1998) Orbis, Pualines Publications Africa 3.

with the dead, the living, the environment, animals, spirits, and divinities. Misfortune and illness are the results of breaches of such relationships.[10]

African personhood is relational, hence '*umuntu ngumuntu ngabantu*' (a person is a person through other persons), and '*Inkosi yinkosi ngabantu*' (the chief is a chief through the people). The 'other' is important in the construction of the self. In order for the self to be, it needs the validation and affirmation of the other. In fact, individuals are rooted in an ongoing human community and are constituted by the past. It is through this community and this past that persons come to self-awareness and a sense of responsibility.[11]

Cosmology

ATR cosmology has two tiers: the supernatural (or spiritual) and the physical. The former includes the Supreme Deity, minor deities, ancestors, and other spiritual beings or forces. It is a source of great power. It is where all creative work is done, and is therefore of major consequence in the physical realm. The physical tier includes humans, animals, plants and the rest of the tangible world. Because it is subject to the authority of the spiritual, solutions to problems in the physical world are often sought in the spiritual, and, for this purpose, rituals are devised for maintaining harmony between the two.

The ancestors

Africans have never thought of their ancestors as demons or wicked spirits. Instead, they are revered and projected as a source of moral authority. John Mbiti called them the 'living-dead', as they are dead physically, but continue to play a significant part in the lives of the living. As superhuman persons, ancestors are able to bestow blessings upon or bring misfortune to the living. For Mbiti, ancestors are the guardians of family affairs, traditions, ethics and activities, because they are closer to God, and are therefore able to petition on behalf of the living.[12] For this reason, ancestors are 'bilingual': they speak the languages of both the spirits and the living.

The ancestors communicate with the living through the powerful medium of dreams and visions during divination sessions. Dreams are where

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10 Terence O Ranger 'African traditional religion' in Peter Clarke & Stewart Sutherland (eds) *The World's Religions: the study of religion, traditional and new religions* (1991) Routledge 106 at 110.

11 Harvey Sindima 'Liberalism and African culture' (1990) 21 *Journal of Black Studies* 190 at 199.

12 Mbiti (n6) at 26.

ancestors convey their 'needs' to the living, and are the reason for certain rituals in the homestead. In the case of diviners and those in training to become diviners, ancestors use dreams to reveal the truths they must know in order to continue their journey. In this way, some diviners and other sacred specialists claim to have received important information about useful herbs, how they are supposed to be mixed and what ailments they treat.

Dreams may, of course, be complex and confusing, and they need to be interpreted by individuals who understand the codes being used. Therefore, a family that is uncertain about the meaning of a dream will consult a diviner for interpretation. Such people have not only specialised knowledge, but also access to the supernatural world. Since some dreams originate from the supernatural, diviners are the best placed to determine their meaning.

In African thought, things are not always what they seem. Behind any event, there is always a history. For example, when someone has a car accident, while there may be a rational, factual explanation – for instance, one of the vehicles was not roadworthy, a driver was drunk or someone was speeding – there is also an appeal to the unseen reality, ie who was responsible for the accident happening and what were his or her intentions? How can one be protected from such things happening in future? The truth can only be uncovered through access to the supernatural world. What happens in the seen world is thus formed and directed by the unseen. The truth can be uncovered only by connecting to that world, and sacred specialists hold the key.

Since ancestors are close to the Supreme Being and free from the physical body, they have extra powers and limitless vision. They do not inflict harm on people; they simply withdraw their protection, and the forces of evil are then able to attack. Ancestors are said to derive their authority from the Supreme Deity. They act on their own, motivated by moral attitudes and the values they previously held as living elders in the community. They, like the living elders, expect service and recognition from their juniors, and they become irate when ignored or neglected. Ancestral ethics provide an explanatory system to account for affliction, as well as a symbolic system that supports the elders' authority in the homestead.

In his study of labour migration among the Gcaleka people of Willowvale in the Eastern Cape,[13] McAllister established that the conservatives

13 Patrick A McAllister 'Work, homestead, and the shades: the ritual interpretation of labour migration among the Gcaleka' in Philip Meyer (ed) *Black Villagers in Industrial Society: anthropological perspectives on labour migration in South Africa* (1980) OUP at 205–253.

('red people')[14] were able to keep their explanatory system intact while accommodating elements brought about by a changed socio-economic and political environment. Consequently, migrants to the metropolitan centres of South Africa took with them their homestead ancestors, who continued to offer protection within the confines of their microcosm.[15] The ancestors were therefore believed to accompany the migrant to unknown territory, to protect him from the dangers of mine work and other unknown forces, and then to bring him back home to safety. For his part, the migrant was supposed to come back to the village, and there build his homestead. Since the village was where he belonged, its microcosmic ethos remained intact, even though he might be far away.

> *The emphasis on the return as a moral good in itself, for example, serves to highlight not only the danger of absconding but also the fact that the rural home is primary, to be served by means of occasional forays into the mining industrial world. Going out to work for the homestead is morally good and right; not to return to the rural structure and to accept its authority is morally wrong.*[16]

In fact, 'migrant labour is rationalised' and made meaningful in terms of the need to 'build the homestead' (*ukwakha umzi*).[17] Building a homestead means that the migrant is establishing himself firmly as part of the village. The hard work that he does is for the sole purpose of building his homestead and achieving the respectability that goes with it. The migrants move between the two tiers of physical and spiritual, and even embrace elements from both at the same time.

An elaborate ritual system was developed to meet changing socio-economic conditions. Idioms, events and sayings were reinterpreted to keep the explanatory system intact, while at the same time engaging with socio-structural changes – notably, the monetary economy – which were steadily being integrated into the traditional system. The young migrant, on his return, paid homage to the village and homestead elders, and he brought gifts and bottled liquor for close family and relatives. In McAllister's words, 'the authority of the elders of the community in general is aimed at ensuring that labour migration does not threaten or disrupt the accepted lifestyle'.[18]

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14 The concept appears throughout the text.

15 See also Martin E West *Bishops and Prophets in a Black City: African Independent Churches in Soweto, Johannesburg* (1975) David Philip.

16 McAllister (n13) at 232.

17 McAllister (n13) at 208.

18 McAllister (n13) at 232.

Rites of passage

These are rituals that mark transition from one state to the other. There are four main family rites of passage in African thought: birth, puberty (or initiation), marriage and death.

First, the birth of a child is a significant event that is celebrated by the family. A child is perceived as a gift from the ancestors. (According to Okereke, childbirth is a woman's crowning glory, for it completes her womanness.) The process of birthing is a space, where the two sets of ancestors collaborate in endowing the new being with gifts and talents. The name given to the child is meant to celebrate the lineage ancestors, prophesy what the child will become, and mark historical events.[19] The child is then introduced to the lineage ancestors. After this ritual he or she is regarded as a member of the family.

Second, initiation is a stage at which boys and girls are introduced to the realities and responsibilities of adulthood. At the end of the process, during which they receive a thorough education, they are ushered into the world of adults, ready to take their place and to make appropriate contributions. As Robert Baum comments:

> *In many African societies, knowledge is seen as transformative. People who could not use the power they acquire through learning in a way that benefits the community receive only limited instruction. For the uninitiated, the immature and the outsider, knowledge is restricted to what elders decide should be the public presentation of their religious thought.*[20]

Third, marriage is an institution which ensures the perpetuation of a lineage, and humanity in general. Because marriage is the relationship within which children are born, Africans disapprove of children conceived out of wedlock – hence such derogatory names as *umntwana wesihlahla* (a child of a tree) or *iveza ndlebe* (the one who only shows an ear). These epithets indicate the importance of purity. For Laurenti Magesa marriage is the means whereby individuals attain their full humanity and also transmit the vital force.

> *Because of its importance in preserving and transmitting the life-force, proper order is to be maintained every step of the way in marriage preparations and the marriage itself. … All pertinent rituals and taboos must be observed. The*

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19 Grace Eche Okereke 'The birth song as medium for communicating woman's maternal destiny in the traditional community' (1994) 25 *Research in African Literatures* 19 at 20. Cf Javier Perez de Cuellar, the former UN Secretary General, and the role he played in securing Namibia's independence in 1989.

20 Robert M Baum 'Graven images: scholarly representations of African religions' (1990) 20 *Religion* 355 at 359.

> *ancestors, guardians of the vital power of their descendents, have a special stake in this step of a person's life, and so they are involved in a very special way.*[21]

It follows that every person who has been initiated has a duty to marry and have children, and it is within this context that certain views on homosexuality need to be understood. It is seen as a threat to the institution of marriage, which has over millennia ensured the continued existence of humanity.

Fourth, death is the transformation of the living to the living-dead. Funerary rituals are designed to ensure a safe passage from physical to spiritual existence. In this group of rituals, the final ceremony is a bringing home (*ukubuyisa*), which inducts the individual into the fellowship of the ancestors. Ranger says that *ukubuyisa* ushers in a new phase of life for both the living and the departed individual.[22] It marks the formal end of the mourning period, thus allowing the living to decide how the deceased's estate is to be distributed. For the deceased it means a final passage to being an ancestor.

Witchcraft

In spite of modernisation, Christianisation and globalisation, belief in witchcraft continues to flourish in South Africa. This belief permeates all areas of South African life, including politics and sport. For instance, rumours circulate in the media about the use of *muthi* in local football; they even led FIFA to comment in the build-up to the 2010 FIFA World Cup.[23] The fear is that there might be substances in traditional remedies that could enhance performance and give African teams an unfair advantage.

Witchcraft is an explanatory framework used to understand evil and misfortune. Chidester defines it as anti-social behaviour: witches are against society, since they threaten to replace the dominant construction of the social norm with their own rules of engagement and operation.[24] Their alternative to the norm is both evil and immoral. It upsets the societal

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21 Magesa (n9) at 121.

22 Terence O Ranger 'Dignifying death: the politics of burial in Bulawayo' (2004) 31 *J of Religion in Africa* 110 at 114.

23 IOL 'Fifa on muti high alert' *IOL* (21 February 2010). Available at http://www.iol.co.za/general/news/newsprint.php?art_id=nw20100221175858225C754409&sf (accessed 26 June 2010); 'Fifa fear muti doping' IOL (21 February 2010). Available at http://www.iol.co.za/?set_id=6&click_id=19&art_id=nw20100221162929668C443578 (accessed 26 June 2010); 'Fifa wrings hands over African muti' *Sports Illustrated* (22 February 2010). Available at http://www.sportsillustrated.co.za/soccer/20100222/fifa-wrings-hands-over-african-muti/ (accessed 26 June 2010).

24 David Chidester *Religions of South Africa* (1992) Routledge 15.

balance, and succeeds in dehumanising not only the perpetrator but also the victim. Acts of witchcraft therefore cause distress and anxiety; healing, together with certain of its rituals, is meant to reinstate social harmony.

Pre-colonial African history is littered with stories of how society discovered and dealt with witches. One of the most common methods was a process of 'smelling out'. Once revealed, the witch would either be executed or forced to flee. Colonialism introduced laws that prohibited the smelling out of witches. Thus, the evidence provided by indigenous sacred specialists was not accepted in the courts, as it could not be scientifically proven. These measures did not quell the belief in witchcraft; sacred specialists simply did not divulge the identity of the persons concerned. Rather, their focus shifted to diagnosing the problem for the client and offering solutions: expulsion of the polluting agent and protection from future invasions or attacks. This approach has informed the practice of most of the Zionist and later Pentecostal churches.

An understanding of witchcraft provides a window into the reality of African community life, which is all too often concealed by talk of ubuntu. Witchcraft gives one a better idea of daily existence, because it reflects the scramble for resources, recognition and the assertion of authority. In a polygamous (*isithembu*) culture, it is natural that wives will be suspicious of one another, since they always fear that one of the other wives might use supernatural powers to gain an unfair advantage. Witches and sorcerers are said to manipulate supernatural powers to inflict harm and destruction on people and their families. They disrupt progress, and they interfere with the individual's power to reach full potential. In other words, they stop one's *becoming*.[25]

Pollution has a strong influence on a person's ability to achieve his or her potential. The pollution of sacred locations (or spaces), which are often sources of spiritual strength and direction, is considered harmful. Personal belongings may also be polluted, as may individuals, which implies the violation of their integrity. In this way witchcraft may interfere with a person's ability to procreate, to pass at school or to find a job. In fact, all personal misfortunes, whether injuries or lost opportunities, may be attributed to the activities of witches.

A first line of defence against the evil power of witches and sorcerers is the ancestors. It follows that they must be appeased by observing all the necessary rituals. A second line of defence requires compliance with the

25 John L Comaroff & Jean Comaroff 'On personhood: anthropological perspectives from Africa' (2001) 7 *Social Identities* 267 at 272.

taboos applicable to the individual in question, according to gender and standing in the family and community.

From this perspective, illness and misfortune can be explained in terms of the wrath of the ancestors for either sins of omission or commission. Such sins are not necessarily those of the affected individual; they could be the result of actions (or non-actions) of grandfathers or any other predecessors. Malidome Somé, for instance, cites the case of a child who died as a result of his father's omission.[26] It was not the child who was punished but the father, who had been repeatedly reminded to give the ancestors their dues, but chose instead to ignore them. HIV/AIDS could be viewed in this light, especially when it afflicts children who are innocent of any wrongdoing.

Witches are regarded as anti-social, selfish, and immoral. First, they are said to be filled with malice and evil designs, as they have the capability to inhibit the development of personhood. Second, witches act covertly at night, sometimes using witch-familiars, such as baboons, hyenas or owls, to carry out their plans. (It is important to note that they are able to keep their activities secret.) Third, they can execute their evil designs, because they possess extraordinary powers, ones which are anti-life and capable of consuming the life force of others. Through these powers, they can *ukukhinyabeza* (cripple) others to prevent them from growing and flourishing. Fourth, since they are opposed to society, they break all natural rules, notably social taboos and the prohibitions on incest, adultery, rape, abortion, and bestiality.

In summary, witchcraft is the illegitimate use of the supernatural to gain advantage at a physical level. It is illegitimate, because it undermines the most basic rules of society. African cosmology nevertheless privileges the supernatural over the physical, allowing the former to control and determine what happens to the latter. Access to the supernatural realm therefore makes one dangerous. As a result, witches are feared because of their power to gain access to the supernatural for evil means.

By contrast, sacred specialists are both feared and revered. People often say that specialists have *isithunzi* (an aura or dignity), which accompanies their office. Thus, although they are trusted, they are still feared, because they could easily unleash supernatural force on anyone who annoys them. In fact, as Harriet Ngubane points out,

> *[t]he institution of divination provides another instance of a woman's marginality as she is a point of contact between 'this world' and 'the other world'. The diviner*

26 Malidoma Patrice Somé *Ritual: power, healing and community* (1993) Swan Raven 26.

is not polluted with 'darkness' (umnyama). On the contrary she is in a state of light and purity.[27]

Illness

The anthropologist Victor Turner reported that illness is conceived of as a species of misfortune alongside such other species as bad luck at hunting, reproductive disorders, physical accidents and the loss of property.[28] Natural forms of sickness, such as headaches, respond to remedies known to everyone, but unnatural ones do not.

Illness causes disorder and disruption, which in turn cause imbalance. Two main causes of illness are often cited: witchcraft and the breach of an ethical code or taboo, such as incest. Healing incorporates activities that restore physical, social and spiritual order. It is the duty of the sacred specialists to discover the reasons for disorder, and then to prescribe appropriate measures to restore order.

Disorders

There are many disorders, personal and societal, that are attributable to the activities of witches and their familiars. Some of the common ones are listed below.

Isinyama

Isinyama is the dark cloud that envelops a person, attracting bad luck and attacks by witches. The word is derived from -*mnyama*, which means darkness of the night, 'darkness' here standing for a state of distress. Anthropologist, Harriet Ngubane, discovered that, among AmaZulu, *isinyama* is linked to beliefs in pollution. In fact, '[p]ollution for the Zulu can be seen as a marginal state believed to exist between life and death. It is conceptualised as a mystical force which diminishes resistance to disease, creates conditions for misfortunes, disagreeableness and repulsiveness.'[29] Mr Mbomvu, a traditional healer, explained that

Isinyama makes you dark and unattractive, girls will reject you, people will dislike you for no reason whatsoever, the worst thing is that even amateur witches (izimfunda makhwela zabathakathi) will try their luck with you because you are an easy target (ngoba ulula). They will test the effectiveness of their magic with

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27 Harriet Ngubane 'Some notions of "purity" and "impurity" among the Zulu' (1976) 46 *Africa* 274 at 278.

28 Victor Turner *The Forest of Symbols* (1967) Cornell University Press 300.

29 Ngubane (n27) at 274.

> *you. Everything you try might end up failing because people will be very reluctant to support you.*[30]

Isinyama is always mentioned as the cause of a person's inability to get a job or for having lost one. It might also lead to disruptions in family relations and accidents. It is crucial, therefore, that *isinyama* be removed. It does not just happen: it is brought about by witches.

According to Setiloane, 'physically perceived the human person is like a live electric wire which is ever exuding force or energy in all directions'.[31] This energy interacts, in a state of equilibrium, with the energy emanating from others. Witches interfere with the make-up of the essence of an individual in order to create a state of disequilibrium. That person's energy then sends out signals which will not be accepted by those he or she meets. This constitutes the beginning of misfortune and bad luck.

The important point to remember here is that witches place their disruptive elements inside the human body, ie, at the centre of the generation of energy. To solve this problem, the person affected will be required to go through a bath which not only deals with the manifestation of the problem but also cleanses the exterior body. Holy water will eventually deal with the source of the problem, either by means of an enema or purgative. Once the source has been removed, the individual's energy returns to its natural state, and equilibrium is again restored.

Idliso

Idliso gets into a person's body orally. It is derived from the stem -*dla*, which means to eat. Because it disrupts the proper functioning of the body, it is poisonous. The intention behind giving *idliso* is to induce an action that would stop the individual from becoming. Adam Ashforth reports that in Soweto 'the most feared mode of deployment is that of *muthi* in food or drink'.[32] The recipient of *idliso* would be unsuspecting, and the *muthi* is put in their food. Once inside the body, the *muthi* starts working, and manifests itself in illness and misfortune.

The traditional healer Mr Mbomvu, who is said to have treated a lot of people with *idliso*, claimed that witches have the ability to give *amadliso* to people while they sleep:

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30 Interview with the author.

31 Gabriel M Setiloane *African Theology: an introduction* (1986) Skotaville Publishers 13.

32 Adam Ashforth 'Muthi, medicine, and witchcraft: regulating 'African science' in post-apartheid South Africa' (2005) 31 *Social Dynamics* 211 at 213.

> *You would find yourself dreaming as if you are having a meal or a drink and at that point the witch inserts this poison in your mouth and you eat it. They give you this thing in a powder form but once inside your body it turns into what the witch wanted it to be. It will then do what it is there to do to make you ill or kill you.*[33]

It is, therefore, important for these substances to be taken out of the body. In cases of those with well-established *amadliso*, the healer will advise the client not to vomit immediately but, for some time, to drink holy water.

Isichitho

The noun *isichitho* comes from the verb, *chitha (ukuchitha)*, meaning to spill or to destroy: *ukuchitha amanzi/ubisi* (to spill water/milk), *ukuchitha umuzi* (to destroy a home). In this context, the term *isichitho* means that the future of an individual has been destroyed; whatever they try to do they will never succeed. *Isichitho* thus causes a person to suffer misfortunes, such as failing to get a job, not getting along with an employer or persistently being rejected by women. The disorder effects destruction not only on the person but also on the home and community, which is why people will try everything in their power to find ways of stopping it.

Because *isichitho* is a magic spell, it manifests itself in physical appearance. The evil substances may sometimes manifest themselves in bad skin and pimples, thereby making the afflicted individual unattractive.

Case studies

AmaZulu reintroduce male circumcision

Initiation among AmaXhosa, AmaHlubi, and BaSotho has been going on from time immemorial. These peoples took pride in their young men coming of age through an ability to endure both physical pain and difficult circumstances. Initiation involved a combination of rituals, circumcision and seclusion (isolation), together with much serious instruction on manhood and its responsibilities.

In order for a man's initiation to be recognised as authentic, a boy must spend time in the bush and undergo circumcision the traditional way without the assistance of Western medicine. Any male who is not initiated, and is of age, may be ridiculed and referred to as a 'boy'. Over the past 10 to 15 years, initiation has come under serious scrutiny because of the deaths and mutilations resulting from poorly performed circumcisions. Although

33 Interview with the author.

many voices have been heard in support of the custom, others have called for its abolition as archaic and dangerous.

The practice of circumcision as part of male initiation among AmaZulu was stopped by King Shaka in the early part of the nineteenth century. After being taken to court by animal rights activists for the killing of a bull during *ukweshwama* celebrations in December 2009,[34] King Zwelithini ka Bhekuzulu of the AmaZulu announced that he was reintroducing male circumcision among his people.[35]

By this proclamation, King Zwelithini sought to do three things. First, he asserted himself as custodian of IsiZulu custom, culture and heritage. He claimed that the tradition of circumcision was an old one, which was a form of authentication. He argued that King Shaka did not abolish the custom in the 1820s, but suspended it due to prevailing political conditions: he could not afford to have groups of young men recuperating in the bush while his territory was under attack. King Zwelithini therefore presented circumcision to the public not as a novelty but as a tradition.

Second, the King was responding to public calls to do something about the high HIV infection rates, especially in areas within his domain. Scientific findings had disclosed that circumcision lessened the chances of contracting the virus. The move to reintroduce the tradition was thus justified partly as a measure to fight escalating rates of HIV infection.

Third, taking into account the public outcry about botched circumcisions (especially in the Eastern Cape), King Zwelithini looked for ways of distinguishing his actions from others. His spokesperson was at pains to explain that, because of the length of time between the suspension and reintroduction of circumcisions, the Zulu had lost the collective memory of how the ritual was to be performed. Because no one now had the skills needed to perform the traditional operation, they would enlist help both from those who had maintained the custom and from medical practitioners (who would be used to train traditional surgeons).

For a tradition to work, however, it must give the impression of being authentic. Thus a serious attempt needs to be made to create a link between the past and the present: notwithstanding obvious social changes,

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34 'Zulus should be proud of culture: Zwelithini' SABC News 5 December 2009 and Bongani Mthethwa 'KZN back circumcision programme to combat HIV' *Mail & Guardian* (19 January 2010).

35 Dr Mathole Motshega, the Director of the Kara Heritage Institute, who is currently the Chief Whip of the ANC, and has served as legal advisor to the Royal Council of Mudjadji the Rain Queen, was among those who congratulated the king for realigning the AmaZulu with other indigenous groups who had retained the custom.

the custodians of a tradition have to maintain its authenticity. This authentication process is a creative one. On this matter, Ali Mazrui's work is instructive, as he maintains that the process of identity construction involves a degree of nostalgia, amnesia, and false memory.[36] There is always a convenient forgetting and an appeal to an imagined past, thereby creating false memory. At any particular time in history, various societal pressures influence the way tradition is practised. These may be political, economic or social.

In the case of circumcision, the major reason for its reintroduction was the need to stop the spread of HIV/AIDS. In addition, African culture in general, and Zulu culture in particular, was accused of discrimination, as it required females to undergo virginity testing to ensure sexual purity, but allowed men to do as they pleased. The custodians of tradition therefore introduced a similar requirement for males.

From this event, we observe the borrowing of expertise and technology from another culture. Such appropriations are not new; they have always happened. Human history is, in fact, filled with examples where people have borrowed creatively from other cultures, and then redefined or re-baptised the results for use in a new environment. The re-baptism – in which alien concepts, practices, and technologies are given local meaning, content, and symbolism – is part of the process of authentication.

An openness to other interpretations of reality makes authentication possible. It is not an easy process, however, for people are bound to be somewhat resistant to change and sceptical of outside knowledge. In her study of Nigerians living in Lagos, for instance, Sandra Barnes indicates an ambivalent attitude towards outside knowledge.[37] Although its usefulness might be apparent to most people in an area, mastering it may pose problems.

The focus of King Zwelithini's declaration was on circumcision, and little attention was paid to initiation more generally. This is not surprising, however, as the King was committed to engaging with other indigenous groups and showing that tradition is not only handed down but is also taken up. As he sought to make the reintroduction of circumcision acceptable to his people, the King reconceptualised initiation, taking the old form and giving it new content in accordance with the dictates of the twenty-first century.

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36 Ali A Mazrui 'Cultural amnesia, cultural nostalgia and false memory: Africa's identity crisis revisited' (2000) 13 *African Philosophy* at 87–98.

37 Sandra T Barnes 'Ritual, power, and outside knowledge' (1990) 20 *Journal of Religion in Africa* 248 at 252.

A house-opening ritual

Africans in mainline churches have appropriated the church and its practices as their own. Certain African practices, however, remain outside the formal or public church discourse, notably, the issue of ancestors and their veneration. Even so, individual members perform rituals honouring their deceased relatives in their homes. This practice shows that there is both continuity and discontinuity between the church and the home: while the latter is supposed to serve as a primary socialising agent for the church, there are matters where the two do not communicate. Nonetheless, it is important to realise that certain members of the church do not see any contradiction between what they do for their ancestors in their homes and what they do for their Christian faith.

It is a common practice for Africans in urban areas, when moving into a new property, to have a house-opening ritual. Through this means, the family introduces the ancestors to the new premises, and asks them to protect the home and its occupants. These rituals differ from family to family. Some require slaughter of a number of beasts for a feast, together with beer drinking, while others require only beer drinking and cooked samp.

On 16 December 1999, a house-opening ritual was held at the house of a Mr Ziqubu, who was an elder in a mainline Christian church. The slaughtering was performed on a Friday evening, and much food was prepared. People came in large numbers. For the purpose of the ritual, a sacred space was created in the backyard. Chairs were arranged in a circle, at the head of which was seated the ritual leader. From that point, the seating was arranged according to seniority, which was determined by age and the individual's date of circumcision. All the men respected and followed the instructions of the leader.

When the time came for the ceremony to start, the ritual leader stood up to address the congregation. He asked people to take off their hats because they were going to pray. He then started a prayer in a conventional Christian form, asking God to bless the ceremony and the family. When he finished, he explained the purpose of the occasion. He pointed to Mr Ziqubu, and said:

> *This man has invited all of us to share in this feast where he introduces his forefathers to his home. He asks for their protection and guidance. As we all sit here we are now members of his clan. Let us then eat and celebrate.*

After this, the leader directed a speech to the ancestors and said *MaNcamane amahle naba abantwana benu bathi bafuna nazi apho bekhona nibakhusele nibaphe neentsikelelo.* (MaNcamane [clan name] here are your children; they

say they want you to know where they are residing. They are asking for your protection and blessings.)

Ritual speech is a means of communicating a specific message to the divinities about a sacrifice that is being made. The leader called the living-dead by their clan name, inviting them to share in the communion with the gathering. He went on to intercede for the couple, asking them to open all doors and to know where they were.

Mr Ziqubu was called upon to initiate the beer drinking. Two beverages were available: the traditional brew (*umqombothi*) and bottled alcohol (brandy and beer). There were two beakers and two bottles of brandy, one for the older men and one for the younger. Everyone was expected to have a sip of both drinks, because it was an ancestral ritual. As a result, all took part.

Next to me, sat a man who belonged to St John's Apostolic Faith Mission. In our conversation, I told him that I did not take alcohol. He said that in his church they did not allow people to drink, but that we were at a solemn function where we all had to participate, so even a taste would be enough. In subsequent rounds, it became possible to pass the beaker without tasting. Since this occasion was not a social drink but an ancestral ritual, some of the teachings of the church on alcohol consumption were overlooked.

Later on, plates of food were circulated. People enjoyed the good food and drink. While we sat and talked, newcomers arrived, and the ritual leader stood to explain again the reason for the gathering. Occasionally, he appointed someone else to speak. Individuals who stood up to address the congregation removed their hats and put on jackets or covered their shoulders as a sign of respect for the ancestors. This type of behaviour is common in church.

Women were in a separate place, where they partook of their own brew and food. No woman was allowed to come near the sacred space, just as no man was allowed to mingle with the women. To reinforce traditional gender divisions the women's dress was more 'conservative', and those closely linked to the family covered their hair. *Oomakoti* (married women) of the clan, whether they were directly related or not, had to observe *ukuhlonipha* (respect, taboo) restrictions during the period of the ritual. (The same is also true during funerals and other *imicimbi* [celebrations] of the clan.)

This house-opening ritual suggests a certain discontinuity between what happens in church and what takes place at home. Mr Ziqubu drew on both the African traditional culture and Christianity. People who were part of the ritual did not see anything wrong with its performance. For Mr Ziqubu there was no contradiction between the blood of Christ and that of the beast.

His ancestors had to know exactly where he was, and there was an attempt to re-enact a traditional village scene by sacralising the backyard. The success of the ritual depended on following the senior clansmen's advice: an ordinary space in the backyard of a suburban home was made sacred by the creation of *ubuhlanti* (a cattle enclosure), and the ritual leader transformed ordinary speech into sacred by using ritual language.

The driving force behind the ritual was a need to obtain protection from the ancestors. Mr Ziqubu believed that his ancestors would protect him against misfortune and illness. What is more, with their presence in his home, he could also gain material wealth, since opportunities would open up for making money.

This ritual shows how ancestral religion is adapting to rapidly changing urban situations. Modernity is dominant, but not hegemonic: there are areas of African life which it has not yet reached. The ritual brings together three elements: ancestral religion, Christianity, and modernity. The identity of the man is constructed in terms of all three aspects.

CHAPTER 3

Religion vs Culture: Striking the Right Balance in the Context of African Traditional Religions in the New South Africa

Jewel Amoah

Introduction: Religion and culture

Scholars and lawyers analysing religion are generally careful to keep the world's major religions distinct from culture.[1] But, historically, Western scholarship has tended to conflate African traditional religions (ATRs) with African culture. The unfortunate effect of this fusion has been to diminish the significance of the African belief systems – which is troubling in an international human rights context, where religious rights are more highly regarded than the right to culture.

The distinction between religion and culture is a decidedly Western idea, and no doubt has its uses in promoting a better understanding of foreign societies. This chapter contends, however, that understanding is best facilitated by the creation of a bridge linking the two concepts, while at the same time acknowledging their differences. An awareness of the relationship between religion and culture is also about appreciating the relationship between individuals and their community.

This chapter argues that the interconnectedness of religion and culture can be addressed through the idea of intersectionality and inculturation. Intersectionality acknowledges that religion and culture are separate and distinct aspects of an individual's identity. Inculturation assumes that elements of religion and culture may inform one another in the practical manifestation of belief.

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1 For purposes of this chapter, the 'major' religions are considered to be Christianity, Judaism and Islam.

The conflation of religion and culture was imposed by outsiders and is not inherent in the African perspective. In order to examine the impact of this conflation fully, one must first establish the traditional African perspective. This examination begins firstly, by presenting international and South African conceptions of religion and culture. Secondly, by noting that the relationship between the two is, on one level, essentially about the relationship between an individual and his/her community, and discussing Western and traditional African perspectives of human rights and the place of the individual and the community in human rights theory. Thirdly, by explaining why it is necessary to distinguish the individual from the community to ensure full enjoyment of human rights entitlements. Fourthly, by examining the issue of identities and proposing intersectionality as a means of addressing individual identities within the community. Finally, by referring to recent case law, demonstrating the impact of considering culture and religion as intersecting factors in identity, and the challenges and benefits that this intersection poses for litigating human rights claims.

Conceptions of culture

Apart from each culture being historically unique, and relevant to 'belief, art, morals, law, custom',[2] etc, what is known about the meaning and content of culture? On the international level cultural rights are provided for in the International Covenant on Economic, Social and Cultural Rights (ICESCR)[3] and the Universal Declaration of Human Rights (UDHR)[4]. Specifically, article 27(1) of the UDHR states:

> *Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*

Article 15(1)(*a*) of the ICESCR provides:

> *The States Parties to the present Covenant recognize the right of everyone … to take part in cultural life.*

The international human rights framework does not provide a clear definition of culture or cultural life. It can be inferred from the references to 'cultural life' that it is a dynamic concept and is not intended to be rigid, fixed or stagnant – this may be why there is no settled definition. However,

2 Madhavi Sunder 'Cultural dissent' (2001) 54 *Stanford Law Review* 495 at 511–512.
3 UN General Assembly Resolution 2200A (XXI), 21 UN GAOR Supp (No 16) at 49; UN Doc A/6316 (1966); 993 UNTS 3; (1967) 6 *ILM* 368.
4 UN General Assembly Resolution 217A (III), UN Doc A/810 at 71 (1948).

what does exist is a range of national or regional contextual interpretations of cultural life.[5]

Proposing an adequate definition for culture, and giving specificity to its content, has become increasingly difficult in modern times, as the impact of globalisation and global harmony erode cultural distinctions or, at least, makes them less relevant. There seems to be a contemporary trend to speak of global culture, or a culture of humanity. Such references emphasise the underlying commonalities between all peoples, rather than address the unique distinctions that characterise cultural groups of one sort or another. Consider that

> *modern society is becoming increasingly homogeneous across cultures and heterogeneous within them. Globalization, liberalization, the Internet and Diaspora – to name only a few of the forces of modernization – are collapsing cultural barriers and facilitating unprecedented culture flows of people, information, and ideas across traditional and cultural boundaries.*[6]

Historically, anthropological efforts to define culture resorted to Tylor's characterisation of 'that complex whole which taken together includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society'.[7] As Sunder explains, 'anthropologists now largely dismiss Tylor's view as mistaken in its characterization of culture as a static, unchanging set of beliefs that is imposed upon individuals generation after generation'.[8] This notion has been replaced by an understanding of a cultural life as being dynamic and vibrant.

Sunder goes on to discuss the notion of cultural dissent, which 'recognizes that cultures are changing, in some ways for the better. By acknowledging plurality within culture, this approach facilitates a normative vision of identity in which individuals can choose among many ways of living within a culture.'[9] She compares 'cultural dissent' with 'cultural survival', which she says involves measures that 'often end up impeding internal reform efforts to contest discriminatory or repressive cultural discriminatory norms. The survival approach reinforces old notions of imposed identity

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5 For instance, article 17(2) of the African Charter on Human and Peoples' Rights provides that 'every individual may freely take part in the cultural life of his community'. Although this is still not a comprehensive definition, it does establish a clear relationship between one's cultural life, one's community and one's self.

6 Sunder (n2) at 497–498.

7 Sunder (n2) at 511; Edward B Tylor 'Primitive culture' as cited in Paul Bohannan & Mark Glazer (eds) *High Points in Anthropology* 2ed (1988) McGraw-Hill at 6.

8 Sunder (n2) at 512.

9 Sunder (n2) at 501.

over new normative visions of identity as choice.'[10] In considering these two oppositional notions of culture, Sunder suggests that, whatever else culture is, it is fundamentally about choice, specifically, the choice to belong to and conform with practices that are traditionally associated with one's group, or to strive to renew and expand the parameters that define group membership. Sunder's critique, or her oppositional framework of cultural dissent and survival, is based on challenging the following five assumptions about culture:

- Culture has a fixed content that remains static.
- Culture determines the individual.
- Culture is bounded.
- Culture is homogeneous.
- Culture is unitary.[11]

These assumptions form the character, or definitional content of culture. In essence, culture is consistent, identifiable and time-limited. These parameters dictate the way in which individuals are expected to identify themselves within the culture.

Cultural rights and the South African Constitution

The difficulty in defining culture was acknowledged by O'Regan J in *MEC for Education: Kwazulu-Natal and others v Pillay and others*,[12] where she reflected on the following three senses of culture in modern usage: the first is the concept of culture as involving the arts; the second is culture in a more plural form including handicraft, popular television, film and radio; and the third is the anthropological conception of culture which refers to the way of life of a particular community. There can be no doubt that it is the third concept of culture to which the Constitution refers in ss 30 and 31.[13] The specific references in the South African Constitution are:

> *Language and culture*
> *30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.*
>
> *Cultural, religious and linguistic communities*
> *31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –*

10 Sunder (n2) at 500.
11 Sunder (n2) at 530.
12 2008 (1) SA 474 (CC).
13 *Pillay's* case (n12) para 149.

> *(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.*

Unlike the international framework, the South African Constitution treats religious and cultural communities in a similar manner. If there is considered to be a substantive difference between the two, there is no difference in the protection afforded to the manifestation of these rights.

Without necessarily breaking down the precise content of culture, O'Regan J determines that 'cultural practices are associative and … the right to cultural life is a right to be practised as a member of a community and not primarily a question of sincere, but personal belief'.[14] She continues, that 'if the right to cultural life "cannot be meaningfully exercised alone", then an individualised and subjective approach to what constitutes culture is faulty'.[15] The inference here is that culture and cultural rights fall within the purview of the community, not the individual.

Also in *Pillay*, O'Regan J shares her understanding of how the Constitution requires an approach to culture as emphasising the following four concepts:

> *(1) cultural rights are associative practices, which are protected because of the meaning that shared practices gives to individuals and to succeed in a claim relating to a cultural practice a litigant will need to establish its associative quality;*
> *(2) an approach to cultural rights in our Constitution must be based on the value of human dignity which means that we value cultural practices because they afford individuals the possibility and choice to live a meaningful life;*
> *(3) cultural rights are protected in our Constitution in the light of a clear constitutional purpose to establish unity and solidarity amongst all who live in our diverse society; and*
> *(4) solidarity is not best achieved by simple toleration arising from a subjectively asserted practice.*[16]

Each of the above four concepts assumes that culture, cultural practices or cultural rights, however framed, occur within the context of community. From associative practices to unity to solidarity, O'Regan's characterisation of culture reflects something that has no substantive meaning for the individual in his or her own right, but rather, comes to the individual through membership in the community. Culture is not simply about who

14 *Pillay's* case (n12) para 154.
15 Ibid.
16 *Pillay's* case (n12) para 157.

one is, but rather, where one fits. This notion of fit implies a need for a context to be structured around which culture and cultural rights can be developed, exercised and enjoyed.[17]

Conceptions of religion

> *Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture.*[18]

Religious belief is arguably the foundation of humanity. Despite its accepted value, 'religion is almost impossible to define. By linking religion inseparably to freedom of belief, international law seemingly avoids that dilemma.'[19] The link between freedom of religion and freedom of belief is further explained by Johan van der Vyver as follows:

> *Since the same entitlements included in freedom of religion also constitute the substance of freedom of belief, and both freedoms are subject to an identical set of limitations, the concept of religion does in a sense qualify the meaning to be attributed to belief. Since freedom of religion is regulated in international human rights instruments in conjunction with freedom of belief, the kind of beliefs that come within the protection of those instruments must, broadly, be of the same kind as, or have something in common with, religious belief.*[20]

Sunder proposes a definition of religion that is similar to the conception of culture. As she explains, 'contrary to law's centuries-old conception, religious communities are internally contested, heterogeneous, and constantly evolving over time through internal debate and interaction with outsiders'.[21] This constant changing or evolution of religious communities is not to suggest that beliefs are not rigidly established or well grounded, but rather that, even within this rigidity, there is a religious context that is responsive to surrounding societal changes. Sunder continues her argument of religious change and explains that 'while the subject matter of religion is

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17 O'Regan further states (para 159) that: 'It will not ordinarily be sufficient for a person who needs to establish that he or she has been discriminated against on the grounds of culture to establish that it is his or her sincerely held belief that it is a cultural practice, or that his or her family has a tradition of pursuing this practice. The person will need to show that the practice that has been affected relates to a practice that is shared in a broader community of which he or she is a member and from whom he or she draws meaning.'

18 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 33 per Sachs J.

19 Johan D van der Vyver 'The contours of religious liberty in South Africa' (2007) 21 *Emory International LR* 77 at 89.

20 Van der Vyver (n19) at 89–90.

21 Madhavi Sunder 'Piercing the veil' (2002–2003) 112 *Yale LJ* 1399 at 1402–1403.

spiritual and textual, it is human beings who interpret religion and make it meaningful for their time'.[22]

Almost to the contrary, Sunder also speaks of a definition of religion in the broad sense of international human rights law, where religion

> *in the twenty-first century [is] a sovereign, extralegal jurisdiction in which inequality is not only accepted, but expected. Law views religion as natural, irrational, incontestable, and imposed – in contrast to the public sphere, the only viable space for freedom and reason. Religion can be characterized as the 'other' of international law,*[23]

since its penchant for promoting inequality is accepted on the basis of religious freedom; but such promotion of inequality would not be tolerated in the context of any other right.

In taking the position that 'law's conception of religion and culture matters', Sunder advocates an understanding of both law and culture that is filtered through the prism of law: the lens through which all rights obtain accountability and derive their legitimacy. In light of this, she cautions that as 'long as law continues to hold a fundamental view of religion and culture, it will transfer more power to fundamentalists and traditionalists at the expense of human rights'.[24] Sunder portrays religion, or at least religion as upheld by the fundamentalists, as a not-so-quiet threat to the advancements of human rights and equality that have generally been made in the contemporary international arena.[25]

The international framework for protection of religious rights reflects efforts to protect individual freedoms related to religious beliefs. The general trend in religious rights seems to be to protect the rights of individuals to believe (or not believe). Article 18 of the International Covenant on Civil and Political Rights (ICCPR) provides the following protection for individual religious freedom – and outlines when this freedom may be legitimately curtailed for broader public protection:

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually, or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.*

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22 Sunder (n21) at 1423–1424, quoting Bhikhu Parekh.

23 Sunder (n21) at 1402.

24 Sunder (n21) at 1406.

25 Overall, Sunder (n21) at 1424 laments that 'religion is studied and preserved as a fixed, unchanging object rather than as an ever-shifting, subjective construct'.

3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*
4. *The states Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

Although the emphasis here is on individual religious beliefs, there is still recognition of the need to practise and manifest such beliefs in community with others. Thus, although protection of religious beliefs ostensibly applies to the individual, it is also clear that the individual is part of a community – and the community too has access to religious rights.

Similarly the Universal Declaration of Human Rights, Article 18 provides that:

> *Everyone has the right to freedom of thought, conscience and religion; this includes the right 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 teaching, practice, worship and observance.*

Again, this reflects a primary protection of religious belief and secondary protection for the manifestation or practice of that belief in community with others.

In considering the regional, African conception of religion, Article 8 of the African Charter on Human and Peoples' Rights provides that:

> *Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.*

This provision is interpreted in light of the overall spirit and purpose of the Charter, as noted in the preamble, which is to 'promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa'. Such importance of course reflects an overriding emphasis on community association.

South African constitutional provision for religious rights

The South African Constitution provides specifically for religious rights in s 15:

(1) *Everyone has the right to freedom of conscience, religion, thought, belief and opinion.*
(2) *Religious observances may be conducted at state or state-aided institutions, provided that –*
    (a) *those observances follow rules made by the appropriate public authorities*

(b) they are conducted on an equitable basis; and
(c) attendance at them is free and voluntary.
(3)(a) This section does not prevent legislation recognising –
(i) marriages concluded under any tradition, or a system of religious, personal or family law; or
(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

Recognition in terms of paragraph (*a*) must be consistent with this section and the other provisions of the Constitution. This provision addresses religious belief, religious practices and religious codes governing traditional marriage and family law matters. The constitutional provision does not itself define religion, but it does outline what the right to religion encompasses. This right appears to be one that belongs to the individual to manifest, as compared with the right to culture, which is exercised in community with others.

Despite the difficulties in defining the right to religious belief, the right has been identified as a key right within the human rights framework, as 'religious belief has the capacity to waken concepts of self-worth and human dignity which form the cornerstone of human rights'.[26] Further, as Lourens du Plessis states, 'religious freedom is high on the priority list of basic freedoms singled out for protection in national as well as international human rights instruments. Some regard it as "the most sacred of all freedoms".'[27] All this protection, interestingly enough, is for a right which by all accounts is very difficult to define.

Typically, protections for religious rights focus on the right to choose what to believe. This protection extends equally to the freedom to choose not to manifest any religious belief at all. If the emphasis is to be on the notion of religious belief rather than a broader concept of religious rights, then it is helpful to clarify what is meant by religious belief in the African context. Gerhardus Oosthuizen explains that:

> *[b]elief in Africa is not an epistemological issue, not fides (belief) but rather fiducia (trust), a non-epistemological activity. It is not based on propositions but on relationships. In traditional African religion it is more a question of trust, more a matter of relationships than of propositions of logical arguments which*

26 Van der Vyver (n19) at 78.

27 Lourens M du Plessis 'Freedom *of* or freedom *from* religion: an overview of issues pertinent to the constitutional protection of religious rights and freedoms in "the new South Africa"' (2001) *Brigham Young University Law Review* 439 at 448.

> *predominate. In the traditional religion it is the deep sensitive attainment rather than cerebral acceptance which takes precedence.*[28]

In this sense, the notion of religious belief or trust is an ethereal one, relying more on the superficial and the mystic than on the tangible and observable. This sense of the ethereal is based on the fact that human beings freely believe in what they cannot prove. But the fact that these beliefs 'are bizarre, illogical or irrational to others or are incapable of scientific proof, does not detract from the fact that these are religious beliefs',[29] which happen to be protected by the right to freedom of religion. The ethereal sense that is attached to freedom of religion is what elevates it to the status of the sacred. 'Religion forms the basis of the relationship between the believer and God or Creator and informs such a relationship. It is a means of communicating with God or the Creator.'[30] This communication is a private dialogue, emphasising the importance of the individual (and not the group or community).

Simply put, 'religion is a matter of faith and belief'.[31] The freedom of religion or belief encompasses two components: the freedom to adopt a religion or belief of one's choice; and the freedom to manifest that religion or belief.[32] These two components address both the individual (as in the right to hold a belief) and the community – those with whom the individual joins to manifest this belief or those who witness the individual's manifestation of belief. As the then Chief Justice Chaskalson explained in *Prince*, 'the right of an individual to practise his or her religion is part of the section 15(1) right. The associational right, to practise religion in association with others,'[33] is provided for in s 31. The demarcation between the individual right and the group or associational right, although necessary for the purposes of the present argument, is really an artificial distinction. And, as Justice Sachs explained in *Christian Education*,

> *[j]ust as it is difficult to postulate a firm divide between religious thought and action based on religious belief, so it is not easy to separate the individual religious conscience from the collective setting in which it is frequently expressed. Religious practice often involves interaction with fellow believers. It usually has both an*

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28 Gerhardus C Oosthuizen 'The place of traditional religion in contemporary South Africa' in J K Olupona (ed) *African Traditional Religions in Contemporary Society* (1991) Paragon House at 40.

29 *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 42.

30 *Prince's* case (n29) at para 48 per Ngcobo J.

31 *Prince's* case (n29) at para 42.

32 Johan D van der Vyver 'Limitations of freedom of religion or belief: international law perspectives' (2005) 19 *Emory International Law Review* 499 at 500.

33 *Prince's* case (n29) at para 110.

> *individual and a collective dimension and is often articulated through activities that are traditional and structured, and frequently ritualistic and ceremonial.'*[34]

Van der Vyver further discusses the differences between these two components in stating that, 'while freedom to believe is an absolute right, freedom to manifest one's religion or belief is not'.[35]

Significant judicial consideration of the right to believe has been undertaken in two cases: *S v Lawrence*[36] and *Christian Education South Africa v Minister of Education*.[37] Ngcobo J stated in *Prince* that this previous consideration revealed the following:

> *'(a) the right to entertain the religious beliefs that one chooses to entertain;*
> *(b) the right to announce one's religious beliefs publicly and without fear of reprisal; and*
> *(c) the right to manifest such beliefs by worship and practice, teaching and dissemination.'*[38]

It was also emphasised that 'implicit in the right to freedom of religion is the "absence of coercion or restraint"'. Thus 'freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs'.[39]

The individual vs the group: Protecting the balance in religious freedom

I suggested earlier that the relationship between religion and culture is, in essence, the relationship between the rights of the individual and those of the group. The protection of religious beliefs and the rights thereof are generally focused on the individual, whereas cultural rights, and in fact the enjoyment and manifestation of culture itself, require the group as the vehicle through which these rights can be fully exercised.

The separation of individual and community helps to gain a better appreciation of the different ways in which rights of the individual and rights of the community are enjoyed and protected in both domestic and international spheres. The shifting emphasis between the individual and the group in human rights is seemingly divided along regional lines. The Western notion of human rights generally tends to emphasise the rights of

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34 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 19.
35 Van der Vyver (n32) at 501.
36 *S v Lawrence, S v Negal; S v Solberg* 1997 (4) SA 1176 (CC).
37 2000 (4) SA 757 (CC).
38 *Prince's case* (n29) at para 38.
39 Ibid.

the individual over those of the group. On the other hand, the non-Western (or for the present purposes, African) perspective of human rights tends to prioritise the group over the individual – primarily because in the African tradition, there is no individual without the group.[40]

Western notion of human rights

The current discussion of African traditional religions and the specific operation of religious and cultural rights is based on the premise that human rights take on a particular regional character and manifestation. In considering the Western perspective of human rights, this can be summarised in Danchin's comment that 'the West embodies a particular legal tradition premised on a stridently individualistic account of moral personality; and the "universal" rights asserted by powerful states … are thus merely another form of Western imperialism – universalizing the tenets of a distinct tradition'.[41] Danchin cautions against Western influence masquerading as universalism. The 'stridently individualistic' account is in stark contrast to the notion of ubuntu and the traditional African understanding that individual identity is dependent upon group membership.[42]

African notions of human rights

God is like a skin or an apparel; each individual wears it in his or her own way[43]

The emphasis here is on ATRs, but this is not the only non-Western perspective of human rights that emphasises the group over the individual.[44]

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40 This concept is reflected in the concept of ubuntu, which holds that a person is a person through other people. In essence this means that one's sense of self, value and dignity is dependent on acknowledgement by and participation in a community. See *S v Makwanyane* 1995 (3) SA 391 (CC) especially paras 225, 237 and 308.

41 Peter G Danchin 'Who is the "human" in human rights? The claims of culture and religion' (2009) 24 *Maryland Journal of International Law* 94.

42 Danchin (n41).

43 Ugandan proverb, quoted in Daniel D Nsereko 'Religion, the state and the law in Africa' (1996) 28 *Journal of Church & State* 269 at 271.

44 For example, in 'Cultural dissent', Sunder (n2) explains (at 560–561) that in the case of Islam, particularly as the religion is practised in the Middle East and South Asia,

> *[b]ecause religious autonomy is understood in terms of a group rather than an individual, the traditional approach is to "balance" a group's rights to religion against women's interest in equality. This approach offers Muslim women living under fundamentalist versions of their religion no possibilities for equality and religion – they must either reject their religion in favour of secular, universal human rights norms or content themselves to remain in a culture that discriminates against them, if the discrimination is linked to religious beliefs. The model reflects a cultural relativist approach, supporting cultural autonomy against the imposition of "Western" values.*

There is often a clash of cultures where non-Western religions are compared with a Western 'universal' standard. The object of the current discussion is to challenge the appropriateness of this universalism, where the Western framework of human rights is found not to have universal relevance.

Differences in African and Western notions of human rights also mean that there are differences in the nature and forms of religion that exist in each context. In South Africa, the religious distribution is roughly as follows:

> *[t]wenty percent of black Africans belong to one of about six thousand varieties of black separatist or indigenous Christian movements, often referred to as 'syncretistic' churches because of their combination of African traditional elements with mission Christianity. Twelve percent of blacks are Methodist. African traditionalists make up the second largest religious group, accounting for nearly fifteen percent of the South African population.*[45]

Considering this demographic distribution, it appears that the syncretistic African traditionalists comprise the majority of African religions. Thus any conception of human rights, including the right to religious belief, even if framed in the context of a Western notion of human rights, operates within a traditional African context, and derives its meaning as such.

Religion, like culture, is susceptible to change – although less so – as are Africanist interpretations and applications of human rights. Although protection for religion is rigidly fixed, the content of religion itself need not necessarily be. In fact, Olupona suggests that it has been the ability to change that has protected African religions from being completely eroded by the various historical incursions of other religions. He posits the example of the 'encounter with the two monotheistic religions which have come to Africa, Christianity and Islam … [which] triggered various kinds of responses to the encounter'.[46] These responses exhibited flexibility, but not a complete withdrawal of African traditional religion. Instead, 'African Christians or Muslims at best remain as "insider-outsiders" or "outsider-insiders", because the religions they profess are anchored and mediated through other cultures, in this case, either European or Arab'.[47]

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45 Erin Goodsell 'Constitution, custom, and creed: balancing human rights concerns with cultural and religious freedom in today's South Africa' (2007) 21 *Brigham Young University J of Public Law* 111 at 117.

46 Jacob K Olupona 'Major issues In the study of African traditional religion' in Jacob K Olupona (ed) *African Traditional Religions in Contemporary Society* (1991) Paragon House at 31.

47 Makau Mutua 'Returning to my roots: African "religions" and the state' in Abdullahi Ahmed An-Na'im (ed) *Proselytization and Communal Self-Determination in Africa* (1999) Orbis Books 169 at 181.

In the course of being flexible, yet still maintaining a core characteristic, African religions have set an example that the Western notion of human rights would do well to follow. In this regard, the 'African traditional approach with its holistic emphasis has much to give to the modern world with its closed, limited, merely rationalist disposition'.[48] This is reflected in the traditional religions in South Africa, in that 'the human being is not dehumanized, but his/her personality is of value to the community'.[49] The sense of unity, of being together, is vital. 'The traditional religious approach has made worship in the indigenous church context more existential – religion here has to do with peoples' various dimensions of existence.'[50] In this regard, one begins to see how the African notion of religion relies more on a notion of community than it does on a notion of the individual. But until the world is fully receptive to the lessons it can absorb from African religions, Africans themselves 'remain the bearers of a suspended and distorted identity because the adopted religions cannot fully express their history, culture, and being'.[51]

The core communal and non-universalistic characteristic of African religions is explained further by Mutua, who says that:

> *unlike Christianity or Islam, [African religions] do not seek to convert or remake the "other" in their image. The notion of converting "the other" is alien because the religion of the people is their identity and being; … it is redundant and tautological to talk of the religion of the Yoruba, for instance, because their identity is their religion.*[52]

According to Mutua, the difference between African religion and African culture is imperceptible – most probably because such a difference does not exist, or even, perhaps, because there is no use for such a distinction in the African conception of human rights. But because this distinction is perceptible, even palpable in the Western notion of human rights, the exercises of proselytisation were far more insidious and devastating to African culture than one might have expected from efforts to achieve religious conversion.

Mutua argues that the effect of proselytisation of European Christianity and Arabic Islam resulted in a 'cultural genocide'.[53] In the effort to convert

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48 Oosthuizen (n28) at 49.
49 Ibid.
50 Ibid.
51 Mutua (n47) at 181.
52 Mutua (n47) at 172.
53 Makau Mutua 'Proselytism and cultural integrity' in Tore Lindholm *et al* (eds) *Facilitating Freedom of Religion or Belief: a deskbook* (2004) Koninklijke Bell 651 at 651–652.

adherents, the notion of African culture, which was intrinsically tied to African religion, was excised, thus leaving the African converts not only adherents to a foreign religion, but also without a familiar culture within which to define themselves. The following discussion of inculturation, or a blending of Christian elements and African culture, is offered as a workable compromise that could stave off the cultural genocide that Mutua suggests is the inevitable result of the incursion of Christianity and Islam into the African cultural and religious landscape.

Inculturation: The blending of African and Western concepts of religion

Inculturation purports to be a compromise that incorporates both Western and non-Western aspects of religion. In essence,

> *inculturation in the context of (Christian) religion denotes the use of African culture as a medium of communicating the gospel message. Inculturation thereby seeks to give a purified meaning, in conformity with Christian truth, to African cultural practices.*[54]

In accordance with this definition, African culture is little more than a conduit for channelling Christianity to the people at the expense of their traditional religions. Thus, it seems that inculturation, masquerading as a compromise, is really a means of prioritising Christianity over African religions. In his discussion of inculturation, Tlhagale stresses that it 'is a process that identifies, purifies and translates concepts of African culture that are best suited to communicate the Christian experience'.[55] This notion of purification suggests of course, that Christianity is the only true or pure religion and that the aim of proselytising is to rid other religions of their impurities through inculturation. In essence, purification is about extracting the traditional cultural component – which will result in a form of religion that stands separate and apart from the culture in which it operates.

Mutua suggests that true inculturation could not come about if human rights law lived up to its promise and recognised that 'the right to freedom of religion also includes the right to be left alone – to choose freely whether and what to believe'.[56] The religious incursions or proselytisations run contrary to this aspect of the right; otherwise, it would have been noted that proselytisation is a violation of the other's right not to believe in the faith of the proselytiser.

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54 Buti Tlhagale 'Inculturation: bringing the African culture into the church' (2000) 14 *Emory International Law Review* at 1249.

55 Tlhagale (n54) at 1275.

56 Mutua (n53) at 651–652.

Although inculturation seems to replace one religious belief with another, its means of doing so is through an observance and respect for faith that is common to both religions. Inculturation uses the devotion to the sacred nature of religion to usurp the footing of traditional African religion and culture. As Tlhagale explains:

> *[f]aith, because it has its own life, its own norms, will necessarily transform the host culture so it becomes part of that culture and yet not of that culture. … Faith creates a new culture, a new meaning, even though this new culture may use distinctive features of the host culture. Faith is the lever that unshackles the African culture from its own self-imprisonment, from the limitations inherent in the African world-view.*[57]

Thus, the devotion to faith is both the core of ATR and the seed of its demise in the fact of inculturation. In a sense, it is this blind devotion to faith that lays African religions open to the process of inculturation and thereby infiltration of Christianity. According to Tlhagale, 'the goal of this process is to allow the Christian message as received and experienced to express itself in the local culture'.[58] Thus, although inculturation, or the idea of blending Christian and traditional African religious elements, has the potential to provide a compromise solution, blending elements of both worlds, the reality is that it simply promotes Christianity.

Embedded in the notion of inculturation is the supremacy of Christianity. Primacy of one religion over another, however, is contrary to universal human rights laws, which seek to protect the freedom to practise and believe in all religions equally. Thus what is required is a conception of human rights that embraces and supports African traditional religions.

The necessity of distinguishing the individual from the community

I suggested previously that the differences between Western and non-Western conceptions of human rights centre on the emphasis that is placed on the rights of the individual vis-à-vis those of the community. From the traditional African perspective, one's sense of identity is derived from the community, and identity and dignity are 'inseparably linked as one's sense of self-worth is defined by one's identity'.[59] Further, one's identity in the community provides the entry for access to human rights.

