

THE FREEDOMS OF RELIGION AND CULTURE UNDER
THE SOUTH AFRICAN CONSTITUTION:
DO TRADITIONAL AFRICAN RELIGIONS ENJOY EQUAL
TREATMENT?

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INTRODUCTION:
THE RELATIONSHIP BETWEEN RELIGION AND CULTURE

On Sunday, January 20, 2007, Tony Yengeni, former Chief Whip of South Africa's governing party, the African National Congress (ANC), celebrated his early release from a four-year prison sentence by slaughtering a bull at his father's house in the Cape Town township of Gugulethu.¹ This time-honored African ritual was performed in order to appease the Yengeni family ancestors. Animal rights activists, however, decried the sacrifice as an act of unnecessary cruelty to the bull, and a public outcry ensued.² Leading figures in government circles, including the Minister of Arts and Culture, Pallo Jordan, entered the fray, calling for a proper understanding of African cultural practices. Jody Kollapen, the Chair of the Human Rights Commission, said: "the slaughter of animals by cultures in South Africa was an issue that needed to be dealt with in context. Cultural liberty is an important right . . ."³

That the sacrifice was defended on the ground of African culture was to be expected. More surprising was the way in which everyone involved in the affair ignored what could have been regarded as an event of religious significance. Admittedly, it is far from easy to separate the concepts of religion and culture, and, in certain societies, notably those of pre-colonial Africa, this distinction was unknown. Today in South Africa, however, it is clearly necessary to make such a distinction for human rights litigation, partly because the Constitution specifies religion and culture as two separate rights and partly because it seems that those

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1. Yengeni animal slaughter not criminal—SAHRC (Jan. 23, 2007), http://www.ioi.co.za/index.php?set_id=1&click_id=13&art_id=qw1169538120458B262 (accessed Jan. 24, 2007).

2. *Id.*

3. *Id.*

working under the influence of modern human rights seem to take religion more seriously than culture.

The fact that indigenous African belief systems are constantly being treated as incidents of African culture obviously says something about the way in which traditional religions are perceived by outsiders. This perception has a long history, beginning with Christian and Islamic missionary activity on the continent, and continuing with colonial conquest.⁴ Although the conflation of the two concepts tends to devalue culture, the perception persists, and, ironically, is shared by advocates of both indigenous religions and human rights. The Yengeni affair is a typical example.

The hierarchical relationship between religion and culture is evident in various situations. One is the judicial doctrine of “non-entanglement,” which, since the advent of the 1996 Constitution, is becoming a prominent issue in the South African jurisprudence on freedom of belief.⁵ This doctrine—derived from the United States—obliges the state to remain neutral on matters of religion. In South Africa, the neutrality doctrine implies that the courts must refrain from involvement in matters of religious dogma;⁶ moreover, unless absolutely necessary, they may not impose secular laws on religious communities nor should they attempt to interpret the tenets of religious doctrine.⁷ By implication, the same deference is not to be shown to systems of culture.

In another situation—a project to reform the African customary law of marriage—law-makers paid scant regard to traditional beliefs. The South African Law Reform Commission might have been expected to recognize the role of religion (and its associated rituals), since it is considered fundamental to Christian, Islamic, Hindu and Jewish marriages; but in the Commission’s preparatory works, African religion was hardly mentioned.⁸ Instead, nearly all of the parties involved in the legislative process assumed that recognition of customary marriages rested exclusively on the right to culture.⁹

4. D.B. Barrett, *Schism and Renewal in Africa* 85 (Oxford U. Press 1968).

5. *See infra* n. 6.

6. *Mankatshu v. Old Apostolic Church of Africa & others* 1994 (2) SA 458 (TkAD); *Allan & others v. Gibbs & Others* 1997 (3) SA 21 (SE) (S. Afr.); *Ryland v. Edros* 1997 (2) SA 690 (C) at 703; *Taylor v. Kurtstag NO & others* 2005 (1) SA 362 (W) 39; *Singh v. Ramparsad* 2007 JDR 0019 (D) ¶ 50.

7. *Worcester Muslim Jamaa v. Nazeem Valley & others* 2002 (6) Butterworths Constitutional Law Reports 591 (C).

8. South African Law Commission *Report on Customary Marriages* (1998) Project 90, Government Printer, Pretoria ¶¶ 4.4.5ff.