Just as there is an intrinsic, almost symbiotic connection between the individual and the community, there is a similar connection between religion and culture. However, because religion and culture are perceived

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57 Tlhagale (n54) at 1250–1251.
58 Tlhagale (n54) at 1284.
59 *Pillay's case* (n12) at para 53, per Langa.

as separate and distinct rights, at times it may become necessary to classify a particular practice or right as being based in either religion or culture. In the same way, there are times when it is necessary to determine whether one's enjoyment of a particular right is based on one's individual identity, or identity as a member of the community. The determination of a right as being either religious or cultural depends on whether 'a particular asserted practice is shared within the broader community, or a portion of it, and therefore properly understood as a cultural practice rather than a personal habit or preference'.[60]

Community membership does not eradicate individual preferences.[61] Although the right to culture – and the notion of culture itself – is based on a notion of commonality, or shared interests, there is still room for individual expression within the community. As Langa explains, 'while cultures are associative, they are not monolithic. The practices and beliefs that make up an individual's cultural identity will differ from person to person within a culture.'[62] Thus, although cultural rights are primarily group or community rights, there is still an acknowledgement that the community consists of individuals, who may differ in the way in which they seek to assert their culture. For instance, one individual may express 'culture through participation in initiation rites, another through traditional dress or song, and another through keeping a traditional home'.[63] All practices may be reflective of a particular culture, but not all individuals who are part of the cultural community will practise all aspects, and, even then, might not practise them in the same way. The fact that there are individual manifestations of culture demonstrates that there is some space for the reflection of individual practices and characteristics within a cultural community. This recognition of individual manifestations of cultural rights implies an individual status that is usually expected for religious rights. Thus, the elevation of the status of the individual within a culture to the same level as that which she would enjoy with respect to religious rights implies the possibility of equalising the status of religious and cultural rights.

60 *Pillay's* case (n12) at para 154, per O'Regan.

61 See David S Caudill 'Lacan's psychoanalysis: religion and community in a pluralistic society' (1995–1996) 26 *Cumberland LR* 125 at 144.

62 *Pillay's* case (n12) at para 54, per Langa.

63 *Pillay's* case (n12) at para 54.

Intersectionality as a means of addressing individual identities within the group

The interconnectedness of religion and culture can be addressed through the notion of intersectionality. This is an analytical framework that developed out of American Critical Race Theory (CRT). It examines the way in which multiple aspects of personal identity affect the individual's experience of equality.[64] Religion and culture are fundamental and inseparable aspects of one's identity that intersect to create a particular experience of both individual religious belief and group cultural belonging.

The argument advanced here is that one's access to and enjoyment of either religious or cultural rights is affected by how one is able to configure and access the other right – bearing in mind the fact that, for much of Africa, there is no individual without the group. Consequently, the protection of the individual's right to religious belief is intimately connected with that person's right, as a member of her community, to partake in cultural practices.

Sunder suggests that religion and culture need not necessarily be construed as polarised entities relating to different aspects of individual identity, but, instead, the two concepts should be seen as closely related. In relaying the perspective of the activist network, Women Living Under Muslim Law, she explains that this relationship is not based on the fact that religion and culture are fixed entities, but rather that 'far from being homogeneous and fixed, religion and culture are and *ought to be* plural, contested, and constantly evolving to meet the changing needs and demands of modern individuals'.[65] Sunder recognises that religion and culture, in spite of the differences they may represent in terms of the relationship between the individual and the community, must both reflect an acknowledgement of changing social contexts. Although religion and culture are at times considered to be fixed certainties, ideally, they ought to be flexible enough to change along with social contexts, thereby making them relevant to the lives of both individuals and communities.

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64 See Kimberlé Crenshaw 'Mapping the margins: intersectionality, identity politics, and violence against women of color' (1990–1991) 43 *Stanford Law Review* at 1241ff. Initially, intersectionality was concerned with race and gender, and argued that the discrimination experienced by African American women was different to the discrimination experienced by white women or African American men, because the African American woman's experience is located at the intersection of race and gender, and this specific location could not be accessed by those who did not share those particular aspects of identity.

65 Sunder (n21) at 1441.

In 'Cultural Dissent', Sunder explains that the liberties ascribed to culture imply corresponding restrictions on individual freedom. In this sense, in advocating for the cultural rights of the group, one is, in essence, simultaneously relinquishing any rights that one might have as an individual. This is not to suggest that the interests of the group and the individual are always in competition where culture is concerned, but, in those instances where there is conflict, the exercise of cultural rights includes an expectation that the interests of the individual will give way to the broader interests of the group. Sunder describes this as

> *a world in which cultural identities are imposed and individuals have no agency to contest discriminatory or repressive cultural norms. Under current law, individuals have either a liberty right to associate on the association's terms or an equality right in the public sphere. But individuals have no right to liberty and equality within a normative association. Individuals have no right to contest the cultural meaning of associational membership or to hold plural views within an association. To the contrary, the more normative or expressive an association is, the more autonomy the group has to exclude dissenters; an individual's equality right will be upheld only if that right does not conflict with the liberty right of the association to define itself.*[66]

On this basis then, individual rights and freedoms – particularly the right to equality – are the price that one pays for group membership and its attendant enjoyment of culture. This position goes a long way towards illuminating the conflict that arises when cultural beliefs and practices are seen to be in conflict with individual rights to equality. In 'Cultural Dissent', Sunder explains that there can never be true dissent within cultures – or within cultural groups – as any such dissent, as reflected in the dissonance between individual and group rights, could result in expulsion from the group. And, since culture is dependent upon group association for manifestation and enjoyment of cultural rights, one cannot dissent from the culture and still exert a cultural right.[67] In suggesting the ideal of cultural survival, or specifically, survival of the rights of the individual within a cultural context, Sunder argues for a 'critical legal approach to cultural survival that would require law to recognize the plurality of meanings within a culture'.[68]

It may be that religion and culture are so intimately bound up in each other, as well as in the identity of the right holder, that any attempt to separate them is academic, futile, and contrary to the way in which religious and cultural rights are exercised in Africa today. Such an intimate

66 Sunder (n2) at 535.
67 Sunder (n2) at 549.
68 Sunder (n2) at 557.

connection may mean that rights violations could just as easily be grounded in culture as religion, and thus elevate culture to a status in rights litigation that it has not previously enjoyed.

The balancing act between religious and cultural rights, just like the balance between the rights of the individual and the rights of the community, is a very delicate one. For instance, when religion is seen to be an intricate and indistinguishable thread in the fabric of a particular culture, then any efforts to question or delegitimise the religion 'can easily lead to the collapse of social norms and cultural identities'.[69] Thus, in order to prevent cultural dislocation as a consequence of religious criticism, there must be a clear demarcation between religion and culture. Yet, this demarcation is still somewhat fluid, reflecting a blurred line that divides religion from culture, and acknowledging that at times there is a blending of one into the other.

Exploring the relationships between law and culture, and law and religion

The following is an exploration of the relationship that religion and culture each has with the law. Law – whether it be the international human rights instruments which provide the universal framework for the enjoyment of the right to religious belief and the right to culture, or the domestic constitution of religious and cultural rights – establishes the legitimacy for claims to the enjoyment of these rights. The intermingling of religion and culture, and consequently of the attendant legal claim, was clearly demonstrated in *MEC for Education: KwaZulu-Natal and others v Pillay and others*.[70] Generally, the case looked at the place of religious and cultural expression in public schools. Specifically, because she wore a nose stud to high school, a student was subjected to disciplinary action for failing to comply with the school's uniform code of conduct. The girl (and her mother on her behalf) argued that the nose stud was an expression of her Hindu culture and religion and that the school's request for her to remove it violated her rights to both culture and religion. The identified difficulty in this case – namely that of distinguishing between Hindu culture and Hindu religion – is a universal dilemma of all cultures and religions.[71]

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69 Mutua wa Mutua 'Limitations on religious rights: problematizing religious freedom in the African context' (1999) 5 *Buffalo Human Rights LR* 75 at 76. Mutua states that the result of delegitimising religion in most of black Africa is a culturally disconnected people, neither African nor European nor Arab.

70 2008 (1) SA 474 (CC).

71 *Pillay's* case (n12) at para 13, per Langa.

The young Ms Pillay grounded her claim in both religion and culture, but the Constitutional Court majority judgment of Langa J maintained that it was important to keep these two grounds separate and distinct. In articulating this distinction, Langa J said that

> *religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community. However, there will often be a great deal of overlap between the two; religious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum and may be based on the community's underlying religious or spiritual beliefs. Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.*[72]

The dual grounding of the claim in both religion and culture was further emphasised by Langa J where he reflected that

> *the temptation to force [grounds of discrimination] into neatly self-contained categories should be resisted. That is particularly the case where the evidence suggests that the borders between culture and religion are malleable and religious belief informs the cultural practice and cultural practice attains religious significance.*[73]

Although it is often difficult to distinguish cultural practice from religious belief, there are arguably interpretative differences in the protection that each is afforded in law. In her dissenting judgment in *Pillay*,[74] O'Regan J pointed out that the 'Constitution recognises that culture is not the same as religion, and should not always be treated as if it is'.[75] In referring specifically to ss 9, 15, 30 and 31 of the Constitution, the judge discussed the similarities and differences in the equality rights protection that refer specifically to religion and specifically to culture. For instance,

> *[r]eligion is dealt with without mention of culture in section 15, which entrenches the right to freedom of belief and conscience. By associating religion with belief and conscience, which involve an individual's state of mind, religion is understood in an individualistic sense: a set of beliefs that an individual may hold regardless of the beliefs of others. The exclusion of culture from section 15 suggests that culture is different.*[76]

And, on the other hand,

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72 *Pillay* case (n12) at para 47, per Langa.
73 *Pillay* case (n12) at para 60, per Langa.
74 Justice O'Regan dissented in part to the order proposed by Justice Langa.
75 *Pillay* case (n12) at para 143, per O'Regan.
76 Ibid.

> *[t]he inclusion of culture in section 30 and section 31 makes it clear that by and large culture as conceived in our Constitution, involves associative practices and not individual beliefs. … By including religion in section 31, the Constitution makes plain that when a group of people share a religious belief, that group may also share associative practices that have meaning for the individuals within that religious group. Where one is dealing with associative practices, therefore, it seems that religion and culture should be treated similarly.*[77] *… Associative practices, which might well be related to shared religious beliefs, are treated differently by the Constitution because of their associative, not personal character.*[78]

O'Regan's argument is that religion and culture ought to be treated differently in so far as one has an associative nature and the other does not.[79]

The issue in *Pillay* was whether Ms Pillay's wearing of the nose stud was an associative practice. This involved considering whether her participation in and association with her cultural and religious community was dependent on her wearing the nose stud. This led to a further level of inquiry, namely, how broadly or narrowly community should be defined. Given that wearing a nose stud is something that was practised by her mother and grandmother, it was clearly an associative practice on the basis of her family community. But the nose stud was not something that was broadly mandated by either Hindu religion or Hindu culture. In the end, it was deemed reasonable that Ms Pillay ought to have been able to apply for a religious exemption from the provision of the uniform policy that had prevented her from wearing her nose stud.

The protective rights afforded to cultural, religious and linguistic communities in s 31 of the South African Constitution acknowledge that these communities are not static, but are dynamic and continuously responding to changing social contexts.[80] This dynamism also implies a level of contestation that causes cultural shifts as a result of certain competing interests.

In *Smit v King Goodwill Zwelithini*[81] the issue involved a battle of cultures – namely that of a particular Zulu community versus that of a broader public interest group who argued that a cultural practice involving the ritual killing of a bull violated their beliefs relating to the protection of animal rights. Unlike *Pillay*, *Smit* did not entail the need to fashion a remedy on the basis of either religious or cultural rights. The First Fruits harvest festival,

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77 *Pillay's* case (n12) at para 144, per O'Regan.
78 *Pillay's* case (n12) at para 145, per O'Regan.
79 *Pillay's* case (n12) at para 147, per O'Regan.
80 *Pillay's* case (n12) at para 152, per O'Regan.
81 [2009] ZAKZ 75 (PHC).

of which the initiation ceremony and ritual bull killing were part, was a long-standing community cultural practice.[82] Although one purpose of this practice was to honour the ancestors, as this is a form of devotion and thanksgiving in ATRs, it is very difficult to separate the religious aspect from the overriding culture. Moreover, the community saw no need to make this distinction, as, for their purposes, religion and culture fit together to form a complete whole.

In the result, however, the immediate order sought by Smith (of the Animal Rights Trust), namely, prevention of the bull-slaughtering ceremony, was refused on the basis that the application was brought too late, and the community would have been irreparably harmed had the remedy been granted. In this way, the preservation of long-standing tradition outweighed an eleventh hour request to assert animal rights. However, this does not bar any future attempt to reopen this particular debate.

The modern conflation of religion and culture

The difficulty in *Pillay* seemed to be the judiciary's attempt to protect an individual's right to cultural expression without any consideration of evidence from the cultural community as a whole. The issue in *Smit* seemed to be a battle between two cultural communities. Religion is not an overly strong element in either case, thus demonstrating that South African jurisprudence is perhaps moving towards considerations of cultural rights on their own, without the familiar framework of religious protection. Such a shift, if it is indeed happening, reflects a growing concern with associative rights over those of the individual. The strengthening of cultural communities and their attendant rights may in the end still mean that religion is being conflated with culture. References to conflation and equalising the perceived hierarchical relationship between religion and culture is often marked by the tension of having to choose one or the other. Typically, one's religious beliefs are determined by (or at the very least, are a function of) one's culture – effectively conflating religion and culture. But it seems that case law is more comfortable addressing rights under the rubric of religion. Establishing equal consideration for religious

82 See *Smit's* case (n81) para 8, where Justice Van der Reyden described the ceremony at issue as 'an annual event that takes place at around the same time each year for significant religious and cultural reasons, and [which] is well known to the public and has been recorded in various writings dealing with customary law. Indeed it is a ceremony that has been performed by the Zulu nation uninterruptedly since time immemorial.'

belief and cultural rights does not completely alleviate this tension, as there is still the issue of when to choose which.

In recent years, expressions of culture – particularly those of South African traditional culture in the form of rituals, festivals and sacrificial animal killing – has garnered much media attention, as the performance of these rituals has been deemed offensive to animal rights activists.[83] On the other hand, these rituals are performed by members of South African communities in accordance with their cultural traditions. In both *Smit* and the finding by the South African Human Rights Commission on a January 2007 bull slaughter,[84] traditional animal sacrifice rituals were challenged by those outside the culture in question. The applicants asserted the dignity and preservation of the animal concerned. Such an assertion assumes that the holistic perception of the animal is limited to its being a separate living entity, deserving individual rights and protection. The other point of view is that animals are part of a larger cultural framework, and that animal sacrifice, if practised humanely and respectfully, is a long-standing component of cultural practice. In this way, the animal is seen as fulfilling its role as part of the community, and is a key component in maintaining the cycle of the cultural life of that community.

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83 See news reports of the January 2007 slaughter of a bull by senior ANC member, Tony Yengeni, upon his release from prison: 'Yengeni animal slaughter not criminal – SAHRC', *IOL* (23 January 2007), available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw1169538120458B262 (accessed on 29 March 2010); 'We Want the Bull to Bellow', *News24* (28 January 2007), available at http://www.news24.com/Content/SouthAfrica/News/1059/8dbea7bab4da4835a95c3a68ed1767c2/We_want_the_bull_to_bellow (accessed on 14 August 2010). See also Kevin Behrens 'Tony Yengeni's ritual slaughter: Animal anti-cruelty vs culture' (2009) 28 *South African Journal of Philosophy* at 271ff. See also media reports of the First Fruits Festival in 2009: 'Bull-killing Ritual Defended', *IOL* (7 December 2009), available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20091207102625586C296701&page_number=2 (accessed on 14 August 2010); 'Bull-killing Ruling promotes Cultural Tolerance', *Mail & Guardian* (4 December 2009), available at http://www.mg.co.za/article/2009-12-04-mkhize-bullkilling-ruling-promotes-cultural-tolerance (14 August 2010).

84 See 'Yengeni Animal Slaughter Not Criminal – SAHRC' (n83).

The challenge to the cultural rights that were at the heart of the Yengeni and First Fruits affairs seeks to subvert particular cultural rights to the broader interests and obligations related to animal rights and protection – which are not directly related to either religion or culture.[85] The claim that animal sacrifice is a traditional African cultural right is therefore on shaky ground. This leads one to question its legitimacy as a right that deserves protection.

Conclusion

The line between religion and culture is a blurred and grey one. Yet, despite the melting of each into the other, religion and culture exist as distinct entities, providing substantive content and character both to individuals and communities. This blurred line results in a tendency to mistake one for the other, or to conflate one with the other. This tendency should be avoided, for it sends the wrong message regarding the legitimacy of ATRs. In reality, it is often very difficult to distinguish African religion from African culture.

Yet, this distinction is necessary for the purposes of contemporary litigation to protect the enjoyment of these rights. In framing a claim on the basis of either religion or culture, one must be careful to demonstrate the aspects of each, while at the same time maintaining the distinction. In this way, a separate body of judicial interpretation of religious belief rights and cultural practice rights may emerge. This separate body may reflect the unavoidable crossover between religion and culture, but, even so, it seeks to establish that traditional African culture, which has so often been disregarded in the international arena, can be established as an area that deserves special protection.

In order to obtain complete, yet distinct, recognition for both religious and cultural rights, perhaps what is required is a new conception of inculturation, whereby religion and culture are bonded and reflected almost indistinguishably in both individual belief and community association.

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85 However, the text of the judgment repeats the applicants' contention that their advocacy in seeking to prevent the slaughter of the bull is a matter of conscience and belief. Specifically, the pleadings state:

> *'The applicants' sincerely held belief is that animals must be protected and saved from cruelty and suffering at the hands of human beings. It is for this reason that the applicants have been appointed as trustees of the Trust, a vehicle which enable them to actively intervene in practices and behaviour which cause harm and suffering to animals. The applicants' beliefs are integral to the applicants' own sense of identity, self-worth and dignity. The applicants' regard themselves as under a moral and ethical obligation to prevent the cruel and inhumane treatment of animals. For this reason, the applicants submit that their freedom of conscience is impacted upon the ritual killing of a bull at the Ukweshwama ceremony.'*

See *Stephanus Smit v King Goodwill Zwelithini Kabhekuzulu* [2009] ZAKZ 75 (PHC) para 7.

Such a conception would acknowledge the similarities and syncopation that facilitate the protection of both religion and culture. The new idea of inculturation would serve to highlight African traditional religions, but would not necessarily mean a devaluation of cultural rights. The conception would be viewed as an ultimate manifestation of progress in both human rights theory and practice, as it would reflect a modern embrace of the traditional.

CHAPTER 4

Umkhosi Ukweshwama: Revival of a Zulu Festival in Celebration of the Universe's Rites of Passage

Christa Rautenbach[1]

History is replete with examples of societies that have destroyed each other in consequence of cultural and religious intolerance but serves also to illustrate that understanding and respect for others who hold different beliefs and the recognition of the right to observe their own cultural heritage results in harmonious co-existence where conflict could otherwise have arisen.[2]

Introduction

South Africa is a young democracy with a past made notorious by racial discrimination on all levels of public and social life. The diverse nature of South African society and the renewed interest in traditional customs and values pose new problems which daily threaten harmonious cooperation in society.[3]

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1 I wish to thank Professor Alan Brimer for his valuable comments on an earlier draft of this chapter.

2 *Stephanus Smit v King Goodwill Zwelethini Kabhekuzulu* [2009] ZAKZPHC 75 (the *Smit* case).

3 The South African population can broadly be divided into the following groups: Africans 79,6 per cent, Coloureds 8,9 per cent, Indian/Asian 2,5 per cent and whites 8,9 per cent. These groups can be subdivided by the ethnicity, language, religion and origins of a particular group. See Statistics South Africa, Statsonline: The Digital Face of Stats SA. Available at *http://www.statssa.gov.za/publications/P0302/P03022007.pdf* (accessed on 3 June 2008). In terms of religious affiliation, over three-quarters (79 per cent) of South Africans are Christian, mainly Protestant. Other prominent religions include Islam (2 per cent), Hinduism (2 per cent) and Judaism (2 per cent). About 15 per cent of the population practise no religion at all. See Central Intelligence Agency, *The World Fact Book* Available at *https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html#Econ* (accessed on 30 June 2008). South Africa has 11 official languages. According to the 2001 census, isiZulu is the mother tongue of 23,8 per cent of the population, followed by isiXhosa (17,6 per cent), Afrikaans (13,3 per cent), Sesotho (9,4 per cent), and English and Setswana (8,2 per cent each). The least-spoken indigenous language in South Africa is isiNdebele, which is spoken by 1,6 per cent of the population. In addition to these official languages, several local and foreign dialects are spoken in South Africa. See Statistics South Africa (2004) 8–12.

When the Zulu king, Goodwill Zwelethini Kabhekuzulu, decided to revive the age-old *Umkhosi Ukweshwama* (the First Fruits Festival),[4] and with it the ritual of bull slaughtering, he probably did not anticipate the public outcry that would ensue, especially from animal activists.[5] The controversy finally ended up in court when the Animal Rights Africa Trust (the Trust) applied for an interim interdict in the *Smit* case prohibiting the slaughtering of a bull at the Festival, which was to be held on 4 December 2009 in Nongoma, KwaZulu-Natal. The Trust based its application mainly on two grounds. First, it argued that the freedom of conscience and belief allows it to believe in and champion the cause of animal rights. Second, it averred that culture is not an absolute right but is subject to the laws of the land.[6] The application was dismissed in the KwaZulu-Natal High Court Pietermaritzburg primarily because the applicant's factual basis was flawed and did not prove that the bull was indeed to be tortured, as had been reported in the media. The Court also expressed the view that conflicts such as these should be resolved by the relevant authorities and the intervention of parliament.[7]

What makes the First Fruits Festival different from others of its kind is the fact that it is celebrated within the framework of Zulu tradition. This includes elements of both religion and culture, which are rights protected under the South African Constitution.[8] The Constitution refers to culture[9]

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4 The words can loosely be translated as 'First Fruits Festival'. The festival's roots date back quite far. For early accounts, see H Kück *'Umkosi Wokwazulu*: the Annual Festival of the Zulus' (1878) *Folk-Lore Journal* at 134–139. Reports suggest that it fell into disrepute and that it had not been celebrated for a very long time before its revival by the Zulu king. See in this regard Eileen J Krige *The Social System of the Zulus* 4ed (1962) Shuter & Shooter 249 note 1, which indicates that the festival ceased to be held as a result of European restrictions in connection with the slaughtering of a bull and the performance of military reviews by civilian groups.

5 A few examples include: Narissa Subramoney 'Rights groups slam bull killing ritual' *Eyewitness News* (17 November 2009) available at http://www.eyewitnessnews.co.za (accessed on 22 March 2010); Bheki Mbanjwa 'IFP enters ritual bull killing 'fray' *IOL* (26 November 2009), available at http://www.iol.co.za (accessed on 22 March 2010); Sipho Khumalo 'Attack on Zulu culture "malicious" *IOL* (23 November 2009), available at http://www.iol.co.za (accessed on 22 March 2010); Ingrid Oellermann 'Premier's aide: cruelty claim "distorts" bull slaughter ritual' 1 December 2009 *The Witness*, available at http://www.witness.co.za (accessed on 2 December 2010).

6 *Smit's* case (n2) at paras 7–8.

7 *Smit's* case (n2) at para 17.

8 Constitution of the Republic of South Africa, 1996 (the Constitution). On the official website of the 'Zulu Nation and the Zulu 'Royals' the Festival is discussed under the heading 'Zulu Culture'. See http://www.zuluroyals.com (accessed on 19 August 2010).

9 Culture is referred to in ss 9, 30, 31, 181, 184–186, 235 and Schedules 4 and 5.

and religion[10] on a number of occasions, and there are no direct indications in the text that the one is favoured above the other. Nevertheless, there seems to be a tendency among legal scholars and some of the judiciary to treat religious rights as being more important than cultural rights.[11] Some authors argue that the differences and commonalities between the two should not matter, because African traditions do not draw any distinction between the concepts – they are one and the same.[12] This viewpoint corresponds with the respondents' contention in the *Smit* case that the Festival is a 'religious and cultural' event.[13] For purposes of this contribution, the author will not engage in discussion of the tension between culture and religion, as it is dealt with elsewhere.[14] Assuming, for the time being, however, that the Festival is religious and not cultural in nature and must, accordingly, take a higher ranking, it would still be necessary to determine whether it can indeed be classified as religion.[15]

This assumption presumes a clear and universal understanding of the nature of religion, which is where the difficulties begin. Definitions are mental constructs and will apply to the natural world only if we reduce it to such constructs, which increases the danger of falsification. Is it thus possible to define and determine religion in a way that will suffice for purposes of constitutional adjudication in each instance? How should religion be conceptually defined in a constitutional context? Since the challenges posed by the exceptionally fluid meaning of the notion of religion are manifold

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10 Religion is referred to in ss 9, 15–16, 31 and 37.

11 See Jewel Amoah & Tom Bennett 'The freedoms of religion and culture under the South African Constitution: do traditional African religions enjoy equal treatment?' (2008) 8 *African Human Rights Law Journal* 357 at 368.

12 See the discussion by Jewel Amoah in chapter 3. See also some of the reading material in Michael Lambek *A Reader in the Anthropology of Religion* (2002) Blackwell Publishing 61–82.

13 *Smit's* case (n2) at para 8. With regard to the tendency to classify issues such as these as cultural issues, see also the media statement published by the Department of Cooperative Governance and Traditional Affairs on 25 November 2009, available at http://www.info.gov.za/speeches/2009/09112611451002.htm (accessed on 22 March 2010); and the remarks made by President Jacob Zuma at a banquet held in honour of Vice-President Atiku Abubakar of Nigeria in Durban, available at http://www.info.gov.za/speeches/2004/04091008151005.htm (accessed on 22 March 2010).

14 See Jewel Amoah's discussion in chapter 3.

15 However, in *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) at para 52, Ngcobo J refrained from engaging with the question of whether there is a difference in approach towards religion and culture and held that 'cultural convictions or practices may be as strongly held and as important to those who hold them as religious beliefs are to those more inclined to find meaning in a higher power than in a community of people'.

and obvious, it may be necessary to find a way in which to limit the scope of what may be described as religion in the context of the Constitution.

This chapter first explores the possible meanings of religion in the context of African traditional religion (ATR) to determine whether the Zulu tradition of *Umkhosi Ukweshwama* can indeed be regarded as religious.[16] For this purpose, I have relied heavily on the scholarly works of prominent anthropologists and sociologists.

The second issue which will be dealt with concerns the question whether the Festival qualifies as a religious event and whether the rituals, such as the offerings of the first harvest and the bull slaughtering during the Festival, can also be regarded as religious.

As clearly illustrated by the facts of the *Smit* case, rituals have a tendency to upset individuals and communities who do not share the same values as those performing them. It is also possible that a ritual may be against the laws of the state. One such example is the use and possession of cannabis for religious purposes, both of which are prohibited in terms of national legislation. As pointed out by Ngobo J in *Prince v President, Cape Law Society*:[17]

> *[T]he right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which laws they will obey and which they will not, the State should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and the respect for the law.*

With this statement as a starting point, this contribution surveys some of the problems that arise when religion and law collide, and it discusses some possible ways of dealing with them.[18]

Although many rituals, no doubt, may offend individuals or groups, this contribution focuses on animal sacrifice. This is an essential act in various traditional religious ceremonies, and it is needed to seal such rites of passage as initiation, marriage and burial, not to mention occasions when a thanksgiving is offered to the ancestors. What is more, animal sacrifices have also been the cause of great public controversy in South Africa.

16 See further chapter 3.

17 2001 (2) SA 388 (CC) at para 26. This was an interim judgment made before the final judgment was delivered in *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC).

18 See the discussion 79ff.

Is the Zulu tradition a religious rite?[19]

The pertinent question – whether the Zulu tradition is religion or culture – never came to the fore in the *Smit* case, most probably because it was never in dispute. Nevertheless, the applicant's arguments were based on the fact that bull slaughtering was part of the culture of the Zulu community, while the respondent contended that it was both a religious and a cultural ritual. Although the court finally dismissed the application on the default of a legal basis, a discussion of the question could have made a valuable contribution towards the debate. The most difficult cases for lawyers are those where theoretical arguments become important; the meaning of an inexact concept such as religion falls squarely within this category. As a consequence of the many possible multi-layered and context-dependent meanings of the notion, religion is a much contested concept, the meaning and parameters of which have been the subject of deliberations primarily by anthropologists and sociologists for many years.[20] Increasingly, legal scholars and lawyers are joining the quest to find a suitable description.[21] While this quest continues we are left with a plethora of fragmented and diverging views on the relevance, nature and meaning of religion.

19 Zulu beliefs have interested anthropologists since early times, and numerous publications exist in this regard. For example, James Macdonald 'Manners, superstitions, and religions of South African tribes' (1891) 19 *Journal of the Anthropological Institute of Great Britain and Ireland* at 113–140; Gerhardus Cornelius Oosthuizen 'Isaiah Shembe and the Zulu world view' (1968) 8 *History of Religions* at 1–30; Thomas E Lawson *The Religions of Africa* (1984) Harper & Row 12–49.

20 The exact scope and meaning of religion have been the focus of many debates between eminent scholars from all spheres of science, especially the natural sciences, so much so that its study has been referred to as the 'scientific study of religion' See Timothy L Hall 'The sacred and the profane: a first amendment definition of religion' (1982–1983) 61 *Texas Law Review* 160 at 163.

21 See Gerhard van der Schyff 'The legal definition of culture and its application' (2002) 119 *SALJ* at 288–294 and the sources cited by him. See also Johan D van der Vyver & Christian M Green 'Law, religion and human rights in Africa: introduction' (2008) 8 *African Human Rights Law Journal* 337 at 338–339.

The question whether Zulu traditions can be regarded as a religion has been dealt with on a few occasions before,[22] and, since it is impossible to do justice to all of the viewpoints regarding the exact scope and meaning of religion in the confines of a chapter such as this, the focus will be on a few cases in point. Also, in light of the supremacy of the Constitution, it will not be possible to separate the efforts of defining religion in the Constitution from broader issues of constitutional interpretation;[23] neither will it be possible to advance one perfect definition of religion that will satisfy all. In addition, the quest to find a legal definition for a particular religion might result in the exclusion of other religions which may, in turn, violate other constitutional rights.[24] In spite of these dangers, some sort of description is necessary to determine which kind of activity warrants constitutional protection.[25] Put differently, a definition of religion is essential in order to ascertain whether acts performed in the name of religion qualify for constitutional protection.[26]

Although subjected to severe criticism by prominent African scholars,[27] a number of earlier European scholars gave valuable insights in searching for a suitable description of religion, albeit in a non-legal context. The minimum definition provided by Tylor,[28] namely that religion is the belief

22 The characteristics of ATR, according to John S Mbiti in *African Religions and Philosophy* (1969) Frederick A Praeger 1–5, can be summarised as follows: (*a*) there is no formal distinction between the sacred and the secular, religious and non-religious, and spiritual and material aspects of life; (*b*) the focus is on the community's participation and not so much on the individual's; (*c*) there are no formal, systematic sets of dogmas which must be adhered to and the assimilated practices are handed down from generation to generation; (*d*) religion is not universal but is community bound, although cross-pollination may occur as a result of intermarriage, migration and other factors; (*e*) conversion from one religion to another is not possible; one is born into a particular religion; (*f*) a religion has neither founders nor reformers; and (*g*) belief in the continuation of life after death is found in all religions. See also the discussion of traditional South African religion by Sibusiso Masondo in chapter 2.

23 For example, s 39(2), which requires a promotion of the constitutional values in the interpretation of legislation, the common law and customary law.

24 For example, s 9(3), which prohibits unfair discrimination on the ground of religion, s 15(1), which confirms everybody's right to freedom of religion, and s 31(1), which allows for religious communities to practise their religion.

25 Hall (n20).

26 Van der Schyff (n21) at 289.

27 See the criticisms raised by Mbiti (n22) at 7–10 against the works of earlier scholars.

28 Edward B Tylor *Primitive Culture* (1871) JP Putnam's Sons.

in spiritual beings,[29] is still quoted today and remains relevant.[30] The Zulus are no strangers to spiritual beings. God, ancestral spirits and other deities form part of the Zulu belief system and this definition seemingly satisfies our desire to label the Zulu tradition as religious.[31] Tylor's animist theory has no requirement of belief in a supreme being.[32] He identified a belief as religion where adherents thought that everything had its own spirit, none of which was supreme, for example, the God of the sky and ancestral spirits.[33] The vestiges of those religions are still with us today, sometimes incorporated in the rituals of traditional communities, such as the First Fruits Festival.

Another anthropologist, Wallace,[34] provides us with a more practical approach towards defining religion, which he summarises as the 'fundamental pattern of religion', which can be described in terms of 'levels of analysis'.[35] In summary, this approach entails the following:[36] On the first level we find a supernatural being. The second level comprises certain categories of behaviour which he recognises as the 'minimal categories of religious behaviour', namely: prayer,[37] music,[38] physiological exercise,[39]

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29 Tylor also developed a theory where so-called animism is the first stage of development. (Animism means belief in the existence of individual spirits that inhabit natural objects and phenomena.) He held that adherents of the ATRs believed in countless spirits and as a result of this belief ATRs were at the bottom of the religious scale of evolution. Anthony FC Wallace *Religion: an anthropological view* (1966) Random House 6–7 refers to Tylor's theory as the evolutionary theory, where religion is the expression of stages in man's cognitive development. See the criticism by Mbiti (n22) at 8.

30 See also the description of religion by O'Regan J in *Pillay* (n15) at para 47.

31 A number of publications exist in this regard. See, for example, Kurt E Koch *God Among the Zulus* (1981) EBNER Ulm.

32 The name of Edward Tylor has been linked with the concept 'animism' from an early stage. See, for example, 'The religion of savages' 1866 *Fortnightly Review* at 71–86.

33 See also Axel-Ivar Berglund *Zulu Thought-patterns and Symbolism* (1976) Hurst & Co 32ff where the various divinities of Zulus are discussed.

34 Wallace (n29).

35 Wallace (n29) at 83.

36 In similar vein, Paul Radin, in *Primitive Religion: its nature and origin* (1957) Dover Publications 3–4, holds the view that religion consists of at least two parts: that which is a belief in spirits outside man and external characteristics consisting of specific acts.

37 Prayers address the supernatural. Wallace (n29) at 53–54.

38 Including singing, dancing and playing instruments. Wallace (n29) at 54–55.

39 This is the physical manipulation of the psychological state, for example, the use of drugs. Wallace (n29) at 55–56.

exhortation,[40] reciting an oral or written code,[41] touching things (*mana*),[42] taboo,[43] simulation,[44] congregation,[45] inspiration,[46] symbolism,[47] and finally, sacrifice.[48] At the third level he categorises 'the threading of events of these ritual categories into sequences called *ritual*[49] and the rationalization of ritual by *belief*'.[50] The fourth level refers to the ceremonies which can be organised into complexes called 'cult institutions',[51] and the last level refers to the religion of a society, which consists of a conglomeration of the different cult institutions.[52] When one applies his methodology to the Zulu tradition, it is evident that it fits neatly into his characterisation of religion. Zulus believe in supernatural beings, for example God and ancestral spirits (level one). They perform certain rituals corresponding with one or more of the minimal categories of religious behaviour; for example, the bull-slaughtering ritual during the Festival falls into the category of sacrifice (level two). This ritual is not a meaningless event, but is believed to symbolise the cyclic development of the Zulu king from strong to weak and then strong again

40 Addressing another human being, for example the traditional healer. Wallace (n29) at 56–57.

41 This includes mythology, morality and other aspects of the belief system. Wallace (n29) at 57–58.

42 For example, Catholic beads and a traditional healer's 'dolosse' (bones and other materials used in the practice of the healer). Wallace (n29) at 60–61.

43 Meaning that touching some things is forbidden. Wallace (n29) at 61–62.

44 Imitating things which are directed at the control of supernatural beings or the control of supernatural power that usually involves some simulation. Simulation is also present in the sacrifice of animals. Wallace (n29) at 58–60.

45 Processions, meetings and convocations which are the social aspects of the religion. Wallace (n29) at 65.

46 Recognition that some psychological experiences are the result of divine intervention. Wallace (n29) at 65–66.

47 The manufacture and use of symbolic objects. Wallace (n29) at 66–67.

48 It includes immolation, offerings and fees. Wallace (n29) at 64–65.

49 Wallace argues (n29) at 68 that the programme of ritual 'may be regarded as a succession of discrete events belonging to one or more of the thirteen categories described above'.

50 Wallace (n29) at 68.

51 According to Wallace (n29) at 84–88 a cult institution is 'a set of rituals all having the same general goal, all explicitly rationalized by a set of similar or related beliefs, and all supported by the same group'. It would therefore be possible for a Zulu to be a follower of Christianity but also a participant in the rituals taking place at the *Ukweshwama* Festival, where 'a set of rituals all having the same general goal' are performed and supported by most Zulus.

52 The religion of a society, though a conglomeration of different cult institutions, is not necessarily a well–organised, unified religious system but may also be a collection of 'less well-organized special practices and beliefs'. Wallace (n29) at 78–83.

(level three).[53] Although an individual may participate in Zulu rituals, it is also possible for such an individual to follow another religion (level four). Finally, the Zulu society may consist of a conglomeration of different cult institutions loosely labelled as constituting the Zulu religion (level five).

Yet another definition of religion that still finds expression in some of the latest literature is the one proposed by Durkheim.[54] This focuses on the sacred-profane dichotomy.[55] According to Durkheim religion can be defined as follows:

> *A religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden – beliefs and practices which unite into one single moral community called a Church,*[56] *all those who adhere to them.*

In Durkheim's terms, religion is a combination of four elements, namely beliefs, practices (rituals), the sacred and the Church.[57] Beliefs are states of opinion or thoughts which consist in representation,[58] while practices are rituals or determined modes of action.[59] In order to characterise the ritual as sacred or profane one has to characterise the object or aim of the ritual. Thus, it will be necessary to characterise the belief first before one can characterise the ritual. For example, the aim of the rituals at the Festival is to pay homage to God for his contribution in the cultivation of the first crops.[60] Because the belief is linked to God, it is regarded as sacred, which then bestows on the ritual a sense of the sacrosanct.

The bull-slaughtering ritual at the Festival is less easy to characterise as a religious ritual, given the aim of the ritual as described by the historical

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53 See the discussion 75ff.

54 Emile Durkheim *The Elementary Forms of the Religious Life* (1912) 7th Impression George Allen (translated from French by Joseph W Swain).

55 According to Hall (n20) at 163, the sacred refers to the 'wholly other', distinct from the physical world, while the profane refers to natural elements. Arnold van Gennep *The Rites of Passage* (1909) (translated by Monica B Vizedom & Gabrielle L Caffee) (1960) University of Chicago Press 1–2 also refers to the sacred and the profane and observes that, as one moves downward on the 'scale of civilizations' (obviously referring to traditional communities in comparison with Western communities), there is an ever-increasing domination of the secular by the sacred. Everyday events, such as hunting, marriage and giving birth, all fall within the sacred sphere.

56 The term 'Church' may refer to a national building or to a society but it does not refer to a private religion. Durkheim (n54) at 44–45.

57 Marco Orrù & Amy Wang 'Durkheim, religion and Buddhism' (1992) 31 *Journal for the Scientific Study of Religion* 47 at 48–49.

58 Durkheim (n54) at 36.

59 Ibid.

60 See the discussion 75ff.

expert in the *Smit* case.[61] According to him the bull symbolises the king who, in olden times, was killed when his power waned, to be replaced by a new king. In contemporary times the slaughtering of the bull symbolises the death of a weak king and the installation of a new powerful king, in other words, the revitalisation of the monarch's waning powers.[62] On the face of it, the belief linked to this ritual does not involve a supreme being but a king who is a normal human being, and this cannot therefore be classified as a religious ritual. However, the constant presence of God and the ancestral spirits during the Festival probably satisfies the requirement that the ritual relates to the supreme being. In other words, given the fact that the whole festival is devoted to God and the ancestral spirits, their presence inevitably qualifies all of the rituals performed during the Festival as religious.[63] The belief that the king is also the direct link between God and the people further strengthens the religious character of the slaughtering of the bull.

Durkheim's definition continues with the requirement of the Church, which represents the organisational framework for celebrating sacred rituals.[64] During the Festival the Zulu king performs this function together with appointed persons, such as a traditional healer. The king is regarded as the representative of the community who deals directly with God on their behalf.

The sacred is the thread that runs though all three elements, belief, ritual and Church, and it is thus of paramount importance to understand Durkheim's conceptual distinction between the sacred and profane.[65] According to him the former is that which has 'been put into an ideal and transcendental world', while the latter is that which is part of the 'material world'.[66] However, it is possible for a human being to move from one world to another. For example, when a young man undergoes initiation rites he leaves the profane world and passes into the world of the sacred. In other words, he is reborn in a new form.[67] Also, the bull-slaughtering ritual during the Festival symbolises the death of a weak king only to be reborn as a vibrant king, and the offering of the gall bladder stuffed with medicine and herbs symbolises the ancestral spirits' sharing of the feast.[68]

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61 The expert is Professor Jabulani Maphalala. His affidavit is quoted at 11.
62 *Smit's* case (n2) at 12.
63 See also the discussion in 75ff and the argument of Wallace that the presence of a supreme being is not imperative.
64 Orrù & Wang (n57) at 48–50 and the literature to which they refer.
65 Durkheim (n54) at 37–42.
66 Durkheim (n54) at 39.
67 Durkheim (n54) at 39.
68 *Smit's* case (n2) at 13.

In contrast to the highly theoretical stance of anthropologists and socialists, Van der Schyff[69] argues that lawyers should follow a more functional approach to religion. In this regard, he supports the view of Liebenberg J, who delivered judgment in the lower court in *Christian Education SA v Minister of Education*,[70] namely, that religion requires two inquiries, an objective and a subjective one.[71] The former involves the 'evaluation of a set of beliefs to establish whether it would qualify as a religion'.[72] This inquiry presupposes that religions have certain characteristics which are recognisable to outsiders, and corresponds with the assertions of Wallace that there are minimal categories of religious behaviour. When a set of beliefs displays some (not necessarily all) of the religious behaviours identified by Wallace, and also those proposed by Van der Schyff,[73] a court must accept that a religion does indeed exist, and it may not pronounce on the truth or credibility of the matter. In *Prince v President, Cape Law Society* (the *Prince* case)[74] Ngcobo J held the view that the Rastafarian belief system is indeed a religion and held:[75]

> *the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet, that their beliefs are bizarre, illogical or irrational to others or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.*

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69 Van der Schyff (n21) at 289.

70 1999 (4) SA 1092 (SE).

71 At 1100I–J. Some cases seem to favour the subjective approach with the qualification that the belief must be sincere. See *Pillay* (n15) at paras 47 and 52.

72 Van der Schyff (n21) at 290.

73 Van der Schyff (n21) at 290 lists the following characteristics of a religion: belief in a supreme being or beings; belief in a transcendent reality; a moral code; a world view that provides an account of humanity's role in the universe; sacred rituals, holy days and festivals; worship and prayer; a sacred text or scriptures (in the case of African traditional religions these are usually oral accounts); and the existence of a social organisation that promotes religious beliefs.

74 2002 (2) SA 794 (CC).

75 At para 42. Although Ngcobo J delivered a minority judgment, the majority did not express any disagreement with this part of his judgment.

Viewed objectively, the Zulu tradition, and with it also the Festival and its rituals, display some of the characteristics of a religion proposed by Wallace and Van der Schyff, especially with regard to the existence of a supreme being. There should thus be no doubt that the objective inquiry has been satisfied.[76]

More problematic is the subjective inquiry that comes into play when it has been established that a set of beliefs qualifies as a religion in terms of the objective inquiry.[77] This inquiry involves the subjective belief of the individual or group whose religious beliefs are questioned. The subjective belief is further qualified by the requirement that it must be sincere in order to avoid false and opportunistic religious claims.[78] However, scrutinising the sincerity of someone's religious beliefs is easier said than done. In the *Prince* case Ngcobo J accepted that the appellant's belief was above suspicion because the fact that he was a follower of the Rastafarian religion was never in dispute.[79] But what would the position have been if the sincerity of the appellant's belief in Rastafarianism was indeed in dispute?

Van der Schyff[80] proposes the cautious use of certain criteria to determine the sincerity of a religious claim, namely: (a) if there exists written and empirical information to verify that the relevant tradition is indeed a religion; (b) if there are similarities between the professed religious belief and the believer's actions; (c) if the believer is willing to undertake alternative duties or burdens that are equally burdensome but 'neutral from the point of view of that religion's proscriptions'; and (d) if the believer is an active member of a religious organisation. These criteria should not be applied in a negative manner to mean that not complying with them automatically implies disqualification but rather in a positive manner to indicate the existence of a genuine belief when it is present.[81]

The subjective inquiry also does not hamper our efforts to define the Zulu tradition as a religion. There is enough empirical evidence to prove that Zulus believe their traditions, including the Festival, to be religious.

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76 In general, most of the ATRs entail belief in a supreme being. See also Dionne Crafford 'Tradisionele Godsdienste in Afrika' in Piet Meiring (ed) *Suid-Afrika, Land van baie Godsdienste* (1996) Kagiso Publishers 8; Barbara Elion & Mercia Strieman *Clued up on Culture: a practical guide for South Africa* (2001) One Life Media 36–40; Geoffrey Parrinder *African Traditional Religion* (1962) Sheldon Press 31–54.

77 Van der Schyff (n21) at 292.

78 Max du Plessis 'Doing damage to freedom of religion' (2000) 11 *Stell LR* 295 at 297; Van der Schyff (n21) at 292.

79 Paras 40–43.

80 At 292–293 he refers to the criteria advanced by Wojciech Sadurski 'On legal definitions of religion' (1989) 63 *Australian Law Journal* 834 at 837.

81 Van der Schyff (n21) at 293.

Berglund[82] quotes a Zulu man's views on the Festival, illustrating the link between the Festival and God: 'We call this festival *umkosi* because it is the festival on *iNkosi* [God] in the sky. Even by way of the name you can see that it is his festival'. The expert evidence in the *Smit* case clearly illustrates that the Zulu community was so sincere about performing the required 'religious' rituals at the Festival that there was a revolt brewing in the background which would have erupted had they had been prevented from doing so. There should be no doubt that the Zulu tradition is indeed subjectively viewed as a religion, especially by Zulus themselves.

Umkhosi Ukweshwama Festival: a Zulu festival with religious rituals?[83]

As the Zulu tradition satisfies both the objective and subjective branches of inquiry, it should be clear that it is indeed a religion, but the question remains whether all rituals, and more specifically the Festival[84] and its rituals, automatically qualify as religious.[85] The phenomenon of rituals has been dealt with quite extensively in anthropological studies, and in this regard Wallace[86] writes:

> *The primary phenomenon of religion is ritual. Ritual is religion in action. ... Belief, although its recitation may be part of the ritual, or a ritual in its own right, serves to explain, to rationalize, to interpret and direct the energy of the ritual performance. ... It is ritual which accomplishes what religion sets out to do.*

The close link between ritual and religion has also been the focus of Raglan in his book *The Origins of Religion* published in 1942.[87] He states outright that rites[88]

> *make up religion, as we can see it practised. For the religious, or the vast majority of them, they are not merely a part of religion, but religion itself. Religion ... consists in the due performance of the rites. Religious belief is belief in the value*

82 Berglund (n33) at 43.

83 For an interesting reading on the differences and commonalities between Greek and Zulu rituals, see Michael Lambert 'Ancient Greek and Zulu sacrificial ritual: a comparative analysis' (1993) 40 *Numen* at 293–318.

84 Early accounts of the Festival divided it into two parts (little and big Festival) with different rituals to be followed in each part, but nowadays only one festival lasting several days is celebrated every year. See Krige (n4) at 249; Max Gluckmann 'Social aspects of First Fruits Ceremonies among the South-Eastern Bantu' (1938) 11 *Africa* at 25–26.

85 This question has been more or less attended to in the foregoing discussion of the meaning of religion in the previous section and will be dealt with only briefly.

86 Wallace (n29) at 102.

87 Lord Raglan *The Origins of Religion* (1949) Watts.

88 Raglan (n87) at 47.

> *and efficacy of the rites, and theology ... consists in giving reasons why these rites should be performed.*

In addition, Kluckhohn[89] recognises a common psychological basis between rituals and myths. He explains that a ritual is[90]

> *an obsessive repetitive activity – often a symbolic dramatization of the fundamental 'needs' of the society, whether 'economic', 'biological', 'social' or 'sexual'. Mythology is the rationalization of these same needs, whether they are expressed in overt ceremonial or not.*

In the light of Kluckhohn's argument, Wallace[91] concedes that rituals and myths are linked together. The myth explains how the ritual came into existence and what it aims to do. For example, most religions have rituals that celebrate the transition of an individual from one social status to another. These rituals are referred to as 'rites of passage' and are based on the idea that human life is biologically divided into life cycles which must be celebrated or mourned – for example, birth, childhood, puberty, betrothal, marriage, pregnancy and death. In ATRs death is followed by another cycle, namely that of the ancestral spirits. However, the whole process of transition is more than a mere biological process; it is also a social event where the community either celebrates or mourns, as the nature of the event dictates.[92] In this context, rites of passage are ritual ceremonies designed to ease an individual's transition from one phase of life to another and to reinforce the religious views and values of a particular community.[93]

Rites of passage are not confined to human cycles but also extend to cyclic events in the universe which have certain ramifications for human life, because humans and nature are so closely related that the former cannot exist independently of the latter. Rites that are occasioned by natural changes, such as the movement of the moon, changes in season, and the

89 Clyde Kluckhohn 'Myths and rituals: a general theory' (1942) 35 *Harvard Theological Review* 45 at 78–79. It should be pointed out that Kluckhohn discusses myths and rituals as cultural and not religious phenomena. However, if one considers that he admits they contain the flavour of 'the 'sacred' (at 47), it is not entirely wrong to conclude that they are also religious.

90 Kluckhohn (n89) at 78.

91 Wallace (n29) at 104.

92 Douglas Davies 'Introduction: raising the issues' in Jean Holm & John Bowker (eds) *Rites of Passage* (1994) Pinter Publishers 1–2.

93 Michael F C Bourdillon *Religion and Society: a text for Africa* (1990) Mambo Press 48.

start of a new year, are sometimes referred to as 'rites of intensification'.[94] The focus here is not on the individual but on the community, which is influenced by these changes. For example, agricultural rituals aim to renew and intensify the availability of crops.

The essential similarity between the rites of passage associated with humans and those with nature is the fact that both are directed towards transition. The first is directed towards transition in humans and the second towards transition in nature. While rites of passage associated with humans have to do with the transition of a person from one status to another – for example, from being unmarried to being married – the rites of passage associated with nature have to do with transitions in nature – for example, from one season to another. Wallace[95] is of the opinion that one should not distinguish between rituals that invoke supernatural beings (the minimalistic definition of Tylor) and other impersonal natural forces,[96] because[97]

> *ritual control of state differs from secular control only in the recognition by the ritual actor and his audience that a supernatural power – a power apart from that at the disposal of muscle, brain, fire, and other tangible physical sources of energy – is brought to bear. Myth, in the most general sense, is the theory of the ritual, which explains the nature of the powers, prescribes the ritual, accounts for its successes and failures.* Together they are religion. *(Emphasis added.)*

The interconnectedness of religion, ritual and myth is reflected in a 'new' definition of religion proposed by Wallace,[98] namely that '[r]eligion is a set of rituals, rationalized by myth, which mobilizes supernatural power for the purpose of achieving or preventing transformations of state in man and nature'. Without going into the complexities of this definition, the elements of religion can thus be summarised as follows: (a) there must be a set of rituals; (b) the rituals must be rationalised by mythology; (c) the

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94 Van Gennep (n55) at 3–4, 178; Wallace (n29) at 105. They have also been called 'rituals of conflict' because of the symbolic killing of the king (through the slaughtering of the bull, which resembles him). See Edward Norbeck 'African rituals of conflict' (1963) 65 *American Anthropologist* 1254 at 1262.

95 Wallace (n29) at 107.

96 To illustrate his point, Wallace (n29) identifies five categories of rituals: rituals as technology intended to control various aspects of nature for the purpose of human exploitation (107–113); rituals as therapy and anti-therapy aimed at controlling human health (113–126); rituals as ideology aimed at controlling the behaviour and values of a community to the advantage of the community (126–138); rituals as salvation intended to validate and confirm social identities, with the connotation of mutual respect for the participants (138–157); and rituals as revitalisation aimed at the revival of community values (157–166).

97 Wallace (n29) at 106–107.

98 Wallace (n29) at 107.

rituals must mobilise supernatural power for the purpose of achieving or preventing transformations in humans or nature.

It should be sufficient to note that the Festival is in celebration of the first harvest as provided by the Zulu God and shared in the presence of the ancestral spirits; the Festival and everything that goes with it are therefore religious.[99] Nevertheless, it could be worth asking whether the individual rituals at the Festival, most notably the slaughtering of the bull, contain the elements set out by Wallace. In the ritual young boys approaching puberty have to control and kill a bull, chosen for its strength and vitality, with their bare hands. The set of rituals present in the slaughtering include:[100] the election of a strong bull; the election of young boys approaching puberty; the killing with bare hands by breaking the bull's neck and without the letting of blood; the removal of the bull's gall bladder after its death and the mingling of natural herbs, plants and medicine with the gall, after which the mixture is given to the king to drink;[101] the distribution of the flesh of the bull among the young 'warriors'; and finally the burning of the remainder of the carcass.

The mythological explanation of the rituals includes: the bull symbolises the king's vitality and strength; the young boys symbolise the warrior's purity, vitality and strength; the slaughtering of the bull symbolises the death of a weakened king and the revival of a new, powerful king; the drinking of the gall mixture symbolises the bull's strength entering the king to prolong his health and strength;[102] the flesh given to the young warriors symbolises the creation of new warriors; and the burning of the remaining carcass prevents impure souls from sharing in the flesh of the bull, which is meant only for the innocent and pure of heart. It is evident that the ritual is aimed at raising supernatural powers to transform the king into a powerful monarch and the young men into warriors. On the face of it, the bull ritual does conform to the elements set out above, and the conclusion must be that the bull-slaughtering ritual is indeed a religious ritual, even when performed in isolation.

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99 It does not make sense to individualise each and every ritual at the festival and then to evaluate whether each one of them is religious or not. As explained by Wallace above, the rituals together are religion.

100 This is the main event preceding all of the other events, including the slaughter of cattle, feasting, celebrating and dancing, in which all of the attendees usually participate. See *Smit's* case (n2) at 12–16.

101 Although the expert evidence indicates that 'the people' were given the gall mixture to drink, Krige (n4) at 254 points out that it was given to the king to drink to symbolise the entering of the bull's strength into the king.

102 Krige (n4) at 254.

The symbolic killing of a king by the slaughtering of a bull is not unusual. It has precedents in the Mediterranean world, for instance, where bulls were worshipped in Spain and Crete, and where the popular Levantine religion centred on Mithras, required the sacrifice of a sacred bull. An example from the Old Testament is the story of Abraham and his son, Isaac. God instructs Abraham to sacrifice Isaac, but then sends an angel to stop him and provide a ram to offer up in his stead.

When law and religious rituals collide: A constitutional resolution?[103]

As already said, a court may not entangle itself in doctrinal questions. In other words, it is not empowered to pronounce on the truth or credibility of a religion.[104] But will a court be in a position to judge the effects of a religious ritual?[105] Religious rituals and, especially, the right of a person to practise his or her religion with other members of a religious community are subject to the Constitution[106] and other laws which prohibit certain religious rituals, in order to achieve a desirable social end.[107] An inquiry into the constitutionality of the rituals in question will usually entail an evaluation of the divergent views and values involved.

It is important to remember that legal science is a human activity, and can therefore not be entirely objective or value neutral. Conversely, as pointed out in the *Smit* case,[108] 'judicial decisions can not (*sic*) be based on emotions and subjective preferences' but must have a 'legally acceptable factual basis'. Another thought should also be apparent here: the Constitution is written

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103 For a discussion of the constitutional provisions that may be relevant, see Lourens M du Plessis 'Affirmation and celebration of the "religious other" in South Africa's constitutional jurisprudence on religious and related rights: memorial constitutionalism in action?' (2008) 8 *African Human Rights Law Journal* 376 at 380–384.

104 *Ryland v Edros* 1997 (2) SA 690 (C): 'It seemed to me that there was a distinct danger that by making rulings on the issues before the Court I might unwittingly become entangled in doctrinal matters which it is inappropriate and indeed undesirable, for the reasons given in the American decisions … for a Judge in a secular Court to do in a country which has a constitution which entrenches every person's "right to freedom of conscience, religion, thought, belief and opinion".'

105 Van der Schyff (n21) at 292.

106 See s 31 of the Constitution. Section 16(1), which guarantees freedom of expression, might also be relevant here. The supremacy of the Constitution is confirmed in s 2 and reads: 'The Constitution is the supreme law of the Republic; law or *conduct* inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' (Italics added.)

107 Van der Schyff (n21) at 291.

108 2000 (4) SA 757 (CC) at para 33.

in English, and the use of the two separate terms 'religion' and 'culture' suggests the frame of thought it represents is a Western frame of thought, in which these are two disparate concepts. As already pointed out, the Zulu language does not make the same distinction and one should always keep in mind that words arise from a different history and different way of conceptualising the world and our place in it.

So far South Africa's jurisprudence has tended to accept and promote religious diversity rather than deny protection.[109] This is evident from statements such as the following:[110]

> *The right to freedom of religion is probably one of the most important of all human rights. Religious issues are matters of the heart and faith. Religion forms the basis of a relationship between the believer and God or Creator and informs such relationship. It is a means of communicating with God or the Creator. Religious practices are therefore held sacred.*

This is echoed in the statement made by Sachs J, in the judgment delivered in the Constitutional Court in *Christian Education South Africa v Minister of Education* (the *Christian Education* case):[111] 'Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture.'

However, the South African Constitutional Court has, on a number of occasions, found justification for limiting the right to religious freedom and religious community practice in terms of either the general limitation clause[112] or internal limitations.[113] Two of these cases can be used as examples. The first case is the *Christian Education* case delivered in the Constitutional Court. In this case, an organisation of Christian parents approached the court to strike down s 10 of the South African Schools Act 84 of 1996, which prohibits corporal punishment in schools and thus also in Christian schools. They averred that corporal punishment was inherently

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109 Du Plessis (n103) 384–408 discusses examples of South African jurisprudence, most notably that of the Constitutional Court, dealing with religious issues in a favourable way.

110 *Prince's* case (n17) at para 25.

111 2000 (4) SA 757 (CC) at para 48.

112 Section 36(1) which reads: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (*a*) the nature of the right; (*b*) the importance of the purpose of the limitation; (*c*) the nature and extent of the limitation; (*d*) the relation between the limitation and its purpose; and (*e*) less restrictive means to achieve the purpose.'

113 Internal limitations refer to the special limitations placed in an empowering provision. For example, s 31(2) lays down that the right of a person to practise his or her religion may not be inconsistent with any provision of the Bill of Rights.

part of the Christian faith and by prohibiting it, the Act infringed their right to practise their religion as a community.[114] As expected, this argument was countered by another rights claim: the Minister of Education argued that corporal punishment infringed other constitutional rights and should not be tolerated in a school environment.[115] In summary, Sachs J agreed that the sincerity of the parents 'belief in corporal punishment as a religious obligation was not in question. However, after an in-depth evaluation of the limitation clause, he held that s 10 of the South African Schools Act 84 of 1996 was a constitutionally valid limitation on parents' free exercise of religious belief.[116]

The judgment of the court illustrates the fine line between meddling in the activities of religious communities and the government's expectations that its laws will be honoured by all citizens irrespective of their religious affiliations. This is also evident from the words of Sachs J:[117]

> *The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.*

Although the case was decided within a constitutional context, it is also difficult to see how corporal punishment can be regarded as a religious ritual. The parents did cite a number of verses in the Bible to prove that Christians are required to administer corporal punishment.[118] Nevertheless, these verses do not point in the direction of religious rituals as described above. Nor is there anything sacred about applying the rod to discipline a child, where similar results could have been obtained by less physical means and still remain within the religious realm.

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114 At paras 2 and 4.

115 At para 8. Sachs J (at para 15) points out that this case involves a 'multiplicity of intersecting constitutional values and interests … some overlapping, some competing'.

116 At para 52. See also Du Plessis (n103) at 387.

117 At para 35.

118 At para 4.

The second case is the well-known *Prince* case, which dealt with the use of cannabis within the tenets of the Rastafarian religion.[119] Gareth Prince completed his law studies successfully and sought to register with the Law Society as a candidate attorney doing community service. However, his previous convictions for the possession of cannabis, which he alleged was required for use in terms of the Rastafarian religion, made him an unfit and improper person to be registered as such.[120] Although Prince initially challenged the constitutionality of the Law Society's decision, he broadened the scope of his argument to include constitutional challenges to some of the provisions of the Drugs and Drug Trafficking Act 140 of 1992[121] and the Medicines and Related Substances Control Act 101 of 1965.[122] The challenge to the legislation was not against criminalising the possession and use of cannabis in general but was limited to the question whether the failure to provide an exception for the use of cannabis for religious purposes by Rastafarians infringed their religious rights under the Constitution.[123] From the facts of the case, it is evident that the use of cannabis is of a sacred ritualistic nature, and is thus an essential part of the Rastafarian religion.

As explained by Ngcobo J,[124] the use of cannabis by the followers of the Rastafarian religion 'is to create unity and to assist them in re-establishing their eternal relationship with their Creator'. The majority and minority decisions were *ad idem* that the legislation criminalising the use and possession of cannabis limited the religious rights of Rastafarians.[125] The only question which remained was whether this limitation was justifiable under the limitation clause.[126] On this question the court was divided, with the majority winning five to four. The crux of the majority decision was that it is impossible for the state to allow an exception for the use of cannabis in a religious context without actually compromising the justifiable objectives of the legislation criminalising the use and possession of cannabis.

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119 The external characteristics of the Rastafarian religion are discussed by Ngcobo J at paras 15–17. The final *Prince* case took a long run-up in the courts. See also *Prince v President, Cape Law Society* 2001 (2) SA 388 (CC); *Prince v President, Cape Law Society* 2000 (3) SA 845 (SCA); and *Prince v President, Cape Law Society* 1998 (8) BCLR 976 (C).

120 At para 2.

121 Section 4(*b*) prohibits the use or possession of cannabis.

122 Section 22A(10) prohibits the use or possession of cannabis except for research or analytical purposes.

123 At para 94.

124 The sacredness of the use of cannabis is discussed at paras 18–20.

125 At para 111.

126 Section 36 of the Constitution.

What this judgment indicates is that the courts are willing to lean over backwards to accommodate religious diversity but that they will, nevertheless, not hold back when a limitation on religious practices (or rituals for that matter) is necessary for the common good.[127] The minority held that:[128]

> *In a democratic society the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social and, where necessary, to enforce that prohibition by criminal sanctions. In doing so it must act consistently with the Constitution, but if it does that, courts must enforce the laws whether they agree with them or not.*

What both of these cases illustrate is how difficult it is to find a balance between competing rights in the area of religion. Sachs J in the *Christian Education* case[129] was wary of this difficulty when he pointed out that '[t]he most complex problem is that the competing interests to be balanced belong to completely different conceptual and existential orders', namely faith (religion) and reasonableness (secular activities in the private and public sphere). The problem is further complicated by the fact that it is sometimes difficult or impossible to distinguish between sacred and secular activities, which, in turn, makes it problematic to determine which activities are sacred and thus protected by the Constitution and which are secular and open to regulation in the ordinary way.[130]

This brings us to the issue *in casu*, the ritual bull slaughtering at the Zulu Festival. As the conclusion was reached that the Zulu tradition and the Festival (including the bull-slaughtering ritual) fall within the realm of religion, a court will not be in a position to pronounce upon the truth or credibility of the rituals performed in the name of the Zulu religion.[131]

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127 At para 139 the court explains that the use of cannabis in the circumstances cannot 'be sanctioned without impairing the state's liability to enforce its legislation in the interests of the public at large and to honour its international obligations to do so'.

128 At para 108.

129 Para 33.

130 At para 34.

131 Interestingly the Festival is not unique to the Zulu community and similar festivals have been held by other religions. One such example is the presentation of first fruits to God as described in the Bible. Lev 23:10–14 reads:

> *When you enter the land that I am about to give to you and you gather in its harvest, then you must bring the sheaf of the first portion of your harvest to the priest, and he must wave the sheaf before the Lord to be accepted for your benefit – on the day after the Sabbath the priest is to wave it. On the day you wave the sheaf you must also offer a flawless yearling lamb for a burnt offering to the Lord, along with its grain offering, two tenths of an ephah of choice wheat flour mixed with olive oil, as a gift to the Lord, a soothing aroma, and its drink offering, one fourth of a hin of wine. You must not eat bread, roasted grain, or fresh grain until this very day, until you bring the offering of your God. This is a perpetual statute throughout your generations in all the places where you live.*

But the question remains whether legislation and other rights could place limitations on the right of communities to perform this ritual. The first piece of legislation that comes to mind is the Meat Safety Act 40 of 2000. This Act prohibits the slaughter of any animal at any place other than an abattoir.[132] As set out in the preamble of the Act, the purpose of this Act is '[t]o provide for measures to promote meat safety and the safety of animal products', and thus not to protect animals. One can argue that the overarching aim of the Act is to protect the consumer of animal products, and that the safety of the public at large is being protected. However, s 7(2)(*a*) provides for an exception in the case of slaughtering for one's own consumption or for religious and cultural purposes, on condition that the meat may not be sold.[133] This Act does not seem to have serious implications for the practice of ritual bull slaughtering.

A similar exception, however, is not provided for in the Animals Protection Act 71 of 1962,[134] which aims to prevent cruelty to animals. In terms of s 2(1)(*a*) of this Act any person who 'ill-treats, neglects, infuriates, tortures or maims or cruelly beats, kicks, goads or terrifies any animal' will be criminally liable. The provisions of this Act came under scrutiny in the Witwatersrand Local Division in the late 1980s in *Society for the Prevention of Cruelty to Animals, Standerton v Nel*.[135] The applicant applied for an interdict to prevent the respondent from holding a rodeo with live bull-riding. In the light of the evidence led, namely that the riding of the bulls (which were not accustomed to being ridden) would inevitably cause such animals to 'experience anger and suffering in the form of fear, discomfort, distress and potential pain', the court awarded the interdict.[136] One cannot but wonder what the outcome of the *Smit* case would have been had the applicant in that case taken the same approach regarding animal cruelty instead of relying on incorrect facts pertaining to the bull slaughtering ritual during the Festival. Surely the process of bull-slaughtering as described in the *Smit* case[137] is not as 'quick and painless' as one is led to believe. It is most likely that an attack by a group of eager young men attempting to close its airways and to break its neck would cause the bull to 'experience anger

132 See s 7. In terms of s 1 of the Act 'slaughter' means 'the killing of an animal and the performance of the usual accompanying acts in connection therewith in order to obtain meat and animal products therefrom'. A bull falls into the category of 'bovine animals' as described in Schedule 1 to the Act.

133 See s 7(2)(*b*).

134 In terms of s 1 of the Act, a bovine (thus bull) is included in the definition of animal.

135 1988 (4) SA 42 (W).

136 At 47I–J.

137 At paras 10–12 of the affidavit of Professor Jabulani Maphalala.

and suffering in the form of fear, discomfort, distress and potential pain,' as described in the rodeo case.

In addition to national legislation, municipalities have legislative power and may thus enact bylaws that regulate the slaughtering of animals.[138] An example of such legislation is a bylaw adopted by the Ubuhlebezwe Municipality in KwaZulu-Natal relating to the Keeping of Animals and Birds but Excluding Dogs.[139] Section 3 of this bylaw prohibits the slaughtering of any livestock within the area of the Ubuhlebezwe Municipality except in traditional communities and on farms. Furthermore, if the slaughtering is for ritual purposes there is an additional requirement – the receipt of written permission from the municipal council. This permission must include health requirements for the slaughtering of the animals as prescribed by an environmental health officer, and procedure guidelines by resolution of the council. Any person who intends to slaughter an animal for religious purposes must comply with certain procedures:

- written notification to the council of his or her intentions fourteen days prior to the event;
- written notification to the neighbours of his or her intentions seven days prior to the event;
- screening the slaughtering process from the public and neighbours;
- use of the meat derived from the slaughtered animal solely for the purpose of the religious event;
- handling of the meat in a hygienic manner at all times; and
- disposing of the remains of the animal in the manner as prescribed by the environmental health officer.

The bylaws contain a pro forma letter to be used for the application and the health requirements for the slaughtering. The stated purpose of the health requirements is to safeguard the health of the consumers of the meat and to promote harmony in the community.

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138 See s 151 of the Constitution for the status of municipalities in South Africa and s 156 for the powers and functions of a municipality. The matters that fall under the legislative competence of municipalities are set out in Part B of Schedules 4 and 5 of the Constitution. The slaughtering of animals is typically a matter over which a municipality will have the power to make bylaws.

139 Notice 130 published in *KwaZulu-Natal Provincial Gazette* 314 of 5 August 2009. The date of commencement has not been published yet. Another example, also in the KwaZulu-Natal province, is the bylaws of the uMialazi Municipality which contain similar prescriptions in s 29 of the Keeping of Animals published in the *KwaZulu-Natal Extraordinary Provincial Gazette* 389 of 11 March 2010.

A transgression of these bylaws could lead to the commission of an offence punishable by law.[140] As pointed out by Petrus,[141] the definitions of the various crimes in South Africa are more or less clear-cut. However, as soon as the term 'ritual' is put before a crime and it becomes a 'ritual crime', the legal system becomes less capable of handling the case. The same can be argued with regard to slaughtering animals. Under normal circumstances slaughtering must comply with rigorous requirements to ensure health safety. However, as soon as it becomes a 'ritual slaughtering', other rules apply and the only qualification is that such ritual must be religious or, as in the case of the Ubuhlebezwe municipality, ceremonial. It is not only the courts who will have to make value judgments in this regard but also municipal officials at the local level. As a result, the danger of arbitrary decisions becomes more and more likely.

It is true that recourse to the Constitution is seen as the way of resolving many of South Africa's problems. This is also true in the area of religion, where the Constitution has often been instrumental in protecting religious rights in one way or another. It could either be used to confirm and demand the protection of religious rights or to justify limitations on existing religious rights. There is no doubt that some religious rituals are more offensive than others to the values of outsiders.[142] Although a court is not empowered to pronounce upon the truth or credibility of a religion, constitutional limitations aimed at the achievement of a desirable social result may be placed on religious rituals.[143] It is not the desirability of the ritual that is evaluated but the desirability of its effects, and one has to agree that it is the responsibility of government to give direction in the form of policy and legislation when dealing with such issues.

Conclusion

The issue of ritual animal slaughtering is a global issue, and is not limited to African traditional religions.[144] The religious slaughtering of animals

140 See s 17.

141 Theodore S Petrus 'Ritual crime: anthropological considerations and contributions to a new field of study' (2007) 20 *Acta Criminologica* at 119–120.

142 The term 'outsider' refers here to everybody that does not form part and parcel of the particular religion.

143 Van der Schyff (n21) at 291.

144 Bull slaughter is a remarkably common phenomenon – from ancient Egypt, Crete, Greece, and Spain through to the present day. See, for example, the discussion of Pablo Lerner & Alfredo M Rabello 'The prohibition of ritual slaughtering (Kosher Shechita and Halal) and freedom of religion of minorities' (2006/2007) 22 *Journal of Law & Religion* at 1–62.

conjures up important questions pertaining to religious freedom and animal protection. There are, as it were, two opposing tendencies within the context of the Constitution. These conflicting interests have the potential of causing a constitutional tug-of-war between the selfsame constitutional values, namely the right to equality on the one hand, and to cultural and religious freedom on the other hand.

A diverse society such as South Africa's necessitates an approach of legal accommodation. Such an approach requires that the government adopt 'a system of accommodations to permit the minority to carry out its religious obligations'.[145] What this means is that after the majority has decided upon the appropriate regulation applicable generally to all persons engaged in the practice (of slaughtering at an abattoir in accordance with certain procedures), the law provides an exception which permits the minority to deviate from the ideal practice in order to recognise the minority's interests, beliefs or cultural background, as long as society's fundamental principles and critical concerns, such as public order, are not seriously affected.

Freedom of religion and the need to preserve the primary ways of life that constitute a community's religious identity, do not mean that there is no reason to permit injurious practices just because they are rooted in a minority religion. The prevention of the suffering of animals might be one of the prime values of society that needs protection from the practice of religious slaughtering.

We must also be mindful that a blanket exception in the case of religious rituals does not deteriorate into cultural or religious relativism, with the result that ritual slaughtering is justified merely because it is rooted in a cultural or religious belief. The remarks of Van der Reyden J in the *Smit* case dangerously point in this direction. Although one has to agree with the conclusion that the application had no factual base, the court's statement that the Trust had no right to interfere with the religious and cultural practices of others because they found them intolerable was unfounded. The Animals Protection Act 71 of 1962, for one, is aimed at the protection of the 'finer feelings and sensibilities of their fellow humans',[146] which will be harmed by animal cruelty and, surely, this gives one the right to approach a court if one's feelings and sensibilities are affronted by a ritual slaughtering. This is evident from a more recent decision, *National Council of Societies for the*

145 Lerner & Rabello (n144) at 27–31.

146 *R v Moato* 1947 (1) SA 490 (O) 490 and approved in *S v Edmunds* 1968 (2) PH H398 (N).

Prevention of Cruelty to Animals v Openshaw,[147] where Cameron J expressed the view, albeit in a minority judgment, that the National Council had a 'real and continuing' interest in the law preventing cruelty to animals and thus had the right to apply for an interdict to prevent the feeding of live prey to tigers. Most notably, he went further than the previous view – that the aim of the Animals Protection Act 71 of 1962 was to protect the finer feelings and sensibilities of fellow humans witnessing the abuse of animals – by declaring that, although the Act does not confer rights on the animals it protects, it recognises that 'animals are sentient beings that are capable of suffering and of experiencing pain'.[148]

Although the general trend in South Africa is not to afford any rights to animals, some scholars have argued that they do indeed have fundamental interests in their own right that deserve legal protection. In this regard, Bilchitz[149] concluded his arguments pertaining to the question whether animals could be the holders of rights and dignity similar to humans by stating:[150]

> *[R]ecognising the worth and rights of animals is simply a logical consequence of being committed to human rights in that any such commitment must seek to protect all those who are similarly situated and whose interests matter. ... A recognition of the capabilities of animals means that we are forced to consider them as individuals, as having dignity and this in turn requires us to consider the impact upon their interests of every decision we make. The law must be informed to ensure that it embodies this recognition.*

Although these sentiments are noble, most people accept that animals must be killed for food and prefer that it be done in a humane way.[151] Legislation must strike a balance between the humane slaughtering of animals and the protection of religious beliefs, and also between society's right to a healthy environment and a religious community's right to perform ritual slaughtering.

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147 2008 (5) SA 339 (SCA) at para 36. In this case the appellant applied for an interim interdict, pending institution of an action to restrain the respondent from feeding live prey to tigers, in contravention of the Animals Protection Act 71 of 1962. The majority of the court dismissed the application on the ground that it could not be proven that the respondent in the case intended to continue with his actions of feeding live prey to the tigers.

148 See para 38.

149 David Bilchitz 'Moving beyond arbitrariness: the legal personhood and dignity of non-human animals' (2009) 25 *SAJHR* at 38–72.

150 At 72.

151 The term 'humane' is also highly controversial. When is an act of killing humane and when is it inhumane? However, a discussion of the meaning of humane falls outside the scope of this discussion. For more details, see Lerner & Rabello (n144) at 43–49.

Tolerance and understanding should not work in only one direction. South Africa has a multicultural and multireligious society with fundamental differences amongst the values and norms of the various communities making up this society. On the one hand, individuals should have understanding for religious rituals (even if they involve animal slaughtering) but, on the other hand, communities performing religious rituals offensive to others should also have understanding for the views of outsiders who might not be aware of the significance or importance of the rituals. To put this differently, religious differences should not be a breeding ground for political intolerance but rather a starting point for understanding our diverse society.[152]

While there is a growing tendency in the courts to endorse anything cultural or religious, especially in the context of previously marginalised groups,[153] the legislature, especially some of the local governments (or municipalities), seems to be steering away from an unconditional acknowledgement and protection of cultural and religious practices. In this regard the bylaws of the two municipalities discussed above are commendable. The Zulu ritual of slaughtering a bull will thus be allowed but within a controlled context that might, at least theoretically, lead to a more acceptable outcome. Nevertheless, it is conceded that animal rights activists will remain unhappy with the state of affairs, regardless of the controlled circumstances in which the slaughtering will take place.

The *Umkhosi Ukweshwama* is a Zulu festival in celebration of the universe's rite of passage. There is no good reason why this festival should not coexist with many other festivals that celebrate people's religious beliefs. Nevertheless, if there are rituals performed at this festival that do not pass the test of constitutionality they should not prevail merely because they are part of a religion. Neither should the followers of a religious belief regard themselves as outside the law merely because they have a constitutional right to practise their religion together with other members of their religious community.

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152 Amanda Gouws & Lourens M du Plessis 'The relationship between political tolerance and religion: the case of South Africa' (2000) 14 *Emory International Law Review* at 657–698 discuss the link between political tolerance and freedom of religion in South Africa.

153 Various examples exist in this regard. See, for example, the cases discussed by Gardiol J van Niekerk 'Death and sacred spaces in South Africa and America: a legal-anthropological perspective of conflicting values' (2007) 40 *CILSA* at 30–56.

CHAPTER 5

The Constitutional Framework for the Protection of Religious and Related Rights in South Africa

Lourens du Plessis

Introduction

This chapter depicts, discusses and evaluates the framework within which the Constitution of the Republic of South Africa, 1996 guarantees religious rights and freedom. The framework metaphor suggests that the Constitution provides a general – and by that token fairly 'neutral' – (legal) scaffolding for the even-handed treatment of all religious individuals and groups who hold and manifest their religious beliefs, and conduct their religious observances in most divergent ways. This framework is certainly meant – and has the potential – to stand traditional African religions in as good stead as other religions.

The South African law on state and religion is embodied not just in the Constitution, but also in the common law (as knowable from and developed through case law), in legislation and in administrative/policy directives. This chapter will provide a bird's-eye view, first, of the constitutional provisions and, second, of the mainstream (constitutional) jurisprudence on construing and implementing constitutional guarantees of religious rights and freedom. Legislative and administrative measures will not be discussed in any detail.

Within the constitutional framework, and as a matter of course, can an unbiased and even-handed treatment of the diverse religions and religious beliefs in South Africa be achieved? This is a valid question, since historically – and especially prior to the advent of constitutional democracy in South Africa in 1994 – the law in general, and especially legislation (including South Africa's pre-1994 constitutions), favoured a certain version of Christian monotheism *vis-à-vis* especially 'non-mainstream religions', which would have included 'traditional African religions'. Much has

changed since 1994, but has the situation of 'out of the ordinary', traditional religions really been improved significantly? This question is the third main point on the agenda of this chapter, prompting an examination of three High Court judgments that dealt with the legal and constitutional ramifications of (protecting) tenets of traditional (African) religions ('the traditional religion cases').

Constitutional guarantees of religious rights

Section 15(1) of the Constitution guarantees everyone's 'right to freedom of conscience, religion, thought, belief and opinion' while s 9(1) guarantees everyone's right to equality before and equal protection and benefit of the law. Section 9(3) proscribes unfair discrimination 'against anyone' on the grounds of, amongst others, religion, conscience and belief. This means that the right to 'equality' in s 9(1) also provides for the equality of religions and the equality of their adherents.

Section 15(1) does not merely protect a right to *religious freedom*, but also to freedom of conscience, thought, belief and opinion, in other words, it guarantees religious *and related* rights. Similarly, s 9(3) read with s 9(1) guarantees religious *and related forms* of equality.

The written constitutional text – in its Bill of Rights in particular – qualifies, amplifies and directs the basic ss 15(1), 9(1) and 9(3) entitlements to religious (and related) freedom and equality in various ways.

(*a*) Section 15(2) allows for the conduct of religious observances at state or state-aided institutions, provided that: this takes place on an equitable basis,[1] rules made by appropriate public authorities are followed[2] and attendance is free and voluntary.[3]

(*b*) Section 29(3) gives a right to establish and maintain (at own expense) independent educational institutions provided they do not discriminate on the basis of race, are registered with the state and maintain standards not inferior to those of comparable public educational institutions.

(*c*) Section 15(3)(*a*) authorises legislation recognising marriages concluded under any tradition or a system of religious personal or family law. Customary marriages, amongst others, of the adherents of traditional religions in South Africa are recognised in terms of the Recognition of Customary Marriages Act.[4] Similar (controversial) legislation is

1 Section 15(2)(*b*).
2 Section 15(2)(*a*).
3 Section 15(2)(*c*).
4 120 of 1998.

also possible for Hindu and Muslim marriages, but it has not yet been adopted.

(*d*) Section 31(1) explicitly backs communal (or 'group') manifestations of religion (and culture)[5] stating that persons belonging to religious (or cultural) communities *may not be denied the right* to practise their religion (and enjoy their culture),[6] and to form, join and maintain religious and cultural associations and other organs of civil society.[7]

(*e*) Religious rights, like all other rights guaranteed in the Bill of Rights, are to be construed *in context*, and are to be permeated with the values articulated in, or implied by, the founding provisions of the Constitution (in Chapter 1, and especially ss 1 and 2), the characterisation of the Bill of Rights in s 7 (which contains a statement of the main objectives), as well as the Preamble. Section 39(1) *requires* any interpretation of the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and to consider international law. Foreign law *may* be considered. According to s 39(2) legislation must be interpreted and the common and customary law developed in a manner that promotes the spirit, purport and objects of the Bill of Rights.

Section 7(1) characterises the Bill of Rights as 'a cornerstone of democracy in South Africa', enshrining the rights of all people in the country and affirming the democratic 'values of human dignity, equality and freedom'. Section 7(2) then enjoins the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.

(*f*) All rights entrenched in the Bill of Rights may be limited pursuant to stipulations of a general limitation clause (s 36) requiring limitations to be (only) in terms of law of general application; reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and compliant with explicitly spelt out exigencies of proportionality.[8] Section 36 does not, however, preclude specific

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5 Paul Farlam 'Freedom of Religion, Belief and Opinion' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2ed (Original Service June 2008) Juta & Co, Pretoria Centre for Human Rights 41-1 – 41-5, 41-8.

6 Section 31(1)(*a*).

7 Section 31(1)(*b*).

8 When limiting a right the following factors must, under s 36(1), be taken into account so as to comply with proportionality:
'(*a*) the nature of the right;
(*b*) the importance of the purpose of the limitation;
(*c*) the nature and extent of the limitation;
(*d*) the relation between the limitation and its purpose; and
(*e*) less restrictive means to achieve the purpose.'

limitations of rights in the very sections entrenching them, or the suspension of rights during a duly declared state of emergency.[9]

The mainstream jurisprudence of the Constitutional Court

The case law that will next be discussed all emanates from Constitutional Court adjudication, and has no doubt set the trend for the realisation and implementation of constitutionally enshrined religious (and related) rights in South Africa. Though not the final word on the topic, the Constitutional Court's jurisprudence on religious rights carries considerable weight and cannot ignored in any discussion of religious and related rights in South Africa. None of the mainstream cases involves a traditional African religion (or religious beliefs) in particular, but some of them do deal with the plight of decidedly non-mainstream and 'out of the ordinary' religions.

The first case was *S v Lawrence; S v Negal; S v Solberg*[10] *('Solberg')*. Ms Solberg, an employee at a chain store, was convicted of contravening s 90(1) of the Liquor Act,[11] which proscribes wine sales on Sunday. She challenged the constitutionality of the section contending that it infringed, amongst others, her right to freedom of religion.[12] Six justices of the Constitutional Court found that this challenge could not be upheld, but they were divided 4-2 on the reasons for this finding. Three thought that the challenge should be upheld, but agreed, on a significant issue of constitutional interpretation, with the view of the minority of two judges. (These three, plus the two judges will be referred to as 'the five', and the remaining judges who dismissed the appeal as 'the four'.)

Chaskalson P spoke on behalf of the four. He contended that Solberg's challenge, based on the right to freedom of religion, required the court's consideration as a matter of religious free exercise only, and not of religious equality (and non-discrimination) as well.[13] Taking his cue from a *dictum* in the Canadian case of *R v Big M Drug Mart Ltd*, (1985),[14] Chaskalson P understood freedom of religion as primarily an individual's right not to be coerced to do anything against her or his religious beliefs (or non-beliefs) – a right to be respected, in other words, and possibly protected, but hardly prone to promotion and fulfilment by the state.[15]

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9 Section 37(4).
10 1997 (4) SA 1176 (CC).
11 27 of 1989.
12 At the time entrenched in s 14(1) of the transitional Constitution (the precursor to s 15(1) of the present Constitution).
13 *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) paras 99–102.
14 13 CRR 64 97.
15 To use the terminology of s 7(2) of the Constitution.

O'Regan J, articulating the concerns of the five, held that the guarantee of a right to freedom of religion entails entitlement to an even-handed treatment of religions and their adherents. In her view s 90(1) unjustifiably encroached on the right to religious freedom. Sachs J and Mokgoro J agreed that there was such an encroachment, but thought that it constituted a constitutionally justifiable limitation of the right in question, and therefore did not cause s 90(1) to be unconstitutional.[16]

O'Regan J disagreed with the contention of the four that issues of religious equality were not up for consideration. She said that the Constitution requires more from the legislature than refraining from coercion.[17]

> *'It requires in addition that the legislature refrain from favouring one religion over others. Fairness and even-handedness in relation to diverse religions is a necessary component of freedom of religion.'*

The court was unanimous on one issue of considerable significance, namely, the absence in the (transitional) Constitution of an 'establishment clause', which erects a wall of separation between church and state.[18] (The same holds true for the 1996 Constitution.)

The second case, *Christian Education SA v Minister of Education*[19] *('Christian Education')*, involved an organisation of concerned Christian parents challenging, in a High Court, the constitutionality of s 10 of the South African Schools Act.[20] This provision proscribes corporal punishment in any school, public or private. According to the religious beliefs of the applicants, corporal punishment was fundamental to the upbringing of their children, and s 10 thus infringed their right to freedom of religion – in a *religious* private school! The High Court turned down the application.

In the appeal to the Constitutional Court,[21] Sachs J handed down a carefully reasoned judgment dismissing the application on the basis that s 10 imposes a constitutionally acceptable limitation[22] on parents' free exercise of their religious beliefs. He refrained, however, from expressing any view on whether it is a constitutionally allowable exercise of a religious belief if parents themselves administer corporal punishment to their own children. He also did not really address the question of what schools (and teachers)

16 *Lawrence's* case (n13).
17 *Lawrence's* case (n13) at para 128.
18 *Lawrence's* case (n13) at paras 99–102.
19 2000 (4) SA 757 (CC).
20 84 of 1996.
21 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).
22 In terms of s 36 of the Constitution.

should be permitted to do in a country where a modern-day constitution is in place, entrenching fundamental rights in accordance with stringent standards of constitutional democracy.

In a significant postscript to his judgment, Sachs J lamented the fact that there was no one before the court representing the interests of the children concerned.[23] He thought that the children, many of them in their late teens and coming from a highly conscientised community, would have been capable of articulate expression. 'Although both the state and the parents were in a position to speak on their behalf, neither was able to speak in their name.'

Christian Education put limits on the free exercise of a religious belief, but it is the one Constitutional Court judgment in which the significance of religious and related rights was nonetheless stated most unequivocally.[24]

The third case, *Prince v President of the Law Society, Cape of Good Hope*[25] *('Prince')*, concerned Gareth Prince, a Rastafarian and a consumer of *cannabis sativa* (or 'dagga') for spiritual, medicinal, culinary and ceremonial purposes. He had successfully completed his legal studies to a point where, qualification-wise, he became eligible to be registered as a candidate attorney doing community service. He had twice, however, been convicted of the statutory offence of possessing dagga, and this raised doubts about his fitness and propriety to be so registered, especially in the light of his declared intention to continue using dagga. The Law Society of the Cape of Good Hope refused his registration whereupon he unsuccessfully challenged the society's decision in the Cape High Court.[26]

Prince appealed to the Supreme Court of Appeal.[27] When his appeal was dismissed, he lodged a further appeal with the Constitutional Court. A divided court eventually dismissed the appeal with a 5-4 majority,[28] but before doing so, handed down a significant interim judgment[29] in the course of which Ngcobo J intimated that neither the applicant nor the respondents had – in the course of the proceedings commencing in the Cape High Court – adduced sufficient evidence for any court finally to decide certain crucial

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23 *Christian Education* (n21).

24 Cf, for example, C*hristian Education* (n21) para 36.

25 *Prince v President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (C); *Prince v President, Cape Law Society* 2000 (3) SA 845 (SCA); *Prince v President, Cape Law Society* 2001 (2) BCLR 133 (CC) (hereafter 'the interim *Prince* judgment'); *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) (hereafter 'the final *Prince* judgment').

26 *Prince v President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (C).

27 Interim *Prince* judgment (n25).

28 Final *Prince* judgment (n25).

29 Final *Prince* judgment (n25).

controversies in the case. The case was then postponed in order to give both sides the opportunity to gather and adduce the missing evidence.

This order was quite extraordinary for a final court of appeal, since parties are normally required to adduce all relevant evidence at the time when an action is brought in the court of first instance. Only in rare circumstances are litigants allowed to adduce additional evidence on appeal. The Constitutional Court thought that such circumstances indeed existed in *Prince's* case. As a vulnerable minority community, Rastafarians were entitled to the fullest possible opportunity to be heard. As Ngcobo J explained:

> *[T]he appellant belongs to a minority group. The constitutional right asserted by the appellant goes beyond his own interest — it affects the Rastafari community. The Rastafari community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority. The very fact that Rastafari use cannabis exposes them to social stigmatisation…. Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views …. [T]he state should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law.*[30]

The Constitutional Court thus leaned over backwards to accommodate concerns of a vulnerable, religious minority and its final judgment (going against Prince)[31] did not necessarily undo its positive gestures of concern for Prince and his community.

The *ratio* underlying the majority of the Constitutional Court's final decision is that it is impossible for state agencies involved in enforcing the overall statutory prohibition on the use of dagga to make any form of allowance for the use of small quantities of the substance for religious purposes without actually compromising the justifiable objectives of the overall prohibition. The minority of the court did not dispute the legitimacy of criminalising the possession and use of dagga in general, but it argued that it was feasible for the state agencies involved to craft and police conditions for Rastafarians' limited use of dagga for religious purposes.

The fourth case was *MEC for Education: KwaZulu Natal v Pillay*[32] *('Pillay')*. Sunali Pillay, a female teenager, was a learner at Durban Girls' High School, one of the best schools in the country. She was also a member of the 2,49% Indian, and 1,2% Hindu, population of South Africa. Sunali's school prided itself on an exemplary Code of Conduct, which had been

30 Interim *Prince* judgment (n25); Final *Prince* judgment (n25) at para 26.
31 Final *Prince* judgment (n25).
32 2008 (1) SA 474 (CC).

duly adopted by its governing body in consultation with learners, parents and educators. A learner's parents were required to sign an undertaking to ensure that their child would comply with the Code, in terms of which wearing a school uniform was non-negotiable. The only jewellery allowed with the school uniform was '[e]ar-rings, plain round studs/sleepers … ONE in each ear lobe at the same level', and wrist watches in keeping with the uniform. Especially excluded was 'any adornment/bristle which may be in any body piercing'. Strict enforcement of these 'jewellery rules' sparked the Pillays' dispute with the school.

Upon reaching physical maturity, and as a form of religious and cultural expression, Sunali had her nose pierced and a gold stud inserted. The school did not take kindly to this contravention of its jewellery stipulations, but gave Sunali permission to wear the stud until the piercing had healed. She then had to remove it or else face disciplinary proceedings in terms of the Code. Sunali's mother was requested to write a letter to the school explaining why, as a form of religious and cultural expression, Sunali had to wear a nose stud.

In her letter to the school Mrs Pillay explained that they came from a South Indian family, and that they intended to maintain their cultural identity by upholding the traditions of the women before them. Insertion of the nose stud was part of a time-honoured family tradition. When a young woman reached physical maturity her nose was pierced and a stud inserted to indicate that she had become eligible for marriage. The practice was meant to honour daughters as responsible young adults. Sunali, Mrs Pillay claimed, wore the nose stud, not for fashion purposes, but as part of a religious ritual and a long-standing family tradition, and therefore for cultural reasons.[33]

The school management refused to grant Sunali an exemption to wear the nose stud. Mrs Pillay, complaining of discrimination, took the case to an equality court, which found in favour of the school. The Pillays successfully appealed to the Durban High Court, whereafter the school appealed to the Constitutional Court, which then handed down the judgment presently under discussion dismissing the school's appeal.

33 *MEC for Education: KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC).

Langa CJ, writing for the majority of the court,[34] found, first, that the provisions of the school's Code of Conduct combined with the governing board's refusal to grant Sunali an exemption, resulted in discrimination against her. The problem with the Code was that it did not provide for any procedure to obtain exemption from the jewellery stipulations and excluded nose studs from its list of jewellery that might be worn with the school uniform. The Code thus compromised the sincere religious and cultural beliefs or practices of a learner like Sunali, but not those of other learners. This latter group constituted a comparator showing up the discrimination against Sunali and others in a similar position. The court emphasised that,

> *the norm embodied by the Code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms. Accordingly a burden is placed on learners who are unable to express themselves fully and must attend school in an environment that did not completely accept them.*[35]

Sunali sincerely believed that wearing a nose stud was part of her religion and culture, but the evidence in the case showed that it was no mandatory tenet of either her religion or her culture. The court, however, thought that this in no way lessened the school's discrimination against her:

> *Freedom is one of the underlying values of our Bill of Rights and courts must interpret all rights to promote the underlying values of 'human dignity, equality and freedom'. These values are not mutually exclusive but enhance and reinforce each other …. A necessary element of freedom and of dignity of any individual is an "entitlement to respect for the unique set of ends that the individual pursues". One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.*[36]

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34 The minority judgment of O'Regan J is wholly in agreement with the results of the majority judgment, but poses relevant questions about possible alternative routes to the same destination. She also draws a sharper distinction between religion and culture and the constitutional rights pertaining to them than Langa CJ. Cf *Pillay's* case (n33) at 143–146. For present purposes, however, this debate is not of pressing importance.

35 *Pillay's* case (n33) at para 44. See also Iris Marion Young *Justice and the Politics of Difference* (1990) Princeton University Press 168: 'Integration into the full life of the society should not have to imply assimilation to dominant norms and abandonment of group affiliation and culture. If the only alternative to the exclusion of some groups defined as Other by dominant ideologies is the assertion that they are the same as everybody else, then they will continue to be excluded because they are not the same.'

36 *Pillay's* case (n33) at paras 63–64.

But then, of course, there is always the 'slippery slope' scenario or, worse, the 'parade of horribles', which may, in other cases, turn the tiny gold nose stud '[a]t the centre of the storm'[37] in the *Pillay* case, into an ornament as conspicuous as a nose stud – or a headscarf or a facial veil – or as dangerous as a kirpan, the metal dagger of religious and cultural significance worn by Sikh men. The court dismissed this line of argument and quelled the fears inducing it:

> *Firstly, this judgment applies only to bona fide religious and cultural practices. It says little about other forms of expression. The possibility for abuse should not affect the rights of those who hold sincere beliefs. Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do so, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a 'parade of horribles' but a pageant of diversity which will enrich our schools and in turn our country.*[38]

To assess, briefly, the mainstream jurisprudence, I agree with Patrick Lenta[39] that '*Pillay* clearly represents a development of the Constitutional Court's jurisprudence on religious liberty and cultural accommodation'. It is, as a matter of fact, a landmark judgment, significantly inspired by a *jurisprudence of difference*. By analogy with a 'politics of difference',[40] a jurisprudence of difference affirms and, indeed, celebrates 'otherness' beyond the confines of mere tolerance or even magnanimous recognition and acceptance. By realising its jurisprudence of difference, the *Pillay* judgment, in effect, complied with the injunction in s 7(2) of the Constitution that the state must respect, protect and, on top of that, *promote* and *fulfil* the

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37 In the words of Langa CJ in *Pillay's* case (n33) at para 1.

38 *Pillay's* case (n33) at para 107. In a similar earlier case, *Antonie v Governing Body, Settlers High School* 2002 (4) SA 738 (C), the Cape High Court adjudicated the issue of wearing Rastafarian dreadlocks and a cap to school, allegedly in contravention of the school's Code of Conduct. It decided very understandingly (and even generously) in favour of a learner claiming her right freely to express her religious beliefs. In this case, however, the school's governing body had enforced the Code of Conduct in a most draconian way. Although the Code graphically depicted a number of forbidden hair styles, it said nothing about dreadlocks and caps. The governing body, however, expelled the applicant for wearing dreadlocks and a cap, after finding her guilty of serious misconduct. This meant that she was treated as if she had committed a criminal offence!

39 Patrick Lenta 'Cultural and Religious Accommodations to School Uniform Regulations' (2008) 1 *Constitutional Court Rev* 259 at 271.

40 Young at (n35).

(religious and related) rights entrenched in the Bill of Rights.[41] As Iris Marion Young suggests, a politics (and jurisprudence) of difference have a distinctive grasp of 'quality equality':[42]

> *A goal of social justice … is social equality. Equality refers not primarily to the distribution of social goods, though distributions are certainly entailed by social equality. It refers primarily to the full participation and inclusion of everyone in a society's major institutions, and the socially supported substantive opportunity for all to develop and exercise their capacities and realize their choices.*

The mainstream religious-rights judgments of the Constitutional Court preceding *Pillay* were not devoid of 'jurisprudence of difference' moments. In *Solberg*, such a moment came when the five judges said that religious freedom and the even-handed treatment of religions always go hand in hand.[43] In *Christian Education*, Sachs J's contention that the children should also have been heard,[44] was another such moment. So, too, in the *Prince* cases, was the Constitutional Court's insistence that the Rastafarians as a (religious and cultural) minority should be given the fullest possible opportunity to be heard.[45]

Pillay is (to use a Dworkinian metaphor)[46] a recent chapter in a constitutional chain novel interrogating issues of identity and difference,[47] and, since it ventures to call for a celebration of otherness, it augurs well for constitutional support to traditionally 'non-mainstream' religions and religious identities, including traditional African religions.

It should be noted that the *Pillay* case was brought – and decided by three courts (two of which were specially designated equality courts) – as an *equality* complaint. This is why it ended up as such a powerful assertion of the claimant's religious and cultural rights (and identity, one could add). (The preceding mainstream cases on religious rights had all been brought as freedom claims.) A comparator – which is called for when dealing with an equality complaint – facilitates the detection of otherness and of disparities. This 'discovery', in its turn, shows up the inarticulate preferences and

41 In the judgment itself only passing reference is made to s 7(2), and then not in a context where any of the main issues in the case dealt with. Cf *Pillay's* case (n33) at para 40 n18.

42 Young (n35) 173.

43 See *Lawrence's* case (n13).

44 See *Christian Education* (n21).

45 See Final *Prince* judgment (n25).

46 Ronald Dworkin *Law's Empire* (1986) Fontana Press 228–238.

47 Another very powerful, recent chapter is *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC).

biases underlying supposedly neutral norms, and interrogates the even-handedness of the effects of such norms.

Jurisprudence involving traditional African religions (and culture)

The judgments discussed under this heading were handed down by High Courts and, in one instance, by the Supreme Court of Appeal. The cases deal, in a most direct way, with claims based on traditionalist African beliefs pitched against rights entrenched in the Bill of Rights,[48] and understood very much in accordance with Western conceptions of human rights.

Originally, *Bührmann v Nkosi*[49] *and Nkosi v Bührmann*[50] *('Bührmann/Nkosi')* came as an application before a single judge. It was thereafter taken on appeal before a full bench of the Transvaal Provincial Division of the High Court (TPD) (presently the North Gauteng High Court) in Pretoria.[51] Eventually, it ended up in the Supreme Court of Appeal (SCA) in Bloemfontein.[52]

From 1966 to 1981, Grace Chrissie Nkosi, with her late husband and their children, lived on the Bührmann family farm, De Emigratie, in the district of Ermelo, Mpumalanga. The couple were both farm labourers. The family then moved to a neighbouring farm where Mr Nkosi passed away in 1986. With the permission of Mr Gideon Bührmann, who in 1970 had taken charge of farming operations on De Emigratie from his father (the Nkosis' previous employer), Grace returned to De Emigratie where she continued to live with her two sons. As from 28 November 1997, Grace, in terms of the Extension of Security of Tenure Act (ESTA),[53] became 'an occupier' of the land with the rights of residence and use,[54] as well as a right to family life in accordance with her culture[55] and the freedom of religion, belief, opinion and expression.[56] The Act also entitles any person (and not only an occupier) to visit and maintain family graves on someone else's land, subject to certain conditions.[57] The national legislature enacted ESTA with the plight (and constitutional rights) of black 'vassals' on white

48 Chapter 2 of the Constitution.
49 2000 (1) SA 1145 (T).
50 2002 (1) SA 372 (SCA).
51 The judgment of the full bench was reported as *Bührmann v Nkosi* 2000 (1) SA 1145 (T).
52 *Nkosi v Bührmann* 2002 (1) SA 372 (SCA).
53 62 of 1997.
54 Section 6(1) of the Act.
55 Section 6(2)(*d*).
56 Section 5(*d*).
57 Section 6(4).

farms very much in mind. Hence, it moderately empowers them *vis-à-vis* the white landlords at whose mercy they had traditionally been.

Grace's son, Petrus, was born on De Emigratie in 1968, and died in 1999. Gideon refused Grace permission to bury him on the farm, where, it must be pointed out, he had also been living legally. When Gideon approached the High Court in Pretoria for an order prohibiting the burial, a single judge (Cassim AJ) refused the order. Gideon then successfully appealed to a full bench of the same court in Pretoria, whereupon Grace unsuccessfully appealed to the Supreme Court of Appeal.

Grace's contention that she had a right to bury Petrus on the farm was based, first, on the allegation that, in 1968, her family had buried one of her grandsons on a piece of land pointed out by Bührmann senior (Gideon's father) for family burials. Seven family members had subsequently been buried there. Secondly, Grace alleged that, according to her custom and religious belief, a family member who passes away is only physically but not spiritually separated from those left behind; a deceased thus has to be buried in a place where the surviving family members can communicate spiritually with him or her on a daily basis. Her late husband and his mother performed the rituals necessary to declare and introduce the piece of land set aside for burials as 'home for the ancestors'.

Both the full bench of the TPD and the SCA thought that the issue they had to decide was how to weigh Grace's right to her religious and cultural beliefs against Gideon's right of ownership to his land. The majority of the court in Pretoria (Ngoepe JP dissenting) and a unanimous SCA did not have much difficulty in concluding that the latter's property right weighed heavier, and that the right to freedom of religion had 'internal limits'.[58]

Satchwell J, in the High Court, voiced the sentiments of the majority of that court (and actually of the SCA too).

> *The Constitution clearly envisages that the second respondent [Ms Nkosi] is free to hold and act upon her religious convictions and that she is not to be interfered with or discriminated against in regard thereto. However, we were referred to no authority and I know of none which imposes on a private individual a positive obligation to promote the religious practices and beliefs of another at one's own expense. If such were envisaged either by the Constitution or the Extension of Security of Tenure Act, each occupier who professed a religion or set of beliefs would be entitled to require of the landowner that he permit the erection of a church or tabernacle or other place of worship on his land in circumstances where*

58 *Nkosi* case (n52) at para 49.

> *the occupier's religion required adherents to gather together with symbols of faith in an enclosed building.*[59]

The parallels drawn in this dictum are extreme: Grace Nkosi's request was akin to asking a landowner for permission to erect a church or tabernacle or other place of worship on her/his land! Ngoepe JP's lone, dissenting (and sobering) voice in the Nkosi-Bührmann saga stands in stark contrast with this extensive exaggeration:

> *[T]here is already an area for burial; other employees … bury on that farm with the appellant's [Gideon's] permission; the area the appellant loses to the grave is probably 1 m by 2 m; and … in terms of the law as it stands, the respondent [Grace] will in any case still be entitled to visit … existing … graves. I am not persuaded that the loss of a 1 m by 2 m area constitutes such a drastic curtailment of the appellant's right of ownership as to justify denying the respondent the right I have already described in detail.*[60]

A section has since been included in ESTA[61] providing a right to bury a deceased 'occupier' on the land where s/he lived in accordance with the deceased's and the family's religious and/or cultural beliefs, but on the condition that an established practice of burial in respect of that land exists. This right extends to the burial of family members of an occupier who die while living with her/him on the land. The new provision, which would have resolved the Nkosi-Bührmann issue in Grace's favour, was challenged unsuccessfully in the Land Claims Court, in the case of in *Nhlabathi v Fick*.[62] The court held that the impugned provision does not constitute a taking of property in breach of s 25(1) of the Constitution.

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59 *Bührmann* case (n51) at 1155D–F. The Land Claims Court previously, in *Serole v Pienaar* 2000 (1) SA 328 (LCC), voiced similar sentiments on the applicability of ESTA rights to justify the procurement of a right to bury a family member on someone else's land: '[p]ermission to establish a grave on a property could well amount to the granting of a servitude over that property. The owner of the property and all successors-in-title will, for as long as the grave exists, have to respect the grave, not cultivate over it, and allow family members to visit and maintain it. Although the specific instances of use in s 6(2) are set out "without prejudice to the generality" of the provisions of ss 5 and 6(1), they still serve as an illustration of what kind of use the Legislature had in mind when granting to occupiers the right to "use the land" on which they reside. The right to establish a grave is different in nature from the specific use rights listed in s 6(2). It is, in my view, not the kind of right which the Legislature intended to grant to occupiers under the Tenure Act [ESTA]. Such a right could constitute a significant inroad into the owner's common-law property rights. A Court will not interpret a statute in a manner which will permit rights granted to a person under that statute to intrude upon the common-law rights of another, unless it is clear that such intrusion was intended.'

60 *Bührmann* case (n51) 1161F–G.

61 Section 6(2)(*d*A).

62 2003 (7) BCLR 806ij [2003] 2 All SA 323 (LCC).

In *Crossley v National Commissioner of South African Police Service*[63] *('Crossley')*, Mark Scott-Crossley, a white farmer, and three of his black employees, Simon and Richard Mathebula and Robert Mnisi, stood accused of the murder of an ex-employee of Scott-Crossley, one Nelson Chisale. (The charges against Mnisi were eventually withdrawn because he turned state witness.) Chisale was dismissed by Scott-Crossley, but returned to the latter's farm to collect his belongings, whereupon he was severely assaulted, and – allegedly while still alive – thrown to a pride of white lions in an encampment at the Mokwalo Game Farm near Hoedspruit in the Limpopo Province. Chisale's remains – a skull, broken bones and a finger – were later found in the lion camp.

On Friday 12 March 2004, Scott-Crossley and the two remaining accused sought an urgent interdict in the Pretoria High Court to stay Chisale's funeral which was planned for the next Saturday morning at 06h00 in the Maboloka village near the town of Brits in the Northwest Province.[64] The applicants wanted a pathologist, designated by their attorneys on their behalf, to examine the remains of the deceased in order to assess (and challenge, if necessary) forensic evidence to be adduced at the criminal trial. A number of state officials involved in the investigation were joined as respondents, and none of them opposed the application.

Patel J, who heard the application, eventually dismissed it because the applicants failed to establish urgency. The court found that the application could and should have been brought at an earlier stage, and its 'urgency' a day before the planned funeral was, in the court's view, attributable to the applicants' own procrastination. In the course of his judgment, however, Patel J attended to some substantial constitutional considerations without clearly indicating if and how they had a bearing on his eventual findings.

For instance, he made much of the applicants' neglect to inform the family of the deceased of the application that they were bringing and to consider joining them as respondents. According to the applicants it was difficult to trace the deceased's relatives, but some of his relatives nonetheless learnt from the press about the application and showed up at the hearing. They were Ms Fetsang Jafta, a niece of the deceased, and her uncle, Mr Terrence Mashigo, the manager responsible for community participation affairs in the office of the Executive Mayor of the Madibeng Local Community. Patel J afforded the latter an opportunity to address the court on behalf of the family, and afterwards thought that he did so with solemnity and dignity.

63 [2004] 3 All SA 436 (T).

64 The case has been reported as *Crossley v National Commissioner of South African Police Service* [2004] 3 All SA 436 (T).

Mashigo's address was quoted *verbatim* in the judgment. He mainly explained why, in view of certain ritual preparations that had already been made, the family's custom and belief impelled the burial of the deceased at 06h00 on the Saturday morning, and he furthermore voiced indignation at the applicants' claim that they could not track down the deceased's family to inform them of the application. The fact that the court was seriously considering the family's constitutional rights met with Mr Mashigo's approval.

Looking clinically at the situation, an expert legal observer would probably say that the judge had to decide how to reconcile the religious and cultural rights of Nelson Chisale's relatives with the applicants' right to a fair trial.[65] Patel J held that, in the particular situation, the right to dignity of both the deceased and his relatives trumped the applicants' right to a fair trial, and he advanced the African saying *umuntu ngumtu ngabayne abantu* [a person is a person through other people] as 'a further *raison-d'être*' for the refusal of the application.[66] The court verbalised its understanding of ubuntu as follows: *'ubuntu* embraces humaneness, group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, humanity, morality and conciliation.'[67]

Stephanus Smit NO v His Majesty King Goodwill Zwelithini[68] *('Zwelithini')* concerns the occasion when, once a year, Zulu people gather in great numbers at one of King Goodwill Zwelithini's palaces to celebrate *Umkhosi Ukweshwama* (the First Fruits Festival). This event usually takes place towards the end of the year, and at about the same time every year. A ritual central to *Umkhosi Ukweshwama* is the slaughtering of a bull by young men (actually boys) with their bare hands. According to the applicants in the case (all representing the Animal Rights Africa Trust), the bull is killed by choking it, 'by pushing sand or mud down its throat, gouging out its eyes to down the animal, twisting its testicles and tying its penis until the animal succumbs and is then jumped on, kicked and beaten until it dies, usually about forty minutes after the event began'.[69] The applicants acknowledged that none of them had ever witnessed such a killing firsthand. They relied on various (other) sources for information about the ritual.

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65 As intimated previously, it was actually not necessary for the court to make a finding in this regard, because it had already found against the applicants on the issue of urgency. Patel J, however, did express a view on the constitutional issue.

66 *Crossley's* case (n64) at para 18.

67 *Crossley's* case (n64) at para 18.

68 [2009] ZAKZPHC 75.

69 *Stephanus Smit NO v His Majesty King Goodwill Zwelithini* [2009] ZAKZPHC 75 at para 6.

The proceedings were initiated in the KwaZulu-Natal High Court, Pietermaritzburg, where applicants sought interim relief 'to interdict and restrain' the king 'from causing or permitting a bull to be slaughtered' at an *Umkhosi Ukweshwama* on 4 December 2009 at the palace in Nongoma, KwaZulu-Natal. The legal grounds for the application were, first, that the killing of the bull would constitute a contravention of s 2(1)(*a*) of the Animals Protection Act,[70] and, secondly, that it would be in breach of South Africa's international obligations under the Terrestrial Animal Health Code.[71] Thirdly, and in a more 'constitutional vein', the applicants contended that slaughtering the bull (as previously described) would infringe their s 15(1) right to freedom of religion, because they believed that 'animals must be protected and saved from cruelty and suffering at the hands of human beings'. Their beliefs in this regard were 'integral to' their 'own sense of identity, self-worth and dignity' and they had a right to manifest their beliefs in practice and to have them protected.[72] Finally, and still with reference to the Constitution, the applicants contended that the respondents' right to give expression to and practice their culture, had to be exercised in a manner compatible with the constitutional injunction to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.

> *While the need to encourage and support cultural diversity is recognised by the Constitution, so too must solidarity be recognised. A society can cohere only if all its participants accept that certain basic norms and standards are binding.*[73]

The respondents complained because the applicants brought their application at a late stage, leaving them (the respondents) only one week to deal with weighty matters of substantial importance to the community. Insofar as factual matters were concerned, the respondents alleged that the applicants misconstrued the religious and cultural significance of *Umkhosi Ukweshwama* and the ritual of slaughtering the bull, which had primary religious and cultural significance.[74] They also disputed the applicants' second-hand version of the killing of the bull. Instead, they contended, 'the animal is overpowered to disable it by closing its airways and thereafter its neck is broken in a specific manoeuvre that causes a quick and painless death. No bloodletting of any kind is allowed nor is dismemberment of any

70 71 of 1962.
71 Article 7.1.2.
72 *Stephanus Smit*'s case (n69).
73 *Stephanus Smit's* case (n69) at para 7.
74 *Stephanus Smit's* case (n69) at para 7.

kind whatsoever part of the ritual slaying.'[75] This is so because the killing of the bull represents a symbolic killing of the king. According to the respondents the ceremony also had a religious aspect, because the ancestors 'are called upon to share in the feasting and the rite is part of thanksgiving to them for the safe arrival of the harvest. The texture of a feast or ritual ceremony is … marked by the presumed presence of the divinities ….'[76]

The court, per Van der Reyden J, stated at the outset that the relief sought by the applicants could only be granted 'if an admissible and legally acceptable factual basis for the relief exists'.[77] The eventual finding in favour of the respondents thus basically had a factual foundation with little reasoning about the relevance of a broader religious rights jurisprudence for the case. There was, for instance, no reference to religious-rights case law. However, the court peppered its *dicta* when articulating its findings of fact, with evaluative observations (concerning the behaviour and attitude of the applicants) in such a manner that there can be little doubt about the legal and constitutional choices it had made in the broader context of the protection of religious and related rights in South Africa.

The court described the applicant's portrayal of the gruesome manner in which the bull is killed as 'a figment of an overactive imagination probably born from an overzealous storyteller intent upon telling a grand tale that would hardly be of interest to a listener if the true details are related'. It reproached the applicants for not verifying their factual information with more circumspection and also for flouting protocol by demanding, in an email sent directly to the King himself, that he enter into dialogue with them. According to the court, they thereby showed their disdain for Zulu culture.[78]

The court described the application *in casu* as 'symptomatic of an intolerance of religious and cultural diversity' and 'an attempt to force… particular secular views … on others':

> *The Applicants proceed from the premise that they have a right to interfere with the religious and cultural practices of others that they find intolerable to their own beliefs. The Applicants are completely misguided in their contention that they have such a right. If anything, they have in the process called into question the legitimacy of the religious and cultural practice and offended the members of the Zulu nation who are now called upon to justify their beliefs and cultural*

75 *Stephanus Smit's* case (n69) at para 12.
76 *Stephanus Smit's* case (n69) at para 13.
77 *Stephanus Smit's* case (n69) at para 4.
78 *Stephanus Smit's* case (n69) at para 14.

> *practices. This is particularly harmful to the development of a democracy based upon tolerance and promoting diversity.*[79]

What also weighed heavily with the court were the many examples in history of societies destroying each other due to cultural and religious intolerance. The antidote to this danger was 'understanding and respect for others who hold different beliefs and the recognition of the right to observe their own cultural heritage' which 'results in harmonious co-existence where conflict could otherwise have arisen'.[80]

Concluding, 'on a balance of convenience', that granting the applicants the interim relief they sought would cause far greater prejudice to the Zulu nation than refusal of such relief would cause the applicants, the court refused the application.[81]

Conclusions

In the mainstream religious rights cases discussed above,[82] the constitutionally entrenched rights to religious freedom and equality were asserted *vis-à-vis* organs of state by beneficiaries of these rights, *seeking an exemption* of some sort. In the traditional religion cases,[83] on the other hand, claimants wishing to manifest their religion and culture or to conduct religious (and cultural) observances, came up against other beneficiaries under the Constitution who alleged that some of their constitutional rights stood to be compromised by the claimants' action. In the mainstream cases, therefore, much hinged on the courts' assessment of the intensity of state power putting the claimants' religious rights at risk.

The traditional religion cases, however, involved a reciprocal weighing of the rights of beneficiaries under the Constitution – and then giving precedence to the rights of one of the parties. The difference just described is historically accidental: rights associated with traditional religions can also be asserted *vis-à-vis* the state, and the rights dealt with in the adjudication of the mainstream cases *vis-à-vis* persons or institutions without state authority. Even so, important features of the jurisprudence involving issues of traditional African religions are traceable to a history taking the course just described. With this in mind, the three traditional rights cases previously discussed will now (in conclusion) briefly be assessed.

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79 *Stephanus Smit's* case (n69) at para 15.
80 *Stephanus Smit's* case (n69) at para 15.
81 *Stephanus Smit's* case (n69) at para 15.
82 See 76ff.
83 See 80ff.

In *Bührmann/Nkosi* Grace Nkosi's occupational, religious and cultural rights, originating in the Constitution and re-affirmed by ESTA, were weighed against Bührmann's constitutionally guaranteed right to his (and the family's) property. Actually the latter entitlement is not guaranteed as a *right* in the Constitution. What s 25 entrenches instead is a constitutional guarantee against (i) a deprivation of property 'except in terms of law of general application', as well as (ii) an all-out arbitrary deprivation of property (which no law may permit). But, in the *Nkosi-Bührmann case*, the majority of judges in the Pretoria High Court and in the SCA (with *their* peculiar 'culture') had little difficulty concluding that the 'strange' religious and cultural rights of Grace Nkosi (and her family) could not trump Gideon Bührmann's right(s) to his (and his family's) immovable property. It is, with respect, not far-fetched to say that the courts' finding resulted from an ideological predisposition manifesting in the subordination of certain 'lesser' constitutional rights to other 'greater' – 'blue' or freedom – rights.[84]

Ngoepe JP's sobering, down-to-earth, observation that what Bührmann stood to lose was but a one metre by two metre piece of land in a graveyard already assigned to Grace Nkosi's family, escaped his colleagues, who were preoccupied with the sanctity of Bührmann's right to his land. Satchwell J's remark that what Grace was claiming was comparable to wanting to have a 'church or tabernacle or other place of worship' erected on Bührmann's land,[85] was the fearful voice of ideologically induced exaggeration, not of reason. Such an attitude stands in the way of developing a jurisprudence of difference, which would obviously work to the benefit of traditional African religions. Legislative intervention to undo the consequences of the *Nkosi/ Bührmann* judgments was therefore indeed appropriate.