9. In this respect, the Commission was following a pattern of thinking already well-established in the courts: the “religious element” of marriage was mere custom, of no greater

Yet another example of the preference for religious over cultural rights is supplied by a leading South African case, *Christian Education, South Africa v. Minister of Education*.¹⁰ Here, the applicants began by arguing that a right to use corporal punishment in schools was based on both the right to religion and the right to culture. Although neither argument ultimately succeeded, it is interesting to note that the applicants abandoned their claim to culture. The case proceeded on the sole ground of freedom of religion, presumably on an intuitive assumption that this would be perceived as the weightier right.

In none of these situations was it clear who had decided that religion was to be given priority over culture, or why this priority had been introduced. These two questions, together with the broader issue of how religion and culture are to be balanced in today's South Africa, lie at the heart of this paper.

The centerpiece of South Africa's widely acclaimed Constitution, Act 108 of 1996, is a fully justiciable Bill of Rights which protects, *inter alia*, the freedom to pursue cultures and religions of choice.¹¹ We argue that, in spite of these guarantees, and notwithstanding the fact that traditional religions are still practiced in one form or another,¹² they receive far from equal treatment. This state of affairs is quite at odds with the constitutional commitment to equality and the country's policy of promoting religious and cultural diversity.¹³

We submit that unequal treatment will persist as long as traditional African religions are protected only to the extent to which they mirror the religious characteristics of non-African (in essence, Western) religions. We further submit that the only way to correct this situation is to seek protection under the rubric of culture, rather than religion. To this end, we argue that culture secures not only the elements of belief and practice that comprise traditional African religions, but also the right of adherents to have faiths that differ from the Western construct of religion.

consequence than "music, singing or a wedding reception." See *Sila & Another v. Masuku* 1937 NAC (N&T) 121 at 123 and H.J. Simons, *Customary Unions in a Changing Society*, 320 Acta Juridica 322-325 (1958).

10. 2000 (4) SA 757 (CC).

11. Constitution of the Republic of S. Africa, Act 108 of 1996, (Dec. 18, 1996), § 30 & 31.

12. See the statistics cited below in the text to *infra* n. 104.

13. The Constitutional Court, in *Christian Educ., S. Afr. v. Minister of Educ.* 2000 (4) SA 757 (CC) ¶ 24, for example, held that the Constitution gives people the right to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlights the importance of individuals and communities being able to enjoy what has been called the "right to be different."

I. THE CONSTITUTIONAL RIGHTS TO RELIGION AND CULTURE

The freedom of religion, implying a state's duty to refrain from interfering in an individual or community's pursuit of a chosen belief, was one of the earliest human rights to be given legal force.¹⁴ It made its appearance in Europe during the seventeenth and eighteenth centuries in response to persecutions suffered by dissenting groups.¹⁵ The right to culture, on the other hand, emerged only much later, coming to fruition during the twentieth century.¹⁶ In its original sense, culture denoted something quite different from what is now contemplated in instruments such as Section 31 of the South African Constitution.¹⁷ In the eighteenth and nineteenth centuries, it was taken to mean intellectual or artistic endeavor, and so implied a freedom, akin to the freedom of expression, to perform or practice the arts and sciences.¹⁸

A later meaning of culture—one that is the concern of this article—developed largely in response to the politics of nationalism in Europe.¹⁹ This conception of culture denoted 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.²⁰ Through these means, one group could distinguish itself from other groups.²¹

Culture in the latter sense often develops a close and symbiotic relationship with religion;²² and, in practice, it is far from easy to

14. This right is now preserved in all international human rights conventions. See e.g. art. 18 of the Universal Declaration of Human Rights (1948), art. 18 of the International Covenant on Civil and Political Rights (1966) and art. 8 of the African Charter of Human and People's Rights (1981).

15. See e.g. the right to freedom of religion featured in the Declaration of the Rights of Man and the Citizen (cl. 10), which was proclaimed during the French Revolution.

16. H.A. Strydom, *The International and Public Law Debate on Cultural Relativism and Cultural Identity: Origins and Implications*, 21 S. African Yearbook Intl. L. 1, at 4ff (1996).

17. T.W. Bennett, *Human Rights and African Customary Law* 23-25 (Juta & Co. 1999).

18. See art. 15(1)(a) & (c) of the International Covenant on Civil and Political Rights (1966). See P. Sieghart *International Law of Human Rights* 339 ¶ 23.5.3 (Clarendon Press 1983).

19. Thus, culture was linked to self-determination. See art. 1(1) of the International Covenant on Civil and Political Rights (1966), which provides that, by virtue of the right to self-determination, all peoples are entitled to pursue their own cultural development.