Patel J's judgment in the *Crossley* case was an attempt to reclaim humanity and dignity for the deceased Nelson Chisale and his (extended) family, given the gruesome way in which he as a human being had been reduced to a plastic bag full of bones, and his family bereft of a loved one in a most barbaric way. This is what Terrence Mashigo in his address to the court was also pleading for. Mashigo was speaking not only for the observance of tradition, but also much more for the resurrection of the family's dignity, ravaged not only by the (mal-)treatment meted out to the deceased, but also

84 Andre J Van der Walt 'Property Rights v Religious Rights: *Bührmann v Nkosi*' (2002) 13 *Stell LR* 394 at 414 calls it 'a matter of perspective' resting on the 'seemingly natural and uncontested basis that ownership is absolute, complete and inviolate in principle, and that the owner's property can only be taken away or invaded permanently on the basis of either consent or clear and unambiguous legislative authority.'

85 See *Nkosi* case at (n52).

by the applicants' (and, in particular, Scott-Crossley's) arrogant claim that they (the family – by blood, by affinity and, above all, by ubuntu) were not traceable, and therefore not contactable. Such a trivialisation of a family's identity in a matter as weighty as the burial of one from the fold, is a serious assault on the humanity of all. Mashigo, for instance, insisted that carrying an identity document and being employed were decisive in carving out Chisale's identity as a (known) member of a (knowable, extended) family. That is contrary to the popular belief that an identity document confers but a number-like identity on its holder – mainly for impersonal official purposes.

The court heeded Mashigo's plea on behalf of the family invoking the right to human dignity – coupled with ubuntu – in a powerful yet unspectacular manner. The court did take the applicants' right to a fair trial seriously, but also did not treat it as a monumental entitlement trumping the family's constitutionally entrenched, religious rights.[86] *Contextualisation* of both parties' rights was the first step towards construing and concretising these rights, and not – as was the case in the *Nkosi-Bührmann* judgment(s) – an *exaggeration* of a threat one party's rights hypothetically posed to a right of the other party. In the peculiar circumstances of the case, Patel J actually did what Ngoepe JP tried to achieve in the *Nkosi-Bührmann* case, namely, to appeal to practical wisdom or 'common sense' by not conceiving of constitutional rights in an essentialist, all or nothing manner, and not ranking them (albeit intuitively) as 'lesser' (esoteric religious and cultural) and 'greater' ('blue' or freedom) rights.

Crossley provides a good example of judicial reasoning recognising and developing a jurisprudence of difference. The only oddity is that the arguments used in this regard did not really determine the outcome of the case. The matter was actually disposed of on the basis that the applicants failed to convince the court of the urgency of the application!

Zwelithini is a good example of a case where a jurisprudence of difference was mostly practised rather than preached. At the outset, the court stated that the relief sought by the applicants could only be granted if 'an admissible and legally acceptable factual basis' existed.[87] 'Legal acceptability', however, seems to have featured more prominently in the court's mindset informing its analysis and construction of the facts of the case, rather than in the reasons it gave for its judgment. The judgment thus lacks a classical *ratio*

86 Cf, for example, *Crossley* case at (n64) paras 11–13 for the court's consideration of this right and a discussion of the possibilities for realising it for purposes of the criminal trial.

87 *Stephanus Smit's* case (n69) at para 4.

decidendi that could be cited as authority in subsequent cases, but it is by no means neutral in the choices regarding 'legal acceptability'. The judgment is also a loud clarion call to respect religious and cultural otherness, and, in that sense, it stands traditional African religions (and culture) in good stead.

As a forceful attitudinal expression of honouring diversity and 'otherness', however, a judgment like *Zwelithini* leaves one question unanswered, namely, how severely may someone from a 'mainstream' culture and religion, exercising a constitutional right (to freedom of expression, for example), criticise the religious and cultural beliefs of, say, an African traditionalist? Due to the obnoxious attitude of the applicants, *Zwelithini* was not an appropriate case to deal with this vexed question: a factual finding against the applicants was justified. The question will, however, not go away, and it is waiting to be addressed in the course of further developing our constitutional jurisprudence on the religious and cultural rights of traditional Africanists. Let us hope that a judgment of the same quality as Pillay will eventually give direction.

CHAPTER 6

Recognition of African Initiated Churches for State Purposes: Doctrinal Opposition or Procedurally Correct?

Willemien du Plessis

Introduction

The previous chapters considered the position of African traditional religions (ATRs) in South African law. Here, we turn to the problematic issue of African Initiated Churches. (These churches are described in various ways: the terms African Independent Church or African Initiated Church are the two most commonly used, and will be indicated by the abbreviation AIC.) Although the AICs would consider themselves Christian, they have not shared in the benefits of the established denominations because they have too many elements of traditional African beliefs.

After almost a century of intense missionary activity in Southern Africa, African Christianity experienced an immense growth of Pentecostal spirituality, beginning in the 1890s. Although a powerful catalyst,[1] this was but one of the forces behind the rise of the AICs. In response to changes brought about by migration, natural disaster, war and colonisation, Africans had already learnt to adapt. Change had, in fact, become a way of life.[2] Thus the arrival of missionaries and Christianity was seen as merely another factor demanding adjustment. What 'was new was not modernization per se but the takeover and control of this process by outside forces which then directed it in their interests'.[3]

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1 J W Hofmeyr 'Post-independent mainline churches in Africa (1975–2000)' (2004) 60 *HTS: Theological Studies* 1307 at 1309.

2 Peter Clarke *New Religions in Global Perspective* (2006) Routledge 187.

3 Ibid.

The changes brought about by colonialism and Christianity, however, were too abrupt.[4] Time was needed to adapt,[5] and, in the case of religion, the AICs provided a medium of transition from an older to a newer order.[6] In fact, the growth of AICs can be seen as one of the ways in which ATR has survived, since the AICs are fundamentally Christian but have not forsaken the beliefs and practices of the past.[7] AICs emerged all over Africa, and southern Africa was no exception. Here the AICs appeared from about the 1880s.[8]

During the colonial era in Africa, AICs were seen to be state collaborators. Subsequently, in the post-colonial period, during the rule of military juntas or dictatorial states, they were ignored, but when those regimes collapsed and African states began to democratise, the AICs emerged again with stronger voices. In effect, they have played a major role in promoting African democracy.[9]

The history of the AICs in South Africa followed the same pattern as in the rest of Africa. The established churches, including AICs, were to play a leading role in the process of reconciliation that began in the 1980s.[10] According to Hofmeyr:[11]

> *A possible explanation could be that the independent churches created the mental space to experiment with the Christian message at a time when the Bible was the only message that the apartheid state was prepared to allow to be freely disseminated. Therefore, Pentecostalism most probably became a spiritual space that assumed a political character that the state did not bother to police very*

4 Clarke (n2) at 206.

5 On the question of time, see also John S Mbiti 'African religions and philosophy' in Albert G Mosley *African Philosophy* (1995) Prentice Hall at 87–115.

6 Michael F Bourdillon *Religion and Society: a text for Africa* (1990) Mambo Press 277–278.

7 Clarke (n2) at 187. See also 115ff below. Bourdillon (n6) at 274 explains it as follows: 'Religion helps to provide a new self-image and a new identity.'

8 See Clarke (n2) at 188–201; Bourdillon (n6) at 271. See also *Dwane v Goza* (1903) 17 EDC 8 at 10–12 for a history of the establishment of the Ethiopian Church in the Eastern Cape. For a general list of sources, see David Chidester, Judy Tobler & Darrel Wratten *Christianity in South Africa: an annotated bibliography* (1997) Greenwood Press chapter 4.

9 Hofmeyr (n1) at 1310; Alex Thomson *An Introduction to African Politics* 2ed (2000) Routledge 68, 73.

10 Hofmeyr (n1) at 1324–1330.

11 Hofmeyr (n1) at 1329. See also Greg Cuthbertson 'Globalising and Christianising racial segregation: South African debates in *The International Review of Missions*, 1912–1934' (2006) 34 *Missionalia* 201 at 218–219 and 225; Bourdillon (n6) at 27 and 271–272.

> *closely because they assumed the majority of its members were illiterate and unschooled, which was not always the case.*[12]

The AICs, however, were not regarded as a 'real Christian religion' by other Christian churches,[13] and they received no official recognition from the state. But the Constitution of the Republic of South Africa, 1996, and its predecessor, the interim Constitution of 1993, brought about a new dispensation of non-discrimination. This principle applies to all facets of social life, including religion.[14]

Several laws make provision for officers of religion or for the exercise of religious rights.[15] While the constitutional protection of religion is discussed elsewhere in this book,[16] this chapter seeks to determine whether the South African legislation recognises AICs for state purposes and to what extent they – and their individual members – are entitled to practise their beliefs.

In the 1996 census, approximately 30 million people in South Africa indicated that they belong to a Christian religious group. In 2001, the number had risen to 35,8 million. A third of this number claimed an affiliation to the mainline churches,[17] while another third indicated an affiliation to the AICs. The statistics show a growth of approximately 5 per cent in the membership of the AICs from 1996 to 2001. Only a small percentage of South Africans said that they adhered to a 'pure' African religion.[18]

This chapter sketches a brief background of the AICs and the reasons why they were, and still are, not tolerated by the established Christian churches. The relationship between law and religion is then discussed, and the position of the state in religious matters. When considering these questions, and the relevant legislation, an important preliminary question is whether the AICs can be treated as juristic persons.

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12 Hofmeyr (n1) at 1331 ascribes the current growth to the church's association with 'God's healing power', which attracts poor and sick people.

13 See 116–117 below.

14 See 118–119 below.

15 See 124–132 below.

16 See chapter 5.

17 Anglican, Methodist, Roman Catholic, Presbyterian, Lutheran, Dutch Reformed etc.

18 Statistics South Africa *Primary Tables South Africa Census '91 and 2001 Compared.* Available at http://www.statssa.gov.za/census01/html/RSAPrimary.pdf (accessed on 23 June 2009). In 1990 Bourdillon (n6) at 272–272, ascribed the growth in the AICs as a movement away from the African traditional religions.

African Independent Churches

There is no single AIC and no single African Independent Faith, as understood by some religious traditions. Instead, there are numerous AICs, ranging from small groups to large churches with an international following.[19] According to Hayes,[20] for instance, South Africa has more than 7 000 AICs.[21]

Various forces contributed to the development of the AICs.[22] Certain Christian rituals were adapted to traditional practices, of which healing is perhaps the best example. Healing affects 'all aspects of one's well-being, physical, spiritual, psychological, moral and social'.[23] Baptism, which is an important rite of Christian churches, became a major feature of the AICs, where it is regarded as a key ritual for both cleansing and healing.[24]

The AICs' tolerance of African traditions proved to be their great attraction. Polygamy, which was frowned upon by the established Christian churches, is a case in point.[25] Certain other traditional African rituals, however, such as the drinking of blood, and the use of alcohol or tobacco, were frowned upon. Some of the AICs had these banned.[26]

Certain AIC rituals derive from both the Old and New Testaments, namely, praying, 'abstention from pork, night communion with the washing

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19 Bourdillon (n6) at 271.

20 Stephen Hayes 'Issues of "Catholic" Ecclesiology in Ethiopian-type AICs' in Grey Cuthbertson, Hennie Pretorius & Dana Robert (eds) *Frontiers of African Christianity* (2003) Unisa Press 137. He makes a distinction between two main groups, namely the Ethiopian and the Zionist movements, but also indicates that each AIC follows its own tradition and that fusion between the movements occurs in some instances (137–138).

21 The AICs have a Council of African Instituted Churches (CAIC) that consists of ten member associations formed out of member churches from South Africa. The Constitution of the Council is based on broad aims and points of departure common to the AICs. The Council meets at an annual conference and has an executive committee. See in this regard the World Council of Churches website: http://www.oikoumene.org/en/member-churches/regions/africa/south-africa/council-of-african-instituted-churches.html (accessed on 1 June 2010).

22 See further John S Mbiti *African Religions and Philosophy* (1969) Frederick Praeger 232–238, S I Maboea 'Causes for the Proliferation of African Independent Churches' in Gerhardus C Oosthuizen, Michiel Casparus Kitshoff & S W D Dube (eds) *Afro-Christianity at the Grass-roots: its dynamics and strategies* (1994) EJ Brill 121–136.

23 Clarke (n2) at 195.

24 On the coast of Africa, followers are baptised in the sea. Alan Anderson 'Healing in the Zion Christian Churches of Southern Africa: Daneel's Research in Zimbabwe compared with the South African Movement' in Cuthbertson, Pretorius & Robert (n20) at 107–109; 111–115.

25 Bourdillon (n6) at 274.

26 Clarke (n2) at 195–196.

of the feet, and the seventh day Sabbath'.[27] Yet others are purely African, such as the use of drums and traditional dancing,[28] 'divining out witchcraft' and reliance on dreams and communication with the ancestors.[29]

In general, the AICs provide a belief system that is syncretistic, one that is flexible and accommodating. Christianity – like Islam – is encretistic, it is based on written texts, doctrines and specific rules, whereas the AICs are more in line with known oral traditions; they focus on daily life and reconciliation.[30]

A reflection on intolerance

Inevitably, the views of the established Christian churches on the relationship between culture and religion have varied through the ages. The typical approach was that of the early missionaries in Africa: they followed Tertullian's teaching that Christ was the enemy of culture. Yet, when interpreting their own culture, missionaries subscribed to Abelard's idea that Christ is a part of culture.[31] Hence, according to the missionaries' criteria, which were in fact their own culture and religion, whatever they found in Africa had little chance of fitting into the Christian paradigm.

There are many other reasons why the traditional Christian churches refused to recognise African religions and AICs in spite of doctrinal similarities.[32] The mainstream churches said that: AIC religious officers were untrained; they had no knowledge of the Bible or hermeneutics; their knowledge was inferior, erroneous and misleading; their interpretations were biblicist and legalistic; and the AICs' syncretism with African culture was unacceptable.[33] The belief of traditional Christianity in the 'exclusivity

27 Clarke (n2) at 195. See also Cuthbertson (n11) at 211.

28 See Clarke (n2) at 195–196.

29 Bourdillon (n6) at 275–276, Anderson (n24) at 107 and 109–111 and Conrad Wethmar 'Conceptualisation of evil in African Christian theology' (2006) 26 *Acta Theologica* 249 at 262.

30 Bourdillon (n6) at 275. See also Maboea (n22) at 121–136.

31 Johan J Kritzinger & S J J Niemand 'Sinkretisme as missionologiese uitdaging' (2007) 28 *Verbum et Ecclesia* 488 at 490.

32 Jewel Amoah & Tom Bennett 'The freedoms of religion and culture under the South African Constitution: do traditional African religions enjoy equal treatment?' (2008–2009) 24(1) *J of Law & Religion* 1 at 5 fn 25.

33 Kritzinger & Niemand (n31) at 501–502, Claudia Nolte-Schamm 'Approaches to inter-religious dialogue: a theological appraisal' (2005) 20 *Practical Theology in SA* 89 at 101; and Amoah & Bennett (n32) at 12–13 indicate both the commonalities and differences. See also Willemien du Plessis 'Afrika en Rome: regsgeskiedenis by die kruispad' (1992) 25 *De Jure* at 289–307.

of the truth' led to intolerance and the rejection of any doctrine differing from its own.[34]

Policy in South Africa was dominated, for many years, by only one Christian denomination, the Dutch Reformed Church. As a result of the pre-eminent position of this one church, the state either ignored or refused to tolerate others, whether the AICs or even other mainstream Christian churches (which notionally worked within the same 'paradigm' as the Dutch Reformed Church).[35] The Constitution, however, heralded a new dispensation, as will be indicated below.

The role of law

The question whether religion should be kept in the private sphere or tolerated in the public sphere has been the subject of considerable debate.[36] A state may decide to be neutral towards religion. Alternatively, it may decide to give some recognition to a specific religion, or to every religion, or to no religion at all.

A neutral policy towards religion implies that the state does not recognise any religion or does not recognise specific religions.[37] Although apparently benign, this policy may result in the stifling of debate or the critical scrutiny of state action.[38] It may also result in the state doing nothing to protect people from being harmed by religious practices, by, for example, allowing unequal standards of treatment or permitting infringements of human rights, because of the underlying reasoning that individuals are entitled to accept or reject religion of their own free will.[39] Even so, certain practices, such as human sacrifice or cannibalism, may be considered so

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34 Gerhard van der Schyff 'The historical development of the right to freedom of religion' (2004) 2 *TSAR* at 259, Rassie Malherbe 'Enkele kwelvrae oor die grondwetlike beskerming van die reg op Godsdiensvryheid' (2006) 47 *NG Teologiese Tydskrif* 180 at 181–182. See also Nicolas Stebbing 'You shall have no other gods before me' in Cuthbertson, Pretorius & Robert (n20) at 125–126 for the reasons why Shona Christians opposed the AIC in Zimbabwe.

35 Nico Koopman 'Freedom of religion and the prophetic role of the church' (2002) 43 *NG Teologiese Tydskrif* 237 at 240–241. Amanda Gouws & Lourens M du Plessis 'The relationship between political tolerance and religion: the case of South Africa' (2000) 14 *Emory International LR* at 657–698 indicate that even in 2000 religious intolerance was rife, not only among Protestants, but also between Protestants and Catholics and among the AICs themselves.

36 See, for example, Roger Trigg *Religion in Public Life: must faith be privatized?* (2007) OUP and William B Eerdmans & J M Vorster "n Etiese Perspektief op Godsdiensvryheid' (2003) 36 *In die Skriflig* 251 at 262–267.

37 Trigg (n36) at 31.

38 Trigg (n36) at 9, 17.

39 Trigg (n36) at 31.

abhorrent that they are not part of the private sphere, in which event the state is entitled to intervene.[40] In a sense, then, religion receives a form of public recognition,[41] and it is at this stage that law and religion become entangled.[42]

The general public and the state may disagree on the desired level of state interference or whether the state should intervene at all. After all, the limits of religious freedom are notoriously difficult to determine,[43] and it is questionable whether those who judge a religious practice are properly equipped to do so if they have no inside knowledge.[44]

South Africa seems to be a religion-neutral rather than a secular state.[45] Various rights and institutions in the Constitution[46] bear testimony to this proposition. A question must nevertheless be answered: if, in terms of ss 15, 30 and 31 of the Bill of Rights, the state recognises various religions, cultures and beliefs, does it also recognise AICs and, by implication, African religions, for state purposes?[47]

Section 15(2) of the Constitution provides as follows:

> *Religious observances may be conducted at state or state-aided institutions, provided that –*
> *(a) those observances follow rules made by the appropriate public authorities;*
> *(b) they are conducted on an equitable basis; and*
> *(c) attendance at them is free and voluntary.*

According to this section, a court may allow religious observances as long as they are conducted according to rules laid down by the state or state-aided institutions. Du Plessis says that the state may decide to allow all

40 Trigg (n36) at 234.
41 Trigg (n36) at 50.
42 Trigg (n36) at 20 and 106.
43 Trigg (n36) at 67–68.
44 See *Singh v SABC 2* [2008] JOL 22444 (BCCSA). See also H M Vroom 'Een theologische faculteit als huis van vele woningen: over de institutionalisering van de theologie in de pluralistische, seculiere samenleving' (2008) 29 *Verbum et Ecclesia* at 562–572.
45 Bernard Bekink 'The intrinsic uneasy triangle between constitutionalism, secularism and the right to freedom of religion – a South African perspective' (2008) 3 *TSAR* 481 at 483 and Pieter Fourie 'The SA Constitution and religious freedom: perverter or preserver of religion's contribution to the public debate on morality?' (2003) 82 *Scriptura* 94 at 102–103.
46 Which has been the topic of many scholarly articles. See in this regard Malherbe (n34) at 182–186 and Bekink (n45) at 487.
47 See chapter 1.

religious practices in order to avoid a constitutional challenge.[48] It may also, however, determine the conditions under which these practices are to be conducted. Section 15(2) leaves such matters to the state's discretion.

Under this provision, an AIC or its members should be entitled to practise their religious observances at a state or state-aided institution, according to the rules of that institution. If no rules exist, however, how should the courts interpret these observances? In this regard, they have dealt with several challenges, many unrelated to s 15(2).[49] While these cases are not discussed in detail here,[50] they indicate that no right in the Constitution is absolute, and that all rights may be limited in terms of s 36. If, for example, a religious practice is unreasonable or could impair the health or well-being of another person, the constitutional freedom of religion may be restricted by the rules of the institution.

Trigg refers to the case of state prisons.[51] If religious freedom is allowed in prisons, it would most probably be allowed only if and in so far as it does not undermine the prison's disciplinary code. Rastafarians would most probably not be allowed to smoke their holy weed (on analogy with the decision in *Prince v President, Cape Law Society*),[52] nor would members of a racist church be allowed to preach their doctrine to fellow inmates.[53]

The role of the state

What, then, is the role of the state? It seems that the state is not to interfere in the day-to-day business of churches or religious entities; its powers relate to matters of correct procedure.[54] For purposes of this chapter, the critical issue is whether AICs are to be treated on a par with the mainstream religions. This issue takes on a sharp focus in the various pieces of legislation that give religious institutions a privileged position in relation

48 Lourens du Plessis 'Freedom *of* or freedom *from* religion? An overview of issues pertinent to the constitutional protection of religious rights and freedom in "the New South Africa"' (2001) 2 *Brigham Young University LR* 439 at 458.

49 See *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), *Wittmann v Deutscher Schulverein, Pretoria* 1998 (4) SA 423 (T), *Singh v SABC 2* (n44), *Christian Education SA v Minister of Education* 1999 (4) SA 1092 (SE) and *Simonlanga v Masinga* 1976 (2) SA 732 (W). For a discussion of some of these cases see Bekink (n45) at 491–495.

50 See chapter 5.

51 Trigg (n36) at 107.

52 2002 (2) SA 794 (CC).

53 Trigg (n36) at 108–109: 'In the case of prisons, the US Supreme Court upheld the constitutionality of protecting religious freedoms in state-run institutions such as prisons in a way that ruled out picking and choosing between different religions.' Hence, it would seem that prison authorities will interfere only if security is likely to be imperilled.

54 Trigg (n36) at 137.

to commercial bodies, or give religious office-bearers a role to play in the state administration.[55] Do the AICs – and by implication practitioners of African religion – enjoy like benefits?

The problem will be approached by considering whether an AIC could be regarded as a juristic person for the purposes of taxation, the Nonprofit Organisations Act 71 of 1997, the Marriage Act 25 of 1961, the Correctional Services Act 111 of 1998,[56] the Extension of Security of Tenure Act 62 of 1997, labour relations, defence and the police services.

AICs as juristic persons

Can the AICs be treated as juristic persons (or voluntary organisations), and thus demand legal recognition? The close relationship between the state and the established churches clearly suggests the answer to this question.

Doctrinal differences aside, according to Nussbaum,[57] the established churches refused to recognise the AICs, because of their reliance on self-governance, self-support and self-propagation. (Ironically, these three characteristics were the pillars on which established churches considered their own organisations to be built.)[58]

A large measure of independence, however, does not necessarily imply a lack of structure. While the bigger churches may have formal constitutions, even the smallest has some sort of organisation, if only the allocation of different offices to its members. In this case, the structure is not necessarily a distribution of powers, but rather a determination of relationships within the group.[59] When the ecclesiastical establishment realised that the status of AICs as churches could not be denied, it nevertheless persisted in disregarding them for being too 'immature'.[60]

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55 See also Pieter Coertzen 'The relationship between church and state in a democracy with guaranteed freedom of religion' (2008) 49 *Dutch Reformed Theological Journal* 221 at 225–226.

56 In the USA it was also questionable whether Native American religions could be practised in prisons. This led to the American Indian Religious Freedom Act of 1978, and the American Religious Freedom Act Amendments of 1994 (Public Law 103–344). A Presidential Directive was issued in 1994 ordering federal agencies responsible for land to transfer eagle carcasses to the National Eagle Repository for distribution for religious practices. See in this regard Margaret C Jasper *Religion and the Law* (1998) Oceana Publications at 31–33.

57 Jasper (n56) at 92.

58 Stan Nussbaum 'The three-self formula in light of the emergence of African Independent Churches' in Cuthbertson, Pretorius & Robert (n20) at 86–87 describes AICs as *'self-founding* or *self-initiating*, they were automatically self-governing, self-supporting and self-propagating'.

59 Nussbaum (n58) at 88.

60 Nussbaum (n58) at 93.

Even if AICs are deemed to be churches in established religious circles, the legal question remains: can such institutions be treated as non-profit organisations and juristic persons in the light of their fluid structures?[61] The answer to this question lies in the complex history of how churches were treated in South African law. Initially, we inherited the English-law idea that churches were not corporate bodies with legal personality.[62]

Hence, in early decisions, the courts ruled that churches were to be regarded as partnerships or societies (*societates)* based on contract.[63] Nevertheless, the relationship between a church and its followers differs from that of parties to a contract: the latter is based on consensus, whereas membership of a church is based on belief and voluntary association. It cannot be compared with a contractual relationship.[64]

About the mid-1950s, however, the courts' attitude changed. According to an *obiter dictum* in *De Vos v Die Ringskommissie van die Ring van die NG Kerk, Bloemfontein*,[65] there was 'much to be said' for regarding the Dutch Reformed Church as a legal person. Thereafter, churches were regarded as juristic persons if they met the following criteria: they had to have rights and responsibilities separate from those of their members; they had to continue to exist in spite of changes in membership; they had to have some sort of internal authority structure; and they had to work towards a unified aim.[66]

AICs complying with these requirements may obviously be treated as juristic persons. The Zion Christian Church of South Africa, for example, will probably qualify, because it possesses land and structures; it acts on behalf of its members; it has an authority structure; and it has an identity

61 See also Gerrit J Pienaar *Die gemeenregtelike regspersoon in die Suid-Afrikaanse privaatreg* (1982) unpublished LLD Thesis University of Potchefstroom at 6.

62 Joan Church 'Religion' in WA Joubert *LAWSA* 2ed vol 23 (2009) at para 150. Property belonging to the Church of England was therefore vested in a statutory body, while trusts were created to deal with the property of non-established churches.

63 See in this regard Pienaar (n61) at 242–243.

64 See Pienaar (n61) at 260–262. See also *Diocese of Harare v Church of the Province of Central Africa* [2008] JOL 22526 (ZH) at para 4.

65 1952 (2) SA 83 (O) at 93.

66 Pienaar (n61) at 276. See also Lourens M du Plessis 'Religion, law and state in South Africa' (1997) 4 *European J for Church & State Research* 221 at 224.

separate from its members.[67] As a juristic person, it would be possible for such a body to obtain property and dispose of it.[68]

The South African Constitution applies alike to individuals and juristic persons.[69] Hence, if an AIC is regarded as a juristic person, it will be entitled to benefit from the rights in the Constitution. If not, its rights (or those of its members) will have to be enforced by individual church members in their own capacity.

The number of disputes between different AICs in Zimbabwe is an illustration of the importance of determining the legal nature of these bodies. Devittie J, in *Independent African Church v Maheya*,[70] stated that, when resolving church disputes, the Zimbabwe courts initially regarded churches as voluntary associations.[71] The growth in independent churches and the number of disputes about church property, however, required the development of a new set of legal principles.

According to Judge Devittie: '[t]he State has a legitimate interest in the peaceful resolution of church disputes.'[72] Using democratic principles, he proceeded to distinguish voluntary associations from churches. For instance, the head of a church is a revered leading figure with a standing quite different from that of the chair of an ordinary club.[73] The judge also noted that, although the constitutions of the AICs might resemble those of voluntary associations, they did not always provide for dispute resolution mechanisms.[74]

After discussing examples in American jurisprudence, Devittie J then indicated that he could explore three avenues in dealing with church disputes. The first would be to declare the case 'non-cognisable as its

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67 See, for example, the interesting testimony of the ZCC during the Truth and Reconciliation hearings. Available at http://web.uct.ac.za/depts/ricsa/commiss/trc/zcctest.htm (accessed on 23 May 2010).

68 In 1905, in the case of *Dwane v Goza* (1903) 17 EDC 8, the court did not even address the issue of whether the Ethiopian Church was a church or not; it was simply accepted as fact. See also *Ethiopian Church Trustees v Sonjica* 1926 EDL 107, where the court ruled on a dispute about ownership of church property. See also the land claim instituted on behalf of the Pentecostal Church of Jesus Christ (SA) against the Old Apostolic Faith of Africa (Gen Note 1587 in *Government Gazette* 32753 of 4 December 2009).

69 Section 8(2).

70 [1998] JOL 2799 (ZH).

71 *Maheya's* case (n70) para 4.

72 See also, for example, *Zambezi Conference of Seventh Day Adventist Church v Seventh Day Adventist Assoc of SA* [2000] JOL 6463 (ZH); *Zambezi Conference of Seventh Day Adventists v General Conference of Seventh Day Adventists* [2001] JOL 8179 (Z).

73 *Maheya's* case (n70) at para 5.

74 *Maheya's* case (n70) at para 10.

resolution involved a decision by this Court on matters of church practice ... and therefore the court had no jurisdiction to entertain the dispute'. As the court had an interest in the peaceful resolution of church disputes, however, Devittie J felt that he could not follow this route.[75]

The second avenue would be to apply the constitution of the 'voluntary association' to determine whether the churches had complied with procedures. The court also declined to apply these rules, because it felt that a strict application of the common law would result in unfairness and would not resolve the substantive issue in the case.[76] The third approach would be to apply the majority principle: the group with the majority membership in the church should determine who (in this matter) should have the church property. This approach, however, would mean that the court must meddle in church affairs.[77]

Because Devittie could not decide, he ordered that new evidence be brought,[78] as a result of which he found in favour of the majority.[79] The Judge held that courts should be put in such a position that they could properly decide disputes between and within AICs.[80]

> *This case has thrown light on the real problems that face the development of the independent churches in the country. I disavow any suggestion that the State should interfere in church administration. But it seems to me that State assistance is needed to impose a semblance of order in church affairs and to protect the interests of the church communities in Zimbabwe who invariably suffer real prejudice from the interminable church disputes that rage on even as I write. A situation has to be created where the appropriate adjudicatory church body resolves matters of church doctrine and practice. The courts ought not to be placed in a situation where fundamental matters of church practice remain unresolved – and the property disputes are made to turn on the procedural law of voluntary associations. If the underlying causes are not resolved a large section of our Christian communities will be disadvantaged.*

In a subsequent case, *Independent African Church (2) v Maheya*,[81] the court was confronted with similar facts. Judge Devittie said that 'the evidence reveals a tension between faith and legality. Although it is a dispute about church property, it brings to the fore matters whose resolution falls outside the permissible area of court intervention.' Because the parties were so

75 *Maheya's* case (n70) at para 12.
76 *Maheya's* case (n70) at para 13.
77 Ibid.
78 *Maheya's* (n70) at para 16.
79 *Bessie Maheya v Independent African Church* (SC 58/07 (Civil Appeal No. 303/99) (Z) of 14 November 2007 (unreported)) at para 2.
80 *Bessie Maheya's* case 2007 (n79) at paras 14–15.
81 [2000] JOL 6454 (ZH) at paras 2–3.

passionate about their church doctrine, he allowed them to put their views before the court, notwithstanding the rules of evidence. He held that: '[t]he passion which matters of faith generates was such that I was loathe to deny the parties the opportunity to vent feelings close to their hearts.' In the end, however, the court decided the question – which congregation had the right to the church property – on legal principles. As in the previous matter, he applied the majority rule.[82]

Nonprofit Organisations Act 71 of 1997

The Nonprofit Organisations Act 71 of 1997 provides for the registration of such organisations (NPOs). In certain African countries, churches must be registered as NPOs,[83] a requirement that the state may use as a method for intervening in religious matters. Registration in South Africa, however, is optional. But churches that fail to register, then lose the ensuing benefits.[84]

Although the Act does not overtly discriminate against any religious bodies, it does stipulate that an NPO must have a constitution complying with certain requirements.[85] Whether AICs (and ATRs) qualify as NPOs is another matter. In order to do so, an organisation must be

> *an association of persons –*
> *(a) established for a public purpose; and*
> *(b) the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered.*

Larger AICs may have their own constitutions and may be eligible for registration as NPOs. Smaller AICs, on the other hand, with no, or virtually no, infrastructure will not qualify. (Some such churches may no doubt consider this situation discriminatory.)

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82 *Bessie Maheya's* case (n79) at paras 6–8.

83 In Botswana, in order to be recognised as juristic persons, all religious organisations must be registered in terms of the Societies Act of 1972. The Registrar may refuse to register an organisation if it does not comply with the aims of the Act. See in this regard Emmanuel K Quansah 'Law, religion and human rights in Botswana' (2008) 8 *African Human Rights Law Journal* 486 at 499–501. See also Gwendolyn Heaner 'Religion, law and human rights in post-conflict Liberia' (2008) 8 *African Human Rights Law Journal* 458 at 482–483 and Abraham Mwansa 'Law, religion and human rights in Zambia: the past, present and the practice' (2008) 8 *African Human Rights Law Journal* 546 at 562–563 for similar provisions.

84 For example, tax exemptions.

85 Section 12. It also means that, if there are amendments to the constitution of this religious body, they would have to be approved by the registrar (ss 19–21). If that is not done, the church may lose its accreditation as a non-profit organisation as well as any tax benefits it may receive. See also Pieter Coertzen 'Kerk en Staat: die optimum verhouding vir godsdiensvryheid' (2006) 47 *Dutch Reformed Theological Journal* 134 at 140–141.

Income Tax Act 58 of 1962

In terms of s 10(1)(*d*)(iv) of the Income Tax Act 58 of 1962, tax exemption is permitted for all receipts and accruals of 'a society or association … established to promote … *(bb)* the common interests of persons (being members of such … society or association of persons) carrying on any particular kind of business, profession or occupation'. Religious groups that fall within the definition of 'public benefit' organisations may claim to be exempt from tax; they need not be specially licensed to do so.

The relevant criteria for these bodies are laid down in 'Public Benefit Activities' which are specified by para 5 of the Ninth Schedule to the Act as follows:[86]

Religion, belief or philosophy

(a) The promotion or practice of religion which encompasses acts of worship, witness, teaching and community service based on a belief in a deity.

(b) The promotion and/or practice of a belief.

(c) The promotion of, or engaging in, philosophical activities.

Although AICs are associations acting in the interest of their members and may therefore qualify, they must comply with conditions laid down by the Minister. The most important of these conditions is a registration requirement: if religious bodies wish to claim exemption from tax on the ground of being public benefit organisations, they must register with the South African Revenue Services and lodge tax returns.

Marriage Act 25 of 1961

Under the Marriage Act 25 of 1961, the Minister (or any officer in the public service) may designate a minister of religion or person holding a responsible position in any religious denomination or organisation a marriage officer.[87] That person may then solemnise marriages in terms of Christian, Jewish,

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86 Section 30 of the Act, as added by s 41 of the Taxation Laws Amendment Act 30 of 2002.

87 For this purpose, the Income Tax Act 58 of 1962 makes no explicit mention of any specific religion. See s 1 for the definition of 'marriage officer' and ss 2–11, 31 and 33–35. Nor does the more recent Civil Union Act 17 of 2006. Section 5 provides that:

(1) Any religious denomination or organisation may apply in writing to the Minister to be designated as a religious organisation that may solemnise marriages in terms of this Act.

(2) The Minister may designate such a religious denomination or organisation as a religious institution that may solemnise marriages under this Act…

In *Singh v Ramparsad* 2007 (3) SA 445 (D), it was held that the Marriage Act 25 of 1961 accommodated registration of marriages without discriminating on the basis of religion, ie, all religions were to be treated equally.

Muslim rites or the rites of any Indian religion.[88] The failure to mention African religions is a significant omission.

AICs may be classified as churches, for they may fall under the rubric of 'Christian' churches. But, if an informal religious group is not registered under the Nonprofit Organisations Act 71 of 1997, or lacks a constitution or is unable to prove that it is a 'religious denomination or organisation', it will probably not qualify as a church. However, were the Minister to refuse an individual the right to act as a marriage officer, if that person complied with all the other requirements laid down by law, the refusal could no doubt be considered unreasonable, in light of s 9 of the Constitution (the equality clause) and ss 15, 30 and 31.

Correctional Services Act 111 of 1998

Under s 14 of the Correctional Services Act 111 of 1998, prisoners are allowed to exercise their right of conscience, freedom, thought, belief and opinion. They may attend religious services and meetings in prison and have religious literature in their possession. Places of worship must be provided, although prisoners may not be compelled to attend religious services or meetings. Under s 13(2), prisoners may be visited by their religious counsellors.

Religion is not defined in the Act, nor does the Act describe what should be understood by 'religious' services and meetings. It would be interesting to know whether prisons regard animal sacrifice as an acceptable religious service or whether they would allow a person professing to be an officer of an ATR to visit prisons. As argued above,[89] prisons would most probably allow entry to religious officers to avoid constitutional challenges, but they would be unlikely to allow any practices that might disrupt order and discipline.[90]

It is not so clear, however, how liability would be determined if something were to go wrong: for instance, the ceremonial slaughter of an animal might lead to disease or a circumcision might result in death or sickness. While a prisoner is still incarcerated, the Department of Correctional Services must provide adequate medical facilities, based on the principles of primary health care.[91] The prisoners would therefore have claims in delict against both the

88 Section 3.

89 See 117–119.

90 The same reasoning would apply if an inmate wished to be circumcised.

91 Section 12(1) of the Correctional Services Act 111 of 1998. Under s 21, prisoners have the right to complain about their treatment or lack thereof to the head of a prison.

state and the religious counsellors if they were to suffer damage as a direct result of religious practices on the premises of correctional facilities.[92]

Moreover, in terms of the Occupational Health and Safety Act 85 of 1993, the head of a prison must ensure that any persons on the premises, who may be affected by activities there, may not be exposed to hazards affecting their health and safety.[93] This protective measure would include religious officers of the AICs who provide a religious service to the prisoners.

Extension of Security of Tenure Act 62 of 1997

The aim of the Extension of Security of Tenure Act 62 of 1997 (ESTA) is to facilitate long-term security of land tenure. The Act is applied mostly to farm workers who suffer eviction,[94] but it also regulates their rights (and those of family members living on farms) to bury deceased relatives.[95] Hence, farm workers may bury deceased family members according to 'their religion or culture, if an established practice in relation to the land exists'.[96] In all of these circumstances, the owner or person in charge of the land may impose reasonable restrictions on the exercise of the rights.[97]

The Act does not prescribe how a funeral must be performed or how many people may attend. Thus, what constitute a landowner's 'reasonable restrictions' have to be determined on a case by case basis. Any person may, nonetheless, visit and maintain graves on conditions laid down by the owner or person in charge.[98]

In African cultures, burial is not a once-off affair. After a year, a gravestone is erected and a substantial ceremony takes place. This is 'the

92 Johann Neethling, Johan M Potgieter & P J Visser *Deliktereg* 5ed (2006) LexisNexis 267ff.

93 Section 9(1) of the Occupational Health and Safety Act 85 of 1993.

94 An occupier is defined in s 1 as 'a person residing on land which belongs to another person, and who has or (sic) on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding ….' The definition is quite broad, but this discussion focuses on farm workers in order to illustrate the point.

95 Section 6. Section 6(2)(*d*) of the Act further states that an occupier has the right to a family life in accordance with the culture of that family.

96 Family members have the same right. See s 6(2)(*d*A) and (5). According to the definition of 'established practice' in s 1, the owner or person in charge or their predecessors should have allowed the farm worker or, in the past, the family to bury deceased members in accordance with their religion or practice.

97 And with regard to visitors on the land. See s 6(2)(*b*)(i)–(ii) and (2)(*d*); (4)–(5).

98 Section 6(4).

ceremony of aggregation ... whereby the deceased's spirit is laid to rest and thus united with the ancestors'.[99]

Before an amendment to the ESTA, the courts were reluctant to acknowledge the right of burial in accordance with religion and custom. They seem not to have understood the importance of a belief that deceased persons should live near their ancestors.[100] In subsequent decisions, however, a more lenient approach was taken, although the rights of the land owner still prevailed over those of the occupier (or former occupier).[101] In *Dhlamini v Joosten*,[102] for instance, the applicants stressed the importance of their belief that family members should be buried near their homestead,[103] and that an owner should not be entitled arbitrarily to deprive someone of that right.[104]

Labour Relations Act 66 of 1995

No person may be unfairly dismissed in terms of the Labour Relations Act 66 of 1995.[105] An important example of unfair dismissal is unfair discrimination by an employer on the basis of an employee's religion, culture or belief. This is automatically regarded as 'unfair dismissal'.[106] Disputes about the fairness of dismissal must be dealt with under s 191 of the Act. If the reason is automatically deemed unfair, the employee may

99 Thomas W Bennett *Customary Law in South Africa* (2004) Juta & Co at 333. See also Gardiol van Niekerk 'Death and sacred spaces in South Africa and America: a legal-anthropological perspective of conflicting values' (2007) 40 *CILSA* at 31–33.

100 See also *Nkosi v Bührmann* 2002 (1) SA 372 (SCA) 387, where it was stated that one religion may not demand more than another, for example, to be buried elsewhere, while all others have to be buried at specific graveyards. See Van Niekerk (n99) at 39–46, Juanita M Pienaar & Hanri Mostert 'The balance between burial rights and landownership in South Africa: issues of content, nature and constitutionality' (2005) 122 *SALJ* at 633 and 635ff, Andre J van der Walt 'Property rights v religious rights: *Bührmann v Nkosi*' (2002) 13 *Stell LR* 394 at 394–400 and A M Janse van Rensburg 'Access to ancestral burial sites – recent decisions' (2001) 16 *SA Public Law* at 412 and 417.

101 Van Niekerk (n99) at 46–55.

102 *Dlamini v Joosten* 2006 (3) SA 342 (SCA). See also *Nhlabathi v Fick* [2003] 2 All SA 323 (LCC), where the court balanced the rights of the land holder against the applicants' right to burial.

103 At 348.

104 At 349.

105 Section 185.

106 Section 187(1)(*f*).

directly approach the Labour Court for redress.[107] The employer may then be interdicted from continuing the offending practice.[108]

Employees may, for example, be dismissed because they arrive late at work after weekends (Easter weekend or the first weekend in Spring) or have to take leave to attend certain religious ceremonies. Employers, however, may specify in their contracts with employees how religious practices are to be accommodated. In this way, they can determine, where necessary, flexible arrival times or additional work hours to catch up on time lost due to religious practices; or they may provide that employees should be assigned different tasks if religious practices prevent them from performing the work due.[109] As the following cases show, such contracts may – but will not invariably – protect employers when confronted by claims of unfair dismissal.

In *Dlamini v Green Four Security*,[110] the applicants were members of the Baptised Nazareth Group. They were appointed as security officers, and, in terms of the employment policy document, they had to be clean-shaven.[111] The applicants alleged that their religion did not permit them to trim their beards.[112] They were warned several times, however, to shave their beards, and, when they failed to do so, they were eventually dismissed.

The ground for the application was unfair dismissal on the basis of religious discrimination. For their part, the respondents alleged that the applicants were contractually bound to be clean-shaven. The applicants had to prove that: 'those claiming the right to do or abstain from doing something because it is permitted or prohibited by their religion must prove that to be an essential tenet of their religion and that they are obliged to observe it.'[113] The court stated that, if an employee wished 'to practise his or her religion in the workplace, an exemption or accommodation must be sought'.[114] It continued to say, however, that:

> *the Constitution will always prevail over a workplace rule that trenches on a right unlawfully or unjustifiably. It is of little consequence, therefore, for the purposes of this case, if they had contracted to be clean-shaven.*[115]

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107 Section 191(5)(*b*). The employee must establish the grounds for the dismissal and the employee must prove that the dismissal was fair (s 192).

108 Section 193.

109 Anne-Marie Mooney Cotter *Heaven Forbid* (2009) Ashgate at 14–15.

110 [2006] JOL 17853 (LC).

111 *Dlamini's* case (n110) at para 3.

112 *Dlamini's* case (n110) at paras 2 and 23.

113 *Dlamini's* case (n110) at para 23.

114 *Dlamini's* case (n110) at para 32.

115 *Dlamini's* case (n110) at para 8.

The following test was applied:[116]

> *Stage One: Are the facts relied upon to substantiate the complaint of discrimination proved?*
>
> *Stage Two: If discrimination is proved, is it justified? At this stage the court must establish whether the workplace rule can be justified as an IROJ.*[117] *If it cannot, that is the end of the enquiry. The rule would be unjustifiably discriminatory and therefore unlawful.*
>
> *Stage Three: If it is an IROJ, it may still be discriminatory, if the impact is not ameliorated by a reasonable accommodation or modification of the rule, or an exemption from it.*

The court arrived at the conclusion that there was no discrimination, as all security officers were treated in the same manner, and that it was a job requirement to be clean-shaven.[118] In addition, the court found that the applicants were selective in which rules of their faith they chose to observe.[119]

In *FAWU v Rainbow Chicken Farms*,[120] Muslim workers refused to work on a Muslim religious holiday. They were specially employed to slaughter chickens according to Halaal standards for the Muslim market. According to their contract, they were allowed to be absent without leave on gazetted holidays only. The workers proposed to work overtime to ensure that production was not lost, but this arrangement was not acceptable to the employer. An agreement was reached, including a provision that not all the butchers could be absent on the same day and at the same time.[121] The employees collectively decided not to report for work on the specific religious holiday, and were accordingly dismissed.[122]

It was held that the employees did not suffer unfair discrimination, and that their employers were operationally justified to require them to work on a religious holiday.[123] The court stressed, however, that dismissal was not the correct sanction to use in this regard. The parties should rather

116 *Dlamini's* case (n110) at para 13.
117 Inherent requirement of the job: *Dlamini's* case (n110) at para 12. See s 187(2)(*a*) of the Labour Relations Act 66 of 1995.
118 *Dlamini's* case (n110) at para 60: 'The standard of neatness observed in security services is high. Particular criteria are set to achieve that standard. The respondent's rule is therefore neither arbitrary nor irrational.'
119 *Dlamini's* case (n110) at paras 66–67.
120 [2000] 1 BLLR 70 (LC).
121 *FAWU* case (n120) at paras 2–8.
122 *FAWU* case (n120) at para 13.
123 *FAWU* case (n120) at para 21.

have tried to reach a compromise with regard to absence on non-gazetted holidays.[124]

The AICs obviously differ among themselves as to which religious practices are mere guidelines and which are compulsory. Depending on the circumstances, expert evidence will have to be led to convince a court of the importance of the practice for the religion concerned. Even so, it seems that, although the courts are prepared to consider the importance of religious practices, they will, in the case of the workplace, also consider the nature of the job description and the employees' contracts before coming to a decision.[125]

Defence and police services

The Defence Act 42 of 2002 provides that, subject to s 31 of the Constitution, the Minister of Defence may, in consultation with the Chief of the South African National Defence Force (SANDF), issue rules and policies relating to religious observance.[126] As early as the *White Paper on National Defence for South Africa* of May 1996, it was stated that:

> *In accordance with the Constitution, the SANDF shall promote freedom of religion and shall cater for the different religious views of its members on an inter-denominational basis. Religious observances shall be conducted on an equitable basis, and attendance at such observances shall be free and voluntary. The Chaplains Service shall regulate religious policy and practice in accordance with departmental policy and in consultation with the Religious Advisory Boards which represent different faiths.*[127]

Accordingly, religious officers of AICs were also allowed to perform religious observances as set out above.

The SANDF exempts certain of their personnel from the strict dress code, in that members may ask for permission to wear beards for cultural reasons.[128]

The South African Police Service (the SAPS) has similar arrangements, but no reference is made to religion. If members of the SAPS, for instance,

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124 *FAWU* case (n120) at paras 27–33.

125 See also John Grogan 'Minority holidays; Religious discrimination at work' 2000 February *Employment Law Journal*. Available at http://www.lexisnexis.co.za/employment-law-journal/default.aspx (accessed on 2 June 2010).

126 Section 62.

127 Para 50. Available at http://www.info.gov.za/whitepapers/1996/defencwp.htm (accessed on 1 June 2010).

128 Clause 59 of the South African National Defence Force Standing Orders 01/99 issued on 22 January 1999, as referred to in *Dlamini v Green Four Security* [2006] JOL 17853 (LC) paras 58–59.

have to wear a beard for religious purposes, they must motivate accordingly, and ask permission in writing from the relevant officer.[129] While wearing a beard may not be an issue with some members of the AICs, wearing the Zionist Star may be. Should a member of the Zionist Church insist on this practice and the SAPS were to refuse, the problem would most probably have to be resolved by way of constitutional argument.[130]

Conclusion

Although the South African governments before 1994 always tolerated religious diversity, the different Christian churches were less tolerant of each other, and especially less tolerant of the AICs. The South Africa of the post-1994 era, however, is no longer dominated by a particular religion or faith, but by the Constitution. While s 9 demands equal recognition for all religions, in practice this recognition – and the state's attempts to be even-handed – may still create tensions. If one religion is favoured above others, or if an individual is treated differently or not allowed to practise his or her religion, the state may be confronted by litigation. Similarly, where the state allows religious practices that are offensive to others in public areas or facilities, it may again be forced into litigation.

Legislation and policy favouring majority over minority religions, or even religions with formal structures over those with informal structures,[131] could well amount to unfair discrimination. The question of how to address these issues is far from simple.

Officials from the AICs must, in terms of the law, be given the same recognition as officials from other religions. None of the laws discussed above excludes certain religions from being practised. Some religious practices, however, may be curtailed by the general law or by workplace regulations, depending on the circumstances. So, for instance, if a religious practice poses a danger to someone's health or well-being, s 24 of the Constitution may be invoked.[132] If a practice, such as wearing unusual clothing or a beard, clashes with a particular job description, it may affect the individual's chance of getting the job.

How do we build a social or administrative system that will assure people that their belief systems are being accommodated within the state

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129 Chapter 6 para 7.4–7.5 South African Police Service: dress order issued in terms of s 25(1) of the Police Service Act 68 of 1995, as referred to in *Dlamini's* case (n110) para 60.

130 See 117–119 above and chapter 5.

131 See Mooney Cotter (n109) at 13 who refers to discrimination that takes the form of favouring majority rather than minority religions.

132 See chapter 8.

administration?[133] Where different faiths refuse to tolerate one another, should the state allow everyone to practise their own beliefs without interfering? Alternatively, should it officially give recognition to or tolerate beliefs in the administration, for example, by appointing religious officers to official positions or by allowing them to officiate at state functions?[134] It would be impossible to accommodate all of the different religions in the state's structures. Until now, South Africa has more or less managed to address these issues at official gatherings and meetings in a structured manner:

> *While the inauguration of Nelson Mandela in 1994 was blessed by a rainbow religious coalition of Christian, Jewish, Muslim, and Hindu prayers, the inauguration of Thabo Mbeki in 1999 began with an invocation by a representative of African traditional religion before the prayers were heard from the other four religions.*[135]

It may be better to apply an even-handed approach to all religions, otherwise, as Joppke[136] claims, some religions might not recognise the public-private distinction, and in such instances 'even strong defenders of multiculturalism have agreed that here is the penultimate limit to multicultural accommodation, in which liberalism is turned into a "fighting creed"'. The danger is that preference for one religion may result in domination or an undue influence on state policy. Notwithstanding these dangers, it does not necessarily follow that religions should be relegated to the private sphere; rather, they ought to remain within the realm of public debate.[137]

Should the state give official recognition to the AICs as juristic persons, although many of these churches do not comply with all the necessary criteria? In other countries, one such criterion, for the purpose of charity laws, is that the entity in question should be a legal entity. In certain European countries, for example, the state is allowed to levy church taxes, and to tax advantages or allow tax exemptions. Once recognised, a church may obtain financial assistance. The disadvantage of this system, however,

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133 See, for example, Vroom (n44) at 569, who refers to this debate from a slightly different angle.

134 Trigg (n36) at 300ff.

135 See David Chidester 'Mapping the sacred in the Mother City: religion and urban space in Cape Town, South Africa' (2000) 13 *Journal for the Study of Religion* at 200ff. Available at http://www.soc.ucsb.edu/projects/ct3/docs/dcmapping.doc (accessed on 10 June 2010).

136 Christian Joppke 'The retreat of multiculturalism in the liberal state: theory and policy' (2004) 55 *British Journal of Sociology* 237 at 241ff.

137 Trigg (n36) at 4–9.

is the need for 'an administrative or judicial procedure in order to determine the status of a particular religion; certainty may be outweighed by rigidity and the possibly unfair exclusion of new and unpopular beliefs'.[138]

South Africa has laws in place to allow entities, such as the AICs, to register as non-profit organisations, and, if they comply with the requirements of the Income Tax Act 58 of 1962, they are exempted from tax. There is, therefore, no reason for a specific regulatory measure to give recognition to the AICs only. There is also no evidence that AICs suffer any specific legislative discrimination. Given the overarching protection of the Constitution, members of AICs may be treated in the same way as members of any other religion.

Even so, while the AICs are recognised for many purposes, full doctrinal recognition may still take some time. A lack of knowledge leads to fear of the unknown, criticism, non-recognition, intolerance and discrimination. Knowledge of another's religion, however, may lead to recognition, tolerance and respect, not only by the legislator and the courts, but also by employers and the general public.

138 Mooney Cotter (n 109) at 14–15 refers to this in the sense that laws protect an individual's beliefs rather than legitimise a certain religion.

CHAPTER 7

Superstition and Religious Belief: A 'Cultural' Defence in South African Criminal Law?

Kelly Phelps

Introduction: The cultural defence and criminal law

'Cultural defence' is a term used in Anglo-American jurisdictions[1] to describe an argument put by members of minority cultural groups that they should be completely acquitted of criminal charges, or their culpability at least mitigated, on the ground that their crimes were motivated by cultural norms. This book is, of course, about religion rather than culture, but that is no reason to exclude the cultural defence from its purview. In fact, courts abroad dealing with the cultural defence (and the growing literature on the subject) make no distinction between culture and religion.[2]

It is also noticeable that the South African courts seldom mention religious belief, although, during the nineteenth century, it was religion rather than culture that preoccupied the authorities. Indeed, Sachs J, in *Prince v President of the Law Society of the Cape of Good Hope*,[3] referred to the problems experienced by non-Protestant religions coming into South Africa. In some cases, the newcomers were deliberately opposed and, in others, hindered by the imposition of ostensibly non-discriminatory public interest regulations. Health measures were a particular issue. During the 1880s, for example, Muslims in Cape Town were driven to riot over the

1 In the civil-law jurisdictions, the preferred term is 'cultural *offence*': Jeroen Van Broeck 'Cultural defence and culturally motivated crimes (cultural offences)' (2001) 9 *Eur J of Crime, Crim L & Crim Jus* at 1.

2 For further exposition of the cultural defence, see Alison D Renteln *The Cultural Defense* (2004) OUP and Marie-Claire Foblets 'Cultural delicts: the repercussions of cultural conflicts on delinquent behaviour. Reflections on the contribution of legal anthropology to a contemporary debate' (1998) 6 *Eur J of Crime, Crim L & Crim Jus* at 187.

3 2002 (1) SACR 431 (CC) para 159.

question of compulsory vaccination and quarantine in isolation hospitals.[4] In the twentieth century, on the other hand, religion featured only occasionally in the criminal law, notably in cases that involved witnesses taking the oath,[5] conscientious objection to military service[6] and of course witchcraft.[7] Significantly, however, belief in witchcraft was argued in terms of culture (confirming the view that people tend to conflate indigenous religions and culture).[8]

As early as 1938, courts in South Africa were showing an awareness of issues of culture and criminal liability. In *R v Biyana*[9] Lansdowne JP acknowledged the widespread belief in witchcraft and said he doubted whether 'Europeans' (referring to the colonial powers) were entitled 'to give [indigenous communities] unqualified condemnation for clinging to such a belief'.[10] Tolerance for the beliefs of others has generally progressed since that decision, and, especially in light of South Africa's new constitutional dispensation,[11] the time is now ripe to consider the viability of a cultural defence in South African criminal law.

Before we can embark on such a discussion, however, we should establish exactly what is meant by the cultural defence. The term is used to describe arguments used to exculpate accused persons or to justify their criminal conduct because they adhered to the customs or beliefs of a minority group – which, ironically in South Africa, is usually associated with those following an indigenous African heritage (a numerical majority of the population).[12] 'A culture defence is a rule of law … which takes effect where the defendants

4 Citing David Chidester *Religions of South Africa* (1992) Routledge 163–166.

5 See *S v Gallant* 2008 (1) SACR 196 (E).

6 Religious conviction could result in mitigation of sentence for convictions under the Defence Act 44 of 1957: *S v Schoeman; S v Martin* 1971 (4) SA 248 (A), *S v Sangster* 1991 (1) SA 240 (O), *S v Butcher* 1986 (4) SA 1051 (O) and *S v Torr* 1992 (1) SACR 409 (W).

7 See *R v Fundakubi* 1948 (3) SA 810 (A), *S v Ndhlovu* 1971 (1) SA 27 (RA), *S v Mokonto* 1971 (2) SA 319 (A) at 320, *S v Ngubane* 1980 (2) SA 741 (A) at 745, *S v Netshiavha* 1990 (2) SACR 331 (A), *S v Motsepa* 1991 (2) SACR 462 (A), *S v Munyai* 1993 (1) SACR 252 (A) and *S v Phama* 1997 (1) SACR 485 (E).

8 See chapter 3.

9 1938 EDL 310.

10 At 311.

11 This issue is discussed more fully below at 139–141.

12 Johan M T Labuschagne 'Geloof in die toorkuns: 'n morele dilemma vir die strafreg' (1990) 3 *SACJ* at 246ff, Andreas E B Dhlodhlo 'Some views on belief in witchcraft as a mitigating factor' (1984) August *De Rebus* 409–410 and Pieter A Carstens 'The cultural defence in criminal law: South African perspectives' (2004) 37 *De Jure* at 312ff.

would not have committed the criminal act had they not belonged to a particular culture'.[13]

Structurally, this defence can take various forms. It can be introduced as a distinct, novel defence; it can form the basis of pre-existing defences (for example the defence of provocation)[14] and it can refer to evidence in mitigation of sentence.[15] The former two configurations form the subject matter of this chapter, which asks whether it is necessary to develop a self-standing defence of culturally divergent beliefs, or whether the existing framework of criminal liability in South Africa is capable of adequately accommodating such arguments.

Religion and culture: Definitions

As was pointed out in an earlier chapter, '[t]he line between religion and culture is a blurred and grey one'.[16] And it must be appreciated that religion constantly feeds culture, and vice versa.

> *Culture and its rules may include religion, since conventions, beliefs and rules may be accepted as part of a religious system of thought. It is … a condition of inclusion in the category of culture that the system be practised within a group, and not merely believed in by some individuals.*[17]

The argument in the above chapter continues, however, to say that the two concepts need to be kept separate for forensic purposes, as courts take matters of religious belief more seriously than culture. How then are religion and culture to be distinguished?[18] There can be no absolute answer, and some

13 Gordon R Woodman 'The Culture Defence in English Common Law: the potential for development' in Marie-Claire Foblets & Alison Dundes Renteln (eds) *Multicultural Jurisprudence: comparative perspectives on the cultural defense* (2009) Hart Publishing at 7–34.

14 Although in this sense the phrase 'cultural defence' is misleading, and it is more accurate to speak of 'cultural considerations' or 'cultural arguments' or 'evidence'. See chapter 3.

15 *R v Biyana* 1938 EDL 310, *S v Babada* 1964 (1) SA 26 (A), *S v Letsolo* 1970 (3) SA 476 (A), *S v Masina* 1993 (2) SACR 234 (T), *R v Fundukabi* 1948 (3) SA 810 (A), *S v Dikgale* 1965 (1) SA 209 (A), *S v Nxele* 1973 (3) SA 753 (A), *S v Modisadife* 1980 (3) SA 860 (A), *S v Malaza* 1990 (1) SACR 357 (A).

16 Chapter 3.

17 Woodman (n13) at 8–9.

18 See George C Freeman 'The misguided search for the constitutional definition of "religion"' (1983) 71 *Geo LJ* 1519 at 1553 and James M Donovan 'God is as God does: law, anthropology, and the definition of "religion"' (1995) 6 *Seton Hall Const LJ* 23 at 60–61, who cites the list of features prepared by the United States' IRS.

scholars claim that the attempt to search for one is futile.[19] A definition might, for example, assume that a 'true' religion contains such features as a belief in a supreme being and a sense of the sacred.[20] By implication these features constitute the essence of the concept,[21] but in fact they are typical of the monotheistic faiths rather than others, such as Buddhism and African traditional religions.[22]

Those seeking a definition of culture also tend to view it in essentialist terms, although, as a social phenomenon, it is generally taken to be broader than religion. It embraces everything that marks humans as social beings, whereas religion is not necessarily a requirement of social life. According to this understanding, religion is a matter of the spiritual, is (apparently) irrational and demands faith (or obedience to authority), whereas culture is a matter of the mundane, and the world of empirically demonstrable cause and effect.[23]

The need to draw a distinction between culture and religion has already become evident in Rautenbach's chapter on the bull killing.[24] If the cultural defence is to be given suitable respect, then criteria should be found to determine the nature of the claim: is it about a cultural practice (protected under ss 30 and 31 of the Constitution) or about something of notionally deeper, spiritual import (protected by ss 15 and 31 of the Constitution)? For purposes of this chapter the criteria used by Rautenbach will suffice.[25] She considers Durkheim's distinction between the sacred and profane,[26] but

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19 See Freeman (n18) at 1519ff and Jeremy Gunn 'The complexity of religion and the definition of "religion" in international law' (2003) 16 *Harvard Human Rights Journal* 189 at 191. Donovan (n18) at 28 goes so far as to say that the exercise is unconstitutional.

20 *S v De Kock* 1997 (2) SACR 171 (T) at 177 can perhaps be considered one of the few cases to distinguish the sacred from the profane.

21 See Freeman (n18) at 1553 and Donovan (n18) at 60–61.

22 Gunn (n19) at 200ff gives three key reasons why religions experience discrimination, and he draws attention to the fact that the reason chosen depends upon what *the group discriminating* considers definitive of its own religion. See in this respect *S v Engelbrecht* 2005 (2) SACR 41 (W), where the accused, who was charged with contravening the Witchcraft Suppression Act 3 of 1957, had conducted certain unusual rituals to effect a healing. The court held that this did not amount to witchcraft. In coming to this conclusion, it referred to the fact that exorcism of evil spirits was well known to Christianity.

23 These distinctions determine Emile Durkheim's *The Elementary Forms of the Religious Life* (1912). See Donovan (n18) at 73.

24 See chapter 4.

25 See chapter 4, citing the work of Anthony F C Wallace *Religion: an anthropological view* (1966) Random House.

26 Emile Durkheim *The Elementary Forms of the Religious Life* (1912) 7th Impression George Allen (translated by Joseph W Swain).

also Wallace's useful suggestion that reference be made to a repertoire of features constituting a 'fundamental pattern of religion'.[27] These features can be arranged on three 'levels of analysis': first, reference to supernatural being(s); second, 'categories of behaviour' (including prayer, exhortation, reciting oral or written codes, taboo, congregation and sacrifice); third, a 'threading of events of these ritual categories into sequences called "ritual" and the rationalization of ritual by belief'.[28]

A caveat must nonetheless be added. In its popular sense culture is taken to mean a people's store of knowledge, beliefs, arts, morals, laws and customs, in other words, everything that humans acquire by virtue of being members of society.[29] But culture is a fluid concept that changes over time, geography or population group.[30] Through various interactions, people draw on the behaviour and ideas of other cultures and thereby change their lives, a process known as acculturation.[31] The same processes are at play in the case of religion. The mutability of both religion and culture is summed up by O'Regan J in *MEC for Education, KwaZulu-Natal v Pillay*:[32]

> *It is also important to remember that cultural, religious and linguistic communities are not static communities that can be captured in Constitutional amber and preserved from change. Our constitutional understanding … needs to recognise that these communities, like all human communities, are dynamic. It is tempting as an observer to seek to impose coherence and unity on communities that are not, in the lived experience of those who are members of those communities, entirely unified.*

Constitutional status of customary law, religion and culture

Since the advent of the Constitution,[33] customary law has assumed a central position in the South African legal landscape.[34] Because customary law is deeply intertwined with African beliefs and ways of doing things, the

27 Wallace (n25) at 83.
28 Wallace (n25) at 68.
29 This definition is derived from the founder of cultural anthropology: Edward B Tylor *Primitive Culture, researches into the development of mythology, philosophy, religion, language, art and custom* Vol 1 Part 4 (1920) John Murray 1.
30 Woodman (n13) at 13.
31 Daina A Chiu 'The cultural defense: beyond exclusion, assimilation, and guilty liberalism' (1994) 82 *California LR* at 1053.
32 2008 (1) SA 474 (CC) at para 157.
33 Constitution of the Republic of South Africa, 1996.
34 See generally, Christa Rautenbach 'Comments on the status of customary law' (2003) 14(1) *Stellenbosch LR* at 107ff.

courts recognise that its application is derived from the right to culture.[35] This right is formally recognised in ss 30 and 31 of the Constitution, which read, respectively: '[e]veryone has the right to … participate in the cultural life of their choice' and '[p]ersons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of their community … to enjoy their culture'. Furthermore, s 211(3) explicitly provides that customary law must be applied by the courts 'when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'.

Section 9(3) of the Constitution protects the right to equality. Culture and religion are both explicitly mentioned in this section as listed grounds upon which the state may not unfairly discriminate. Finally, s 39(2) bolsters the constitutional impetus behind recognising a cultural defence in South African criminal law by providing that: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

Because customary law derives from a history of religious and cultural practices, its improved status in the South African legal system would imply recognition and acceptance of those practices. This, however, is not always the case. Criminal justice is very much a product of the common law, with the result that conflicts occur where conduct viewed from a common-law perspective is deemed a criminal offence, but from an African and religious perspective is deemed permissible. A well-known example is the practice of *thwala*.[36] Courts have long been sceptical of this institution, although it is fairly common in certain communities.[37] Their reservations are due to the fact that *thwala* may amount to the commission of a common-law crime,

35 Thomas W Bennett *Human Rights and African Customary Law under the South African Constitution* (1995) Juta & Co 23.

36 Thomas W Bennett *Customary Law in South Africa* (2004) Juta & Co at 212.

37 See *Mkupeni v Nomungunya* 1936 NAC (C & O) at 77–78 where the court observed: 'While it is recognized that the custom of "twala" is still largely practised among the natives, this Court is not prepared to countenance its use as a cloak for forcing unwelcome attentions on a patently unwilling girl.' See also Thomas W Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) Juta & Co 190.

such as abduction,[38] rape[39] or assault.[40] Thus, in *R v Swaartbooi*,[41] after finding the accused guilty of assault, the court said that:[42]

> *this Court will not recognise the barbarous custom of twalaing as a defense to a charge of assault which may be committed upon a girl whom it is desired to twala, or upon any of her friends and relations who wish to resist the efforts made by the bridegroom or any member of his party.*

Notwithstanding the courts' reluctance to formulate a consistent policy on a cultural/religious defence, the view has been expressed that the Constitution is now a good reason for the formal recognition of this defence 'albeit in context and balance of the limitation clause'.[43] Indeed, it seems curious that jurisdictions such as the United States and England, which have no formal recognition of minority cultures, have espoused vibrant debates about the cultural defence for the last two decades.[44] Conversely, while cultural and religious diversity is positively encouraged in South Africa, the defence has attracted very little attention from the courts or commentators.

While the constitutional protection we accord religion and culture undoubtedly provides a strong basis for arguing that these issues must be given due respect in criminal matters, this does not indicate in what form. Must the courts recognise a novel defence of religious conviction (or cultural co-orientation)? Before this question can be answered it is necessary to review the elements of criminal liability and consider how matters of religion and culture have affected them in the past and what role they may now play in terms of the constitutional imperatives.

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38 *R v Njova* 1906 EDC 71 and *R v Ncedani* 1908 EDC 243 (both courts refused to accept the *twala* custom as a defence against the crime of abduction). See also *R v Sita* 1954 (4) SA 20 (E) at 22.

39 *R v Mane* 1947 EDL 196.

40 *R v Swaartbooi* 1916 EDL 170.

41 Ibid.

42 *Swaartbooi's* case (n40) at 172.

43 Carstens (n12) at 329.

44 Note that in England and the United States the discussion of a cultural defence usually centres on immigrant and minority populations. See for example Leti Volpp '(Mis)identifying culture: Asian women and the "culture defense"' (1994) 17 *Harv Women's LJ* at 57ff, Woodman (n13) at 30 and *R v Derriviere* (1969) 53 Cr App R 637. This distinguishes the discussion from a South African context where customary law and connected notions of culture/religion involve the majority of the population. Another noticeable distinction is that foreign jurisprudence on this topic centres on the need for a general standard of homogeneity, whereas in South Africa the focus is on the diversity of the population. See Woodman (n13) at 33.

Culture and religion as exculpatory or justificatory factors within the elements of criminal liability in South Africa

The courts have had occasion in the past to consider arguments of culture and belief in criminal cases,[45] but as yet no 'cultural defence' has been established in South African criminal law.[46] Therefore, in order to determine whether it is necessary (or even desirable) to have a separate defence of this nature, the elements of South African criminal liability must be reviewed to decide how culture and religion have been accommodated or can be accommodated in the future.

In all cases, if the prosecution is to secure a conviction, it must prove beyond a reasonable doubt the following elements of liability: voluntary conduct, unlawfulness, capacity and fault (often referred to as *mens rea*).[47] Because capacity and fault hold the most scope for accommodating considerations of culture, they will receive the most attention in the following discussion.

Voluntary conduct

The requirement of voluntary conduct is clearly rooted in the philosophical notion of individual responsibility, which is in turn based on the doctrine of free will. According to this doctrine, all people have the innate ability to choose between different courses of action. Having this choice means that the law can justifiably hold an individual responsible for consequences that flow from any chosen action. Accordingly, 'a human act must be voluntary in the sense that it is subject to the accused's conscious will'.[48]

The defence against an allegation of voluntary conduct is that of 'automatism'.[49] Involuntary conduct producing automatism is described

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45 For example, *R v Matomana* 1938 EDL 128, *R v Njikelana* 1925 EDL 204, *Phiri v R* 1963 R&N 395 (SR), *R v Mbombela* 1933 AD 269, *R v Swaartbooi* 1916 EDL 170, *S v Ngema* 1992 (2) SACR 651 (D) and *R v Ngang* 1960 (3) SA 363 (T).

46 Carstens (n12) and Thomas W Bennett 'The cultural defence and the practice of *Thwala* in South African law' (2010) 10 *Botswana Law Journal* at 3-26.

47 Jonathan M Burchell *Principles of Criminal Law* Revised 3ed (2006) Juta & Co at 138. Note that, for crimes such as murder, there is the additional element of causation: Burchell op cit 209–225. Put simply, this requires that the accused be the factual and legal cause of the consequence (in the case of murder, the death of the deceased). As culture is unlikely to be relevant to an enquiry into causation this element is not discussed in this chapter.

48 Burchell (n 47) at 179.

49 Burchell (n 47) at 180–181. Note that automatism can take the form of 'sane' or 'insane' automatism. The latter is the result of mental illness, and brings about different consequences to cases of sane automatism. For purposes of this chapter, everything mentioned in the text of automatism should be taken as references to sane automatism, as conduct motivated by culture or religion is clearly not a mental illness.

by such terms as 'mechanical activity',[50] 'unconsciousness'[51] or 'automatic activity'.[52] It has been found to result from actions during dreams or nightmares while the accused was 'half awake',[53] dissociated[54] or concussed.[55]

It is clear that in cases of automatism free will is no longer being directed to the individual's actions, and that she or he should therefore not be held criminally responsible for any consequences flowing from these actions. The list of factors so far considered by the courts as possibly leading to a defence of automatism is open, and there is no reason in principle why cultural practices or beliefs should not be included. In fact, belief was taken into account as far back as 1960, at a time when the political climate in South Africa was far less conducive to respecting diversity.

In the case of *Ngang*[56] the accused was charged with assault with intent to do grievous bodily harm. He had dreamed that a *tokoloshe* was trying to attack him. He therefore got up and stabbed the 'thing', which turned out to be the deceased. In finding that the action 'was no more than a purely physical reflex', the court was persuaded by the absence of any other motive for the killing.[57] Thus, the accused escaped liability on the basis of automatism. Clearly, in order to reach this conclusion the court accepted the truth of the accused's belief in a *tokoloshe*.

The court described the *tokoloshe* as a 'creature or demon much dreaded by most natives'.[58] It is a being in African folklore that has been the subject of many different descriptions.[59] Neither the court nor the prosecution, however, elicited any expert evidence to investigate the veracity of the accused's belief, although situating his version of events within broader evidence pertaining to the *tokoloshe* could have helped to evaluate his *ipse dixit*. Yet, unquestioning acceptance of an accused's version of culture or religion in this manner would allow offenders to invoke their beliefs with the cynical intention of escaping liability.[60]

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50 *R v Dhlamini* 1955 (1) SA 120 (T) at 121.
51 *R v Mkize* 1959 (2) SA 260 (N) at 265.
52 *R v Ngang* 1960 (3) SA 363 (T) at 365.
53 *Ngang*'s case (n52) and *Dhlamini*'s cases (n50).
54 *S v Mahlinza* 1967 (1) SA 408 (A).
55 *S v Ngema* (n45) and *R v Smit* 1950 (4) SA 165 (O).
56 *Ngang*'s case (n52).
57 *Ngang*'s case (n52) at 366A-F.
58 *Ngang*'s case (n52) at 364B-C.
59 Anon 'The Tokoloshe (Tokolosh, Tokoloshi, Thokolosi, Tikaloshe) Africa's Brownie'. Available at http://www.tokoloshe.tk (accessed on 4 June 2010).
60 Bennett (n46) at 32.

Notwithstanding these concerns, it is clear that no legal innovation is required for religion to be considered during an inquiry into the voluntary conduct of an accused in South Africa.

Unlawfulness

The element of unlawfulness can be met with a range of defences justifying the accused's conduct. In South African criminal law these are: private defence, necessity/compulsion, impossibility, superior orders, consent, public authority, disciplinary chastisement, *de minimus non curat lex* and *negotiorum gestio*.[61] Because the enquiry into unlawfulness is objective,[62] it is unlikely that defences of religion and culture will have much scope to affect this element of liability.[63]

Even so, Carstens gives the following example to show that culture may still have a role to play, especially in the defence of compulsion:

> *[A] headmen (nkosi) of a tribe may order/instruct one of his henchmen to assist in the killing of an elderly member of the tribe to obtain the perceived 'live-giving' parts of the body (the eyes and the genitals) to be buried near the site of an annual initiation ceremony to be held to ward of (sic) evil spirits and to please/appease the ancestral spirits. In terms of the hierarchy of power a henchman cannot refuse the orders of an nkosi as disobedience (albeit to an objectively unlawful order) will amount to severe punishment (and even death).*[64]

With respect, this scenario does not disclose a new role for culture within the existing defence of compulsion. The example refers to the threat of 'severe punishment (and even death)', which would allow the court to apply the ordinary rules of compulsion without having to consider its cultural context.

It is trite law that threats of harm – and especially death – can lead to a successful defence of compulsion.[65] However, the objective nature of an unlawfulness enquiry[66] suggests that consideration of religious belief or cultural factors will be restricted.

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61 Burchell (n47) at 141–146 and 226–357.

62 Burchell (n47) at 227.

63 Cf Carstens (n12).

64 Carstens (n12) at 327.

65 *S v Pretorius* 1975 (2) SA 85 (SWA), *S v Kibi* 1978 (4) SA 173 (E) and Burchell (n47) at 256–279. According to Burchell (at 259), the requirements for establishing the defence of compulsion are:

> *(A) a legal interest of the accused must have been endangered (B) by a threat which had commenced or was imminent but which was (C) not caused by the accused's fault; and it must have been (D) necessary for the accused to avert the danger, and (E) the means used for this purpose must have been reasonable in the circumstances. (footnote omitted)*

66 Burchell (n47) at 227.

Capacity

In a South African criminal trial the state must prove that the offender had the requisite criminal capacity when committing the prohibited conduct. The test here is twofold: whether the accused was able to distinguish between right and wrong, and whether she or he could act in accordance with that distinction.[67] The first part of the test is often referred to as a 'cognitive' enquiry (which investigates a person's capacity for insight), while the second part is termed a 'conative' enquiry (which investigates capacity for self-control).[68]

The defence to negate capacity is called non-pathological incapacity.[69]

> *Under the influence of the development of the overarching subjective concept of capacity, the courts acknowledged that any factor, whether intoxication, provocation or emotional distress, could serve to impair this criminal capacity,* assessed essentially subjectively.[70] *(emphasis added)*

In line with the above quote it has been argued that an accused, acting on a belief in witchcraft or the medicinal power of *muthi*, may lack criminal capacity with regard to either the cognitive or conative tests. The belief may therefore be subsumed under 'the already recognised and existing defence of non-pathological incapacity (in respect of provocation)'.[71]

On the surface, then, it appears that an enquiry into capacity is a promising area of the criminal law for developing an argument of belief. Although evidence could be introduced into court in order to establish the existing defence of provocation resulting in non-pathological incapacity, it must be appreciated that this defence is a complex and contested area of law. Hence, the current state of the law on provocation must first be established.

Provocation

In accordance with legal principle, a finding of non-pathological incapacity, subjectively assessed, will lead to a complete acquittal (including an acquittal

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67 Burchell (n47) 147 and 358–454 and Carstens (n12) at 327.

68 Burchell (n47) at 358.

69 Note that there is also a defence of pathological incapacity, often referred to as the defence of 'insanity'. As this defence is irrelevant to a discussion of religion or culture in the criminal law, it will not be discussed in this chapter. Any references to incapacity should therefore be read as non-pathological incapacity.

70 Burchell (n47) at 150.

71 Carstens (n12) at 322–323. Note, the term 'muthi murder' is defined by Carstens (n12) at 322 as 'a ritual during which a victim, who complies with particular requirements (eg child or virgin), is selected in order to obtain specific body parts such as the eyes or genitalia used for medicinal purposes after having been mixed or boiled with other plant or animal constituents'.

of a murder charge).[72] Courts and commentators, however, have expressed a sense of unease about this defence due to the purely subjective nature of the enquiry – if the accused's version of events was unreliable, all other evidence flowing from it would be tainted and would result in provocation becoming a 'get out of jail free card'.[73]

The Supreme Court of Appeal addressed this problem in the case of *Eadie*.[74] Navsa JA warned that application of the subjective test for capacity should be approached with caution. A distinction should be drawn between loss of temper, on the one hand, and loss of control, on the other. Only the latter should lead to a successful defence of provocation, otherwise courts would be condoning impulsive and harmful behaviour in circumstances in which adults should be able to control themselves: 'the policy of the law, with regard to provoked killings must be one of reasonable restraint.'[75] Thus, Eadie himself could not rely on the defence in circumstances in which he had battered the victim to death in an alleged incident of 'road-rage'.

The court in *Eadie* further restricted the ambit of the defence by stating that the *ipse dixit* of the accused should not be too readily accepted. By drawing inferences from objective surrounding factors, courts could interrogate the accused's version of events in order to decide whether to believe their subjective versions: '[a] court is entitled to draw a legitimate *inference* from what "hundreds of thousands" of other people would have done under the same circumstances (ie looking at objective circumstances).'[76] The Supreme Court of Appeal has thus objectivised an otherwise purely subjective enquiry. To answer the question whether an accused could have acted differently, courts can consider how other similarly situated persons might have responded.

Hence, the current law regarding provocation, because of the subjective nature of the capacity enquiry, is ripe for including issues of culture and religious belief.

> *The first part of this test of capacity pertains to the cognitive functions of the accused's mind – his or her capacity to appreciate the wrongfulness of his or her conduct. This enquiry is subjective. Factors such as youthfulness, mental illness, intoxication, ignorance, lack of education, illiteracy or even superstitious belief on the part of the accused may affect his or her perception, appreciation or knowledge and may, therefore, be relevant to the determination of his or her*

72 *S v Arnold* 1985 (3) SA 256 (C), *S v Nursingh* 1995 (2) SACR 331 (D), *S v Moses* 1996 (1) SACR 701 (C) and *S v Potgieter* 1994 (1) SACR 61 (A).
73 Burchell (n47) at 150.
74 *S v Eadie* 2002 (3) SA 719 (SCA).
75 Burchell (n47) at 151.
76 Burchell (n47) at 150.

> *liability …. [T]he second part of the capacity inquiry … is partly subjective and partly objective in nature. It is subjective in the sense that it allows the court to take into account that the accused may have lacked the capacity to control his or her conduct as a result of … any of the … subjective factors relevant to the first part of the capacity enquiry.*[77]

Furthermore, the cautions issued by the court in *Eadie*, and the resulting objectivisation of provocation, provide courts with the impetus to gather all relevant expert evidence pertaining to religion and culture. This would avoid the past practice whereby courts unquestioningly accepted such arguments,[78] and it should guard against opening the floodgates. Fears in this respect are summarised in the following quote:

> *Could a firm and widely held belief in the supernatural be regarded as a factor which is relevant to the accused's criminal capacity? The accused's illiteracy would obviously be relevant to his or her capacity to commit a crime which involves a fair degree of literacy …. If superstitious belief and literacy are both relevant to the inquiry into capacity, then what about a firmly held belief, possibly inculcated from youth, based on racial prejudice? Why should the belief in superstition be tolerated but not the belief based on indoctrination?*[79]

Not only do the courts' safeguards against abuse of the defence of provocation protect against opening the floodgates but so does the Constitution.[80]

> *Constitutional norms preventing racism and other unacceptable forms of discrimination aim to set patterns of acceptable behaviour and, for the purposes of determining criminal responsibility, little credence should be given to views and beliefs that threaten these norms in a fundamental way, especially when individuals holding these prejudiced views have been given fair notice of the Constitutional standards.*[81]

Fault

While capacity is an area of law where there is scope for considering culture and religion, they have already been invoked in the area of fault. Nonetheless, as will be argued below, the existing decisions – which were

77 Burchell (n47) at 532.

78 See discussion of *R v Ngang* 1960 (3) SA 363 (T) under the section on *Voluntary conduct*.

79 Burchell (n47) at 363.

80 Constitution of the Republic of South Africa, 1996.

81 Burchell (n47) at 363. See also Christof Heyns 'Reasonableness in a divided society' (1990) 107 *SALJ* at 279 and Johan M T Labuschagne, 'Wederregtelikheidsbewussyn, die ukutheleka-gebruik en die konflik tussen inheemse gebruike en die strafreg' (1988) 1 *SACJ* at 477, for pre-Constitutional rights analysis.

largely unreceptive to these claims – reflect a very different social and political climate. Is there now room for reconsidering the decisions?

A fundamental principle of South African criminal law is that conduct should not attract liability unless it is committed with a guilty mind. Fault can take two forms: intention and negligence. The manner in which these forms have accommodated, or can accommodate, arguments of culture and religion will be considered separately below.

Intention

The test for intention is purely subjective. The prosecution must first establish that the accused had a recognised form of intention, of which there are four types in South African criminal law: *dolus directus*,[82] *dolus indirectus*,[83] *dolus eventualis*[84] and *dolus indeterminatus*.[85] The prosecution must then show that the accused had knowledge of the unlawfulness of his or her conduct. If the accused genuinely did not know, or at least did not foresee the possibility that his or her conduct was unlawful, then a criminal conviction cannot result.[86]

The latter requirement distinguishes South African law from other jurisdictions, such as England, where a mistake of law needs to be reasonable rather than merely genuine,[87] and from Germany, where the mistake must be unavoidable.[88] In keeping with South African legal principles, however, because the test for intention is purely subjective, intention is vitiated if the accused harboured a genuine mistake of law or fact, and therefore lacked knowledge of unlawfulness.

The absence of a reasonableness requirement means that the intention element of liability is amenable to accommodating an argument of culture or religion. In fact, regardless of the cause of the mistake – whether due to culture, ignorance or stupidity – once evidence has been adduced (and

82 'The accused meant to perpetrate the prohibited conduct or to bring about the criminal consequence': Burchell (n47) at 461.

83 The unlawful consequence was not the main aim of the accused's conduct, although it was 'substantially certain' to occur: Burchell (n47) at 461.

84 '[T]his form of intention exists where the accused does not mean to bring about the unlawful circumstance or to cause the unlawful consequence which follows from his or her conduct, but foresees the possibility of the circumstance existing or the consequence ensuing and proceeds with his or her conduct': Burchell (n47) at 462.

85 '[T]he accused does not have a particular object or person in mind, for instance, if he throws a bomb into a crowd of people or derails a train': Burchell (n47) at 152.

86 *S v De Blom* 1977 (3) SA 513 (A).

87 Woodman (n13) at 21.

88 Burchell (n47) at 153.

not rebutted) establishing a genuine belief, an acquittal must ensue. So, for example, an accused charged with divining the presence of a witch (which requires intention to be proved) could argue that he believed his conduct was lawful in terms of his belief system. Proof that this belief was genuinely held would then be the basis for a successful defence of mistake.[89]

Putative defences

Putative defences are an extension of the rule regarding knowledge of unlawfulness. As discussed previously, the justificatory defences negating unlawfulness are all objectively assessed. Nevertheless, if an accused genuinely, though mistakenly, believed that he or she was acting under a defence, for example private defence, the element of intention will be vitiated. So, for example, if A killed B because she believed her life was in danger from B, when in fact, viewed objectively, no such danger existed, A's conduct would still be viewed as unlawful. The defence of private defence would therefore fail. A could, however, invoke the defence of *putative* private defence, namely, that she honestly, but mistakenly, thought she was acting in private defence. If successful in convincing the court of her version of events, she would not be found guilty of murder, as intention (in the form of knowledge of unlawfulness) would be lacking.

This argument would still hold if the reason for her mistaken but genuine belief was due to religious conviction. If the mistaken belief was not only genuine but also reasonable, then an acquittal would result for the competent verdict of culpable homicide, because negligence is required for a charge of culpable homicide (considered in more detail below). It is thus clear that the current law regarding intention already encompasses cultural and religious factors.

A potential problem regarding the defence of mistake

The criticism has been raised that, where the law is used as a tool of social transformation, as was the case with the new Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, a cultural/religious defence may defeat the transformative aim.[90] An exemplary and controversial example of such a concern was the rape trial of South Africa's (now) President Jacob Zuma, where the defence of mistaken belief was invoked on cultural grounds. Cultural beliefs should not have been allowed

89 Labuschagne (n12) at 256–266, Carstens (n12) at 333 and D Z Dukada 'Some thoughts on the 'ukuthwala' custom vis-à-vis the common-law crime of abduction' (1984) August *De Rebus* at 387.

90 Woodman (n13) at 4.

to justify the removal of the complainants' dignity, equality and autonomy to choose whether to engage in sexual activity.

The defence in the *Zuma* trial,[91] however, used cultural practices in an apparent attempt to establish the defence of mistaken belief in consent. Hence the accused 'testified that, according to the Zulus … a man who leaves an aroused woman without going ahead and having sexual intercourse with her, may be accused of rape'.[92] The unsubstantiated reference to Zulu culture raised by the defence in this context was wholly inappropriate, as it insinuated that the accused had no obligation, beyond drawing cultural generalisations, to take steps to ascertain consent.[93]

The problem with the *Zuma* case is not with the principle of the defence of mistaken belief per se but rather with its application. No expert testimony was elicited to confirm that his representations of Zulu culture were accurate. In a country committed to the protection of fundamental human rights, it is hardly appropriate for the courts to entertain, without critical reflection, evidence based on an accused person's account of outdated myths and stereotypes.[94] If substantively just outcomes are to be achieved, courts should be prepared to question the nature and authenticity of these beliefs.

Negligence

Cultural and religious considerations fit neatly into the existing rules concerning intention, more specifically knowledge of unlawfulness. But the same cannot be said with respect to negligence. Unlike intention, the

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91 *S v Zuma* 2006 (2) SACR 191 (W).

92 Thea Illsey 'The defence of mistaken belief in consent' (2008) 21 *SACJ* 65 at 66 (footnotes omitted). Illsey refers to Amy Musgrave & Jenni Evans 'Zuma: she gave signals' *Mail and Guardian* (4 April 2006), Fikile-Ntsikelelo Moya '100% Zuluboy' *Mail and Guardian* (12 April 2006) & Michael Wines 'A highly charged rape trial tests South Africa's ideals' *New York Times* (10 April 2006).

93 Similar fears have been expressed in a British context. Ashworth and Temkin have warned that the wording of s 1(2) of the British Sexual Offences Act 2003 – that whether a mistake is reasonable should be considered in 'all the circumstances' – is so broad that it may permit entry of the complainant's sexual history and 'culturally engendered' beliefs. Jennifer Temkin & Andrew Ashworth 'The Sexual Offences Act 2003: rape, sexual assaults and the problems of consent' (2004) *Criminal Law Review* 328 at 340.

94 *Zuma*'s case (n91) at 216. Moreover, simply because dominant and subordinate cultures may converge on an issue does not necessarily signal that this viewpoint is acceptable. In *Zuma*, for example, arguably prejudiced views concerning the subordination of women in society were equally evident in the cultural testimony of the accused and the judgment of the court. For instance, 'that the offence would not be committed in the same vicinity as the accused's own family, that the victim would immediately raise a hue and cry and that she would wash immediately after the act'. See Bennett (n46) at 32.

enquiry into negligence is objective, judged according to the standard of the fictional 'reasonable person'. Thus, in order to establish negligence, the prosecution must prove beyond a reasonable doubt that a reasonable person in the same circumstances as the accused would have foreseen the unlawful consequence that would occur as a result of his or her conduct and would have taken steps to guard against the consequence in question.[95]

Both commentators and courts have found the fictional 'reasonable person' stubbornly difficult to define, which has led to controversy and contestation in this area of law.

> *The potential injustice of applying a completely objective criterion of negligence in a diverse, multi-cultural community with varying degrees of education, literacy and backgrounds has long been recognised …. Its effect is that 'the unsophisticated and uneducated shepherd will be treated no differently from the professor'.*[96]

This debate is all the more relevant in a diverse society, such as South Africa's, particularly one in which rights to freedom of religion and cultural association are enshrined in the Constitution.[97]

The potential injustice of the objective standard referred to above is clearly apparent in the frequently cited case of *R v Mbombela*.[98] Here, a rural youth, described by the court as of 'rather below the normal'[99] intelligence, was accused of murdering a nine-year-old child. The relevant facts of the case are summarised as follows:

> *On the day in question, some children were outside a hut that they supposed to be empty, and they saw 'something that had two small feet like those of a human being'. They were frightened and called the accused. The accused apparently thought the object was a 'tikoloshe', an evil spirit that, according to a widespread superstitious belief, occasionally took the form of a little old man with small feet. According to this belief, which was shared by the accused, it would be fatal to look this 'tikoloshe' in the face. He went to fetch a hatchet and, in the half-light, struck the form a number of times with the hatchet. When he dragged the object out of the hut he found that he had killed his young nephew.*[100]

Mbombela sought to rely on the defence of genuine mistake in that he believed he was killing a *tikoloshe*, not a human being. In considering an appeal of the trial court's verdict of murder, the Appellate Division held that Mbombela's mistake was indeed genuine and that he therefore lacked the intention

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95 Burchell (n47) at 154.

96 Burchell (n47) at 531–532, quoting Hefer JA in *S v Melk* 1988 (4) SA 561 (A) at 578F-G.

97 See earlier discussion at 139–141.

98 1933 AD 269.

99 *Mbombela's* case (n98) at 270.

100 Burchell (n47) at 535.

required for a conviction of murder. The court nevertheless convicted him of culpable homicide, because his mistake was held to be unreasonable. The standard of reasonableness by which he was judged ignored the 'race or the idiosyncrasies, or the superstitions, or the intelligence of the person accused'.[101]

In *S v Ngema*,[102] Hugo J sought to temper the harsh effect of applying a purely objective test for negligence in a culturally diverse society, and thereby to reflect the changing standards in South Africa during its transition out of apartheid. He departed from the earlier 'Eurocentric' decision in *Mbombela* and held that belief in the *tikoloshe* could be taken into account when conducting the objective negligence enquiry. The approach in *Ngema* is clearly in keeping with the recognition given to culture and belief under the Constitution.[103]

Nonetheless, it may have a potentially negative effect on the general principles of criminal liability in South African law, because it makes the test for negligence vaguer.[104] Hugo J made the following observation:

> *One must, it seems to me, test negligence by the touchstone of the reasonable person of the same background and educational level, culture, sex and – dare I say it – race of the accused. The further individual peculiarities of the accused alone must, it seems to me, be disregarded.*[105]

The above quote, however, provides no guidance as to what would constitute 'the further individual peculiarities' and on what principled ground these 'peculiarities' are distinguished from the features Hugo J deemed worthy of consideration for the negligence enquiry.

Other High Court decisions endorsed the idea that the objective standard of reasonableness should be imbued with a degree of individuality, but they failed to develop an all-encompassing theory to direct future courts in the 'individualising' process. This area of the criminal law thus remains uncertain.[106] For example, case law tends to draw a line between internal

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101 *Mbombela's* case (n98) at 273–274.

102 1992 (2) SACR 651 (D).

103 Note, the Constitution had not yet been created when *Ngema* was decided. In this sense Hugo J could be described as ahead of the times.

104 Certainty of the law is a cornerstone of the principle of legality.

105 *Ngema's* case (n102) at 656–657.

106 See for example *S v Robson; S v Hattingh* 1991 (3) SA 322 (W) and *S v Shivute* 1991 (1) SACR 656 (Nm). Even the Appellate Division has contributed to the vagueness surrounding the negligence test. See, for example, Jansen JA in *S v Ngubane* 1985 (3) SA 677 (A) at 686–687 (commenting on *S v Van As* 1976 (2) SA 921 (A)): 'there may be doubt as to whether the phrase "redelikerwyse kon en moes voorsien het", used in *S v Van As*, connotes anything more than the conventional objective standard, albeit *somewhat individualised*' (emphasis added).

and external characteristics (that is, the circumstances in which accused persons find themselves).[107] Only the latter are attributed to the reasonable individual, but in practice courts have not adhered to a strict application of this rule. Hence, internal features, such as age and gender, have also been considered.

The potentially harsh effect of the objective enquiry into negligence in a society of diverse religions and cultures is somewhat mitigated if, as suggested above, belief and culture are accommodated in the enquiry into criminal capacity.[108] In fact, it has been argued elsewhere, even the much debated case of *Mbombela*[109] would have had a different outcome and avoided injustice had the modern rules of capacity been applied.[110] The court weighed the cultural evidence in the balance. It accepted that the accused genuinely believed the object in the hut was a *tikoloshe* with fatal powers, and that such belief was prevalent in the community of which the accused was part. It could then have concluded that 'the accused might have lacked the subjective capacity to appreciate the wrongfulness of his conduct'.[111]

If such an approach is taken to accepting arguments of belief in the element of capacity, the need for an awkward marriage between the objective criterion of negligence and the subjective features of religious belief is avoided.

> *[T]he need for the 'individualisation' of the standard of the reasonable person is unquestionable. However, if this 'individualisation' can already be achieved within the already partially subjective, preliminary inquiry into capacity then justice and logic will coincide and an unnecessary duplication of inquiries will be avoided.*[112]

The principles of criminal liability may thereby be developed in a direction that reflects the diversity of South Africa's citizen body.

Conclusion: A principled approach to a cultural defence

In summary, it has been argued that the existing elements of criminal liability in South Africa are capable of giving due expression to the imperative of recognising culture and religion under the Constitution. The element of voluntary conduct, specifically the defence of automatism,

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107 Woodman (n13) at 23.
108 This perspective was advocated in Jonathan M Burchell & John Milton *Principles of Criminal Law* 2ed (1997) Juta & Co 360–363.
109 *Mbombela's* case (n98).
110 Burchell (n47) at 535–536.
111 Burchell (n47) at 536.
112 Burchell (n47) at 537.

has already shown itself capable of dealing with such arguments, though perhaps in an unprincipled manner. It has been argued that the element of capacity, through the defence of non-pathological incapacity, is well suited to accommodating considerations of belief and culture. The cognitive leg of the enquiry is purely subjective, and the conative capacity enquiry already represents a middle ground between a subjective and normative enquiry that would require less adjustment than housing belief considerations within the largely objective enquiry into negligence.

In spite of the courts' willingness to accept religious and cultural arguments in an individualised reasonable person test for negligence, this approach would increase uncertainty in an area of the law that is already unclear. By recognising cultural and belief arguments in the capacity test, however, the law can reflect South Africa's diversity, without duplicating a cultural/religious enquiry or departing from long established principles of criminal liability. Considering the purely subjective nature of intention, culture and belief are already well established as pertinent factors. The issue is not whether these factors can be accommodated, but, as with voluntary conduct, whether the courts should continue to proceed in the unquestioning manner they have done in the past.

Hence, perhaps surprisingly, it is clear that there is no need for a distinct defence of religion and culture in South African criminal law. An accused person can argue these considerations in establishing defences that already exist, and the courts are under a constitutional obligation to take them seriously. This will require a principled approach to the manner in which courts accept evidence and argument of cultural or religious motivations, something that has hitherto been lacking. In an attempt to flesh out what such a principled approach would entail, Bennett[113] lists a number of factors as critical elements of the defence. Arguably, the issues he identifies are equally important for courts to grapple with, whether a new, distinct defence is created or whether culture and religion are raised as evidence of pre-existing defences. The factors are as follows: distinguishing between dominant and minority groups;[114] a clear understanding of what culture or religion means;[115] engaging with the issues of acculturation

113 Bennett (n46) at 18–25.

114 As South Africa's history shows, a subordinate culture need not be a numerical minority.

115 Culture is a dynamic concept that often seems to defy definition, and seldom connotes complete accord. See O'Regan J in *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) at para 157.

and assimilation;[116] determining whether the act is required, approved or obligatory in a relevant belief or cultural system;[117] determining whether the act conforms to the requirements of the relevant system,[118] and determining whether the act is directly related to the relevant religion or culture.[119]

The above factors, pointing to the crucial issues that the courts must consider, can all be accounted for in a simple three-stage approach.[120] First, the court must look for the accused's religious/cultural motivation or justification (a subjective inquiry). Second, it should consider the accused's testimony in the context of evidence about the culture and beliefs of other members of the group. (This is identical to the enquiry into conative capacity – the accused's subjective belief is objectivised by considering it against the backdrop of the beliefs of other similarly situated persons.) Third, the cultural norm at stake should be set against the backdrop of the rights enshrined in the Constitution in order to ensure that recognising the religion or culture as a defence will not unduly infringe the rights of vulnerable persons. In this manner, the equal status of the common law and customary law is protected, since both systems are subject to the same ultimate mediator: the Constitution. This is not a source of law that can be described as enshrining or embodying the dominant culture/religion over subordinate ones. It creates a new, rights-based culture.

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116 See Bennett (n46) at 22: 'people never observe the norms of one particular culture to the exclusion of all others. Rather they comply with whatever norms seem expedient to their immediate circumstances.' Bennett goes on to suggest the typical factors that courts would need to consider, though clearly this is not a closed list: 'education, language proficiency, form of marriage, type of work, place of upbringing and place of residence. Even if this inquiry discloses a fairly consistent degree of assimilation, the court should, nevertheless, bear in mind that the accused may still have special reasons for complying with traditional minority norms.'

117 Not all members of a cultural or religious group are subject to the same norms; these frequently differ across age and gender. This is clearly the case with such practices as circumcision. See Bennett (n46) at 23 and Woodman (n13) at 2.

118 It may be difficult to establish the essential elements of a particular practice, especially considering the dynamic nature of cultures and religions and the impact of the process of acculturation.

119 There needs to be a causative connection between the practice and the commission of the unlawful conduct to invoke a cultural/religious defence. The conduct must have been committed as a result of adherence to a belief, rather than other considerations, such as socio-economic need. Bennett (n46) at 24 shows (with reference to the *thwala* custom) how this distinction is often difficult to draw.

120 These three stages are listed by Bennett (n46) at 25.

CHAPTER 8

Witchcraft and the Constitution

Nelson Tebbe[1]

Introduction

Two women in their sixties were confronted by a group, dragged from a home to a sports field, doused with petrol, and set alight.[2] Both perished. Journalists reported that one of the women was the grandmother of a twelfth-grade student who was the only person in her class not failing exams. Classmates blamed the grandmother for their lack of success at school – in other words, they suspected that she had used witchcraft to aid her granddaughter's studies and to thwart other students.

In another incident, a crowd of about eight hundred people surrounded a home, threw stones through the windows, and threatened to incinerate the building along with the family inside.[3] Police used stun grenades to protect the inhabitants. Officers later told reporters that the crowd had assembled after the murder of a nine-year-old girl. When her body was discovered, it was found to be missing an eye and, according to some reports, its genitals as well. People gathered on speculation that family members had killed the girl for her body parts, which could be used in *muthi* (a term sometimes

1 Thanks to Adam Ashforth and Isak Niehaus for helpful comments on a previous draft and to Tom Bennett for skilful editing of this volume. Andrew Coyle and Meghan O'Malley provided excellent research assistance. I am grateful to Dean Michael Gerber, President Joan Wexler and the Dean's Summer Research Stipend Program at Brooklyn Law School for generous support of this project.

2 Gordano Stolley & Miranda Andrew 'Union says jealousy behind "witchcraft" murders' *Mail & Guardian Online* (7 September 2007), available at http://www.mg.co.za/article/2007-09-07-union-says-jealousy-behind-witchcraft-murders (accessed on 7 July 2010).

3 South African Press Association '"Muti killing" sparks violence' *News24.com* (15 February 2008), available at http://www.news24.com/SouthAfrica/News/Muti-killing-sparks-violence-20080215 (accessed on 7 July 2010). This happened on the outskirts of Durban, not in a rural area.

translated as 'medicine'). They blamed the family because of its relative wealth, which they suspected came from selling body parts for use in healing or witchcraft.

Although the incidence of violence related to occult beliefs has not been determined by a reliable empirical study, media reports like these appear frequently in South Africa.[4] Two types of stories are common, represented by the two accounts above. First are attacks on supposed witches, like the brutal murder of the grandmother and her companion.[5] Second are accounts of killings for body parts, presumably so that the parts can be used in *muthi*, and reprisals against those suspected of carrying out such murders.[6] By some accounts, violence against suspected witches reached a peak during the transition to democracy in the late 1980s and early 1990s, and since then it has remained a significant factor[7] – though, again, levels of such violence are difficult to discern with any accuracy.

Incidents like these two have drawn public concern, and government has responded. In 2007, for example, Parliament passed a law strengthening punishment for any murder that is related to witchcraft activity or involves the

4 See Isak A Niehaus 'Witchcraft as subtext: deep knowledge and the South African public sphere' (2010) 36 *Social Dynamics* at 65. Niehaus suggests that much witchcraft-related activity goes unreported because it occurs in private social spaces, such as the home. Of course, news reports should be read with scepticism, as to both accuracy and representativeness.

5 See Hallie Ludsin 'Cultural denial: what South Africa's treatment of witchcraft says for the future of its customary laws' (2003) 21 *Berkeley J of International L* 62 at 80–90. Ludsin argues that there was a rise in vigilante violence against accused witches after passage of the Witchcraft Suppression Act 3 of 1957.

6 Although these two types of story concern phenomena that are different in significant respects, it may make sense to discuss them together, since those who use *muthi* for ill are often considered to be witches by definition. For example, Ashforth emphasises that at least in Soweto, where he performed his fieldwork, '[e]ach and every person deploying *muthi* for malicious or illegitimate ends – such as, say, accumulating excessive wealth or power – is spoken of as a "witch"'. Adam Ashforth *Witchcraft, Violence, and Democracy in South Africa* (2005) University of Chicago Press 134. In sum, the phrase 'witchcraft-related violence', as I use it here, includes both types of story.

7 Ashforth (n5) at 130: 'there has been an upsurge in the practice of witchcraft in South Africa since the mid eighties.' To support this proposition, the author cites Dr Anthony Minnaar of the Centre for Conflict Analysis, quoted in 'Blaas toordokters geweld aan?' *Rapport* (20 October 1991). See also Niehaus (n4) at 66, 71 and 74, who argues that, although witchcraft became a more public issue in the late 1980s and early 1990s, when it intersected with certain forms of anti-apartheid protest and accompanying violence, its lower profile since then can be explained by the normally private and local character of discourse about witchcraft, and not necessarily by a change of government policy or by a decrease in local activity related to witchcraft beliefs.

removal of a body part.[8] Now, government officials are calling for stronger criminal laws that would not only punish perpetrators themselves even more harshly but would also penalise the people who create the demand for *muthi* containing human body parts.[9] Another proposal recommends better police reporting, so that witchcraft-related killings can be distinguished from ordinary murder.[10] Specific reporting would make it easier to conduct empirical studies to measure the frequency and character of crimes driven by such beliefs.[11] Finally, officials propose special education campaigns.[12]

Significant criticism has followed certain government proposals. For example, in 2007 officials in the province of Mpumalanga proposed a bill that would have criminalised not only accusing someone of witchcraft, but also pretending to practise witchcraft itself.[13] Moreover, the bill would have toughened regulation of 'traditional healers'. Finally, it would have required chiefs and headmen to discourage gatherings and practices that served to identify witches. The Traditional Healers Organization (THO) objected to the bill in a submission to the Mpumalanga government, saying: 'The Bill still sound[s] backward, racist, Christian, neo-liberal, lacks respect for other religious beliefs and still makes us feel that we are still [sic] under apartheid rule.'[14] From another angle, the South African Pagan Rights Alliance (SAPRA) complained that the bill would effectively criminalise the harmless practice of 'Western paganism' in violation of the constitutional guarantee of religious freedom.[15] It did not become law.

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8 Section 51 of the Criminal Law Amendment Act 105 of 1997, as read with Schedule 2, Part I (*e*)-(*f*), as amended by s 5 of the Criminal Law (Sentencing) Amendment Act 38 of 2007.

9 Noluthando Mayende-Sibiya, Minister for Women, Children and Persons with Disabilities, Address at the Ritual Killing Indaba, Presidential guesthouse, Pretoria (2010), available at http://www.info.gov.za/speeches/2010/10032314451006.htm (accessed on 7 July 2010).

10 Ibid.

11 Ibid; see also BuaNews 'Dept, healers declare war on muthi killings' *BuaNews Online* (18 February 2010), available at http://www.buanews.gov.za/news/10/10021814251001 (accessed on 7 July 2010): a spokesperson for the Department of Women, Children, and People with Disabilities called for 'more research to better understand the underlying factors' behind *muthi*-related murders.

12 Mayende-Sibiya (n9).

13 Mpumalanga Witchcraft Suppression Bill of 2007 (draft), available at http://www.pagancouncil.co.za/node/66 (accessed on 7 July 2010).

14 Traditional Healers Organization *THO comments to Mpumalanga Witchcraft Bill, 2007*, available at http://www.paganrightsalliance.org/thoonmpumalanga suppressionbilll.pdf (accessed on 7 July 2010).

15 Niehaus (n4) at 71; see also Muchena Zigomo 'S Africa witches fight for rights' *Reuters Life!* (20 July 2007), available at http://www.reuters.com/article/idUSL20806502200707 20 (accessed on 7 July 2010).

I will focus here on government responses to witchcraft beliefs and practices, and on questions of constitutional law that surround those responses. Of course, that perspective excludes many aspects of a complex social phenomenon. However, paying particular attention to policymaking and constitutional law may not be entirely inappropriate. After all, witchcraft beliefs appear to be widespread, they involve accusations of harm by others, they can lead citizens to feel unsafe and to demand government protection, and they sometimes erupt into criminal acts. When witchcraft does enter into the public conversation, the debate often becomes a legal one.[16]

My contention will be that policymaking on witchcraft beliefs and practices raises questions for the modern constitutional order, questions that so far have not figured prominently in public discussion. My aim here is to frame and foreground those questions. At the most general level, they arise out of a tension within the Constitution. On the one hand, government policy has long disapproved of witchcraft practices that cause harm and threaten individual rights. Arguably, that disapproval now has constitutional significance, at least to the extent that the victims of witchcraft-related violence tend to be members of vulnerable groups, such as women, children, the aged, or the disabled. On the other hand, officials are bound by a constitutional commitment to protect the many citizens who fear the occult. Various provisions of the Constitution embody that commitment, including sections concerning religious liberty, equal citizenship, freedom of culture, customary law, and traditional leadership.[17] In other words, officials may wish to denounce and deter witchcraft practices, and to some degree they can, should, and must. At the same time, the Constitution also prevents them from ignoring the freedom and equality of people who believe that *they* are the ones being harmed by enemies wielding occult forces.

Some of the constitutional issues are easy – perhaps easier than commonly acknowledged. For example, it is uncontroverted that society cannot tolerate practices, even constitutionally protected religious practices, when they result in human deaths. Government decisions to punish killings associated with witchcraft or *muthi*, or to impose especially severe punishments for such murders, are unlikely to raise legal difficulty. Proposals for improved police reporting or plans for education campaigns that emphasise the illegality of witch hunts are equally innocuous.

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16 Niehaus (n3) at 66 argues that, when occult belief has become a matter of public discussion in South Africa, 'debate has focused almost exclusively on witchcraft and the law'.

17 Section 15 of the Constitution of the Republic of South Africa, 1996 (religious freedom); s 9 (equality); s 30 (language and culture); s 31 (cultural, religious and linguistic communities); s 211 (customary law) and s 212 (traditional leaders).

Other questions are somewhat more intriguing. Does current statutory law – which dates from the apartheid era and outlaws the identification and denunciation of supposed witches – implicate constitutional principles of religious liberty, cultural freedom, free speech or equal citizenship?[18] What about proposals that would require chiefs and headmen to discourage gatherings where diviners may identify people as witches?[19] Would education campaigns designed to 'demystify the beliefs around witchcraft and sorcery' impermissibly entangle the state in religious questions?[20] Regardless of the answers, these constitutional issues deserve a place in the debate.

Notice that the tensions I am addressing are internal to constitutional discourse. Setting up an opposition between so-called 'traditional' religion and 'modern' constitutionalism distorts more than it clarifies, given the fact that beliefs and practices concerning the occult have long thrived within the contemporary political economy.[21] Witchcraft and related phenomena raise questions for South African constitutionalism, but it is not useful or accurate to say that the underlying conflict is between primordial customs and modern legality.

What is witchcraft?

Witchcraft definitions can vary from place to place, from time to time, and even from person to person. However, many South Africans would probably agree with the definition that I adopt here: witchcraft is the practice of using supernatural power for evil, in order to harm others or to help oneself

18 Witchcraft Suppression Act 3 of 1957, as amended by Act 50 of 1970.

19 Mpumalanga Witchcraft Suppression Bill of 2007.

20 Philip Alston *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Promotion and Protection, Summary* (hereinafter *Alston*) (27 May 2009) United Nations Human Rights Council, A/HRC/11/2 (hereinafter referred to as Report of Special Rapporteur Alston: summary) at para 49(d).

21 John L Comaroff & Jean Comaroff 'Criminal justice, cultural justice: the limits of liberalism and the pragmatics of difference in the new South Africa' (2004) 31 *American Ethnologist* 188 at 188–189. Elsewhere, I show how a local community adapted its methods and criteria for selecting a new chief, partly out of a stated desire to conform to new constitutional principles: Nelson Tebbe 'Inheritance and disinheritance: African customary law and constitutional rights' (2008) 88 *Journal of Religion* 466 at 485–488.

at the expense of others.[22] A witch, then, is a human being who deploys supernatural power for nefarious purposes.[23] This way of understanding the word is opposed by many 'Western pagans' or Wiccans, who may well identify themselves as witches or wizards, and for whom the term does not necessarily carry a negative connotation.[24] My focus, however, is on so-called 'traditional African' beliefs and practices,[25] and when I use the term 'witchcraft' without qualification, I mean to refer to them.

A few characteristics of this definition should be emphasised. First, witchcraft is a second-order term of accusation or suspicion, not a first-order term of self-identification. Again, this separates it from 'Western paganism' or Wicca. Witches are thought to operate in secret, and perhaps

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22 See Nelson Tebbe 'Witchcraft and statecraft: liberal democracy in Africa' (2007) 96 *Geo LJ* 183 at 190. Cf Edward E Evans-Pritchard *Witchcraft, Magic, and Oracles among the Azande* (1976) Clarendon Press 1, Adam Ashforth 'An epidemic of witchcraft? The implications of AIDS for the post-apartheid state' (2002) 61 *African Studies* 121 at 126, Peter Geschiere *The Modernity of Witchcraft: politics and the occult in postcolonial Africa* (1997) University Press of Virginia 13–14 and Monica H Wilson 'Witch beliefs and social structure' (1951) 61 *American J Sociology* 307 at 307–308.

My definition ignores a classic distinction between witchcraft and sorcery. Evans-Pritchard first separated those who inherit supernatural powers (witches) from those who actively acquire them (sorcerers). See Evans-Pritchard (n22) at 1 and Wilson (n22) at 307. Although the difference between these two has some currency among scholars, others find that it is not common in everyday discourse, and therefore do not observe it. Geschiere (n22) at 225 fn1, for example, uses the terms witchcraft and sorcery interchangeably. Likewise, I will not distinguish between them here.

23 Ashforth (n6) observes that witchcraft is 'deliberately inflicted by malicious others'.

24 See Tshwarelo Eseng Mogakane & Thabisile Khoza 'Cauldron boils in witchy word war' *Mail & Guardian Online* (26 February 2010), available at http://www.mg.co.za/article/2010-02-26-cauldron-boils-in-witchy-word-war (accessed on 7 July 2010).

25 The term 'traditional', as it appears in phrases like 'traditional African beliefs', 'traditional leaders', or 'traditional healers', is of course highly problematic. However, it is commonly used not only by South Africans in ordinary conversation, but also in the Constitution and in statutes. See, for example, s 211 (1) of the Constitution of the Republic of South Africa, 1996 ('The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution'); s 8(*d*) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('no person may unfairly discriminate against any person on the ground of gender, including – any practice, including *traditional*, customary or religious practice, which impairs the dignity of women and undermines equality between women and men') (emphasis added). As a result, the term is difficult to avoid entirely.

even unconsciously.[26] So when scholars talk about witchcraft, they are usually describing the beliefs of people about *other* people – not primarily confessions (though those sometimes occur), but charges or allegations.

Second, witchcraft is a form of human action. Although occult forces themselves are supernatural, they are directed by ordinary mortals, acting out of mundane motives like jealousy or revenge.[27] For instance, while *muthi* is sometimes said to have inherent agency in the form of occult power working within, it is always set in motion by humans.[28]

Third, the practice of witchcraft is said to be malevolent. Jealousy is perhaps the most common motive, yet witches are also thought to act in order to promote themselves or their family members at the expense of others, or even out of an inherent craving to cause harm.[29] They reportedly use various forms of harmful magic, such as lightning, familiars, zombies, and substances like *muthi*. Although many supernatural instruments are morally ambiguous – in the sense that they can be wielded for good – their use by witches is not.[30]

Fourth, the English terms 'witch' and 'witchcraft' have equivalents in several African languages. Some scholars have cautioned that the meanings may vary, both among the African terms and between each of them and their English equivalents.[31] For example, one anthropologist noted that the English and French terms for 'witch' and 'witchcraft' carry a meaning of unambiguous malevolence that is not present in corresponding African words.[32] My sense is that, even if one accepts that such variations exist, their practical impact is blunted significantly by the fact that the English terms are widely used by believers themselves.[33] Consequently, every

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26 Geschiere (n22) at 22 and 78, Evans-Pritchard (n22) at 61, Martin Chanock *The Making of South African Legal Culture 1902-1936: fear, favour and prejudice* (2001) CUP 324 and Ashforth (n6) at 137 (emphasising secrecy). There is an interesting tension between the idea that witchcraft can be practised unconsciously and the notion that it is the product of human agency, motivated by ordinary emotions. A classic discussion of this tension is Evans-Pritchard (n22) at 57.

27 Ashforth (n6) at 70 and Geschiere (n21) at 22.

28 Ashforth (n6) at 139.

29 Evans-Pritchard (n22) at 1, 13–14 and 18, and Wilson (n22) at 307–308.

30 Some scholars have noted that the term 'witchcraft' has not carried an exclusively evil connotation in all places and in all historical periods, but it is safe to say that it does for the vast majority of Africans today. For a fuller discussion, see Tebbe (n22) at 192 fn48.

31 See Isak Niehaus 'Witches and zombies of the South African lowveld: discourse, accusations and subjective reality' (2005) 11 *Journal of the Royal Anthropological Institute* 191 at 191.

32 Geschiere (n22) at 194–195.

33 Geschiere (n22) at 14.

serious scholar uses the English or French terms. And there seems to be no question that the English words 'witch' and 'witchcraft' do carry a clear signification of malevolence. Admittedly, ambiguity pervades these practices, because many of the same occult forces that witches purportedly use for wicked purposes can also be bent to constructive ends. For instance, it is unclear whether magic counts as malevolent or benevolent when a grandparent uses it to protect her granddaughter from schoolyard bullies, causing them to wince in pain if they attack her. Yet despite such borderline cases, a fairly clear conceptual distinction is commonly made in everyday discourse between witches who use occult forces for evil, and those who use them for good.[34]

Witchcraft discourse explains misfortune, and explains it in a particular way – as the consequence of purposive human action.[35] In other words, the belief in witchcraft transforms suffering into harm. Two aspects of that transformation are important. First, it has the potential to eliminate virtually all impersonal misfortune. According to this way of thinking, any difficulty at all can be attributed to intentional action, including car accidents, bad weather, illnesses, professional failures, romantic difficulties, and so forth.[36] Second, and related, this way of thinking turns senseless hardship into something meaningful or significant. Moreover, it gives adversity a special sort of significance – it casts suffering as injustice.[37]

Accused witches can be young or old, though they generally are older, and they can be male or female, though they commonly are women.[38] Anthropologists have found that communities tend to suspect members

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34 Isak Niehaus, Eliazaar Mohlala & Kally Shokane *Witchcraft, Power and Politics: exploring the occult in the South African lowveld* (2001) Pluto Press at 17, 26 and 31 note that, while the term 'witchcraft' once was morally ambiguous, today it clearly carries a meaning of nefarious activity.

35 Geschiere (n22) at 22: 'it is ... a basic tenor to these discourses that they explain each and any event by referring to human agency'. Wilson (n22) at 307–308 defines witchcraft as 'a mystical power' used 'to harm others'. Evans-Pritchard (n22) at 18 describes how 'witchcraft explains unfortunate events'.

36 Ashforth (n6) at 10 and 17.

37 See Tebbe (n22) at 187.

38 Compare Mhlaba Memela 'Men are not accused or killed for being witches' *Sowetan* (12 June 2008), available at http://www.sowetan.co.za/News/Article.aspx?id=783397 (accessed on 7 July 2010), which refers to a statement by the director of human rights for the province of KwaZulu-Natal – 'We have never heard of men being accused of witchcraft' – with African Eye News Service '"Witch" hacked to death' *News24.com* (10 January 2008), available at http://www.news24.com/SouthAfrica/News/Witch-hacked-to-death-20080110 (accessed on 7 July 2010), which describes an incident in which an elderly man was killed after being accused of witchcraft.

that are elderly, female, disabled, or otherwise marginalised.[39] On the other hand, witchcraft accusations also often target successful people who allegedly have used occult power to better their circumstances by gaining advantage over others.[40] At the intersection of these target populations are older women living alone who have achieved an unusual measure of financial independence.[41] Leading ethnographers have found that, while suspicions of witchcraft can be directed at anyone whose conspicuous success distances them from the social majority, only those who are elderly or defenceless are actually attacked.[42] Finally, it seems fairly certain that white people are neither accused of witchcraft nor thought to be victimised by it.[43]

People who use esoteric knowledge and occult forces for good, in order to treat physical or mental ailments, are known as 'traditional healers'.[44] Under colonial and apartheid rule, these figures were referred to as 'witch doctors', a term that many found offensive, both because of the association with evil and because the term was used in the context of official disrespect for longstanding and widespread beliefs.[45] Today, healers play an important role in identifying and combating witchcraft, among other problems. In recognition of their significance, Parliament passed the Traditional Health Practitioners Act 22 of 2007, which purports to license and regulate them.[46] These healers are the subject of another chapter in this volume, however, and

39 Niehaus, Mohlala & Shokane (n34) at 113–114.

40 Ashforth (n6) at 97–100 and Geschiere (n22) at 5.

41 Cf Johann Hari 'Witch hunt: Africa's hidden war on women' 12 March 2009 *The Independent* (12 March 2009), available at http://www.independent.co.uk/news/world/africa/witch-hunt-africas-hidden-war-on-women-1642907.html (accessed on 7 July 2010), which reports on witchcraft accusations in Kenya and Tanzania and notes that '[t]he victims [of witchcraft killings] are almost invariably older women, living alone. These women are frightening anomalies here: they have a flicker of financial independence denied to all other females.'

42 John L Comaroff & Jean Comaroff 'Policing culture, cultural policing: law and social order in postcolonial South Africa' (2004) 29 *Law & Social Inquiry* 513 at 525.

43 Niehaus (n4) at 68. But see David Simmons 'African witchcraft at the millennium: musings on a modern phenomenon in Zimbabwe' (2000) 7 *Journal of the International Institute* 1 at 3, available at http://www.triplef.org/Society/docs/African%20Witchcraft%20at%20the%20Millennium.doc (accessed on 7 July 2010), who reports one case of a white victim of alleged bewitchment in Zimbabwe.

44 For more on the dynamics and problematic features of this term, see Tebbe (n22) at 194–195.

45 Ashforth (n6) at 138–139 and Jerome Cartillier 'Sangomas revel in new status' *Mail & Guardian Online* (10 September 2004), available at http://www.mg.co.za/article/2004-09-10-sangomas-revel-in-new-status (accessed on 13 July 2010).

46 Traditional Health Practitioners Act 22 of 2007.

I will not focus on them here,[47] except to note that their activity provides one focus of government policymaking on occult activity.

Fear of witchcraft is widespread in South Africa, though measuring its prevalence is difficult and has not been attempted nationwide, using rigorous empirical methods.[48] Belief in the occult appears to be no less common in contemporary times, and it is present even among observant Christians. Moreover, it seems to exist in every social class, in every part of southern Africa, whether rural or urban, and at every level of education – though of course not everywhere to the same degree and in the same way.[49] During the transition from apartheid in the early and mid 1990s, some suggested that witchcraft-related killings had reached epidemic proportions.[50] While the frequency of reported attacks may have lessened since then, fear of witchcraft continues to affect daily lives.

What is *muthi*?

Muthi or *muti* are terms in Zulu and Xhosa that are sometimes translated as 'traditional medicine' or simply 'medicine'. More often, scholars leave these terms in their original languages because of their diverse and complex meanings. Here, I will use *muthi*.

Generally, *muthi* refers to a substance created by an expert who possesses esoteric knowledge and deploys secret methods.[51] It is morally ambiguous – *muthi* can be put to good purposes, but it also can harm others.[52] Often, though not invariably, *muthi* is thought to be inherently supernatural, operating not as an ordinary herbal remedy would, but instead by means

47 See chapter 9.

48 For recent efforts, see T S Petrus 'Combating witchcraft-related crime in the Eastern Cape: some recommendations for holistic law enforcement intervention strategies' (2009) 22 *Acta Criminologica* 21 at 24–25 and 29, which reports on witchcraft-related violence in the Eastern Cape; B L Meel 'Witchcraft in Transkei region of South African: case report' (2009) 9 A*frican Health Sciences* 61, which reports on three case studies of attacks on suspected witches in Transkei.

49 Jean Comaroff & John L Comaroff *Modernity and its Malcontents: ritual and power in postcolonial Africa* (1993) University of Chicago Press xxv.

50 Ashforth (n22) at 122. See also Ashforth (n6) at 255 who comments: 'Hardly a week passes in South Africa without press reports of witches being killed or of mutilated bodies being found with organs removed for purposes of sorcery.' Jean Comaroff & John L Comaroff 'Alien-nation: zombies, immigrants, and millennial capitalism' (2002) 101 *South Atlantic Quarterly* at 779 noted that belief in zombies had reached 'epic, epidemic proportions'.

51 Ashforth (n6) at 133 and Niehaus (n34) at 25–26. See generally János Mihálik & Yusuf Cassim 'Ritual murder and witchcraft: a political weapon?' (1993) 110 *SALJ* at 127ff.

52 Ashforth (n6) at 139 & Niehaus (n34) at 22.

of otherworldly power. Nevertheless, the South African government has initiated programmes to test the effectiveness of healing *muthi* using scientific techniques.[53]

Anthropologists and ethnographers working in this area have described beliefs around *muthi* in much greater detail, and I will not summarise their work.[54] One feature of *muthi*, however, has become central for policymaking – the fact that some of it includes or incorporates human body parts. When corpses are found missing organs or limbs, particularly certain ones, people suspect that the victims have been killed for these valuable ingredients. Children are included among the victims of such attacks.

Judging by newspaper reports, *muthi* murders are committed regularly.[55] That was also the conclusion of a more serious study conducted by an internationally funded NGO.[56] According to that survey – which at least purported to use a rigorous methodology – 22 per cent of people willing to speak on the subject said they had seen mutilated bodies with missing parts, or pieces separated from bodies.[57] Interviewees also described using and being advised to use *muthi*. For example, one woman who wished to become pregnant consulted a *sangoma* (healer), who told her to wear a belt adorned with children's fingers and male genitals.[58] According to the primary author of the report, there have been incidents of *muthi* killings in every province and in both urban and rural areas, many of them targeting children.[59] The study also found evidence of cross-border trafficking of body parts between South Africa and Mozambique. Reportedly, healers seek parts taken from live victims to be used in *muthi*, usually through a third party who may ship them across the border.[60]

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53 Ashforth (n6) at 148–153.

54 See, for example, Ashforth (n6) at 133–153.

55 Thabisile Khoza 'Money muti harvesting increases' *News24.com* (8 February 2010), available at http://www.news24.com/SouthAfrica/News/Money-muti-harvesting-increases-20100208 (accessed on 7 July 2010) reports that, according to the Traditional Healers Organization, '[n]early 1000 families nationwide reported that the corpses of their dead relatives had been harvested for muti before burial last year'.

56 Simon Fellows *Trafficking Body Parts in Mozambique and South Africa* (2008) Human Rights League, Mozambique.

57 Candice Bailey 'Muti killings is [sic] a way of life in rural areas' *The Star* (16 January 2010) at 7, available at http://www.iol.co.za/index.php?art_id=vn20100116095923456C392652 (accessed on 7 July 2010).

58 Ibid.

59 Ibid: 'It is a prolific problem that affects every single community. The conclusion is that there is no evidence that the adults are specifically asked for, but there is evidence that kids are mutilated.'

60 Fellows (n56) at 7. See also Mayende-Sibiya (n9), who refers to trafficking in human body parts between Mozambique and South Africa.

It seems to be the case that many people believe in the power of *muthi*, either herbal or supernatural, and that many of them even use it alongside so-called Western or biomedical treatments – although, again, reliable data is unavailable.[61] Certainly, media reports of *muthi* killings appear regularly, if not frequently, and government has taken the problem seriously enough to pass special legislation.

Government responses

Because witchcraft is thought to involve harm, there is a sense among many South Africans that government has an obligation to punish perpetrators and protect victims, in much the same way that it acts with respect to physical violence.[62] At the same time, government is called on to protect accused witches from those who take matters into their own hands in the manner of vigilantes. Just as obviously, the state has an obligation to punish people who perpetrate *muthi* killings, and to protect potential victims against attack. In all these ways, government is thought to have a role to play.

Government involvement may be particularly appropriate in the democratic era. Many think that representative government promises a change from the colonial and apartheid regimes, which criminalised and denigrated occult beliefs. A reminder of that disfavour is the Witchcraft Suppression Act 3 of 1957, an apartheid-era law with colonial roots that remains on the books today.[63] It outlaws a range of occult practices, including accusing someone else of practising witchcraft and purporting to use witchcraft (although prosecutions for witchcraft itself are virtually never brought because of the difficulty of producing admissible evidence). Without a doubt, the Act expresses an official view, prevalent at the time of its enactment, that witchcraft beliefs were false and dangerous, and that they stood in the way of the government's civilising mission.[64] Consequently, the

61 Again, for more on the healing aspects of 'traditional' African beliefs and practices, see chapter 9. See also Suren Pillay 'Crime, community and the governance of violence in post-apartheid South Africa' (2008) 35 *Politikon* at 141, who cites a study showing that 70 per cent of residents in the Slovo Park settlement outside Pretoria reported using *muthi* as a protection against harm and misfortune.

62 Ashforth (n6) at 18. Niehaus, however, has recently challenged this view, saying that many ordinary South Africans view witchcraft as a private affair that is outside the realm of legitimate government concern. Niehaus (n42) at 71 and 74–75.

63 The Act was based on earlier colonial models. See Chanock (n26) at 326 discussing the colonial roots of the statute: the Native Territories Penal Code and the Witchcraft Suppression Act of 1895.

64 Chanock (n26) at 321 explains that witchcraft was thought to be 'the outstanding problem of the lawgiver in Africa'.

Witchcraft Suppression Act 3 of 1957 remains widely condemned by those who fear the occult.[65]

Still, government condemnation of witchcraft beliefs has not been free of complexity. For one thing, the apartheid system granted a measure of autonomy to local communities, where chiefs often used their authority over 'customary affairs' to manage the identification, trial and punishment of suspected witches.[66] For another, state judges sometimes mitigated punishment for crimes committed under a perception of witchcraft. For example, one defendant claimed that at the moment he committed the killing, the victim had assumed the form of an animal by means of witchcraft – he said the victim regained human shape only after death.[67] On appeal, the court reduced his sentence from ten to four years imprisonment.[68]

During the transition to democracy, from the late 1980s through to the mid 1990s, reports of witchcraft killings appeared to increase.[69] That change was particularly strong in the north-eastern part of the country, but to a certain degree it seemed to happen everywhere.[70] In many areas, bands of young males who called themselves 'comrades' were said to have led the attacks. Subsequent explanations for the swell of reported attacks have varied, emphasising, for instance, economic or generational dynamics,[71] but many of them acknowledged a political component during that period.

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65 Ashforth (n6) at 265 and Isak Niehaus 'Witchcraft in the New South Africa: A Critical Overview of the Ralushai Commission Report' in John Hund (ed) *Witchcraft, Violence and the Law in South Africa* (2003) Protea Book House at 93, 103.

66 Niehaus (n4) at 67.

67 Tebbe (n22) at 211–215 describes this practice by courts, giving the facts of *S v Netshiavha* 1990 (3) SACR 331 (A), and citing other cases.

68 Ibid.

69 See, for example, Jean Comaroff & John L Comaroff 'Occult economies and the violence of abstraction: notes from the South African postcolony' (1999) 26 *American Ethnologist* at 279, who note that '[p]ostcolonial South Africa, like other postrevolutionary societies, appears to have witnessed a dramatic rise in occult economies: in the deployment, real or imagined, of magical means for material ends'. Reliable numbers are difficult to find. By one newspaper estimate, 676 suspected witches were killed in Limpopo province alone in the first half of 1996, the year the final Constitution was adopted. Jean Comaroff & John L Comaroff 'Reflections on liberalism, policulturalism, and ID-ology: citizenship and difference in South Africa' (2003) 9 *Social Identities* 446 at 467 fn7 (citing newspaper reports). By another newspaper estimate, there were 146 occult-related deaths in a ten-month period from 1994–1995. 'Witchcraft in South Africa' 9 December 1995 *The Economist* (9 December 1995) 85.

70 Niehaus (n4) at 66 cites reports in various parts of the country.

71 Comaroff & Comaroff (n69) at 279 emphasise economic factors; Isak A Niehaus 'The ANC's dilemma: the symbolic politics of three witch-hunts in the South African lowveld, 1990–1995' (1998) 41 *African Studies Rev* at 93 focuses on generational and political factors.

After all, similar groups of young people were important actors in protests against the apartheid regime. The Truth and Reconciliation Commission (TRC) found that at least some of the attacks had a political character at that time, and consequently it granted amnesty to more than 30 young men who had been tried and sentenced for murder and other crimes connected to the killing of accused witches.[72]

Soon after coming to power in 1994, the ANC government in the Northern Province (now Limpopo) established a commission to investigate the witch killings and to propose solutions. The Ralushai Commission conducted an investigation and found that witchcraft-related violence was widespread in the province.[73] That report has justifiably been criticised for slipshod methodology.[74] More interesting than its findings, however, were its proposals, which had some effect on policymaking. The commission proposed a Witchcraft Control Act that would have retained punishment for people who accused others of witchcraft, though only if they did so 'without reasonable suspicion or justifiable cause'; it also would have acknowledged the reality of witchcraft itself, and it would have subjected to criminal punishment those who created a 'reasonable suspicion' that they had harmed others through occult means.[75]

The issue gained momentum in 1998, when the Commission on Gender Equality, an agency of the national government, held a conference on witchcraft violence. After hearing from members of the Ralushai Commission, among others, attendees adopted the *Thohoyandou Declaration on Ending Witchcraft Violence*.[76]

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72 Truth and Reconciliation Commission 'Report of the Amnesty Committee: modus operandi of the committee' (2003) 6(1) *Truth and Reconciliation Commission South Africa Report* 36, available at http://www.justice.gov.za/trc/report/finalreport/vol6_s1.pdf (accessed on 7 July 2010); Truth and Reconciliation Commission Amnesty Committee *Application in Terms of Section 18 of the Promotion of National Unity and Reconciliation Act No. 34 of 1995, In re: Ndwamato Amos Muhadi and 39 Others* (2000 Decision No AC/2000/094), available at http://www.justice.gov.za/trc/decisions/2000/ac20094.htm (accessed on 7 July 2010). Section 20(1)(*b*) of the Promotion of National Unity and Reconciliation Act 34 of 1995 requires, inter alia, that a TRC amnesty application concern a crime that was 'associated with a political objective committed in the course of the conflicts of the past'.

73 Nkhumeleni V Ralushai et al *Report of the Commission of Inquiry into Witchcraft Violence and Ritual Murders in the Northern Province of the Republic of South Africa* (1996) at 1. See also Comaroff & Comaroff (n42) at 514.

74 Niehaus in Hund (n65) at 94–95 and Petrus (n47) at 22–24.

75 Ralushai et al (n73) at 54–55 and 61.

76 The Commission on Gender Equality *The Thohoyandou Declaration on Ending Witchcraft Violence* (1998) at 2, 3–4. See also John Hund 'Preface' in Hund at 7–8, introducing a volume that collected papers given at the conference.

The *Thohoyandou Declaration* displayed a tension that has run through several government proposals. On the one hand, it unequivocally condemned witchcraft violence and expressed frustration at inadequate government protection. Using the language of human rights, it denounced the effects on women and older people in particular. It proposed enhanced police training and law enforcement, economic empowerment of women, new education campaigns, and other measures. On the other hand, the *Thohoyandou Declaration* called for new legislation that would have 'shift[ed] from the current act which operates from a premise that denies the belief in witchcraft, leading to the issue being dealt with outside the criminal justice system'.[77] That sentence could have been read to encourage criminalisation of witchcraft itself. According to the *Thohoyandou Declaration*, new legislation should 'deal with the issue of witchcraft, so that those who are engaged in harmful practices can be separated out from those who are falsely accused'.[78] It should retain punishment for imputations of witchcraft, but it seemingly should only protect those who are 'falsely accused'.[79]

After the conference, the government took certain steps. The South African Police Force formed an Occult-Related Crimes Unit to train officers to handle evidence surrounding witch killings.[80] The Commission for Gender Equality held several 'Witchcraft Road Shows' to promote education on the issue.[81] And in 2000 the Commission introduced a draft 'Regulation of Boloyi (Witchcraft) Practices Act' in Parliament.[82] So far, this bill has not been enacted.[83]

Perhaps frustrated by the national government's inaction, the Province of Mpumalanga introduced a new Witchcraft Suppression Bill in the provincial legislature in 2007.[84] Like its predecessors, the bill tried to manage contradictory impulses.[85] In its preamble, the draft legislation recognised the supremacy of the Constitution, and it declared that '[t]raditional [c]ustoms must be transformed to be in line with the Constitution'. It

77 The Commission on Gender Equality (n76) at 4.
78 Ibid.
79 Ibid.
80 'Devil busters to go bust?' *Mail & Guardian* (19 March 1999) at 19–25, available at http://www.mg.co.za/article/1999-03-19-devil-busters-to-go-bust (accessed on 7 July 2010).
81 Niehaus (n4) at 70.
82 Ibid.
83 In 2004, and again in 2007, Parliament passed legislation purporting to license and regulate traditional healers. Traditional healing is the subject of chapter 9 in this volume.
84 Mpumalanga Witchcraft Suppression Bill of 2007.
85 Niehaus (n4) at 70 says that the bill 'attempts to steer a tricky middle ground'.

also outlawed accusations or imputations of witchcraft, just as current law does.[86] Moreover, it required the 'King or Traditional Leader' to 'promote good neighbourhood [sic] among his or her subjects'. And it directed leaders to discourage and even prohibit *umhlahlo* gatherings, in which diviners might identify people as witches.[87] Finally, the bill called for regulation of traditional healers, which would include prohibiting them from using *muthi* to harm others and requiring them to report any use or solicitation of human tissues.[88] So, in these ways, the bill sought to regulate witchcraft-related practices. Yet it also criminalised the practice of witchcraft itself – though it drew away from the implication that witchcraft exists by using such distancing terms as 'pretends' or 'professes'.[89]

The bill drew criticism from the Traditional Healers Organization, largely on the ground that it did not effect a strong enough 'paradigm shift' away from apartheid law, which had so frustrated 'people who have a justifiable belief that they are bewitched'.[90] THO leaders, in a submission to the Mpumalanga legislature, complained that the bill sounded 'backward,

86 Section 2(1) of the Mpumalanga Witchcraft Suppression Bill of 2007 provides that: 'No person shall point, imply or direct that anybody practises witchcraft or has been bewitched by anybody.' Section 6(1)(*a*) criminalises imputation of witchcraft; s 6(1)(*c*) criminalises the employment of a 'witchdoctor' or other person to identify a witch. The bill defines witchcraft as 'the secret use of *muti*, zombies, spells, spirits, magic powders, water, mixtures, etc, by any person with the purpose of causing harm, damage, sickness to others or their property' and it defines *muti* as 'any mixture of herbs, water, wollen cufs (sic) etc, used by wizards, igedla, inyanga, African Churches, Foreign traditional Healers, etc for the purposes of curing deseases (sic), helping others who come to consult to them for whatever purposes and including causing harm to others or their properties.'

87 Ibid at s 3(5)–(6).

88 Ibid at s 5(2)(*f*)–(*g*).

89 The 'Offences' chapter of the bill reads, in full:

> *6 Any person who conducts himself in the manner below shall be guilty of an offence:–*
>
> *1 (a) Imputes to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard;*
>
> *(b) In circumstances indicating that he professes or pretends to use any supernatural power, witchcraft, sorcery, enchantment or disappointment of any person or thing to any other person;*
>
> *(c) Employs or solicits any witchdoctor, witch-finder or any other person to name or indicate any person as a wizard;*
>
> *(d) Professes a knowledge of witchcraft, or the use of charms, advises any person how to bewitch, injure or damage any person or thing, or supplies any person with any pretended means of witchcraft;*
>
> *(e) On the advice of any inyanga, witch-finder or other person or on the ground of any pretended knowledge of witchcraft, uses or causes to be put into operational (sic) any means or process which, in accordance with such advice or his own belief, is calculated to injure or damage any person or thing; and*
>
> *(f) For gain pretends to exercise or use any supernatural powers, witchcraft, sorcery or enchantment.*

90 Traditional Healers Organization (n14).

racist, Christian neo-liberal'.[91] They argued that it communicated a 'lack of respect for other religious beliefs' in violation of the constitutional right to religious freedom, and even that it would 'cause religious wars within the province'.[92] In place of the bill, the THO put forward a series of legislative recommendations seemingly designed to strengthen government condemnation of occult attack. Although the proposal did not unambiguously call for criminalisation of witchcraft, it seemed to advocate a criminal justice approach by, for example, setting out the sort of testimony by healers that could constitute admissible evidence of bewitchment, proposing a standard of proof, and asking for 'specialized witchcraft courts as appendages to the formal court system'.[93]

Criticism of the Mpumalanga bill also came from a relatively new political voice, the South African Pagan Rights Alliance (SAPRA).[94] SAPRA's leaders pointed out that the proposed law would in effect outlaw the spiritual practices of South Africans who *do* identify as witches – as that term is used in '[W]estern paganism'.[95] That would violate pagans' rights to freedom of religion.[96] In part, SAPRA's objection was definitional: while the majority understands witchcraft to be purely nefarious, pagans define the term more neutrally or even positively.[97] In any event, the Mpumalanga Witchcraft Suppression Bill has not been enacted, presumably at least in part because of these criticisms from the THO and SAPRA.

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91 Ibid.

92 Ibid: 'The state must respect, protect, promote and fulfil the rights contained in the Bill of Rights. Section 15 of the Constitution guarantees that everyone has the right to freedom of conscience, religion, thought, belief and opinion.'

93 Ibid.

94 See http://www.paganrightsalliance.org/ (accessed on 7 July 2010) for information on the group.

95 South African Pagan Rights Alliance *With reference to: P.15/5/15 Comment as an Interested and Affected Party: Mpumalanga Witchcraft Suppression Bill 2007* 5 July 2007, available at http://www.paganrightsalliance.org/mpumalangawitchc-billsubmission.pdf (accessed on 7 July 2010).

96 Ibid. SAPRA's objections to the Mpumalanga bill are also described in Michael Avery 'The legislator, the witch and the wrathful' (2007) 8 *Without Prejudice* 6 at 6–7.

97 Ibid, describing SAPRA's proposal that witchcraft be defined as 'a religio-magical occupation that employs the use of sympathetic magic, ritual, herbalism and divination'. See also Mogakane & Khoza (n24) and Buyekezwa Makwabe 'Mixing politics and witchcraft' *Times Live* (9 August 2009), available at www.timeslive.co.za/sundaytimes/article82695.ece (accessed on 7 July 2010); and Tshwarelo Eseng Mogakane 'Witch term for witches?' *News24.com* (14 September) 2009, available at http://www.news24.com/SouthAfrica/News/Which-term-for-witches-20090914 (accessed on 7 July 2010) (who reports on SAPRA's reaction to Williams's statement).

Calls for the criminalisation of witchcraft itself continue to be heard, although it is far from clear that they will be heeded. Arguments in favour of outlawing witchcraft include the moral claim that government has an obligation to punish wrongdoers and to give citizens a sense of security, and the more pragmatic contention that criminalising occult attack will decrease pressure on communities to resort to violence to protect themselves.[98] Yet Niehaus has observed that outlawing witchcraft may actually strengthen rather than pacify the belief system that drives witch killings in the first place.[99] Regardless of whether a ban on witchcraft would be good policy, it is not likely to become law in South Africa, perhaps in part because of the obvious dangers that it would pose to individual rights and to the rule of law.[100]

However, government has taken several steps to control *muthi* killings, and it has been urged to do more. The Criminal Law (Sentencing) Amendment Act 38 of 2007 introduces a discretionary minimum sentence of life imprisonment for murders related to the unlawful removal of body parts, and for murders related to violations of ss 1(*a*)–(*e*) of the Witchcraft Suppression Act. Apparently, Parliament passed this amendment in response to the perceived escalation in *muthi*-related killings.[101] Since then, the THO has also urged the government to take further action to control *muthi* murders. It has sought to counteract a perception that these killings are performed by, or at the direction of, healers – an impression that could damage the reputation of the profession.[102] THO leaders have been at pains

98 See, for instance, Traditional Healers Organization (n14) which argues that, if witchcraft itself is not properly controlled by government, 'it may result in such cases being dealt with outside the criminal justice system'. Michael Trapido 'Make witchcraft a criminal offence' *Mail & Guardian Online* (13 January 2010), available at http://www.mg.co.za/article/2010-06-07-what-witchcraft-is-this-its-the-gautrain (accessed on 7 July 2010). See also Johannes Harnishchfeger 'Witchcraft and the state in South Africa' (2000) 95 *Anthropos* at 99: '[a]s the majority of South Africans believe in the existence of witchcraft, the new legislator should acknowledge this fact and make witchcraft a criminal offence.'

99 Niehaus (n4) at 71.

100 See below note 120 (discussing constitutional objections to the criminalisation of witchcraft).

101 'This amendment was viewed as necessary in the light of the recent escalation in ritual killings or so-called muti-killings.' Lirette Louw & Johan de Lange 'Comment on Criminal Law (Sentencing) Amendment Act, 38 of 2007' (2008) *Justice Today: the official newsletter of the Department of Justice and Constitutional Development* 14, available at http://www.justice.gov.za/newsletter/JT/JT2008_vol%202.pdf (accessed on 7 July 2010).

102 See, for example, Khoza (n55) and BuaNews (n11).

to emphasise that people who use human body parts in *muthi* are not healers, but witches.[103]

In March 2010, the Minister for Women, Children and Persons with Disabilities held a meeting to address the problem of ritual killings or murders that resulted in the harvesting of human body parts for use in *muthi*. The Minister called on Parliament to enact legislation that would impose even tougher criminal penalties on those who commit *muthi*-related murders.[104] She also called for new legislation to punish the demand side: people who purchase and use medicine containing human parts.[105] Finally, she urged policymakers to gain a better understanding of the root causes of trafficking in body parts, both by requiring improved police reporting of crimes that appear to be related to *muthi*, and by funding empirical studies of the beliefs and practices that drive such crimes.[106]

In short, government has responded to popular concern over violence and other matters related to occult activity. Though policy making on witch killings and *muthi* murders has not been a top priority, it has remained a persistent topic of governance in the democratic era. As debates over such policies continue, it is reasonable to expect continued legislative and administrative activity.

International developments

A relatively recent development is the increased attention to witchcraft-related violence by international human rights organisations, particularly within the United Nations. Alarmed by reports of violence against accused witches throughout Africa and globally, these groups have begun to speak

103 Khoza (n55) and BuaNews (n11).

104 See, for example, Mayende-Sibiya (n9): 'We need to strengthen or reform existing legislation to provide better protection for victims of [*muthi*-related] crimes and to adequately punish the perpetrators through the criminal and civil justice system.' See also South African Press Association 'Minister calls for tougher charges for muti murder' *Mail & Guardian Online* 23 March 2010, available at http://www.mg.co.za/article/2010-03-23-minister-calls-for-tougher-charges-muti-murder (accessed on 7 July 2010).

105 Mayende-Sibiya (n9): '[W]e have to find an additional legislative framework that should enable us to deal decisively with those who buy these body parts and *imithi* [medicine] derived from them.'

106 Ibid: '[w]e should have another category of reporting that describes the extra crimes and the motive for such incidents' and '[w]e need to understand what drives a person to commit such horrible crimes'.

of such deaths as human rights violations.[107] That shift raises the possibility that, at some point, international law could be developed around the issue. Any new international law concerning witchcraft practices could in turn influence South African constitutionalism.[108]

The situation in the Congo particularly seems to have drawn attention to the issue. Here children have been accused of witchcraft and evicted by their families, thus increasing the number of street children in urban areas.[109] Human rights monitors have also documented witch hunts in Ghana, Tanzania, Mozambique, Angola, Nigeria, the Central African Republic – and in South Africa itself.[110] One UN report concludes that 'the number of so-called witches killed or otherwise persecuted is high in the aggregate'.[111]

Human rights officials warn that in many countries group responses to perceived witchcraft frequently target or affect members of vulnerable groups – particularly women, children, the elderly and the disabled.[112] For example, a UN special rapporteur on violence against women reported that, although both men and women are accused of occult attack in South Africa, women are more than twice as likely to be accused.[113] In 2008, the special

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107 One UN report acknowledges that '[t]he relevance of the practice of witchcraft to human rights is clearly a complex matter' and suggests that '[p]erhaps the most appropriate starting point is to examine the contexts in which attention has been brought to the human rights consequences of the phenomenon in recent years'. Report of Special Rapporteur Alston: Summary (n20) at para 49.

108 Section 39(1) of the 1996 Constitution provides that, a court 'must consider international law' when interpreting the Bill of Rights.

109 See, for instance, Jill Schnoebelen *Witchcraft Allegations, Refugee Protection and Human Rights: a review of the evidence*, submitted to the policy development and evaluation service', (2009) 169 *Research Paper* at 14 and *Alston* (n20) at para 49(*j*): 'In the Democratic Republic of the Congo, civil society reports suggest that most of the 25,000 to 50,000 children living on the streets of Kinshasa are there because they have been accused of witchcraft and rejected by their families.'

110 Alston (n20) at para 49(*a*)–(*n*) (summarising these reports); Philip Alston *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: mission to the Central African Republic* (27 May 2009) United Nations Human Rights Council, A/HRC/11/2/Add.3 (hereinafter referred to as Report of Special Rapporteur Alston: Addendum: mission to the Central African Republic) para 46; Radhika Coomaraswamy *Report of the Special Rapporteur on violence against women, its causes and consequences: cultural practices in the family that are violent towards women* (31 January 2002) United Nations Commission on Human Rights, E/CN.4/2002/83 (hereinafter referred to as Report of Special Rapporteur Coomaraswamy: cultural practices) para 46 (reporting on violence against accused witches in South Africa).

111 Alston (n20) at para 51.

112 Ibid: 'Responses to witchcraft frequently involve serious and systematic forms of discrimination, especially on the grounds of gender, age, and disability.'

113 Report of Special Rapporteur Coomaraswamy: cultural practices (n110) at para 46.

rapporteur also brought attention to the effect of witchcraft practices on women in Ghana.[114]

Concern has also been raised by the fact that witchcraft already constitutes a criminal offence in several African countries. According to one report presented to the UN, for example, the Central African Republic provides for life imprisonment and even capital punishment for those convicted of practising witchcraft, though the death penalty is rarely imposed.[115] Other African countries have likewise outlawed the practice of witchcraft, though it is not clear how often such laws are enforced.[116] Philip Alston, the special rapporteur on extrajudicial executions and a leading human rights expert, warned against criminalisation of witchcraft for three reasons: (1) difficulty defining the outlawed conduct with accuracy; (2) complexity of protecting other rights in the process, including rights of culture, speech, and religion; and (3) empirical evidence showing that official sanction has the effect of legitimating private, vigilante-like action against accused witches.[117] Alston concluded that 'available evidence from human rights sources … counsels against the criminalization of witchcraft'.[118]

International organisations are only beginning to address the human rights implications of witchcraft practices.[119] (Less international attention has been paid so far to *muthi* killings and related issues.) If and when international law is developed on the matter, it could well have an impact on South African law.

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114 Yakin Erturk *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Addendum: mission to Ghana* (21 February 2008) submitted to United Nations Human Rights Council, A/HRC/7/6/Add.3 (hereinafter referred to as Report of Special Rapporteur Erturk, Addendum: Mission to Ghana) paras 62–70 notes that, although some men are accused of witchcraft, accusations are directed against women, and that 'the victims of those accusations who suffer the most serious consequences are almost always elderly women'.

115 Alston (n20) at para 49(a).

116 Alston (n20) at para 53: 'A significant number of States have legislation providing for the punishment of witchcraft. Few appear to make regular use of such laws routinely.' See, for example, Chapter V, Part VI of the Criminal Law Codification and Reform Act 23 of 2004 (Zimbabwe) and Cyprian F Fisiy 'Containing occult practices: witchcraft trials in Cameroon' (1998) 41 *African Studies Rev* 143 at 144 who describes s 251 of Cameroon's 1967 Penal Code, which imposes criminal punishments on, inter alia, '[w]hoever commits any act of witchcraft'.

117 Alston (n20) at para 55 and Report of Special Rapporteur Alston: addendum: mission to the Central African Republic (n110) at paras 49–51, p 25.

118 Alston (n20) at para 55.

119 Alston (n20) at para 52: '[I]nternational human rights bodies have dealt only sporadically with the issue and have focused mainly on the need for consciousness raising and education. For the most part, the response has been a very limited one and the complexity of the challenges has tended to be glossed over.'

Constitutional questions

Policymakers are still deciding whether and how to respond to witchcraft-related violence, *muthi* killings, and associated social questions. Here my aim is not to advocate for one government action or another as a matter of optimal policy, but instead to highlight constitutional questions that might be raised by certain current proposals. Mostly, these constitutional questions have not been asked and are at risk of being missed in the contemporary debate.

None of this is to say that witchcraft or *muthi* practices rank as priorities for lawmakers or bureaucrats, nor that new government action is imminent in this area. Yet, because occult practices have been a matter of public debate, and because a few measures have recently been taken, it is at least conceivable that additional statutes or regulations could be enacted.

Now, some of the constitutional questions are easy to answer – easier than might be supposed. One simple proposition is that any religious or cultural practice that involves the taking of a human life deserves no protection, even if it implicates religious or cultural freedoms recognised in the Bill of Rights.[120] Criminal convictions of people involved in the murder of accused witches or in *muthi* killings are perfectly permissible, as a matter of constitutional law.

Another conclusion that should be non-controversial is that lawmakers are free to impose greater criminal punishments on people who commit crimes involving the occult. Parliament did something along these lines in the 2007 law that instituted a discretionary minimum sentence of life imprisonment for people convicted of murder related to witchcraft or to the harvesting of body parts for *muthi*.[121]

Yet, more could be done in this regard. After all, statutes that require greater punishments, or create separate legal categories, for criminal conduct when offenders are motivated by hatred or bias toward particular groups – commonly known as hate crime laws – are commonplace and

120 See s 15 (religious freedom), s 30 (language and culture) and s 31 (cultural, religious and linguistic communities) of the 1996 Constitution.

121 Criminal Law (Sentencing) Amendment Act 38 of 2007.

constitutional, although somewhat controversial.[122] Analogous laws could be passed that would set out special levels (or categories) of punishment for conduct related to a belief in witchcraft.[123] Moreover, punishment need not be limited to perpetrators of violence themselves. Philip Alston, the UN Special Rapporteur on extrajudicial executions, argues that governments have an obligation to take 'all available measures' to prevent and prosecute witchcraft-related crimes.[124] He offers, as a model, laws enacted to counteract lynching of African-Americans in the United States in the late 19th and mid 20th centuries. Those provisions punished state and local law enforcement officials who failed to take reasonable steps to prevent a lynching, and many of the statutes required governments to pay damages to victims' families.[125] To the extent that police in South Africa have been less than vigilant in enforcing existing laws against those who commit crimes against perceived witches, the anti-lynching laws may provide a useful model – one that would present no constitutional obstacles.

It should also be clear that proposals to criminalise the purported practice of witchcraft itself raise grave constitutional concerns. Think, for instance, of the Mpumalanga Witchcraft Suppression Bill, which would have outlawed the 'professed' or 'pretended' exercise of 'witchcraft, sorcery, or enchantment.'[126]

As I noted above, laws outlawing witchcraft in even more straightforward terms are on the books in several African countries, and proposals for similar statutes arise from time to time in South Africa.

Chief among the problems raised by such laws is the difficulty of identifying ostensible witches with any consistency or accuracy. The principal technique is divination, a supernatural practice that cannot satisfy

122 See, for example, *Wisconsin v Mitchell* 508 US 476 (1993) which upheld a state statute that provided for a sentencing enhancement where the offender selected the victim on the basis of race. For a critique of such legislation, see Heidi M Hurd & Michael S Moore 'Punishing hatred and prejudice' (2004) 56 *Stanford Law Review* at 1081. In South Africa, human rights groups have called for the passage of hate crime laws. See Hlengiwe Mnguni 'Call for hate crimes law' *New24.com* (8 July 2010), available at http://www.news24.com/SouthAfrica/News/Call-for-hate-crimes-law-20100708 (accessed on 11 July 2010).

123 The Criminal Law (Sentencing) Amendment Act 38 of 2007 is an example of such a law, but it creates only discretionary minimum sentences, and for only one category of occult-related crime.

124 Alston (n20) at para 57.

125 Ibid.

126 Section 6(1) of the Mpumalanga Witchcraft Suppression Bill of 2007.

evidentiary requirements.[127] Consequently, trying accused witches in state courts could well violate the constitutional requirement of a fair trial.[128] Allowing spiritual experts to give testimony about whether someone had engaged in witchcraft would also entangle government in religious practices, endorsing their conclusions and giving them the force of state power, in ways that would run afoul of constitutional prohibitions on government involvement in religious affairs.[129] Moreover, to the extent that accusations disproportionately fall on protected groups – including women, the elderly and the disabled – giving effect to them in state courts could conceivably constitute the sort of 'indirect' governmental discrimination that is prohibited by the equality clause of the Bill of Rights.[130] For all these reasons, criminalisation of the apparent practice of witchcraft ought to be seen as constitutionally problematic.

Other constitutional questions are easily resolved in the opposite direction. People have a right to *believe* in the existence of occult forces and even to think that fellow citizens are manipulating those forces to harm others. As the Supreme Court of the United States has said, the freedom to believe is absolute, even if the freedom to practise a religion cannot be.[131] That is true of harmful or wrongheaded beliefs just as much as it is true of helpful or truthful ones.

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127 Tebbe (n22) at 233–236 describes the problems with criminalisation from the perspective of democratic political theory. See also Alston (n20) at para 55 who points out 'the difficulty of defining with any accuracy the conduct being proscribed' by laws that ban witchcraft or sorcery.

128 See s 34 of the 1996 Constitution: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court …;' and s 35 (3): 'Every accused person has the right to a fair trial'.

129 Although South Africa lacks a provision that parallels the United States Establishment Clause, its general religious freedom provision has been interpreted to require some version of non-establishment or the separation of church and state. See, for example, *S v Lawrence; S v Negal; S v Solberg* 1997 (10) BCLR 1348 (T) at paras 92–102: in upholding a law that prohibited the sale of liquor on Sundays, a majority of the court held that freedom of religion under s 8 of the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution) prohibited government endorsement of religion that coerced or constrained religion. See also *Christian Education of South Africa v Minister of Education* 2000 (10) BCLR 1051 (T) at para 18: 'freedom of religion may be impaired by measures that coerce persons into acting or refraining from acting in a manner contrary to their beliefs' (quoting *Solberg's* case supra at para 92).

130 Section 9(3) of the 1996 Constitution prohibits direct or indirect discrimination on the basis of, inter alia, gender, sex, age and disability.

131 *Employment Division v Smith* 494 US 872, 894 (1990): 'Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute.'

In between these two sorts of easy questions lie somewhat more difficult ones. Consider, for instance, the question of whether people have a free speech or religious freedom right to simply *name* other people as witches, either publicly or in private. The current Witchcraft Suppression Act 3 of 1957 criminalises this, and the Mpumalanga Witchcraft Suppression Bill would have continued that ban.[132] On the one hand, naming people who are allegedly harming others by occult means is a form of expression that seems to be important to the religious practices of many South Africans. On the other hand, however, the often violent consequences of witch naming may well justify limits on the practice, even if rights of free speech and religious liberty are implicated.[133] Implicitly invoking the constitutional principle that speech is not protected in cases of incitement, the Minister for Women, Children and Persons With Disabilities recently emphasised that '[h]ealers should not incite violence by declaring that certain people are witches'.[134] Though this principle is fairly clear, much could depend on how the Constitutional Court interprets rights of religious liberty and freedom of expression in this context.

Consider too the frequent calls for education programmes. Where these simply seek to teach people that witchcraft-related practices must operate within the bounds of the criminal law, they are presumably unproblematic. But what about recent proposals for government to 'publicly question the existence of harmful witchcraft' or to 'demystify the beliefs around witchcraft and sorcery' or to 'challenge prejudices underlying the abuse of girls and women, including the notion of witchcraft'?[135] Some adherents may think that these messages mimic the official attitude of denial and

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132 Section 1(*a*) of the Witchcraft Suppression Act 3 of 1957 and s 2(1) of the Mpumalanga Witchcraft Suppression Bill 2007.

133 For example, naming individuals as witches may fall under ss 16(2)(*b*)–(*c*) of the 1996 Constitution, which states that freedom of expression 'does not extend to … incitement of imminent violence … or … advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'. However, under 16(2)(*b*), it would need to be proven that witch identification causes immediate physical harm, or, under 16(2)(*c*), is speech advocating hatred based on race, gender, ethnicity or religion. *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (T) held that 'harm' under 16(2)(*b*) is restricted to expressions leading to imminent physical violence, while under 16(2)(*c*), 'harm' is broader than imminent violence but is restricted to only hateful expressions based on race, gender, ethnicity or religion.

134 Mayende-Sibiya (n9) at 3.

135 Report of Special Rapporteur Erturk, Addendum: Mission to Ghana (n114) at para 93. See also the Alston (n20) at para 49(d): 'After a visit to Ghana, the Special Rapporteur on violence against women called upon the Government to demystify the beliefs around witchcraft and sorcery.'

denigration during the colonial and apartheid eras.[136] In other words, government condemnation of witchcraft beliefs themselves, apart from their consequences, could violate the principle of equal citizenship by making believers feel like disfavoured members of the political community, could impair their dignity, and could implicate religious and cultural freedoms.[137] Furthermore, official disapproval might well involve the government in questions of religious truth – something that constitutional law generally prohibits.[138] Cutting in the other direction, however, are serious concerns about the effects of witchcraft-related beliefs and practices on criminal activity, especially when it is directed against members of vulnerable social groups.

Also potentially complex is the matter of whether a statute could require chiefs and other leaders to prohibit certain rituals related to witchcraft. For example, the Mpumalanga Witchcraft Suppression Bill attempted to stop leaders from allowing gatherings where witches might be named.[139] It is one thing to outlaw a speech act – naming a witch – that is closely related to vigilante-style violence. It may be another matter for the government to prohibit a central ritual in a religious tradition, even if it centres on the same sort of witch naming. Courts may require the government to show a close connection between the ritual and illegal violence against suspected witches, given the danger that such a prohibition poses to rights of speech, religion, and culture. Again, how the jurisprudence in this area will develop is unclear, but each step away from simple criminalisation of violence against accused witches has the potential to introduce constitutional complexities.

136 Ashforth (n6) at 265 and Niehaus in Hund (n65) at 107.

137 Section 3 (equal citizenship), s 10 (dignity), s 15 (religion) and ss 30–31 (culture) of the 1996 Constitution.

138 *United States v Ballard* 322 US 78, 87 (1944) stated that the courts cannot determine the 'truth or falsity' of religious views. *Employment Division v Smith* 494 US 872, 887 (1990) commented that: '[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.'

139 Section 3(5) of the Mpumalanga Witchcraft Suppression Bill of 2007 provides that: 'It shall be the responsibility of any traditional leader to … [p]rohibit the holding of *Umhlahlo* within his area of jurisdiction.' *Umhlahlo* is defined in the bill as 'a gathering of families or persons with the approval of the Traditional Leader or King at the place of an *Inyanga* [traditional healer] with the purpose of identifying another as witch by the *Inyanga*, irrespective of whether the gathering is voluntary or involuntary'.

Conclusion

Witchcraft beliefs and related practices are complex social phenomena that present difficult challenges for lawmakers who are bound by the Constitution and committed to upholding its values. Putting aside the policy considerations that might make any particular governmental response more or less attractive, I have focused on the legal aspects of those challenges. In particular, my objective has been to foreground certain constitutional questions raised by policies and proposals that can be found in the current debate. In some respects, the constitutional issues are easier than might be supposed. For example, Parliament may punish violence against suspected witches, even with laws that specifically address religiously motivated murder and assault. Also, people may believe that occult forces exist, and that those forces are being manipulated by jealous or malevolent neighbours. Less obviously constitutional are calls for educational campaigns that would denounce witchcraft beliefs, or proposals for laws that would prohibit certain rituals related to witch naming. Regardless of the answers, these sorts of constitutional questions should be considered as part of the public debate.

CHAPTER 9

Rainbow Healing: Traditional Healers and Healing in South Africa

Michael Eastman

Introduction

Thirty-five thousand MB, ChB or MD-qualified doctors[1] practise in South Africa's science-based biomedical[2] health care system.[3] Yet it is the approximately 200 000[4] traditional African healers who meet many of the health care needs of the bulk of the population. Some estimates conclude

1 Health Professions Council of South Africa http://www.hst.org.za/indicators/HumanResources/HPCSA/, (accessed 6 May 2009).

2 This term will be used in preference to 'Western medicine' or 'modern medicine'.

3 Additionally, some 100 000 nurses are registered with the South African Nursing Council South African Nursing Council http://www.sanc.co.za/ Local copy: http://www.hst.org.za/indicators/HumanResources/SANC/, (accessed 4 May 2009).

4 This figure is contested. In 1994, in J P de V van Niekerk (ed) 'Bridging the Gap – Potential for a health care partnership between African traditional healers and biomedical personnel in South Africa' (2006) 96 *South African Medical Journal* 1ff the figure was estimated to be 200 000, a figure repeated in Engela Pretorius 'Traditional Healers' in Nicholas Crisp & Antoinette Ntuli (eds) *South African Health Review 1999* (2000) Health Systems Trust. Nceba Gqaleni, Indres Moodley, Heidi Kruger, Abigail Ntuli & Heather McLeod 'Traditional and Complementary Medicine' in Harrison S, Bhana R & Nruli A (eds) *South African Health Review 2007* (2007) Health Systems Trust at 178, however, suggest the figure to be 185 477.

that between 70 to 80 percent[5] of South Africans use traditional healers either exclusively or in tandem with biomedicine. This is thought to be because traditional healers are, for the most part, more easily accessible, more widely available and an integral part of the population's social and cultural systems.

Defining the scope of traditional healing[6] is difficult, due to the varieties of traditional healers. In broad terms, however, it usually consists of religious, spiritual, personal or supernatural divination to aid in determining the cause of the problem complained of, coupled with application of, inter alia, herbal concoctions, spells and charms, inspired by the wisdom of kin and ancestors, as remedies.

The march of time has not diminished the number of adherents. Although all are not agreed on its value,[7] belief in the power of traditional healing is, today, as widespread as ever.[8] This belief is not confined to particular generations or to those of a certain education or socio-economic standing.[9] Rather, it is widely held across social boundaries.[10]

Thus is medical pluralism at play in South Africa. The minority biomedicine has been closely regulated and standardised,[11] whereas

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5 This figure is extrapolated from World Health Organisation estimates for Continental Africa in *Promoting the Role of Traditional Medicine in Health Systems: a strategy for the African region 2001-2010* (2000) WHO. Other studies have noted the difficulty in establishing how many people consult healers for health-related problems – see Nicoli Nattrass 'Who Consults Sangomas in Khayalitsha? An Exploratory Analysis' (2006) 151 *CSSR Working Paper*, University of Cape Town, while others have noted a usage rate of around 50–60%. See Debbie Le Beau 'Dealing with Disorder: Traditional and Western Medicine in Katutura (Namibia)' in Wilfrid H G Haacke (ed) *Namibian African Studies* Vol 6 (2003) Rüdiger Köppe Verlag.

6 The term 'traditional healing' in this chapter incorporates only traditional African healing, and does not extend to indigenous forms of healing from other continents, such as Chinese or Indian traditional healing, the use of which is becoming more prevalent in South Africa.

7 Sumaya Mall *Attitudes of HIV Positive Patients in South Africa to Traditional African Healers and their Practices* (2008) *CSSR Working Paper* No 215, University of Cape Town 1 at 8.

8 Nkhumeleni V Ralushai et al 'Report of the Commission of Enquiry into Witchcraft Violence and Ritual Murders in the Northern Province of South Africa' (1996) HSRC 57.

9 John Hund 'Witchcraft and accusations of witchcraft in South Africa: Ontological denial and the suppression of African justice' (2000) 33 *CILSA* at 384ff.

10 Nelson Tebbe 'Witchcraft and statecraft: liberal democracy in Africa' (2007) 96 *Geo LJ* 183 at 194.

11 Principally by the Health Professions Act 56 of 1974 and the National Health Act 61 of 2003.

traditional healers were, until very recently, legislated against.[12] The recent introduction of the Traditional Health Practitioners Act 22 of 2007, however, has overturned the Witchcraft Suppression Act 3 of 1957,[13] which had outlawed traditional healing. The new law,[14] which makes the practice of such healing lawful, is a revelation for patients, for a preferred source of health care is no longer accompanied by the threat of sanction, but may be accessed in an open and legitimate manner.

Despite this legislative acceptance, the practice remains much maligned in formal medical circles, and traditional African healing continues to bear both the scars and the sure-footedness that tends to accompany a secretive practice and philosophy. This chapter hopes to wash away some of those obscurities and show the possibilities, medical and legal, from the emerging co-operation and understanding between biomedical doctors and traditional healers.

The art of traditional healing

'Traditional healing' is a somewhat contentious term – and for good reason. There is no unitary, all-encompassing pattern of thought about the practice of healing the body by traditional methods.[15] Conceptions of exactly how a person is to be healed vary widely from healer to healer and from patient to patient.[16] Moreover, as new methods of treatment are continually being explored, adapted and adopted, some of which are pragmatic hybrids of biomedicine,[17] the 'traditional' element of traditional African healing seems a less and less appropriate epithet. Yet the term persists in use by most

12 Witchcraft Suppression Act 3 of 1957 and the Witchcraft Suppression Amendment Act 50 of 1970.

13 Ibid.

14 Which came into force on 30 April 2008.

15 Pamela Richards *Traditional Healers and Childhood in Zimbabwe* (1996) Ohio Univeristy Press at 5.

16 Ibid 6.

17 In *Sithole v Rex* 1939 NPD 192, a traditional healer used a stethoscope to avail himself of modern science in the diagnostic phase, an act he believed to be to the benefit of his patients. The court ruled this to be an acceptable action, for he was examining only, and not prescribing medicine based on use of the stethoscope, which the court held was not an attempt to hold himself out as a doctor (which would have been unlawful). Followed in *Ndhlovu v Rex* 1942 NPD 397. An anecdote from Professor Mike McGovern of Yale University's Department of Anthropology notes a traditional healer in the Gambia, in the late 1980's, re-using needles in syringes to inject herbal liquids into patient's bloodstreams. The author has observed and heard many traditional healers in urban areas referring to themselves as 'doctors' and using pictures of stethoscopes on the advertising flyers that are distributed at street corners.

concerned,[18] and whatever peculiar alterations and modifications the belief may have undergone, healers still derive their power to heal through their relationships with kin and ancestors.[19]

Such healing is not entirely disparate, however, for there do exist some common philosophical threads that run through traditional healing as practised within today's South Africa.[20] It is these threads that we will use to define the concepts of health, sickness and healing, as they are interpreted within traditional African belief structures.

A steady principle in traditional healing is that a person's good health is determined not only by the body's own, internal actions, but extends to, and is partly controlled by, the individual's social relationships and identities.[21] Hence, the worthiness, or lack thereof, of a person's actions is deemed a significant element in contributing to overall health.[22]

Strong, tightly-knit group and familial bonds form the basis of the small societies common in traditional, rural, life.[23] A person's kin not only act as supporters, but also as educators and advisors, and, consequently, their role in presenting choices for a person is important. [24] Therefore, ensuring that such bonds are cordially maintained is important not only for the figurative health of the group, but also for the literal health of its individual members.[25]

Kinship relations go beyond the immediate, corporeal world. Appeals are made to another source, that being deceased kin or, to use another term, the

18 Certainly many healers regard it as a correctly-encompassing term. See Joanne Wreford *We Can Help! – A Literature Review of Current Practice Involving Traditional Healers in Biomedical HIV/AIDS Interventions in South Africa* (2005) *CSSR Working Paper* No 108, University of Cape Town 1 at 2, who argues that use of the term by the healers themselves constitutes sufficient reason for it to be regarded as accurate. Moreover, the name finds favour with the legislation in question, the Traditional Health Practitioners Act 22 of 2007.

19 Tebbe (n10) at 195.

20 Engela Pretorius 'Complementary/Alternative and Traditional Health Care in South Africa' in Hendrik C J van Rensburg (ed) *Health and Health Care in South Africa* (2004) Van Schaik at 507.

21 Gordon Chavunduka *Traditional Medicine in Modern Zimbabwe* (1994) University of Zimbabwe Publications 1.

22 Ibid at 9 and Pretorius (n20) at 530.

23 Chavunduka (n21) at 47.

24 Pretorius (n20) at 530–533.

25 Pretorius (n20) at 533.

ancestors.[26] Ancestors participate actively in the world of the living. Mostly they care benevolently for comfort, and they advise the living about life.[27] But they can also be malevolent – disgrace upon the kin, or an act violating their memory by the person concerned, may cause them dissatifaction.[28] Understandably, in a group reliant upon coherent social relations for its survival, any attempt to spoil those relations, and any act which has the effect of upsetting the kin, is punished by those who watch over the group.[29] Hence, within this philosophy, health and healing are inalienable from broader understandings of the intimate cosmological connection between the individual and the social group.

As a result, people are deemed to be in good health when they have a synthesised, balanced relationship within themselves (the individual), between their selves and the social habitat within which they live (the kinship group and beyond) and between their selves and the natural environment through which they move.[30] Disruption of, and discord between, these balanced relationships is an event leading to sickness and a general state of malaise in the life of the affected individual.[31]

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26 South Africa is, however, a country in which a majority of the population professes to be of the Christian faith, and, at first glance, this may appear to be at odds with the concurrent feature that the majority of citizens also align themselves with traditional philosophies. However, although some sectors of the Church have professed disdain for traditional practices, others embrace traditional beliefs and practices, from time to time, adapting them. Many such Christians interpret the Bible in a relatively literal sense, placing ancestors within the context of spirits, saints and other Christian icons. Although missionaries tended to keep Christian doctrines and medicine separate, interpreting disease in a rationalist, scientific way, literal African interpretations diverged. The Bible, somewhat unpredictably, though entirely understandably, provided validation of the traditional African belief that health and healing are intimately connected to good relations with the spiritual world. For further reading on the subject, see Bengt G M Sundkler *Bantu Prophets in South Africa* (1961) OUP and Elizabeth Isichei *A History of Christianity in South Africa* (1995) Cromwell Press, as well as the classic Miroslav Volf *Exclusion and Embrace* (1996) Abingdon Press. The latter work provides, amongst other things, an excellent account of the intricate adaptations of Christianity to suit contemporary political and social needs in diverse environments.

27 Pretorius (n20) at 531.

28 Pretorius (n20) at 532.

29 Chavunduka (n21) at 57.

30 John M Janzen *The Social Fabric of Health: the social fabric of health: an introduction to medical anthropology* (2002) McGraw Hill 39.

31 Within these relationships, the dual dichotomies of a pure and polluted body, harmonious and discontented mind, and a cool and hot internal energy must be settled. Edward C Green *Indigenous Theories of Contagious Disease* (1999) Alta Mira Press 12.

Disruption can be effected by either personalistic or naturalistic means, a point often revealed in field studies, but frequently not properly appreciated. Personalistic ailments are those either 'sent' by others,[32] such as witches in the employ of another, or are directed by a person's ancestors when they are unhappy with the individual's conduct.[33] Naturalistic ailments are present through no particular social taboo breaking, but are simple matters of fact – infection through dirt, pollution through contact with impure substances and environmental sickness through the air, land and water.[34]

To remedy these disruptions, people will engage in some form of health care seeking behaviour, as any creature would. Remedies are sourced either by personal wherewithal or through those who hold themselves out to have sufficient knowledge and skill to put an end to the ailment – in this case, traditional healers. Two manifestations of healer tend to predominate, those being herbalists and spirit mediums, though there is much mingling and overlap of the two arts, and, ultimately, the source of power underpinning most traditional healers is regarded to be ancestor, kin and other spiritual relationships.[35]

Herbalists are educated through a process of apprenticeship, and are taken in by those already practising and educated in the properties of various pharmacopeia and their uses.[36] These natural products, usually roots, leaves, bulbs and herbs, are then converted into pastes, brews and rub-on smears in an attempt to cure the diagnosed ailment.[37] Knowledge of what substances are appropriate is obtained either by experimentation and guess work, or by dreams, coupled with observation of effects.[38]

Spirit mediums, by contrast, are identified as suitable for their role by the occurrence of a calling from their ancestors to become healers. They either begin to practise immediately following this calling, or pass through initiation rites where established healers attempt to assist them in honing and using their skills of communication with the spirit world.[39] They then use these talents to engage with their own and their patient's ancestors,

32 Ibid 13.
33 Ibid 13.
34 Ibid 76.
35 Adam Ashforth *Witchcraft, Violence and Democracy in South Africa* (2005) University of Chicago Press 294.
36 Lilian Simon *Inyanga – Sarah Mashele's story* (1993) Justified Press 5 and Chavunduka (n21) at 24.
37 Personal communication with Jo Thobeka Wreford, a traditional healer practising in Cape Town, 20 April 2007.
38 Chavunduka (n21) at 24 and 71.
39 Simon (n36) at 6 and Chavunduka (n21) at 24. Personal communication with Jo Thobeka Wreford, 20 April 2007.

in order to help an individual understand the meaning of events and make choices in life as appropriate.[40]

Divination is performed in a number of ways. For example, objects that have a particular spiritual significance to the healer will be thrown. By looking at the ways in which they fall, the diviner may discern a pattern representing a particular interpretation revealed through the world of the ancestors. From this, a conclusion may be arrived at which will assist in alleviation of the pain or harm complained of.[41]

Consequently, traditional healers do not occupy the narrow role of a health care provider, as that is understood in biomedical terminology. They do more. When good health is regarded as the product of an intimate and complex cosmological web of the personal and the social, it is unnecessary to separate medicine from a wider, holistic world view. As a result, traditional healers are claimed to be effective for a wide range of ailments – not all of which are recognised as such by biomedicine – from gout, epilepsy and evil spirits, to stomach pains and nausea. To be sure, there are many imposters, preying on the desperation of their patients, and they are quick to advertise their cures on South Africa's pavements. Some healers profess an ability to cope with, amongst other matters, unemployment, infertility, penis strength, bad luck, job finding and HIV/AIDS. Still others claim an ability to influence court judgments[42] and to protect people from theft and financial struggles. As may be imagined, telling the difference between a *bona fide* traditional healer and a charlatan is not always easy.

The use of traditional healing

Such diversity of philosophy and practice, without apparent empirical verification, has proved more than a little discouraging for many biomedical doctors. Traditional healing draws its power from faith and belief, rather than (seemingly) empirical fact, biomedicine's staple source of knowledge. Consequently, although the majority of the biomedical community has appreciated the widespread belief in traditional healing,[43] it has denied that this belief should be either tolerated or accommodated in a viable public health care programme.[44] This exclusionary stance has been exacerbated by various and palpable abuses of trumped-up traditional medicines within the

40 Janzen (n30). at 206.
41 Ibid 206.
42 Babington Maravanyika 'Justice the Sangoma Way' *Cape Argus* (21 July 2007).
43 Ortrun Meissner 'The traditional healer as part of the health care team?' (2004) 94 *SA Medical J* at 901ff.
44 Chris Bateman 'Legal bone throwing has doctors hopping mad' (2004) 93 *SA Medical J* at 882ff.

context of the HIV/AIDS pandemic, by both state and non-state actors, all of which has had the effect of strengthening the case for critics of traditional healing.[45]

The antipathy resulting from these differences has set biomedicine and traditional healing against each other. The philosophies that underpin them, and the practices that drive them, seem not to permit compromise. It would therefore be expected that a patient's use of traditional healing or biomedicine is not only mutually exclusive, but perhaps even competitive. But this is not necessarily so. Medicine is not dogmatic: rather, it is unfailingly eclectic, thanks to one special ingredient – people. And, in South Africa at least, it appears that biomedicine and traditional healing are employed by patients in a complementary and mutually supportive fashion.

Initially, the patient adopts the 'known', first and foremost, and that beginning is informed by the individual's world view of self. This perception, which is both personally conceived and adopted from external sources, assists in dictating the individual's response to any personal or social stimulus.[46] An interpretation of what it means to be of poor health is no different from any other view.[47] Hence, although the physiological experience may be uniform amongst people, the psychological experience of health and healing is undoubtedly shaped by personal understandings of the world. It follows that the interpretation of the reasons for, and the meaning of, the experience may differ widely from person to person.

These world views or explanatory models inform and define both the belief held, and the action that the belief inspires. Thus, the healers' explanatory models allow them to discern the nature and cause of complaints, time and modes of onset of the symptoms, course of sickness and treatments.[48] For patients, such explanatory models assist in perceiving what the problem is, whether or not it warrants attention, and what the appropriate attention should be.[49] Upon embarking upon a course of treatment, these models allow a person to evaluate consistently whether the prescribed remedy is advantageous and acceptable to their explanatory model, and, if it is geographically available and financially accessible, whether it can be adopted for future use.

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45 Chris Bateman 'Government encouraging snake-oil salesman Rath' (2005) 95 *SA Medical J* at 372ff.

46 Arthur Kleinman *Patients and Healers in the Context of Culture* (1980) University of California Press 159.

47 Ibid 158.

48 Ibid 159.

49 Ibid 159.

Should the 'known' prove ineffective, there will be a temptation to change one's strategy, and this is where a blending of methodologies occurs. Foraging becomes the order of the day, because the individual will adopt an attitude of 'if it works, then it works'. Hence, regardless of the underlying principles, patients will adopt successful strategies into the armoury of health case for future use.

Consider some of the more recent studies on the subject. Between 1996 and 2003, a relatively in-depth study focused on the health care habits of a group of 362 inhabitants of Katutura, the largest township in Namibia, lying on the outskirts of Windhoek.[50] From the findings, it was evident that these people consulted both biomedical doctors and traditional healers. 42 percent of the respondents noted that they had consulted a traditional healer in addition to a biomedical doctor. Most of these (32% of the 362) used traditional healers after having consulted with a biomedical doctor. Very few, however, consulted only traditional healers. Therefore, a significant minority of the population focused their health seeking behaviour on different, and perhaps competing,[51] paradigms.

Another study,[52] conducted in the rural valleys of northern KwaZulu Natal, used 974 respondents as a test group. It also found that a significant number of patients had resorted to a dual approach.[53] Virtually all respondents consulted biomedical doctors when in ill health. Importantly, just under half used both a biomedical doctor[54] and a traditional healer, despite the fact that this increased the sum of money spent on a single health problem to close to R1 100.[55] If using only a biomedical doctor, the average amount spent was R243, whereas the use of a traditional healer alone produced an average cost of R433 (for visiting a herbalist) or R371 (for consulting a spirit medium).[56] An earlier study in the Orange Free State had also demonstrated a considerable cost difference between biomedicine and traditional healing, the latter tending to be twice as expensive as the former.[57]

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50 Le Beau at (n5).

51 In particular see (n4) and the accompanying supplement.

52 Anne Case, Alicia Menendez & Cally Ardington *Health Seeking Behaviour in Northern KwaZulu Natal* (2005) CSSR Working Paper No 116, Centre for Social Science Research, University of Cape Town.

53 Ibid 7.

54 Either privately or at a local clinic.

55 Case et al (n52) at 7.

56 Case et al (n52) at 7.

57 Engela Pretorius, Gert De Klerk & Hendrik C J van Rensburg *Die tradisionele Heler in Suid-Afrikaanse Gesondheidsorg* (1991) HSRC Publishers 42ff.

From an examination of the available studies, it appears that a significant number of the patients polled consulted healers representing different medical paradigms for the same problem. This can be termed 'dual health care seeking behaviour'. It is a choice made consciously,[58] and is also a widely-observed practice that is encountered the world over.[59] The critical question, then, is why this occurs. Perhaps patients are uncertain of what to do. Perhaps they are desperate, and are willing to try all measures. Examination of the Katutura study, however, would support another reason.

If dual health care seeking behaviour resulted purely from uncertainty or desperation, one would expect to find one of two results in the Katutura study. First, all ailments would result in a roughly equal number of people consulting both biomedical doctors and traditional African healers. Second, particularly serious ailments would tend to generate greater dual health seeking behaviour, given, presumably, the patient's greater desperation.

Interestingly, however, a different trend emerged in Katutura. Certain health problems (and not necessarily the most serious ones) made it substantially more likely that a respondent would consult a traditional African healer either exclusively or in addition to a biomedical doctor. Infertility, intestinal problems, bleeding nose/mouth and, most of all, mental illness and epilepsy, resulted in the most dual health care visits.[60] (The latter two matters sometimes encouraged the exclusive use of traditional healers.)

By contrast, almost all the participants regarded infectious diseases, such as tuberculosis, as problems for biomedical doctors.[61] Moreover, biomedicine was usually utilised as the first port-of-call for most health care problems, the only exceptions being those ailments that attracted dual health care seeking behaviour, when biomedicine and traditional healing vied fairly evenly to be considered the patient's first choice.[62]

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58 Myles Mander *Marketing of Indigenous Medicinal Plants in South Africa: A Case Study in KwaZulu Natal* (1998) Food & Agriculture Organisation 15ff.

59 U A Igun 'Stage in health seeking: a descriptive model' (1979) 1 *Social Science & Medicine* at 13ff.

60 A fact supported by two other studies, namely Lola R Schwartz 'The hierarchy of resort curative practice: Admiralty Islands, Melanesia' (1969) 10 *Journal of Health and Social Behavior* at 200–9 and Joyce E Leeson 'Traditional medicine: still plenty to offer' (1970) 15 *Africa Report* 24 at 24–5.

61 Epilepsy, in particular, suffers from a universal stigma. For another South African study, see Humberto Foyaca-Sibat, Antonio H Del Rio-Romero & Lourdes de F Ibanez-Valdes 'Prevalence of epilepsy and general knowledge about neurocystierosis at Ngangelizwe Location South Africa (2005) 4 *Internet Journal of Neurology* at 906ff.

62 Le Beau (n5) at 14.

When read together with studies on 'indigenous contagion theory'[63] and the concept of an internal 'snake', or *nyoka*, an intriguing trend of dual health care seeking behaviour emerges. As indicated earlier, ethnographic research is increasingly demonstrating that witchcraft is not regarded, in African societies, as the only cause of an ailment. Rather, naturalistic sickness, via the environment[64] within which a person lives, may make a person ill.[65] This is termed 'indigenous contagion theory.' However, the agent of the ailment is not regarded as the cause of the ailment, but as a catalyst for the ailment.

The *nyoka* (internal snake) is a popular concept throughout Africa.[66] It is said to be an invisible serpent that resides in a person's torso, and, when disturbed by imbalances, it 'punishes' its host.[67] The *nyoka* thereby becomes responsible for the ailment. The punishment of the host by the *nyoka* is, apparently, manifested in the form of, inter alia, infertility, intestinal problems, mental illness and epilepsy. These are the same ailments that resulted in the largest percentage of dual health care seeking behaviour in Katutura.

In contemporary ethnographic accounts and studies,[68] traditional healers have said that the appropriate response to such contagious elements, is to administer 'black'[69] medicine as a 'purgative', followed by 'white'[70] medicine, which must be used to sooth the *nyoka*. In some instances, this practice is reversed, the *nyoka* being soothed before administering the purgative.[71]

The fact that only a few, select ailments tended to have large numbers of patients engaging in dual health seeking behaviour, combined with the overlapping of those ailments with indigenous contagion theories and the concept of the *nyoka*, seems to indicate that the prime reason for dual health seeking behaviour is the patients' recognition of the fact that biomedical doctors and traditional healers play different and distinct roles in their

63 Green (n31) at 13.

64 Green (n31) at 13 himself breaks down indigenous contagion theory into three separate components. However, though this division is noted, the author feels that the components are closely interwoven, and can be discussed together.

65 In particular, see Green (n31) at 16 and 21–54. When regarded as 'pollution', notes Green, the concept of disease is not all that different to the biomedical concern with pathogens.

66 Green (n31) at 89.

67 Green (n31) at 91.

68 See Green (n31) at 97.

69 Medicine that has a purgative effect to rid the body of evil: Green (n31) at 97.

70 To restore the functioning of the body once the evil has been removed: Green (n31) at 97.

71 Murray Last & Gordon Chavunduka *The Professionalisation of African Medicine* (1986) Manchester University Press.

health. This is because biomedicine and traditional healing are effective on different aspects of a person in two ways. First, the patient considers certain ailments as having an element that must be alleviated by a biomedical doctor, whereas another element must be tended by a traditional healer. Second, some ailments are exclusionary in that they are viewed as being treatable only by traditional healing or by biomedicine.

This pluralism is given particular resonance when a distinction is made between the terms 'disease' and 'illness'.[72] 'Disease' refers to the scientifically-proven, empirically observable agent of poor health, such as bacteria or a virus.[73] 'Illness', by contrast, is a social, context-dependent, people-based construction of the personal experience of poor health.[74] (For the purposes of this paper, the term 'ailment' has and will be used to cover both elements when necessary.)

An example of this dual conception is readily apparent in the affliction of cancer. The disease component is the explosive and uncontrollable multiplication of cells, leading, possibly, to the death of the individual. Cancer as an illness, on the other hand, is the experience of cancer which is peculiar to each person. It may involve feelings of self-doubt, the classic 'why me, why now?' questions, perceptions of stigma being levelled against the sufferer, and acts that have the effect of re-defining one's identity as a 'person with cancer', rather than as a 'person'.

Despite its biological basis, disease itself may, in fact, be socially triggered and socially upheld, meaning that a biological state of health emerges from the basic organisation of an individual's life. For example, cholera (a disease) does not simply appear, but is rife in areas of poor sanitation, a feature common to many poverty-stricken environments, where no adequate provision has been made for the needs of the inhabitants. Therefore, contracting the disease of cholera is usually premised upon exposure to poverty and poor living conditions.

It may well be that people use biomedical doctors in order to treat what traditional societies regard as 'disease', whilst traditional healers tend to focus on the 'illness'. They thereby help to alleviate the psychological

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72 See, in particular, the wonderful writings of Susan Sontag *Illness as Metaphor* (1977) Penguin. Other works include Susan M DiGiacomo 'Metaphor as illness: postmodern dilemmas in the representations of body, mind and disorder' (1993) 16 *Medical Anthropology Quarterly* at 109ff; Meira Weiss 'Signifying the pandemics: metaphors of AIDS, cancer and heart disease' (1997) 11 *Medical Anthropology Quarterly* 456ff.

73 Deborah Lupton *Medicine as Culture: illness, disease and the body in western societies* 2ed (2003) Sage Publications.

74 Ibid.

stress of an ailment by providing a sensitive social and cultural 'moral vocabulary'[75] which people can use to answer the fundamental questions behind such pain, and to reduce it to a known and confronted entity. With the emphasis it places on moral attribution to ill-health, traditional healing seeks to make explicable the grand human questions that follow misfortune – 'Why me?', 'Why do I deserve to suffer?'[76] Failing that, the comfort derived from simple caring, person-to-person sharing and understanding, undoubtedly assists patients in bringing themselves to confront, accept and ultimately overcome ill-fortune and sickness. More, however, is done by traditional healing than merely providing understanding and comfort.

One of the real successes of biomedicine has been its ability to resolve complicated matters – cancer, heart problems, lung defects, kidney ailments, and so on. However, these problems are less common than the simple ailments that affect and blight the lives of most people – colds and flu, tuberculosis, skin rashes, and so on. So, for millennia hardy people were able to survive with traditional medicine, because, through trial and error, it worked, and kept them healthy till the age when more serious problems came along – and then they died, because traditional medicine had reached its ceiling of efficacy. Biomedicine then entered the fray, and was able to extend life expectancy though dealing with the more complicated problems.

Today, traditional healing is demonstrably effective in many simpler matters, which has ensured its survival. Many traditional remedies have, upon confirmation of their efficacy, been patented and transformed into biomedical drugs, indicating that the active ingredients present in the traditional remedies did have genuine health value.[77] Even when they did not, the well-documented placebo effect of thinking oneself to health probably plays a large part in the success of traditional healing, for, despite the best efforts of biomedical doctors, the human mind remains a

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75 Tebbe (n10) at 197.

76 Edward E Evans-Pritchard *Witchcraft, Magic and Oracles Among the Azande* (1976) Clarendon Press 1.

77 The examples are too numerous to deal with fully. Consider, however, the recent trials and use of *Sutherlandia Frutescens* to assist people living with HIV, and the employment of *Hoodia Gordonii* in weight-loss programmes. Both are plants indigenous to Southern Africa, which have been in use for centuries, and are now being marketed, with biomedical approval, in both the biomedical and complementary and alternative health sectors. See Sjobhan M Harnett, Vaughan Oosthuizen & Maryna van de Venter 'Anti-HIV activities of organic and aqueous extracts of Sutherlandia frutescens and Lobostemon trigonus' (2005) 96 *Journal of Ethnopharmacology* at 113ff.

mysterious and ill-understood frontier, ensuring a continuing desire and need for traditional healing.[78]

The political adoption of traditional healing

With resort to traditional healing commonplace throughout South Africa – and such healing being of some efficacy – it came as no surprise that it was taken off the list of banned activities in the early years of democratic South Africa. Even so, traditional healers were not to be left to continue with their practices. Because of disparities in access to the formal health care system, efforts were implemented to put their art in the public realm.

Apartheid-era health care profoundly affected both people's access to health care and the quality of that care. Recognising these glaring inequalities, the post-1994 government was understandably anxious to improve access to available resources. Adequate primary health care interventions, those at the point of first contact between a patient and a health care worker, were adopted as the principal means by which this policy would be achieved. However, an effectively functioning primary care system would require a substantial increase in the number of available health care workers. Traditional healers, given their numbers and wide dispersal throughout the country, were an obvious source. Yet, quite how traditional healers and biomedical health care workers were to interact with each other remained a point of confusion – and contention.

With their eminent status in their home communities, traditional healers were unprepared to function as entry-level primary health care workers, whose sole task was to supervise patients on behalf of the biomedical system. Equally, there was suspicion from many practitioners in the biomedical realm, who saw traditional healers as remnants of the distant past, unskilled in diagnosis and readily prescribing remedies for which there was no scientifically ascertained basis.

At this juncture, one which probably called for some tact, an unfortunately abrasive figure in the form of the then-Minister of Health, the late Dr Manto Tshabalala-Msimang, supported by the then-President, Thabo Mbeki, appeared. A certain nationalist rhetoric came forth from the

78 This is well documented. For some of the early writings on the matter, consider Henry K Beecher 'Experimental pharmacology and measurement of the subjective response' (1952) 116 *Science* at 157ff and Henry K Beecher 'The powerful placebo' (1955) 159 *Journal of the American Medical Association* at 1602ff. For more up-to-date writing, see Toke S Barfod 'Placebos in medicine: placebo use is well known, placebo effect is not' (2005) 330 *British Medical Journal* at 45ff and Michael E Hyland 'Using the placebo response in clinical practice' (2003) 3 *Clinical Medicine* at 347ff.

Minister, portraying traditional healing as an element of the President's hoped-for 'African Renaissance'. Traditional healing had now found a powerful sponsor.

This, of course, occurred in the context of South Africa having the largest number of HIV-positive people in the world. Hence, state sponsorship included the Minister's promotion of so-called 'traditional remedies', as well as garlic, lemon juice and vitamins as alternatives, not adjuncts to, anti-retroviral drug treatment. The pitting of the parallel philosophies of health, traditional and biomedical, against one another generated an almost intractable conflict.

Almost intractable, but not entirely so, for the positioning, by its so-called patrons, of traditional healing against biomedicine was largely a disfiguring of the truth. As the field studies show, patients employ the two systems in tandem. Hence, once the days of staged antipathy passed, there was no apparent gravitation by patients in directions any different to those they had followed before.

Similarly, despite the raging storm at the time of drafting, the text of the Traditional Health Practitioners Act 22 of 2007, perhaps unexpectedly, does not confuse the purposes and principles of traditional healing and biomedicine. Instead, it deftly keeps the two apart. The Act proceeds from the premise, naturally, that the defining feature of traditional healing is that it is based upon 'traditional philosophy', which the Act defines as meaning the

> *... indigenous African techniques, principles, theories, ideologies, beliefs, opinions and customs and uses of traditional medicines communicated from ancestors to descendants or from generation to generation, with or without written documentation, whether supported by science or not, and which are generally used in traditional health practice.*[79]

As is apparent, the absence of scientific demonstrations of efficacy is expressly indicated as being irrelevant to traditional healing.[80]

The essence of the Act is, first, to protect the public from abuse by charlatans and ignorant healers,[81] and, secondly, to promote good health care practice among healers,[82]consistent with universally accepted health care norms and standards.[83] It authorises the creation of a council,[84] with

79 Section 1 of the Traditional Health Practitioners Act 22 of 2007.
80 Section 1.
81 Preamble.
82 Preamble.
83 Section 5(*h*).
84 Section 4(1).

whom all traditional healers, whether currently or aspiring to practise for gain, must register.[85] Registration is contingent upon their ability to demonstrate, *inter alia*, an ability to heal.[86] Such qualifications may be prescribed by the Minister of Health to be obtained via examinations conducted by an accredited healer.[87]

The necessary qualifications to become a healer have, at the time of writing, yet to be made public. Furthermore, questions of how it would be determined who was a valid and capable traditional healer, have not been resolved, nor how such adjudications would be supported. These questions point in many fascinating directions, particularly since they appear to draw traditional healers closer to biomedical practitioners in the manner by which they are assessed, and further from the original source of their power in the ancestors.

Important for the purpose of this article, however, is that an approach appears to have been taken in the Act that advocates parallel systems of health care: traditional and biomedicine.[88] The two philosophies are allowed to co-exist, but they do not have a formal, institutional overlap, and only become entwined by the peculiar health care seeking practices of the individual patient. Although the details of this endeavour have yet to be worked out, it seems to be the most sensible solution, based on observations of people's health care seeking practices.

Moreover, with the change of government of and sponsors of traditional healing, the antipathy between traditional healers and biomedical practitioners appears to have passed. Since those days the new Health Ministers and Presidents have paid little attention to traditional healers; they have been occupied by more pressing problems. And yet, the circumstances

85 Sections 5 and 6.

86 Section 21 (2) (*b*) (iii).

87 Section 22 (1).

88 Where the opposing philosophies and methods of biomedicine and traditional healing have both been brought into the popular consciousness, they have frequently been married into state health care systems. A variety of methods has been used. States, such as China and Vietnam, relying on the particular characteristics of the indigenous forms of traditional healing, managed to construct a blended conception of medicine, demonstrating both practices to be mutually supportive. A number of African countries, on the other hand, such as Tanzania and Ghana, preferred, in practice, to keep the two philosophies separate but complementary. Many developed nations have tended to adopt alternative medical practices, which were not indigenous to their own territories. These have usually been allowed to flourish, albeit under the strict watch of biomedicine. See World Health Organisation *Legal Status of Traditional and Complimentary Medicine: A Worldwide Review* (2001) Geneva.

that brought traditional healing to the fore are still present: the widespread use, in private, of traditional remedies.

Conclusion

Traditional health care is one example of many issues arising in South Africa's pluralistic society. For too long, the 'knowledges' that are traditional healing and biomedicine have been manipulated into competitively negotiating authority and power away from each other. Certainly, on the face of it, biomedicine and traditional healing are, institutionally, rival philosophies premised on fundamentally competitive notions of what knowledge *is*, each claiming its own grounding to be the ultimate truth, and each attempting to displace the other for legitimacy.

And yet, they need not.

The effect of the Traditional Health Practitioners Act 22 of 2007 is to bring what was once a manifestly private affair – belief and trust in a traditional philosophy – into the incontrovertibly wider domain of the biomedicine-dominated public health care system. In this meeting, it is apparent that traditional healing and biomedicine do not, in fact, talk past one another. They meet and mingle. Perhaps not as institutions, but certainly as sources of comfort to a person afflicted by the pain and doubt of an ailment.

In the private lives of many, traditional healing offers hope and comfort. Hence, a law recognising this dualism is to be welcomed. Indeed, the real contribution of traditional healing to both society and the individual is the respect that it fosters for personal autonomy and the culture of millions. Whilst so doing, traditional healing assists in giving intricate meaning to life. And so, prejudice against benevolent knowledge is prejudice unfounded.

CHAPTER 10

Towards Harmony Between African Traditional Religion and Environmental Law

Loretta Feris & Charles Moitui

Introduction

This chapter examines African traditional religion (ATR) in southern Africa to establish the manner and extent to which certain of its values might be integrated into modern environmental law.[1] The word 'nature' (or 'the environment') as used in this chapter refers to all forms of creation, including human beings, animals, plants and their habitation. Nature in ATR, however, would include the spiritual world.

All religions have their own views on God (or the gods), nature and the relationship of human beings with the two. While ATR is no exception, there is a dearth of information concerning the relationship between ATR and the environment.

The environmental crisis that threatens humanity – by reason, inter alia, of desertification, pollution, climate change and loss of or threat to biodiversity – became a matter of international concern in the early 1970s. This was long after traditional African socio-economic, political and cultural systems (all of which are embedded in ATR) had been disrupted and seriously damaged by colonisation, modernisation and related factors.

Efforts to address the current global environmental crisis are, in essence, being driven if not dictated by varying scientific criteria. However, the

1 By religion we mean a propitiation or conciliation of powers superior to man which direct and control the course of nature and human life: Modiri S Molema *The Bantu: past and present* (1920) W Green and Co Ltd 176.

success of most international environmental law instruments[2] depends upon, among other things, international co-operation and the willingness of states to implement appropriate legislative and administrative measures at a domestic level in compliance with their customary international law and treaty obligations. This necessarily implies that states are obliged to adopt holistic approaches to minimising, controlling or alleviating harm to the environment.

It is the need for a holistic approach to environmental protection that has made this study of ATR compelling, especially in view of the calls for world religions to contribute to ongoing global efforts to make the environment more sustainable.[3] ATR has a competitive advantage due to its inherently holistic approach to the relationship between human beings and nature. This approach exists without the support of any scientific or technological expertise,[4] and is based on an oral and fundamentally moral order that is written in the hearts of the African people. Underlying African thinking is a belief that there is a Supreme Being who created the earth and all the species in it, including human beings.

Because ATR permeates all aspects of its adherents' lives, it is difficult to separate the people and their religion in the conduct of their daily affairs. The traditional societies of southern Africa – ranging from the Xhosa in the south to the Sotho, Karanga and Chewa in the north – have a rich cultural heritage, which is manifested in ATR. Nearly all of the (remarkably

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2 These include the United Nations Framework Convention on Climate Change (with its Kyoto Protocol), adopted 1992 and entered into force on 21 March 1994, and the Convention on Biological Diversity (with its Cartagena Protocol), adopted in 1992 and entered into force on 29 December 1993. In relation to the former, member states were unable to reach a binding agreement on future reductions on greenhouse gases in the atmosphere at the 2009 15th Conference of the Parties (COP) at Copenhagen largely due to socio-economic, political and other considerations as defined by many of the developed nations.

3 Mary Evelyn Tucker & John Grim 'Series forward' in John Grim (ed) *Indigenous Traditions and Ecology* (2001) Harvard University Press at xxvii. In 1986 for instance, representatives of five of the world's major religions – Christianity, Buddhism, Islam, Hinduism and Judaism – met in Italy under the auspices of the World Wide Fund for Nature (WWF). Here they issued the Assisi Declaration that sought to remind humanity about the sacredness of nature, a factor that should significantly inform attempts to address the current environmental crisis, because of the belief that an 'ecogolden age' existed at some time when people respected nature on account of their religious cultural traditions. See Emma Tomalin *Biodivinity and Biodiversity: the limits of religious environmentalism* (2009) Ashgate 1 and 5.

4 Gerhardus C Oosthuizen 'The place of traditional religion in contemporary South Africa' in Jacob Olupona et al (eds) *African Traditional Religion in Contemporary Society* (1991) Paragon House Publishers 35 at 37.

uniform) beliefs, practices and rituals tied up in this heritage[5] exhibit a respect for nature. Although primarily intended to protect the community, this system has beneficial effects on the environment.

This chapter starts out by explaining the philosophical relationship between ATR and the environment. It then sets out the inherent, yet sometimes indirect, ways in which nature conservation is present in certain aspects of ATR. Focusing on one such aspect, traditional healing, it details the conflict that may arise between state efforts to regulate the environment and traditional belief. The chapter concludes by commenting on the possibility of a harmonious coexistence between ATR and environmental law.

African traditional religion and the environment

We must appreciate that when we talk about ATR, we are in fact referring to a host of different religions which vary from country to country, region to region, and group to group. There is, therefore, no one ATR, but rather a range of beliefs and practices that are classified as ATR, some of which may share certain elements, or at least contain shared elements. ATR has thus been described as:

> *a religion that includes (1) foundational religious beliefs, such as belief in impersonal mystical powers, belief in spirit beings, belief in a Supreme Being (God), special shrines or worship places designated to the Supreme Being, and a hierarchy of spiritual beings; (2) foundational religious practices, such as establishing links and relationships with cosmic and spiritual and mystical powers, practices relating to rituals and ceremonies, practices relating to spiritual and mystical communication, and practices relating to traditional African specialists; (3) philosophical foundations in traditional worldview, such as the law of harmony, the law of the spirit, the law of power, and the law of kinship; and (4) the belief in spirit beings, such as God, lesser divinities, ordinary spirits, and the ancestors.*[6]

Traditional African ontology views the earth as sacred because it is the home to all creation. Some religions, however, see the earth as an entity with a soul.[7] Hence, the minerals in the earth, the rivers, mountains and oceans are all sacred objects which the spirits use to communicate their will

5 Martin West *Abantu: an introduction to the black people of South Africa* (1976) Struik Publishers 10.

6 Julius Gathogo 'The challenge and reconstructive impact of African religion in South Africa today' (2008) 43 *Journal of Ecumenical Studies* at 577.

7 Thomas Douglas *African traditional religion in the modern world* (2005) Mcfarland and Company 155.

on one's life.[8] The traditional African thus looks to God and nature from the perspective of his or her relationship with the two.[9] Given this outlook on the world, it is possible to argue that the current global environmental crisis, which threatens not only human civilisation but all life on earth, is fundamentally a moral and religious problem.[10] It is moral because human beings are the only species that have the intelligence and power to determine and choose between right and wrong, whether in their lives or in relation to the environment. It is religious mainly because the faithful (of ATR and many other religions) widely believe that God created the heavens and the earth, together with all the species in it, implying that the species are to live in harmony.

If a religion – ATR in particular – is in harmony with the creative spiritual energies of the times, its myths, symbols and rituals have the power to touch the heart and awaken the faith.[11] It follows that the beliefs and all the other aspects of ATR that are relevant to protection of the environment constitute a fundamental spiritual resource that may be harnessed to address environmental problems. Our search should therefore be for ways to integrate this resource into the domestic legal regime.

It thus seems that some or all elements of ATR may be linked to the environment. Kiernan argues, for example, that a religious system exhibits a number of basic features, one of which is a rootedness in nature and the use of nature for religious symbols, which are impressed with social and mystical meanings.[12] Mbiti, too, when referring to elements shared by different African religions, claims that all of them have an anthropocentric worldview,[13] ie, one in which everything is seen in terms of its relation to humans.[14] (The cosmos, for instance, is classified into five parts, ie, God, spirits, man, animals and non-biological life.)[15] Nature therefore plays a role in many aspects of ATR, whether in its rituals, ceremonies and festivals, or

8 Ibid.
9 Ibid.
10 Stephen C Rockefeller 'Faith and community in an ecological age' in Stephen C Rockefeller & John Elder (eds) *Spirit and Nature* (1992) Beacon Press 141.
11 Rockefeller (n10) at 3.
12 Jim Kiernan 'African traditional religions in South Africa' in Martin Prozesky & John de Gruchy (eds) *Living Faiths in South Africa* (1995) St Martin's Press 15 at 15–17.
13 John S Mbiti *African Religions and Philosophy* (1969) Heinemann 15–16.
14 Mbiti (n13) at 16.
15 Ibid.

in shrines and sacred places, religious objects, art, symbols, myths[16] and legends,[17] or in beliefs, customs and practices.

Healing and healers are found in almost every African society and village.[18] Because major illnesses and troubles are both regarded (and treated) as religious experiences,[19] healers are an important feature of ATR. Traditionally, they relied on the use of plants and animal products to fulfil their calling, and, as a result, worked closely with the environment.

In recent years, however, South Africa has enacted legislation to protect biodiversity and biodiverse areas, which has set the course for what has now become a relationship of conflict between traditional healers and environmental law. But, as is outlined below, this conflict is not necessarily a barrier to reconciliation. We can achieve this goal by identifying certain beliefs and practices inherent in ATR that have the effect of conserving the environment.

African traditional religion and protection of the environment

In 1854 Chief Seattle of Washington, while resisting the introduction of Christianity to his jurisdiction, acknowledged that the new religion was written upon tablets of stone by the iron finger of God.[20] At the same time, however, he said that his people's traditional religion was that of their ancestors, and was written in their hearts.[21] Likewise ATR is not written in books or other materials, but is found in the hearts of the people, and is thus embedded in the culture of most African people.

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16 Myths are often closely related to nature. For instance, the Mpondo, Southern Sotho and Tswana believe that their original ancestors emerged from a particular rock at Lowe, near Mochudi, leaving their footprints in the rock at the beginning of the world: David Chidester *Religions of South Africa* (1992) Routledge 6.

17 One Zulu legend, for example, explores the creation of the earth and the extinction of biodiversity. It is said that: 'The kinds of animals we see today, in all kinds though, are but a remnant of the million children of the Tree of Life that were born in the morning of the world, because Efa, the Spirit of Extinction, has done its wicked work. (Legend tells us of three kinds of lion, of which only one, the one we see and fear today, survived).' Vusamazulu Credo Mutwa in Stephen Larsen (ed) *Zulu Shaman: dreams, prophecies and mysteries* (2003) Destiny Books at 39.

18 John S Mbiti *An Introduction to African Religion* (1975) Heinemann 150.

19 Mbiti (n18) at 152.

20 The assertion was with reference to the message God gave Moses in the Bible (*Exodus* 31:18): 'When the Lord finished speaking with Moses on Mount Sinai, he gave him two stone tablets inscribed with the terms of the covenant written by the finger of God.'

21 'Chief Seattle's 1854 Oration'. Available at http://www.halcyon.com/arbrhts/chiefsea.html (accessed 31 March 2010).

In southern Africa, for example, a person is believed to be born into ATR. That individual becomes part of the clan, and, through the family cycle, will receive primary religious education, as will his or her children, thereby making them all religious practitioners under supervision.[22] These teachings enable the youth to learn by heart the moral order of ATR, and by so doing, they grow up knowing that ATR is an essential part of their lives. For instance, among most African people, the ATR moral order defines the relationship of the individual, the clan and the tribe with one another as well as defining the politics, ethics, law, war, status, social amenities, festivals, and whatever is good or bad.[23]

The ATR moral order is manifested in the beliefs and practices of the people. Such an order not only regulates the conduct of the people but also enables them to recognise and respect the special relationship they have with the environment and other species. It identifies the limitations and expectations of this relationship by providing a moral 'code' of avoidances, prohibitions and injunctions, and providing a system of ritual remedies in cases of breach.[24] The order further enables the people to assess what is right and wrong within the context of how one person's conduct affects the lives of others.[25] It is these ATR beliefs and practices – as manifested in lifestyle, worship and the rites constituting part of everyday life – that are of fundamental importance in assessing the manner and extent to which Africans view their environment.

Allegiance to the Supreme Being, respect for the ancestors (who provide a link between the living and the dead), performance of rituals (including those relating to agriculture), reverence for certain animals, rivers and places (such as mountains, forests and caves), show the extent to which ATR values the environment.[26] In order to understand this fully, we must first identify, from a general point of view, the guiding principles that require conduct which indirectly results in protection of the environment.

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22 Mndende Nokuzola *African Traditional Religion* (1999) Icamagu Institute 1.

23 William Charles Willoughby *The Soul of the Bantu* (1928) Student Christian Movement.

24 Kiernan (n12) at 15.

25 Nokuzola (n22) at 9.

26 It is, however, important to note that other rituals and conduct are inherently destructive of the environment. For example, animal sacrifices or killing animals using methods that are painful violates what the Western world may regard as animal rights.

Guiding principles

Allegiance to beliefs and practices

Allegiance to their beliefs concerning God and the ancestors is a significant principle guiding the conduct of believers in an ATR. In addition to any other considerations, such allegiance results from fear of the consequences of disobedience, not only for the individual but also for the community as a whole. As Soga argues, fear was often effective, yet it was always at hand to act as a convincing interpreter.[27]

In most of the communities in southern Africa, calamities such as drought, diseases and other misfortunes are directly attributable to conduct that was offensive to the ancestors and the gods both of whom were agents of or worked in partnership with the Supreme God. Most, if not all, ethnic groups of southern Africa recognise the existence of God as the creator of the universe and of all the species in it.[28] Worship of God, especially through sacrifices for appeasement of the ancestors and the obligation not to disobey the established moral order, dictates that sacred things (including mountains, caves and certain animals) are to be respected.

Commitment to rituals

Rituals are defined as 'prescribed formal behaviour for occasions not given over to technical routine, having reference to beliefs in mystical beings or powers'.[29] For purposes of protection of the environment, commitment to the performance of rituals is significant. Rituals serve the important function of reviving the relationship between the living and the ancestors – a relationship that creates a link between the physical world and the world after death.[30] Among the Zulu, for example, rituals are regarded as an entrance to and means of maintaining the relationship they have with the four powers of life: the God of the sky, the ancestors, medicine and evil.[31] To take another example, among the Karanga group of the Shona people in Zimbabwe, *shavi* spirits are blamed for illnesses and disease, as they are believed to attack whenever the living violate taboos, thereby failing to comply with their social obligations.[32]

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27 John Henderson Soga *The Ama-xosa* (1931) Lovedale Press 202.

28 West (n5) at 44.

29 Harold Buetow *Religion in Personal Development* (1991) Peter Lang Publishers 261 (quoting Victor Turner *The Forest of Symbols: aspects of Ndembu ritual* (1967) Cornell University Press).

30 Nokuzola (n22) at 8.

31 Thomas Lawson *The Religions of Africa* (1984) Harper and Row Publishers 24–29.

32 Tabona Shoko *Karanga Indigenous Religion in Zimbabwe* (2007) Ashgate 47.

The people see ritual observance as a means of safeguarding their basic needs and the relations that make up their social order: land, cattle, rain, bodily health, the family, the clan and the state.[33] Together with sacred symbols, rituals constitute the 'cornerstone' of ATR, because they are considered to be material points of contact with what is holy, as well as the principal means whereby people can express their experiences of the world.[34] For example, in some cases, the Tonga of Zambia would visit the Malende shrine, speak with the earth priest and carry out rituals intended to prevent imminent disaster.[35] This is a rudimentary application of the modern day environmental law principle of prevention that seeks to prevent known risks. In this and other ways, rituals become a crucial tool of conservation.[36]

Respect for nature

The African people view the universe as part of themselves, and they endeavour to live at peace with it.[37] In cases where there is no biological life in an object, a mystical life may be attributed to it as a means for creating a stronger relationship with the world.[38] As a result humans are not seen as the masters in the universe but, rather, as the centre, the friend, the beneficiary and the user.[39] This relationship requires people to live in harmony with their environment, and to obey the natural, moral and the mystical order: behaviour to the contrary would result in their suffering harm.[40]

What is more, respect for nature has its roots in creation,[41] which is why some peoples – the Shona, for instance – view animals and plants as things with a living soul; they require permission before they may be disturbed.[42] This view of the universe must, of course, be understood within the overall

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33 Edward Geoffrey Parrinder *African Traditional Religion* 3 ed (1962) Sheldon Press 27.

34 Douglas (n7) at 158.

35 Elizabeth Colson *Tonga Religious Life in the Twentieth Century* (2006) Bookworld Publishers 44.

36 Richard Stoffle et al 'Landscape, nature, and culture: A diachronic model of human-nature adaptations' in Helaine Selin (ed) *Nature Across Cultures* (2003) Kluwer Academic Publishers 97 at 98.

37 Mbiti (n18) at 39.

38 Ibid.

39 Ibid.

40 Ibid.

41 Douglas (n7) at 110.

42 Nisbert Taringa 'How environmental is African traditional religion' (2006) 191–214 at 201. Available at http://enviro.lclark.edu/resources/Eastafrica/. (accessed 8 April 2010).

framework of a holistic life as determined by the creator and his agents – the ancestors and spirits.

Unity of purpose

African religions have a sense of unity, co-operation and commitment of purpose in serving their God and also in ensuring that each person's conduct does not offend the community at large. Likewise, efforts at environmental protection and management require co-operation at national level. The co-operative spirit that already exists for the purposes of obeying God and for the good of the community is a good model for environmental protection.

ATR modes of protecting the environment

As has been shown above, ATR is woven throughout all institutions in society. It is a symbolic expression of human life that defines people and their universe, accounting for human behaviour and for other relevant acts which have sustained the human species.[43] As such, protection of the environment is not an explicit goal of ATR, but forms part of a holistic way of living in southern Africa, as in areas of West, East and Central Africa.

Conservation seems to have been an unintended, yet desirable, consequence of adherence to the moral order of ATR. Thus, the attributes of ATR that are associated with protection of the environment are derived from various beliefs (as manifested in practices, rituals and myths),[44] all of which involve sacred places, animals, plants, rivers and so forth. In turn, the reverence for these places and things shows how various aspects of the environment are protected, albeit unintentionally.

Protected areas

Invariably the ATRs of southern Africa designate certain mountains, hills, forested areas, caves, kraals and other places (including, in some communities, the homestead) as sacred. Gods are believed to live in some of these shrines; spirits are believed to reside in many of them, and these spirits provide links with the people's ancestors and their god.

Communities subscribing to belief in the *Mwari*,[45] including the Shona, Venda, Khurutshe, Nyali and Ndebele, have shrines in many places, notably

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43 Buetow (n29) at 260.

44 Myths are defined as 'interlocking stories, usually traditional, of ostensibly historical events, which serve to unfold part of the world view of a people or to explain practices, beliefs, or natural phenomena' – see Buetow (n 29) at 260.

45 This is a regional cult found among various communities in Botswana, Zimbabwe, South Africa and even Tanzania. For a detailed study see Parrinder (n33).

the Njelele shrine in a cave in a hill in Matabeleland (a south-western province of Zimbabwe).[46] Among the Bakalanga, *Mwali* (their term for the Shona *Mwari*) is regarded as a high god and an ultimate authority.[47] The cult is, in essence, concerned with appeasing *Mwali* for rain and fertility; hence every year a rain festival or ceremony is held which many people attend.[48] The shrine is therefore set aside as a place for worship and offering sacrifices, as well as a place where the spirit mediums may seek guidance from the oracle on issues concerning their duties to the community.

In KwaZulu-Natal, in South Africa, villages are sited on gently contoured hills, which are religious spaces where important ATR rituals periodically take place.[49] The beauty of these hills, in the eyes of ATR adherents, seems to derive not only from their natural condition but also because they are sacred grounds.

Among the Swazi in Swaziland, it is in sacred places known as *tindzawo letihloniphegikile* that formal rituals, private or public, are performed.[50] Kabayethe, for instance, is a national shrine where the king and queen mother speak to the national ancestors on behalf of the nation. The shrine is sacred, and to preserve its 'purity' people must remove their shoes when entering; similarly, a menstruating woman and a man who has not cleansed himself after intercourse may not enter.[51] In addition, there are sacred caves in the Mbilanenei, Dlangeni, Mkokotfwa and Mdzimba mountains where members of the royal family are buried. These mountains are of paramount religious significance because, during such crises as drought or epidemic disease, the king visits the mountains to intercede with the ancestors on behalf of the nation. These sacred places are guarded by selected families.[52]

Once designated as a sacred place, the mountain, shrine, cave or river is not only revered but also given special protection, which has the effect of preserving and sustaining the natural environment. This outcome does not seem to be a conscious objective of ATR but rather an unintended consequence.

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46 Leslie Nthoi *Contesting Sacred Places* (2006) Africa World Press xii.
47 Nthoi (n46) at 16.
48 Nthoi (n46) at 115.
49 Lawson (n31) at 17–19.
50 Peter Kasenene *Swazi Traditional Religion and Society* (1993) Websters Publishers 38.
51 Kasenene (n50) at 41.
52 Kasenene (n50) at 42.

Conservation of biodiversity

Traditional African ontology seeks to establish and maintain a balance between human and non-human entities to the extent that certain animals and plants are viewed as sacred.[53] Thus it is taboo to kill such creatures or cut certain trees – all of which are believed to be endowed with a life force comparable with that of humans.[54] Forest preservation, in particular, is central to the conservation of nature.[55] In fact, the Jele people conserve forests because they believe it is only that which comes out of the forest that is clean. Hence, hunting is the responsibility of everyone in the community, including women and children.[56] (Unfortunately they do not seem to appreciate that excessive hunting leads to depletion of the hunted species.)

The Nguni group – comprising the Xhosa, Zulu, Swazi and Ndebele speakers of South Africa – felt proud to be surrounded by 'unmolesting and unmolested' animals that included domestic and wild animals. Man did not want to kill them nor did they want to kill man – an environment of peace and harmony.[57] The people were also aware that, if the earth remained untouched by harrow and unwounded by ploughshares, it would bear all kinds of fruit in plenty,[58] especially when they realised that new grains, squashes and fruits, which were hitherto regarded as poisonous, were in fact healthy human food.[59] It is therefore not surprising that the Nguni were keen observers of nature, with immense knowledge of their national lands and the products of these areas. As a result, they had a name for each species, and an intimate acquaintance with its habits, its uses and its dangers.[60]

In Zimbabwe the *mafukidzanyika* (clothing the land), an earth-healing ritual that was started by those who survived the *chimurenga* (the bush war liberation struggle), is performed when trees are planted to recover land that has been lost ecologically.[61] During the ritual, songs are sung, some of which portray trees as entities that share characteristics of humans. One such song addresses a tree as follows:

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53 Kasenene (n50) at 155.
54 Douglas (n34) at 155.
55 Asonye Uba-Mgbemena & TO Okusaga *African Traditional Religion and Ecology* (1995) Nigerian Conservation Foundation and WWF International 8.
56 Theo Sundemeier *The Individual and the Community in African Traditional Religion* (1998) Hamburg 93.
57 Molema (n1) at 174.
58 Molema (n1) at 43.
59 Molema (n1) at 174.
60 Willoughby (n23) at 5.
61 Marthinus L Daneel *African Earthkeepers* Vol 1(1998) Unisa Press 1.

You tree, you are a thing
which was not seen [appreciated] before
we look at you
like a man looking at his girlfriend
you are an important thing
You tree, you are a woman
We eat of your fruit
We carry firewood from your womb
We take planks for our houses
Shame on us for felling saplings
For our houses.[62]

This song conveys two important messages relevant to our discussion: recognition of the importance of trees in the life of human beings and an apology to the 'soul' in the tree for the loss and damage suffered on account of trespass by humans. The apology signifies the equal right of the plant to life. People are, therefore, not allowed to cut down trees and plants in sacred forested areas and groves.[63]

The Amerindians of Guyana (some of whom originated from Ghana, and were taken as slaves to the Caribbean, bringing with them their ATRs) regarded trees as sacred to the extent that, before they cut any tree, they first 'spoke' to the 'being' within it so that it could give them permission to cut.[64] This meant that trees were regarded as species with a right to live, a right which was safeguarded by the gods. By recognising the right of other species to live, the Amerindians had – and possibly still have – a sense of responsibility for protection of the environment.

There are also many animals that ATR regards as sacred. These include lions, crocodiles, certain snakes (such as the python) and birds (such as the eagle and the hawk), all of which are given special protection out of fear of their relationship with the spirits. The Swazi, for instance, have an ancestral snake that is small and green, and whenever it comes to a homestead, people treat it with care and respect.[65] Similarly, the San in South Africa believe in a supernatural being called Kaggen who, in seeking to maintain a balance between man and nature, put restrictions on the hunting of the eland and the hartebeest – his favourites.[66]

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62 Daneel (n61) at 160.
63 Uba-Mgbemena & Okusaga (n55) at 45.
64 This information was obtained from Ms Amina, a consultant story teller of the Story Telling Foundation of Jamaica during an informal oral conversation at the University of Cape Town on 20 March 2010.
65 Kasenene (n50) at 51.
66 Willoughby (n23) at 17.

Pollution control

Rivers, oceans, ponds and other water sources are important in ATR. Apart from providing water for everyday use, they provide a living environment for animals such as the crocodile and hippopotamus (which many communities in southern Africa believe are sacred). In addition, spirits are believed to live in certain rivers. As a result there are sanctions, notably prohibitions on defecating or urinating in streams, and bans on fishing in sacred ponds,[67] which are designed to ensure that these water sources are not polluted.

Land and agriculture

Land is regarded by most communities as sacred and is thus personified. The Shona, for example, consider land to be the back (*musana*) on which nature and human beings were carried. It therefore has the attributes of a human being, such as being angry (*pasi ratsamwa*) or wanting to kill (*pasi panodya*).[68] The Karanga regard their land as a special gift from the ancestors, and therefore believe that all crops, animals and trees come from the ancestors (who in a sense own the land).[69]

Thus the ATR rituals that are carried out by almost all the communities of Africa 'before the planting of crops and after harvest' are intended to ensure the land and its agents, the ancestors, are at peace with humanity. These rituals are intended to ask the ancestors to bless the people with bountiful crops and to thank them for bumper harvests. The people believe that the ancestors can decide whether to bless the soil, and thereby determine whether the crop or harvest will be good.

A relationship of conflict: Traditional healers and environmental law

It is clear from the above discussion that ATR and the environment is a broad topic that cannot exhaustively be covered in this chapter. Yet it is necessary to examine at least one of its core elements, traditional healing. This practice remains decisive in defining people's lives, but has become controversial in certain aspects of South African environmental law.

Chidester explains that ATR can be described as the power relations that operate in three spheres – the homestead, the polity and the disciplines of scared specialists.[70] First, relationships within the homestead are centred

67 Uba-Mgbemena & Okusaga (n55) at 44.
68 Taringa (n42) at 35.
69 Lawson (n31) at 35.
70 David Chidester et al *African Traditional Religion in South Africa* (2003) Greenwood Press 12.

on ritual relationships that are established between persons, not only among the living but also among the living and the ancestors. Second, while ancestral ritual is anchored in the home,[71] it also has a role in the sphere of the polity, where it is directed towards reinforcing the political authority of kings, chiefs and other traditional leaders.[72]

Third, sacred specialists – diviners, healers and other specialised practitioners – operate in a sphere of religious power that is independent of either the home or polity, but is available to both:

> *[T]raditional healing rests upon a religious frame of reference, and the* igqira *believes that he or she is 'called' by God to his or her vocation … the social role of the* igqira *in a traditional society is equivalent to the sum of three modern specialisations: priest, medical practitioner, and psychologist.*[73]

Traditional practitioners tend to believe that behind all ailments there is some purposeful human, ancestral or divine *agency* at work. Thus, if the proximate cause of a fever is pronounced by the doctor to be a tick bite the patient will want to know, 'but who sent the tick?'[74]

These sacred specialists are, therefore, an important dimension of African traditional religion. A general distinction is often made between herbalists, who are adept in the use of medicines, and so-called diviners, who, in addition to using medicines, are expert in various techniques for gaining spiritual knowledge and power over illness, misfortune or evil.[75] The herbalists' or healers' pharmacopeia is primarily derived from specific plant or animal species, which are used as a basis for the practice of what has become generally known as 'traditional medicine'.

Mbiti suggests that 'medicine' in an African context has a much wider meaning than in Western terms and can be used for many purposes.[76] This ranges from curing the physical conditions of illness to countering the forces of evil. It also includes the curing of the mental and religious causes of illness, bringing good fortune and protecting persons and property from all forms of harm.[77] Mbiti argues that, when used in these various

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71 Ibid.

72 Here there is also a connection to the natural environment, and Chidester points out that the political leader, can preside over rituals of fertility, rainmaking and warfare that strengthen the people and the land. (n70 at 13).

73 Ken Dovey & Ray Mjingwana 'Psychology, religion and healing: The "Amagqira" in traditional Xhosa society' (1985) 64 *Theoria* 77 at 81.

74 M K Ingle 'An appraisal of the African traditional healing system' (2007) 5 *Journal for New Generation Sciences* 30 at 34.

75 Chidester (n70) at 17.

76 Mbiti (n18) at 170.

77 Mbiti (n18) at 171.

ways, medicine generates confidence and a sense of security, and thus makes the world a more comfortable place in which to exist.[78] Traditional medicine therefore plays an important part in health care delivery in Africa. Approximately 70 per cent of people consult traditional healers before they use Western medicine.[79]

After decades-long condemnation of the work of traditional healers, Western medical professionals are gradually acknowledging the therapeutic potential of their work, but the grounds for this reluctant acceptance were limited to its medical and psychological dimensions, with only passing recognition of its social, spiritual or ritual benefits.[80] Thus the World Health Organisation (WHO),[81] while acknowledging that it is difficult to assign one particular definition to the broad range of characteristics and elements of traditional medicine, concludes that traditional medicines:

> *[Include] diverse health practices, approaches, knowledge and beliefs incorporating plant, animal and/or mineral based medicines, spiritual therapies, manual techniques and exercises applied singularly or in combination to maintain well-being, as well as to treat, diagnose or prevent illness.*

From this definition it can be seen that traditional healers treat illness mainly with plant and some animal products. In addition, they may use spiritual resources to augment the healing process. It is, however, in the use of animal and plant products that the potential for conflict can and does arise.

It is not clear exactly how many traditional healers operate in South Africa at present. Some commentators estimate the numbers at between 150 000 to 250 000.[82] There are approximately 22 000 registered with the Traditional Healers Organization, an accredited training service provider for traditional healers.[83] Healers, as stated above, rely primarily on plant and animal products. As the body of the patient is natural, it is believed that natural products will bring the body into equilibrium again to cure the

78 Mbiti (n18) at 174.

79 Neltjie C van Wyk 'Similarities in the meta-paradigm of nursing and traditional healing: An attempt to contribute to the integration of traditional medicine and western medicine in Africa' (2005) 10 *Health SA Gesondheid* 14 at 15.

80 Chidester (n70) at 21.

81 The Traditional Health Practitioners Act 22 of 2007 was passed in 2007, but, at the date of writing, had not come into force. It defines herbalists as those who engage in traditional health practice through the use of traditional medicine, but it does not define traditional medicine with a specific reference to its contents.

82 David M Cumes *Africa in My Bones: A Surgeon's Odyssey into the Spirit World of African Healing* (2004) Spearhead vi. See 183 fn 4 above.

83 Available at http://www.tradtionalhealth.org.za (accessed 24 March 2010).

patient.[84] It is estimated that approximately 27 million South Africans use traditional medicine in one form or another, either because pharmaceutical drugs are too expensive or traditional methods are considered more appropriate.[85]

As a result of the large numbers of traditional healers and users relying on natural products, the demand for animal and plant products for traditional cultural uses is extensive – and is increasing. Accordingly, there exists a rapidly expanding commercial trade in plants and animal parts for traditional medicine; the value of the trade in indigenous plant species alone in South Africa is estimated at R496 million per year, with a further R2,5 billion in value added as prescriptions.[86] Approximately 20 000 tons of plant material are sold each year.[87] Research further indicates that approximately 200 animal species and 550 plant species are traded for traditional medicine in KwaZulu-Natal.[88]

Clearly this trade may ultimately pose a threat to biodiversity, as the major threats to successful conservation of biodiversity are commonly considered to be loss of habitat and direct exploitation of animal and plant species.[89]

Table 1: Popular and threatened species traded as traditional medicine[90]

African Rock Python
Black Mamba
Black Rhino
Bushbabies (Thick Tailed, Lesser)
Cape Grysbok
Dwarf Chameleons (several species)
Giant Golden Mole

84 Van Wyk (n79) at 17.

85 Myles Mander *Marketing of Indigenous Medicinal Plants in South Africa: A Case Study in KwaZulu-Natal* (1998) Food and Agriculture Organization. Available at http://www.fao.org/docrep/W9195E/W9195E00.htm (accessed 23 March 2010).

86 Ibid.

87 Ibid.

88 Ibid.

89 Jeffrey Mcneely et al 'Human influences on biodiversity' in Vernon H Heywood & Robert T Watson (eds) *Global Biodiversity Assessment* (1995) Cambridge University Press 55–56.

90 Steve McKean & Myles Mander *Survey of the trade in vultures for the traditional health industry in South Africa* (2007) Futureworks 26. On file with the authors.

Girdle Tailed Lizards (several species)
Hyaena (Spotted and Brown)
Monitor Lizards (Nile, Land)
Nile Crocodile
Southern Ground Hornbill
Vultures (Cape Griffon, White-backed, Lappet-faced, White-headed)

In a 1998 study among Xhosa traditional healers, it was found that 31 percent of the vertebrates used in their practices were listed in South African Red Data books,[91] which means that their conservation status at the time was already a matter of concern.[92] More recently, a survey was conducted of the trade in vultures for the traditional health industry in South Africa.[93] It showed that a number of species are under severe pressure: the White-backed vulture population in KwaZulu may disappear within 10 to 26 years, given the current harvesting, while the White-headed and Lappet-faced vultures are likely to disappear from this region in the next 5 to 10 years, unless management effort changes dramatically.[94] Conversations with several environmental management inspectors (EMIs), responsible for compliance and enforcement, as well as with Sanparks officials, reveal that the trade in natural species (for the traditional medicine market) is now causing a major threat to the country's biodiversity.[95]

Part of the challenge is that trade in natural species consists of a network that involves harvesters or collectors, who gather large numbers of specimens (most often illegally) and then sell these either directly to traditional healers or to traders, who in turn sell to traditional healers. Given that the harvesters operate illegally, it is difficult to effectively monitor the trade, and, as certain species are being over-harvested in

91 The IUCN (International Union for the Conservation of Nature and Natural Resources) maintains an international list, published as the *Red Data Book*. Red Data Book species are classified into different categories of perceived risk. Each Red Data Book usually deals with a specific group of animals or plants. See, generally, http://www.iucn.org (accessed 5 July 2010).

92 T S Simelane & G I H Kerley 'Conservation implications of the use of vertebrates by Xhosa traditional healers in South Africa' (1998) 4 *South African Journal of Wildlife Resources* at 121.

93 McKean & Mander (n90).

94 McKean & Mander (n90) at 12.

95 Telephone conversations and email correspondence between the authors and compliance and enforcement directorate members in the Eastern Cape, Free State, Gauteng and Western Cape (on file with the authors).

South Africa, collectors are now moving to neighbouring countries, such as Zimbabwe, Swaziland and Mozambique, where enforcement mechanisms are either lacking or non-existent. In the bigger cities, the traditional healers operate at so-called '*muthi* markets' or they have *muthi* shops. Species are often trafficked into Durban and Johannesburg where the biggest muthi markets are located.

This situation then begs the question: to what extent can environmental laws intervene to save biodiversity without impinging on a traditional practice that is closely connected to ATR?

Using the law to protect species used in traditional healing

South Africa is ranked as the third most biologically diverse country in the world.[96] This is a status worthy of protection, and in recent years South Africa has enacted several national Acts dealing with conservation of biodiversity, primarily, the National Environmental Management: Biodiversity Act (NEMBA).[97] While this Act operates nationally, a number of provinces have legislation dealing with nature conservation at a provincial level.

The NEMBA provides for the management and conservation of biodiversity, the protection of ecosystems and species that warrant national protection, the sustainable use of indigenous resources, and a fair and equitable sharing of benefits arising from bio-prospecting that involves indigenous biological resources. The Minister of Environmental Affairs has the power to list species that are threatened or in need of national protection.[98] The Act also makes provision for restricted activities involving listed, threatened or protected species. These activities, which are regulated by way of permits, include hunting, catching, capturing, killing, gathering, collecting, picking parts, importing, introducing from the sea, exporting, having in possession or physical control, growing, breeding, moving, transporting, translocating, selling and trading.

In May 2006, the Minister published the Threatened or Protected Species Regulations (TOPS regulations).[99] By implication, anyone who carries out a restricted activity that involves a listed species will have to apply for a permit from either the national or provincial Department of Environmental Affairs. In some instances, the issuing authority might

96 World Conservation Monitoring Centre *Development of a National Biodiversity Index* (1992) Unpublished.
97 Act 10 of 2004.
98 Section 56.
99 GNR152 of 23 February 2007.

require a risk assessment before a permit is issued. There is a ban on any harvesting or trading in some species – *Encephalartos* (the bread tree), for example.

Activities by traditional healers, such as harvesting or trading in listed plants or animals, are covered by these regulations. Healers thus now require permits that must indicate the species in their possession, the quantity, the period for which they can harvest and the location of the species. If individuals are trading without having collected the species, they also need to indicate how the species came into their possession. Thus, while the NEMBA and TOPS regulations allow traditional healers to continue harvesting and selling medicines that are based on natural products, they attempt to regulate these activities so that they do not undermine the long-term sustainability of biodiversity.

The TOPS regulations have enabled enforcement officials to take action in conjunction with the South African Police Services on muti markets and shops to check whether the traders have the necessary TOPS permits. These raids have led to a number of arrests and successful prosecutions.[100] At the same time, some EMIs believe that this enforcement action is also beginning to create a culture of compliance, as traditional healers are becoming aware that they are obliged to have permits and that government intends to ensure enforcement of the regulations.

On the other hand, the NEMBA now also provides legal protection for the traditional knowledge of traditional healers. It addresses concerns regarding biopiracy, ie, claims that indigenous and community knowledge, innovations and practices about the medicinal, cultural, cosmetic, domestic or other value and use of bioresources have been widely appropriated by pharmaceutical, biotechnological and agricultural industries. While the NEMBA does allow for bio-prospecting, ie, the research, development and application of indigenous biological resources for commercial and industrial exploitation,[101] one of the stated objectives of the Act is to provide for 'the fair and equitable sharing among stakeholders of benefits arising from bio-prospecting involving indigenous biological resources'.[102] It thus makes the granting of a permit to conduct bio-prospecting conditional on

100 In the Free State, one enforcement action lasting a year led to 30 arrests. The heaviest penalty was imprisonment of three years, without the option of a fine. Conversation with Andre Schlemmer, Chief Nature Conservator and EMI, Free State Province Department of Tourism, Environmental and Economic Affairs.

101 Section 1 of the NEMBA.

102 Section 2(*a*)(iii).

prior informed consent of the indigenous community whose traditional knowledge will contribute to or will be used for the bio-prospecting.[103]

Furthermore, the Act requires proof of a benefit-sharing agreement between the permit applicant and the indigenous community to provide for the sharing of any benefits that may be derived from the relevant bio-prospecting.[104] The Act also provides minimum standard terms for such an agreement, most importantly, the manner and extent to which the community will share in any profits or other benefits derived from commercialisation through bio-prospecting.[105] The issuing authority has the discretion not only to engage both parties on the terms and conditions of a benefit-sharing agreement but also to facilitate negotiations to ensure equity.[106]

This provision gives a certain measure of protection to traditional healers against biopiracy, as it addresses some of the concerns relating to agreements between knowledge holders and bio-prospectors that are not covered by the law of contract (which assumes relative equality in bargaining strength). Since most holders of traditional knowledge do not have the capacity to negotiate fair terms, in the absence of a regulatory system, they would be at the mercy of the bio-prospector's moral (and financial) authority and will to engage with traditional healing.

Finally, a further protection of traditional knowledge is included in the Patents Act,[107] which was amended in 2005. This provision requires the patent applicant to lodge a statement declaring whether the invention for which protection is claimed is based on or derived from traditional knowledge (ie, source disclosure), and whether the applicant has authority to use traditional knowledge for an invention that is based on or derived from traditional knowledge or use (ie, prior informed consent).[108] These source disclosure and prior informed consent requirements are to prevent improperly granted patents on traditional knowledge that is already in the public domain. Traditional knowledge holders would be able to oppose a patent application for an invention derived from traditional knowledge, and could petition for cancellation or revocation of an improperly granted patent.

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103 Sections 82(1)(*b*) and (3)(*a*). Details regarding the permit systems are set out in the Regulations on Bio-prospecting, Access and Benefit-sharing *Government Gazette* No 30739 of 8 February 2008.

104 Section 82(3)(*b*).

105 Section 83(1).

106 Sections 82(4)(*a*) & (*b*).

107 Act 57 of 1978.

108 Section 31 (3A) and (3B).

Alternative measures to protect species used in traditional healing

While enforcement action is clearly needed, especially to stem the poaching and illegal harvesting and trafficking in threatened and protected plant and animal species, enforcement officials have realised that other approaches are required. Most provinces have thus embarked on awareness workshops with traditional healers, in which the latter are taught about the need for sustainable harvesting, especially of those species that are under threat or have high biodiversity value.

In addition, traditional healers are encouraged to grow and cultivate the plants they use to ease the pressure on wild specimens and also to stem the market for trade in species harvested in the wild.[109] The Table Mountain National Park (TMNP), for example, has embarked on an initiative in consultation with leaders of the Traditional Healers' Association of the Western Cape. It has established a medicinal herb garden in the protected area that traditional healers may access. In addition, the TMNP holds workshops that involve healers in all aspects of preparing and tending to the garden, and doing practical infield training in topics such as soil stability, germination, propagation and sustainable harvesting.[110]

These alternative measures are designed to encourage traditional healers to appreciate the need for sustainable management of the species they use. At the same time, it shows that, by acknowledging the significance of traditional healing, the government recognises its important role in ATR.

Conclusion

The dilemma of how to address the environmental crisis on earth is a matter of concern for political leaders, environmentalists and other stakeholders globally. Loss of or threats to biodiversity, climate change, desertification and pollution are among the issues with which the international community is grappling. These threats are equally relevant to the Southern African region. Global initiatives are yet to provide an acceptable and lasting solution to the environmental crisis. This complicates the situation in the African continent, especially in Southern Africa, which enjoys some of the world's richest biodiversity. Recognition of ATR can contribute to the solution, at least for domestic purposes.

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109 Conversation with enforcement officials (n95). In Gauteng, traditional healers have raised the possibility of obtaining animal products from culled animals in protected areas or from animals that have died in zoos. This is currently being considered.

110 Table Mountain National Park. Available at http://www.sanparks.org/parks/table_mountain/conservation/research.php (accessed 6 July 2010).

The call for religious groups to assist this global initiative could not have come at a better time, in particular for ATR. ATR permeates and regulates the lives of millions of people. Yet, over the years, its values seem to have been distorted, misunderstood or altogether ignored and marginalised. This is due mainly to the introduction of unrestricted materialism, secularisation and industrialisation, forces that are attributable to the process of human civilisation.[111] These and other developments have encouraged a narrow view of ATR, which has restricted our understanding to matters of ancestors, rituals and magical beliefs. In as much as ATR is embedded in its adherents' beliefs, practices and rituals, we need to appreciate its holistic approach to life.

In Southern Africa, as in many other places in sub-Saharan Africa, ATR operates within a complex socio-economic structure with a clear objective: to ensure that people live in harmony with nature. Such harmony is achieved through respect for ancestors and commitment to rituals; these are guided by the need to ensure that a community conducts itself in a manner that will not offend nature.

ATR has many experts – whether diviners, traditional healers or those who know its moral order by heart – and those engaged in healing play a decisive role in South African primary health care. Merely using environmental law as a compliance and enforcement tool does not take sufficient cognisance of this practice, nor will it lead to the long-term sustainability of natural resources. An important first step lies in alternative measures, notably, education and raising awareness of the importance of the beliefs, practices and rituals of ATR.

While, in the modern world, it is neither desirable nor possible to live in accordance with the moral order of classical ATR, there is a compelling need to revisit and assess those aspects of ATR that can be integrated into existing and future environmental law regimes. Southern African states therefore have an excellent opportunity to harness the values of ATR. The longer they take, the fainter such values become in the memories of the people, and, because ATR derives from storytelling and other forms of oral narrative, its experts are no doubt decreasing in number. Promoting ATR may appear problematic, but having been part of the lives of the people, it provides criteria that might fill some of the gaps in environmental legislation and also enhance its legitimacy.

The medicinal aspects of ATR have been and still are valuable. Integration of herbal medicine into the medical curricula of some of the institutions of

111 Tucker & Grim (n3) at xxiv.

higher learning of South Africa, together with the establishment of clinics that specialise in herbal medicine, indicate that there are many ways in which ATR influences the lives of people today.

ATR, as with any other aspect of life, has weaknesses (some of which might contradict its alleged respect for nature), but space does not allow us to discuss them here. Nevertheless, it has certain attributes, significantly an allegiance to the community, which are relevant to protection of the environment. As a result, people are already aware that protection of the environment is beneficial to the whole community.

Although rituals play an important role in the practice of ATR, we do not need them in order to harness the values of the religion, since it is commitment to the community and unity of purpose that are relevant for our purposes. Protection of the environment is, in essence, a coincidental rather than a direct goal of ATR. Failure of the international community to find a lasting solution to the current environmental crisis (partly due to the complex nature of the crisis and unrelenting anthropogenic activities) has made it imperative to reassess the values of ATR.

CHAPTER 11

Ubuntu, the Ethics of Traditional Religion

Tom Bennett & James Patrick

[In] the long run the special contribution to the world by Africa will be in [the] field of human relationship. The great powers of the world may have done wonders in giving the world an industrial and military look, but the great gift still has to come from Africa – giving the world a more human face.[1]

The appearance of ubuntu in South African politics

Ubuntu lies at the heart of the African ethical system, and indeed African religion.[2] While this complex concept has parallels in Western philosophy, it is nevertheless distinctively African.[3] We will argue, however,

1 Steve Biko *I Write What I Like* (1978) Heinemann, cited by Dion Forster 'Identity in Relationship: The Ethics of Ubuntu as an Answer to the Impasse of Individual Consciousness' in Cornel W du Toit (ed) *The Impact of Knowledge Systems on Human Development in Africa* (2007) Research Institute for Religion and Theology (UNISA) at 245–246. See, too, Dion Forster *Self validating consciousness in strong artificial intelligence: an African theological contribution* (2006a) unpublished PhD dissertation UNISA, for an extensive and detailed discussion of ubuntu in chapters 5–6.

2 *Ubuntu* is the term used in Xhosa and Zulu; *botho* in Sotho; *bunhu* in Tsonga, and *vhuthu* in Venda. The word is found in many parts of Africa: Johann Broodryk *Ubuntu: Life Lessons from Africa* (2002) Ubuntu School of Philosophy 17 and De Tejada cited in Mogobe B Ramose *African Philosophy through Ubuntu* (2002) Mond Books 40–41. It appears as *nunhu* in Shona, *utu* in Swahili and *umundu* in Kikuyu. See M Nkonko Kamwangamalu 'Ubuntu in South Africa: a sociolinguistic perspective to a pan African concept' (1999) 13 *Critical Arts: A South-North Journal of Cultural & Media Studies* 25ff.

3 Cf Broodryk (n2) who argues that, although ubuntu and Western values may have similarities, the former is deeper and more intense. See, further, Ali A Mazrui *Africanity Redefined: Collected Essays of A A Mazrui* Vol 1 (2002) Africa World Press cited in Lovemore Mbigi & Jenny Maree *Ubuntu: the spirit of African transformation management* (2005) Knowres Publishing ix.

that ubuntu has much to offer the wider world, in particular contemporary South African society.

Although at root ubuntu remains a spiritual idea, lawyers, politicians and business managers have latterly appropriated it, perhaps most often – as it has been somewhat cynically said – to package decision-making in traditional African values.[4] The most dramatic example of the use of ubuntu was a clause in the 'postamble' to the interim Constitution of the Republic of South Africa Act 200 of 1993.[5] The country that had emerged from two centuries of colonialism and apartheid was deeply divided by race, class, culture and religion. In a frequently quoted metaphor, however, the new Constitution was to provide 'a historic bridge' between the past and the future.[6] The 'legacy of hatred, fear, guilt and revenge' was now to 'be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation'.[7]

These aspirations were given concrete form in an institution that was vital to ensuring South Africa's peaceful transition to democracy – the Truth and Reconciliation Commission (TRC)[8] – and ubuntu was one of its guiding principles.[9] When discussing the extraordinary success of the Commission, the Canadian philosopher John Ralston Saul concluded that there was 'no clear intellectual explanation'.[10] He conceded that a strong contributory factor was the Christian and humanist outlook of the chair, Archbishop Desmond Tutu, but he also drew attention to an additional element: the fact that the Archbishop had 'very consciously evoked pre-

4 Rosalind English 'Ubuntu: the quest for an indigenous jurisprudence' (1996) 12 *SAJHR* at 641.

5 Ubuntu also appeared in the preamble to the Promotion of National Unity and Reconciliation Act 34 of 1995.

6 Chapter 16 *National Unity and Reconciliation* in the interim Constitution of the Republic of South Africa Act 200 of 1993.

7 See, too, Sachs J in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 113.

8 Which was established by Chapter 2 of the Promotion of National Unity and Reconciliation Act 34 of 1995.

9 The official report on the TRC proceedings describes what ubuntu means and how it substantiates restorative justice: Truth and Reconciliation Commission of South Africa *Report* vol 1 (1998) Government Printer at 125–127. The *Report* (at 127) justifies this approach by heavy reliance upon the judgments of Langa and Mokgoro JJ in *S v Makwanyane* 1995 (3) SA 391 (CC).

10 John R Saul *On Equilibrium* (2001) Penguin 94.

European African concepts such as *Ubuntu*' to 'establish a personal and national sense of justice'.[11]

It is impossible to trace the exact origins of this concept, and Wilson, for one, claims that we need not bother to do so, 'since one of the main characteristics of nationalist ideology is to historicize and naturalize "cultural" signs as they are incorporated into the rhetorical repertoire of state discourse'.[12] True no doubt, but even so, the origin of a concept does much to explain its current associations, and, in this regard, the use of ubuntu prior to the TRC and interim Constitution is significant.

Ubuntu, and its equivalent terms in the different African vernaculars, has always been a word of everyday use. It seems to have been co-opted for the first time into a nation-wide public discourse in South Africa during the 1920s, when the Zulu cultural movement, Inkatha, made it a catch-word of its programme to resuscitate Zulu identity.[13] Ubuntu was invoked as an explicit marker of the virtues of African, and more specifically Zulu, culture.

King Solomon kaDinuzulu had founded the Inkatha organisation in 1922–23 with a view to resisting the radicalism of the trades union movement and British/Afrikaner domination.[14] In its early years, the organisation was controlled by *kholwa*, who, although converts to Christianity, were Zulu nationalists in favour of re-establishing the Zulu monarchy. Although Inkatha declined in significance during the 1930s, it was revived in 1975, by Dr Mangosuthu Buthelezi, who launched the Inkatha National Cultural Liberation Movement.[15] This was a national body aimed at liberating all black South Africans from apartheid rule.

While at first supportive of the ANC during its years of exile, Inkatha came to be a bastion of rural traditionalists. In 1981, the organisation formally converted itself into a political party, the Inkatha Freedom Party, with Buthelezi as its president. The value of African thought and philosophy

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11 Ibid. Archbishop Tutu is still a leading exponent of the principle of ubuntu. See, generally, Michael Battle *Reconciliation: The Ubuntu Theology of Desmond Tutu* (1997) Pilgrim Press and Richard A Wilson *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-apartheid State* (2001) CUP 9.

12 Wilson (n11) at 13. After tracing the popularisation of ubuntu by organs of state, he concludes that it was 'the Africanist wrapping used to sell a reconciliatory version of human rights talk to black South Africans'.

13 See Mfuniselwa J Bhengu *Ubuntu: the essence of democracy* (1996) Novalis Press at 10.

14 See, generally, on Inkatha, N Cope 'To Bind the Nation' in Gerhard Maré & Georgina Hamilton (eds) *An Appetite for Power: Buthelezi's Inkatha and South Africa* (1987) Ravan Press ch 4.

15 This organisation emerged at the same time as the Black Consciousness Movement to fill the vacuum in black politics caused by the banning of the ANC and PAC.

continued to be central to the IFP's manifesto,[16] and, in this regard, ubuntu-botho was a key concept. Thus the party, and, by association, ubuntu came to be seen as a system of patriarchal 'family values', and, as such, closely linked to Zulu ethnicity.

Ubuntu and its relationship with law

In spite of the IFP's appropriation of ubuntu, the connotations of the term began to shift during the latter half of the 1990s. Because of its inclusion in the interim Constitution, ubuntu was refashioned as a legal principle by the newly founded Constitutional Court. In the Court's first case, a *cause célèbre* on the death penalty, ubuntu was referred to as one of the reasons for abolishing capital punishment.[17] Thereafter, the term played a less prominent role in the Court's judgments,[18] but it continues to occupy the attention of a fast-growing academic commentary. This body of work is aimed at investigating the place of African values in South Africa's new 'rainbow jurisprudence',[19] more especially the role of ubuntu in building a human rights culture.[20]

While ubuntu has gained a wide currency in legal circles, it is clear that the concept is not only about law. Law has sanctions, and the threat of sanctions would be opposed to the fundamental character of ubuntu, which is about 'caring, compassion, unity, tolerance … empathy … [and] compromise'.[21] On this point, the spirit of law and the spirit of ubuntu

16 See Bhengu (n13) at 10. Thus, the IFP's 2009 National Manifesto declares that: 'The IFP exists as a political party to serve the people of South Africa, and to do so in the spirit of ubuntu/botho. … We recognise ubuntu/botho as the foundation of all human interaction.'

17 *S v Makwanyane* (n9).

18 *AZAPO v President of the RSA* 1996 (4) SA 671 (CC), *Bhe v Magistrate, Khayelitsha; Shibi v Sithole* 2005 (1) SA 580 (CC), *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) and *Barkhuizen v Napier* 2007 (5) SA 323 (CC). A significant judgment is *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), where Mokgoro and Sachs JJ linked the principles of reconciliation and restorative justice to ubuntu (at paras 68–70 and 112–121).

19 Alfred Cockrell 'Rainbow jurisprudence' (1996) 12 *SAJHR* 1ff.

20 A project launched by Mokgoro J in *S v Makwanyane* 1995 (n9) at para 307. See, further, Irma J Kroeze 'Doing things with values: the role of constitutional values in constitutional interpretation' (2001) 12 *Stell LR* 265 at 265–266, Marius Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SA Public Law* 155ff, Drucilla Cornell 'A call for a nuanced constitutional jurisprudence: ubuntu, dignity, and reconciliation' (2004) 19 *SA Public Law* 661 at 666 and Pieter D de Kock & Johan M T Labuschagne 'Ubuntu as a conceptual directive in realising a culture of effective human rights' (1999) 62 *THRHR* at 114.

21 Nomonde Masina 'Xhosa practices of *ubuntu* for South Africa' in William Zartman *Traditional Cures for Modern Conflicts* (2000) Lynne Rienner 169 at 170.

are plainly antithetical. Sanctions are necessary to constitute law, but, according to Masina, whatever sanction is attached to ubuntu is rarely invoked, because 'family and societal bonds [are] solidly communicated', and breaches of the ubuntu principle are thereby pre-empted.[22] In this view, there is hardly any need for legal regulation.

Ubuntu reveals its non-legal nature in another sense: it emphasises responsibility rather than right. African and western views on the individual, as opposed to the group, diverge, because, in Africa, the family is the focus of social concern, and loyalty to this unit is a cardinal value.[23] As a result, personal and individual interests tend to be submerged in the common weal,[24] and responsibilities become more important than individual rights.[25] Such thinking is evident in the African Charter on Human and People's Rights (1982), which, unlike other bills of rights,[26] rejects the conception of a person 'who is utterly free and utterly irresponsible and opposed to society'.[27]

As members, one of another, people are expected to be mutually caring and concerned, in other words, responsible for one another. Even this idea, however, has been too much thought of in a forensic way, as answerability to

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22 Masina (n21).

23 By contrast, in Western thinking, each person is an isolated entity, protected by rights opposable against the group: Jack Donnelly 'Human rights and human dignity: an analytical critique of non-western conceptions of human rights' (1982) 76 *American Political Science Review* 303 at 311. Hence, as Richard N Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *Am J of Int L* 80 at 82 says, the human rights lawyer sees 'individuals as locked in a constant struggle against society for the redemption of their rights'.

24 Chris Mojekwu 'International Human Rights: the African perspective' in Jack L Nelson & Vera M Green *International Human Rights: Contemporary Issues* (1980) Human Rights Publishing Group 86–87. Emphasis on the group is not seen as threatening, however, because the group provides the individual with support and sustenance: Makau W Mutua 'The Banjul Charter and the African cultural fingerprint: an evaluation of the language of duties' (1995) 35 *Virginia J Int L* 338 at 352 and 360.

25 Donnelly (n23) at 306 and Keba M'Baye '*Human rights* in Africa' in Karal Vasak (ed) *The International Dimensions of Human Rights* (1982) Greenwood Press at 588–589. Thus Langa J in *S v Makwanyane* (n9) at para 224 remarks that '[m]ore importantly, [ubuntu] regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all'.

26 Cf Article 29 of the Universal Declaration of Human Rights, which introduced the idea of including duties in a human rights document.

27 President Senghor's 1979 address to a Meeting of Experts for the preparation of a draft African Charter (cited in Mutua (n24) at 368). Chapter 2 is devoted to the duties owed by the individual to the family, the community and the nation at large.

laws and rules or as accountability.[28] Such legalism is not part of ubuntu. At its heart – and it is a case of 'the heart' – lies response to people's calls and needs in each concrete situation.[29] Responsibility is essentially relational, and not only as between persons, but also mutually between people and society. If 'each one of us is at every moment responsible for making up our togetherness',[30] equally the social whole is responsible for who we are becoming.

In yet another sense, ubuntu is opposed to law: it requires that the individual has not only a responsibility towards others, but also an obligation to do more than the minimum expected. It obliges us to 'go the extra mile'. As Nelson Mandela put it:

> *A traveller through a country would stop at a village and he didn't have to ask for food or for water. Once he stops, the people give him food, entertain him. That is one aspect of Ubuntu but it will have various aspects. Ubuntu does not mean that people should not address themselves. The question therefore is: Are you going to do so in order to enable the community around you to be able to improve?*[31]

Ubuntu is thus *creative* of 'generosity and unselfishness – even to the point of self-sacrifice'[32] – which are thus shown to be realistic qualities, not 'illusory or neurotic'.

Such an approach to life has its parallel in the 'situation ethics' of Joseph Fletcher,[33] a movement of the 1960s and 1970s within the broader field of Christian ethics, which stressed the normative ideal of love in the sense of New Testament *agape*.[34] Like ubuntu, love is an emotive term; it induces feelings of content; there is about it a softening glow; it ingenuously

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28 Joseph Fletcher *Moral Responsibility* (1967) Westminster Press at 234 cites Herbert L A Hart who 'always insisted that responsibility means blameworthiness' and is a matter of 'imputability and culpability – a matter of assessing guilt, related to vincibility and invincibility in a "forum of conscience" where response to law …. is required of the agent'.

29 Fletcher (n28).

30 Drucilla Cornell *The Relevance to Political Theory of the Ubuntu Project* (2008) (unpublished paper in possession of authors) 8.

31 Nelson Mandela, speaking in an interview incorporated in a promotional video for the Ubuntu Linux distribution. Available at http://www.youtube.com/watch?v=ODQ4WiDsEBQ (accessed on 7 May 2010).

32 Augustine Shutte *Ubuntu: an ethic for a new South Africa* (2001) Cluster Publications at 53.

33 Joseph Fletcher *Situation Ethics* (1966) Westminster Press.

34 In summary, Fletcher aimed to develop a method of ethics in which love is always good and the only norm. His approach is both personalistic, focusing on people and what is good for them, and contextual, that is to say (broadly), circumstances alter cases.

disarms any opposition and effectively stops any critical reflection. Love, it is commonly believed, is enough in itself; it is 'the greatest thing' in the Christian faith, and therefore central to Christian ethics.[35] In all such respects, the idea of love functions in Christianity in the same way as ubuntu in Africa,[36] as both an end and a means (and a comparison could therefore be illuminating).

If ubuntu is 'an ethical modality of being together',[37] an interactive ethic, then the manner in which it is expressed will depend on the circumstances. It cannot be captured by any set of rules; it cannot be codified or legislated for. Ubuntu is not legalistic, and, as such, it 'resists the dictate of Western logic and argumentation'.[38] But neither is it antinomian, like the existentialist ethics of Jean-Paul Sartre and Simone de Beauvoir, for whom there could be no 'connective tissue between one situation or moment of experience and another … no fabric or web of life, hence no basis for generalizing moral principles'.[39]

Ubuntu represents a third way: it is situationist. How it is shown in practice varies with the context. The one constant, sole standard, is ubuntu itself. As self-realisation, it is the *summum bonum* of Aristotelian ethics, 'the greatest happiness of the greatest number' of utilitarianism, and the *agape*-istic love of Joseph Fletcher's Christian ethics. In the same way, ubuntu is the goal and norm of the African ethical tradition.

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35 Love may be the last word – but it is a 'swampy' word, a 'semantic confusion': Fletcher (n33) at 15. See, too, Archbishop Desmond Tutu *No Future without Forgiveness* (1999) Doubleday 31: 'A person with Ubuntu is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed.'

36 Such an interpretation of ubuntu has penetrated even the law. See Mahomed J in *S v Makwanyane* (n9) at para 263, who said that ubuntu expressed 'the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women'.

37 Cornell (n30) at 12.

38 Kgalushi Drake Koka *Sage philosophy: The Significance of Ubuntu Philosophy in Post-colonial Africa* (1996) (unpublished paper) Pretoria: Ubuntu School of Philosophy, cited in Mfuniselwa J Bhengu *Ubuntu: The Global Philosophy for Humankind* (2006) Lotsha Publications 46. Indeed, feeling and intuition, rather than rationality, underlie traditional African thought: Abiola Irele 'Francophone African philosophy' in Pieter H Coetzee & Abraham P J Roux (eds) *The African Philosophy Reader: a text with readings (2003) Routledge* at 46.

39 Fletcher (n33) at 25 and Mogobe B Ramose *African Philosophy through Ubuntu* (1999) Mond 83.

The manner in which Fletcher relates *agape* to right-mindedness could also work for ubuntu. In his arguments,[40] ubuntu is easily substituted for *agape*. Three conceptual questions are at stake.

First, is ubuntu emotional, a matter of feelings, whereas justice is volitional, a matter of will or determination? This question, however, appears to be a false opposition. Ubuntu is not sentimental, but rather sensitive to the situation. Its purpose is to satisfy the neighbour's need, not one's own; it is a disposition of the will, and its ethic is attitudinal not emotional. In the same way, justice is 'conative, volitional, decision-oriented, purposive, dispositive'[41] – as is ubuntu. So, ubuntu and right-mindedness are not different, one a matter of feeling and the other a matter of willing. They are the same.

Second, are we to regard ubuntu as personal and interpersonal, and justice as impersonal and objective (even to the extent of being blindfolded)? The answer, again, must be no. Ubuntu is not limited to people with whom we are in direct personal relations. Because it embraces more people than we know, it too operates impersonally and disinterestedly, though it never reduces people to things. It regulates behaviour and provides a standard of judgment, against which failures and infractions may be gauged. Ubuntu is a pervasive all-controlling norm, to which the deliverances of law progressively give body and substance. Both require the exercise of the moral imagination.

Third, are we to think of ubuntu as particular and specific, and of justice as general and dispersed? (As William Blake famously observed, 'He who would do good to another must do it in minute particulars; general good is the plea of the scoundrel, the hypocrite, and flatterer'.)[42] Again, no. One individual is involved in the other, for each has the same problem: distribution. If justice is giving to each person, as a person, what is that individual's due, so likewise is ubuntu. Neither shows favouritism or partiality. But how are our dues to be calculated or balanced among potentially unlimited claimants? Because we exist in community, both justice and ubuntu alike are compelled to be calculating and distributive. If ubuntu is the soul of justice, justice is ubuntu balancing interests and claims and sorting its mix. The relationship between them is that of co-inherence.

In sum, ubuntu and justice are equally volitional, at once personal and impersonal, both particular and general. What may be said properly of one applies to the other.

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40 Fletcher (n28) ch 4.
41 Fletcher (n28) at 49.
42 William Blake *Jerusalem* (1815) 'Chapter 3' (plate 55 l. 60).

The foundation of ubuntu: Religion

It has become a cliché in the writings about traditional African belief systems to say that they admit of no distinction between the spiritual and the physical.[43] While this holistic thinking has no doubt been exaggerated,[44] it nevertheless acts as a useful foil to Western thought, which features a marked dualism between the sacred and the secular.

In the African conception of the universe, an individual's relationship to the cosmos and to others is shot through with a distinctive life force (*ntu*).[45] God,[46] or the Creator, as the centre and source of all life, can be regarded as the source of this force.[47] To take a specific example, the Pondo people of the Eastern Cape[48] acknowledge the existence of this supreme being, and term it[49] *uThixo* or, more to the point for current purposes, *uDali* (the

43 See John S Mbiti *Introduction to African Religion* (1991) Heinemann at 29–30, who said that religion determined all aspects of African life. Cf Yusufu Turaki *Tribal Gods of Africa: ethnicity, racism, tribalism, and the Gospel of Christ* (1997) Crossroads Media Services at 54.

44 See, for example, Olusegun Oladipo 'Religion in African culture: some conceptual issues' in Kwasi Wiredu (ed) *A Companion to African Philosophy* (2004) Blackwell 355–356 commenting on John S Mbiti *African Religions and Philosophy* (1969) Heinemann 2. As Oladipo says (at 358), much of what has been attributed to African belief systems is 'a counter-discourse which tried to show that Africans were not irreligious and immoral as some Europeans were wont to suppose'.

45 Shutte (n32) at 22.

46 Missionary influences, and the need to identify indigenous beliefs with the Christian message, found 'God' a ready basis for vernacular terms denoting a supreme being. See, for instance, John H Soga *The Ama-Xosa: life and customs* (1932) Lovedale Press 133.

47 Shutte (n32) at 22.

48 Pondo belief has been chosen here because it is well documented by Monica H Wilson *Reaction to Conquest: effects of contact with Europeans on the Pondo of South Africa* 2ed (1961) OUP and Fr Heinz Kuckertz 'Symbol and authority in Mpondo ancestor religion: Parts 1 and 2' (1983/84) 42 & 43 *African Studies* at 113 & 1 and *Creating Order: the image of the homestead in Mpondo social life* (1990) Wits UP. An excellent bibliography of traditional religion among the closely related Xhosa-speaking groups can be found in David Chidester et al *African Traditional Religion in South Africa: an annotated bibliography* (1997) Greenwood Press ch 4.

49 The supreme being has no linguistic gender, since the prefix *-u-* in Xhosa denotes either male or female. Any masculine attributes of the being could well have been acquired through the influence of Christianity.

creator).[50] *uDali*, however, is what might be called a *deus otiosus*, since it is too remote from everyday life to be concerned with the immediate welfare of individuals.[51] Hence, the living do not call upon it to intervene in their lives, nor do they have special rituals dedicated to its worship.[52]

More important in everyday life are the ancestors,[53] with a strong force of their own, and, apart from them, are living humans, with a somewhat weaker force. Then, beyond humans, are animals and inanimate objects, which have the least amount of force.[54] Hence it becomes apparent that all living people and all things, together with the spirits, are linked together in an enduring relationship, the unifying life force of which is *ntu*.[55] This unity of being is evident in the fact that the African conception of a person knows of no strict separation between the corporeal and the spiritual. If 'the physical and metaphysical are aspects of reality', the transition from the living to the spirit becomes as natural as life itself.[56]

When people die and become ancestors (*amathongo*), their force increases. What is more, as they age, their life force increases as they move closer to the point of becoming spirit. Because it is believed that individuals can cultivate this force over time,[57] it follows that not everyone will qualify as

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50 Or even *uMenzi* (maker). The idea of the creator survives in a widely held myth that the supreme being broke off nations from reed beds. See Frank Brownlee (ed) *The Transkeian Native Territories: historical records* (1923) Maskew Miller at 116 for the Mpondomise. Hunter (n48) at 269, on the other hand, said that there was 'no proof that the Pondo before contact with Europeans believed in the existence of any Supreme Being, or beings, other than the *amathongo* (ancestor spirits) …. [T]here is no system of rites or complex of beliefs connected with these words.' See, generally, Janet Hodgson *The God of the Xhosa* (1982) OUP.

51 Although some peoples in South Africa accord the supreme being power to determine the workings of nature, especially rain, drought and flood, it plays no particular role in everyday affairs. See William D Hammond-Tooke 'World view I: a system of beliefs' in William D Hammond-Tooke (ed) *The Bantu-speaking Peoples of Southern Africa* 2ed (1974) Routledge & Kegan Paul at 320–321.

52 See Hammond-Tooke (n51) at 319.

53 Belief in the power of the ancestors to intervene in the affairs of the living obviously entails acceptance of a form of life after death, together with a notion of spirit or 'soul' (*ithongo* or *umphefumlo* [lit. breath]): Hunter (n48) at 232.

54 Shutte (n32) at 22.

55 Bhengu (n13) at 2. The notion of *moya* can also be used in this context. One of its translations is 'life' or 'breath'. See below at n102.

56 Richard C Onwuanibe 'The human person and immortality in Ibo (African) metaphysics' in Richard A Wright (ed) *African Philosophy: an introduction* (1984) University Press of America at 184, cited by Ramose (n39) at 81. More important, is the idea that personhood develops as individuals undergo the rituals prescribed by their culture, notably, of course, birth and initiation. As John S Mbiti *Introduction to African Religion* (1975) Heinemann at 93 remarks, 'personhood is, therefore, acquired and not merely established by virtue of the fact of being human'.

57 Shutte (n32) at 25–26.

an ancestor.[58] Ideally, ancestors should be people of great age, who, during their lifetimes, acquired a rich experience of life, and complied with the precepts of ubuntu.[59] The one destined to become an ancestor should also have died in a manner that conformed to the rules of society: 'death by "ill reputed" disease (such as leprosy) or by accident (especially if provoked by lightning) means exclusion from the society of the ancestors.'[60]

It is evident, then, that death is not the end of existence, but rather a change of status. There is no hiatus between living human and spirit.[61] Nonetheless, death is necessary for the emergence of the *ithongo*, and the change of status is marked by appropriate rituals. As soon as someone dies,[62] his or her immediate kin, widows in particular, are expected to go into mourning, the purpose of which is to suspend the everyday routine and segregate the grieving survivors from the community, so that they have time to adjust to their loss and cleanse themselves of the spiritual dangers associated with death.[63]

Mourning generally lasts for about a year, or from one planting season to the next.[64] Thereafter, the family gathers to celebrate the rites of *ukubuyisa* [lit. a 'calling back' ceremony], when the spirit of the deceased is summoned back to preside over the settlement of its worldly affairs and the final ceremony of being laid to rest. Thereafter the spirit is free to join all the other ancestors who constitute the agnatic clan. Some of this host will

58 The spiritual destiny of children and young persons, in particular, is vague: Hunter (n48) at 231.

59 An individual's fate as an ancestor is not necessarily determined by gender: Ogbu U Kalu 'Ancestral spirituality and society in Africa' in Jacob K Olupona (ed) *African Spirituality: Forms, Meanings and Expressions* (2000) Crossroad Publishing at 57.

60 Dominique Zahan 'Some reflections on African spirituality' in Olupona (n59) at 11.

61 Hunter (n48) at 232. See, too, Zahan (n60) at 10.

62 The more elevated a deceased's status, the more elaborate the burial and the longer the period of mourning. Senior males and women fall into this category. The death of young women, children and the unmarried can be dealt with in more or less perfunctory ways.

63 On burial and mourning rituals, Eileen J Krige *The Social System of the Zulus* (1936) Longmans Green 159ff notes that they function not only as rites of passage for the living but also for the deceased, who now begins a journey to the realm of the ancestors.

64 Doo Aphane et al 'Widow: Status or Description?' in Welshman Ncube & Julie Stewart (eds) *Widowhood, Inheritance Laws, Customs and Practices in Southern Africa* (1995) Women and Law in Southern Africa Research Trust at 39.

continue to communicate with the living, but, after several generations, the ancestors cease to be remembered by name. They are then lost to memory.[65]

For the Pondo, and for all who adhere to traditional African religion, there is no concept of original sin and redemption through divine intervention. Instead, believers take 'upon themselves their own redemption by appropriate spiritual techniques'.[66] In this respect, venerating the elderly and the ancestors is a central feature of the system.[67] Because the spirit world is detached from the contradictions and tensions that beset the living, the ancestors are ideally placed to act as immutable sources of wisdom, security and authority. They still take an active interest in the daily life of the living, and their presence is most strongly felt when they visit blessings on good behaviour or retribution on those who stray.[68]

The living maintain their relationship with this spirit world by the regular performance of prescribed rituals.[69] Rituals, in fact, lie at the heart of ancestor veneration, and they become especially necessary for celebrating the major rites of passage – birth, initiation, marriage and death – each occasion demanding a fresh performance according to predetermined rules.[70] The presence of the ancestors is also invoked whenever individuals wish to give thanks for escaping from death or ill fortune. Thus the Pondo belief system – like other traditional African systems – is characterised by 'right action, not right belief – orthopraxis rather than orthodoxy'.[71]

All these intercessions, celebrations and rites of passage are marked by a gathering of the family, and if need be neighbours, to witness the ritual killing of a cow, chicken or goat and the sharing of a common meal. The proceedings are led by the family head who, because of his notionally unbroken ties of blood, represents the most direct channel of communication

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65 See Kuckertz (n48) 263ff for a careful analysis of the terms used to denote the ancestors, each connoting a certain social and spiritual distance from the living: *abadala* [the seniors, lit. those who are old], *abaphantsi* [those who are buried, lit. down below], *amatyala* [those who find fault], *amawethu* [those of us] and *amathongo* [the spirits].

66 Zahan (n60) at 3–4.

67 Shutte (n32) at 25–26.

68 See, generally, Hammond-Tooke (n51) ch 10.

69 See, generally, Aylward Shorter 'African Christian Theology' in John R Hinnells (ed) *A Handbook of Living Religions* (1991) reprint Penguin at 434 and Victor W Turner *The Ritual Process* (1969) University of Chicago Press ch 1 on the Ndembu of Zambia.

70 Various beliefs determine the nature of the rituals, in particular the selection and method for slaughtering certain types of animal. For example, the bellowing of a cow is believed to summon the ancestors. See Hunter (n48) 240ff.

71 Werner F Menski *Comparative Law in a Global Context: the legal systems of Asia and Africa* 2ed (2006) CUP 414 and 415.

with the family's forebears.[72] In this way, the ancestors are kept in constant touch with the day-to-day affairs of the family.

In many respects, the ancestral spirits acted as guardians of the social order.[73] Few pre-colonial African societies had the trappings of centralised statehood, with the result that they had no institutions dedicated to the enforcement of rules and regulations. Instead, the ancestors were on hand with the power to sanction bad behaviour; and their good deeds set a standard of good conduct.[74] The term 'ubuntu' sums up the ethical system expected by the ancestors, with the implication that ubuntu is a spiritual concept.[75]

Oladipo argues that indigenous African beliefs are, in essence, humanistic – and thus the ideal 'spiritual' qualities are no more than what is expected of a person of good character[76] – but the moral and the spiritual are nevertheless emphasised rather than the legal.[77] Hence, while the maxim 'I am a person through people', may, to the Western mind, have no apparent spiritual significance, it means that the individual is to become an ancestor only by behaving with humanity.[78] It follows, then, that those who uphold the principle of ubuntu throughout their lives will, in death, achieve a unity with those departed, and thereby become worthy of veneration.[79]

The emphasis on communion with the ancestors and celebration of the appropriate rituals coincides with three essential elements of ubuntu: increase or diminution of being, unity of life and participation.

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72 See Shorter in Hinnels (n69) at 431, and, for another example, Isaac Schapera *A Handbook of Tswana Law and Custom* 2ed (1955) OUP at 61–62.

73 Chukwuemeka Ebo 'Indigenous law and justice' in Gordon R Woodman & Akintunde O Obilade (eds) *African Law and Legal Theory* (1995) Dartmouth Publishing 39.

74 Kofi A Opoku *West African Religion* (1978) FEP International 39, cited by Ogbu U Kalu 'Ancestral spirituality' in Olupona (n59) at 55.

75 Broodryk (n2) at 139, Turaki (n43) at 54 and Daniel J Louw 'Ubuntu: an African assessment of the religious other' (1998) Paper delivered at Twentieth World Congress of Philosophy. Available at http://www.bu.edu/wcp/Papers/AfriLouw.htm (accessed on 6 May 2010).

76 Thinking which he says results from the imposition of Christian beliefs: Oladipo in Wiredu (n44) at 360. See, too, Samuel O Imbo 'Okot p'Bitek's critique of Western scholarship on African religion' in Wiredu (n44) 364ff, who calls John Mbiti Africa's chief 'intellectual smuggler', ie, the surreptitious importer of Western concepts (at 370).

77 Bhengu (n38) at 101 and 90.

78 Benezet Bujo *Foundations of an African Ethic* (2000) Herder & Herder 5, too, distinguishes between mere communitarian ethics and ubuntu. He also notes that African thought is not limited to the tangible environment, since the community encompasses those who came before, those still to come and those currently in existence. He acknowledges, however, that the ethnic group we are born into forms the basis of all further relations.

79 Louw (n75).

First, with regard to the increase or diminution of being, Shutte says that: 'To the extent that I identify with this common humanity I develop my own humanity, my own identity, and I enter into the hearts and minds of others.'[80] Humanity in this sense is something 'unlimited and all-inclusive and can be shared in by all without being divided or diminished'.[81] By contrast, forces of diminution include violence, wickedness and sorcery (which constitutes a social or spiritual injury).[82]

Second, the unity of life suggests that, whenever the individual chooses to assert the life force (*ntu*), the act will be, as Mulago writes, 'favourable to the blossoming of life, capable of conserving and protecting life, of making it flower and increasing the vital potential of the community'. Such good acts may be contrasted with evil deeds. The latter are prejudicial to the life and interests, whether moral or material, of the individual and the community. 'In this *muntu* ideal, it is in relation to life and afterlife, that every human act is judged.'[83]

Third, acts of participation realise the union of the individual with the community and with the ancestral spirits, links which are both horizontal and vertical.[84]

> *The life of the individual is understood as participated life. The members of the tribe, clan, the family know that they live not by a life of their own but by that of the community. … [A]bove all they know that their life is a participation in that of ancestors.*[85]

Welfare of the individual is therefore a function and a consequence of the welfare of society.

These senses of unity and participation, keys to the understanding of ubuntu, feed into custom and tradition, and, in this way, supply the ethical content of the traditional African belief system. In so far as sanctions are necessary to sustain this system, they are derived from the ancestors.[86] To this end, Ramose posits a triad of the 'three interrelated dimensions' of the living, the living dead and the yet to be born as 'an unbroken chain of relationships which are characteristically of a one-ness and wholeness at the same time'.[87] Ubuntu maintains this triad,

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80 Shutte (n32) at 23.
81 Shutte (n32) at 23.
82 Vincent Mulago 'Traditional African religion and Christianity in Africa' in Jacob K Olupona *African Traditional Religions in Contemporary Society* (1991) Paragon House at 123.
83 Mulago in Olupona (n82) at 123.
84 Mulago in Olupona (n82) at 120.
85 Ibid.
86 Friday M Mbon 'African traditional socio-religious ethics and national development: The Nigerian case' in Olupona (n82) at 102.
87 Ramose (n39) at 50–51 and 94.

and the triad maintains ubuntu. Hence, the individual cannot attain ubuntu without the intervention of the ancestors, just as the ancestors sustain and protect the living and those yet to be born.[88]

The content and function of ubuntu

Ubuntu 'like life and love … is a difficult word or concept to define'.[89] Indeed, even in African thought, it is 'veiled in a heavy *kaross* of mystery'.[90] It seems to be used as a catch-all term, and, for that reason, has been criticised for its vagueness and generality.[91] But this is hardly surprising, because ubuntu is a broad representation of the African idea of the right way of living,[92] or, even more broadly, attitude to life.

The difficulty of understanding such a generalised term is, inevitably, compounded by the problem of translation.[93] 'Humanness' seems too weak a translation.[94] Indeed, to say that ubuntu is 'social justice', 'fairness', or 'humanity' – which has the merit of enveloping the values of 'group solidarity' and 'collective unity'[95] – is not helpful in balancing the interests of the individual and those of the community.

It is obvious that precision cannot be expected of a concept that is expected to play such multifarious roles, and, at the same time, to fly as the banner of a distinctively African ethical order. Moreover, it probably would be unwise, at this time in South African history, when new values are being forged, to seek an exact definition:[96] once the meaning of ubuntu is fixed,

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88 Ramose (n39) at 51.

89 Narnia Bohler-Muller 'The story of an African value' (2005) 20 *SA Public Law* at 266.

90 Ramose (n39) at 53 and Vusamazulu Credo Mutwa *Indaba, My Children* (1998) Payback Press at 555–556. See, too, I Yvonne Mokgoro 'Ubuntu and the law in South Africa' (1998) 4 *Buffalo Human Rights LR* 15 at 15.

91 Heinz Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000) CUP 164. Kroeze (n20) at 260–261 argues that, if ubuntu is simply a particular manifestation of a universal phenomenon, it is redundant. She also says that it is so loaded with meanings that it 'simply collapses under the weight of the expectations'. See, too, English (n4) at 646: '[ubuntu] simply means all things to all men'.

92 Ramose (n2) at 40. Moreover, Mokgoro (n90) at 15 says that the Western use of abstractions 'defies the very essence of the African world-view', which describes through real contexts.

93 Tutu (n35) at 34, Bhengu (n38) at 46 and Mokgoro (n90) at 15.

94 The translation given by Mokgoro J in *S v Makwanyane* (n9) at para 308. See, too, Koka et al cited in Bhengu (n38) at 46.

95 In *Makwanyane's* case (n9) at para 124, Langa J considered ubuntu a value that placed 'emphasis on communality and on the interdependence of the members of a community', while Madala J (at para 237) referred to 'humaneness, social justice and fairness'.

96 Hence Drucilla Cornell & Karen van Marle 'Exploring ubuntu: tentative reflections' (2005) 5 *African Human Rights Law Journal* 195 at 205 argue that the generality of ubuntu is its strength.

its function will be restricted. Nevertheless, we need some understanding of the concept that is sufficiently specific to work as a functional norm. The following are some of its main features.

First, 'I am because we are'. This clause represents the well-known maxim *ubuntu ngumuntu abantu* (Zulu), *umuntu ngumuntu ngabantu* (Xhosa) or *motho ke motho ka batho* (Sotho).[97] The various translations all suggest that 'a person becomes a person through other people'. While the African concept of a person 'does not deny human individuality … [it] ascribes ontological primacy to the community through which the human individual comes to know both themselves (sic) and the world around them'.[98]

The English sentence, requires a definition of 'I' and 'we'. 'I' refers to the individual or person, and the direct link would be the word *umuntu*. But this term has a greater value than the lone individual, in that it means 'a member of humankind'.[99] In addition, *umuntu* has a qualitative value, in that it encompasses the notions of fullness of human life, truthfulness, generosity, self-respect, respect for others and integrity.[100] In other words, it is underpinned by aspirational values which can only be described as ubuntu. Hence *umuntu* can be described as a person who has ubuntu or embodies the concept of ubuntu.[101]

Ubuntu, when understood as 'life force' (*ntu*) or 'breath' (*moyo* in Zulu and Xhosa or *moya* in Sotho),[102] refers to self-understanding and identity, and affirms the individual's humanity by acknowledging others as human and showing a willingness to share the world with them. Again, underlying this idea is the concept of interconnectedness, ie, an *umuntu* has the life force through embodying ubuntu: human beings are such because they recognise their place in the broader notion of life by acknowledging they would not have such life were it not for other human beings.

It is at this point that Western and African ideas diverge. All humans are plagued by the problem of self-identity, namely, where an individual fits into the world. Western philosophy takes a largely subjectivist approach in

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97 Mokgoro J in *S v Makwanyane* (n9) at para 308. See, too, *Bhe v Magistrate, Khayelitsha* (n18) at para 163: 'A sense of community prevailed from which developed an elaborate system of reciprocal duties and obligations among the family members. This is manifest in the concept of *ubuntu* – *umuntu ngumuntu ngabantu* – a dominant value in African traditional culture. This concept encapsulates communality and the inter-dependence of the members of a community.'

98 Ramose (n39) at 79.

99 Forster (n1 2006a) at 60.

100 Forster (n1 2006a) at 60.

101 Forster (n1 2006a) at 60 and Forster (n1 'Identity in relationship') at 266.

102 Forster (n1 2006a) at 62. See, however, Ramose (n39) at 85–86 for the various meanings of *moya*.

defining who a person is, which can be generally summed up in the Cartesian maxim, 'I think therefore I am',[103] or, put in another way, 'I am known, therefore we are',[104] which emphasises the autonomy of the individual.[105] By contrast, African philosophy relies on a relational approach to defining one's identity: 'I participate therefore I am.'[106] In this way, the individual's existence is defined in relation to a whole, although this is not to say that an individual is merely a part of a whole, but rather as a whole in him or herself.

This idea clearly runs counter to the modern Western view of social atomism, which holds that there is no such thing as society, but that individuals, as the basic given, are at the centre of things. They are the only entities that are real, while the social groupings of which they are members are not.[107] Each person is a distinct and independent unit, the bearer of individual rights and linked to the others around it only by contract. Groups are social constructs, abstractions, and thus not deserving the same respect or attention.

Buber realises the force of ubuntu in his classic statement that '[p]ersons appear by entering into relation to other persons',[108] but ubuntu goes even further, for it implies that persons can exist only in relation to other persons. As Shutte says, 'the human self is not something that first exists on its own and then enters into relationship …. [T]hese relationships are what it is.'[109] In this sense, ubuntu may be described as a living sense of human fraternity – 'How good and pleasant it is when brothers dwell together in unity!' (*Psalm* 133) – as witnessed to in the popular African use of 'brother' to include many more than blood relations.[110]

Ubuntu can be looked at as something *outside* of us, but permeating us, what Shutte described as a 'field of force'[111] that is present in each of us,

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103 Forster (n1 'Identity in relationship') at 260.

104 Bujo (n78) at 4.

105 As Forster (n1 'Identity in relationship') at 254 points out, this is an inadequate theory, particularly in light of the technical and scientific advances of modern society, which stresses passive knowledge held by individuals in validating their existence, reliance on which is too simple and easy to emulate.

106 Forster (n1 'Identity in relationship') at 268.

107 Ramose (n39) at 86: 'Individualism is part of the legacy of fragmentation in science and society and, as such, it detracts from the wholeness which is characteristic of traditional African thought.'

108 Martin Buber *I and Thou* (1970) (translated by Walter Kaufmann) T&T Clark 112.

109 Shutte (n32) at 23.

110 It also functions more constructively in giving expression to what the Indian nationalist turned spiritual philosopher, Sri Aurobindo *The Ideal of Human Unity* 3ed (1998) Sri Aurobindo Ashram at 298 describes as 'a living sense of human oneness and practice of human oneness in thought, feeling and life'.

111 Shutte (n32) at 52.

and in the community as a whole. Thus, ubuntu is humanity, although not humanity as a quality of character inhering in some individuals, but as the vital force we share and participate in through 'the interplay which takes place when people come into contact or live together'.[112]

It might be argued that African philosophy therefore aligns with Marxian ideas of society, whereby each individual is but a cog in the greater machine of society, and all must perform their functions for the machine to function. Such an understanding, however, would be wrong. In African thought, all humans are equal or identical to the society, ie, when you are thinking of individuals or a group, you are considering their humanity and not simply their individuality in relation to the corporate unit.[113] Thus, the individual's humanity cannot be distinguished from that of the community.[114] With this in mind, and all that has come before, ubuntu would probably be best understood as a way of living that contributes positively to the welfare of a community.

Seen in these terms, ubuntu represents both for the individual and the group a dynamic and interactive process of *becoming*. Becoming what? 'Become what you are', in St Augustine's well-known formulation. Hence, ubuntu is best seen, not as the end but as the process of day-to-day interpersonal involvement, and the consequent enlargement of the self and the sense of society.

It follows that ubuntu is not simply an intellectual concept, since it arises from the actual experience of life, and, in this sense, it acts as a corrective to such abstractions as 'humanity' or 'the individual'. We are neither to be lumped together in a mass nor separated, but, rather, to be located in a web of living relationships. Ubuntu thus radically challenges the deeply entrenched Western model of the detached ego. The individual is always one-in-society: 'There is no truly human existence without community and that community is not an extra that gets added on but is of the very essence.'[115]

Conclusion: The wider relevance of ubuntu

Ubuntu therefore reveals a truer conception of the individual than the contemporary functional view of Western society, one which sees people as the sum of the various roles they must play, but leaves out of account the individuals themselves and their characters. Ubuntu emphasises human

112 Gabriel Setiloane *African Theology* (1989) Skotaville 21 cited by Shutte (n21) at 23.
113 Shutte (n32) at 52.
114 Shutte (n32) at 52.
115 John Macquarrie *In Search of Humanity* (1982) Student Christian Movement at 88.

closeness and the sense of belonging that are palpably absent from our modern world of isolation and alienation. It is 'an assertion of the priority of being over doing'.[116] When seen in these terms, ubuntu offers a counterbalance – or even a sort of salvation – to the experience of dehumanisation in the Western world, which was a process born of the ideals of the social welfare state, but has led to the atomised individual. In this way, the philosophy of ubuntu comfortably aligns with postmodern thinking, in that it:

> *goes beyond the mere rational into other dimensions to knowing and experiencing. … The postmodern scientific approach rehumanizes – it has a marked influence on what is human. … The importance of the non-rational and trans-rational is again receiving a place in the experience of human beings.*[117]

Ubuntu has two things in common with other kinds of situation ethics (particularly Fletcher's). It is relativist, and, in consequence, coheres well with the contemporary cultural outlook which is wary of absolutes or fixed rules, and looks on moral laws as too abstract in relation to real-life situations. Ubuntu is also personalistic, putting people, not things, at the centre of concern. But neither personalism nor situation ethics as a system is individualistic. Persons are relative to neighbours, to the group, to society. A relationship of ubuntu is not only one-to-one or I-Thou. 'The Other', the term used by Emmanuel Levinas,[118] can be corporate or plural.

Thus, ubuntu is 'many-sided and wide-aimed, not one-directional; it is pluralist, not monist; multilateral, not unilateral'.[119] Ubuntu is not only a matter of personal relations, but rather of social relations or social justice.

A question that is often asked is whether ubuntu – a traditionalist thought system[120] – can answer issues peculiar to the modern world. Bujo, for instance, identifies homosexuality as one such issue. In Africa, men and women are considered bipolar in nature, and the most basic form of the community is seen as the husband and wife, with the eventual addition of children.[121] The modern idea of a single-sex relationship isolates one sex, and ignores an integral part of what it means to be human – heterogeneity.

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116 Quoted by Macquarrie (n115) at 90.

117 Gerhardus C Oosthuizen 'The place of traditional religion in contemporary South Africa' in Olupona (n59) at 39.

118 As in Emmanuel Levinas *Totality and Infinity* (1979) (translated by Alphonso Lingis) Nijhoff.

119 Fletcher (n33) at 89.

120 Having originated in a rural society, it is in danger of being lost through the process of urbanisation: Jacobus Smit, Moya Deacon & Augustine Shutte *Ubuntu in a Christian Perspective* (1999) Potchefstroom University Press at 32.

121 Bujo (n78) at 6–7.

What is more, gay couples refuse, in essence, to engage with a group of humans (heterosexuals), which contradicts the whole idea of ubuntu.

Bujo, however, believes that problems of this nature may be solved by communities accepting an altered social model to 'override' the metaphysical argument. He draws on the fact that the norms and values surrounding all sexual acts have radically changed in recent years. For example, although in former times it might have been considered hospitable for a man to offer his guest a wife for the night,[122] today such a practice would be regarded as unacceptable. Bujo contends that, in these circumstances, we should focus not on the practice but on its underlying value, which, in this case, is the principle of being hospitable. In this way, a community can modify their ideas of what is acceptable and what is meant by ubuntu.

Another modern problem is the need to conserve the environment. The principle of ubuntu, however, is clearly equipped to deal with the issue. As a spiritual world view, it perceives the universe 'as a graded system of life-force, emanating from the source of all force, God, and then going from the strongest, the ancestors who have died and the heads of clans and families, to the weakest, animals and material objects'.[123] Humans are at the centre, open both to nature and to supernature, and, as such, have the responsibility of stewardship to their environment. (Again, this view has a contemporary ring, resonating with the rediscovered sense in the West of the web of life.)

Bhengu believes that an ultimate value underlying ubuntu is the precept that ignorance is the only limitation of life. This provides a useful summing up of the concept. One's neighbour should be viewed as a wealth of knowledge.[124] We should therefore accept our neighbours as the reverse of ourselves, and learn from them. In so doing, we can accept the differences and concomitantly celebrate the similarities.[125]

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122 Bujo (n78) at 37.

123 Shutte (n32) at 22.

124 Bhengu (n13) at 3.

125 He goes on to identify a spirit of ubuntu in the Islamic religious act of *beital mal*, which involves the giving of money into a community pool which serves to help widows and their children. Bhengu (n13) at 8.

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