20. This definition is derived from the founder of cultural anthropology, E.B. Tylor, *Primitive Culture; Researches Into the Development of Mythology, Philosophy, Religion, Language, Art and Custom* vol. 1 (4th ed., H. Holt & Co. 1920) and continues to be taken as a core concept of this discipline. See H.A. Strydom, *supra* n. 16.

21. Hence, culture is inherently oppositional, and consciousness of culture arises only through close interaction between two or more social groups: E.E. Roosens, *Creating Ethnicity: The Process of Ethnogenesis* 12 (Sage Publications 1989).

22. Culture in this sense is protected by art. 27 of the International Covenant on Civil and Political Rights (1966), which provides that:

peoples belonging to . . . minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their

disentangle the two concepts.²³ Hence, religion may function as a marker of culture and vice versa.²⁴ Nevertheless, for purposes of human rights litigation, the two concepts need to be separated, partly because they signify different rights and partly because of the preferred status of religion.

Even so, not all religions enjoy the status of a protected right, which flows from the forms and structures of certain faiths, especially those that are encretistic and monotheistic, that proclaim everlasting truths and purport to explain the plight of the human condition. Adherents tend to regard such religions as paradigmatic. Thus, when they see no similarities between the forms and structures of an exotic faith and their own, they are naturally reluctant to include the exotic within the concept of a true religion.

Attempts at distinguishing culture and religion normally proceed in essentialist terms,²⁵ and essentialism inevitably leads to the requirement of definition: what is meant by a “true” or “proper” religion.²⁶ The definition might, for example, assume that a “true” religion must contain a belief in a supreme being or a sense of the sacred,²⁷ since these constitute the essence of the concept.²⁸ Culture is also viewed in essentialist terms, although as a social phenomenon, it is generally taken to be broader than religion, for it embraces everything that marks humans as social beings,²⁹ whereas religion is not a necessary

own religion, or to use their own language.

23. Progress towards definition is not, of course, assisted by the fact that lawyers, theologians and social scientists tend to work independently. See J.M. Donovan, *God Is As God Does: Law, Anthropology, and the Definition of “Religion,”* 6 Seton Hall Cons. L.J. 23, at 70ff (1995) (regarding the legal and anthropological approaches).

24. This process of blending is familiar to Christian missionaries, since African culture has long been used as a medium for communicating the gospel message. See B. Thagale, *Inculturation: Bringing the African Culture Into the Church*, 14 Emory Intl. L. Rev. 1249 (2000).

25. Essentialism is used here to refer to the assumption that religion and culture have universally valid definitions. Thus, an essentialist critique of religion and religious rights would tend to assume that western religions can speak for all religions, or, at the very least, that the frame of reference for judging them different should be the western frame. In consequence, religions that do not conform to western-specifications may not be recognized and valued as religions.

26. According to some scholars, however, the process of definition is a futile exercise, since religion cannot be defined. See George C. Freeman III, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 Georgetown L.J. 1519ff (1983) and T.J. Gunn, *The Complexity of Religion and the Definition of “Religion” in International Law*, 16 Harv. Hum. Rights J. 189 at 191 (2003). Donovan, *supra* n. 23, at 28 goes so far as to say that the exercise is unconstitutional.

27. This distinction determines Durkheim’s *The Elementary Forms of the Religious Life* (1912). See Donovan, *supra* n. 23, at 73.

28. See Freeman, *supra* n. 26, at 1553 and Donovan, *supra* n. 23, at 60-61, who cites the list of features prepared by the United States’ Internal Revenue Service.

29. See *supra* text accompanying n. 14.

requirement of social life. According to this understanding, religion is a matter of the spiritual and (apparently) irrational, demanding faith (or obedience to authority), while culture is a matter of the mundane, the world of empirically demonstrable cause and effect.

As criteria for distinguishing religion from culture, however, spirituality and the division between the sacred and profane are more suited to the monotheistic religions. These faiths place great emphasis on fixed creeds in order to test the content of belief. Traditional African religions of South Africa, on the other hand, have no established canons of belief (with the result that questions of creed, and the consequent problem of heresy, do not arise), nor do they maintain a strict distinction between the sacred and profane.³⁰

Prior to the new Constitution, freedom of religion in South Africa was disputed in only a few cases. The state generally treated religion as a matter of personal conscience, and government had little interest in regulating such affairs.³¹ Occasionally, however, religious beliefs manifested themselves as practices offensive to the commonweal: the most notable instances were breaches of the Sunday observance laws³² and conscientious objections to military service.³³ In these cases, the courts ruled that individual freedom had to give way to broader public interests.³⁴

Traditional African religions attracted even less attention. They became a legal issue only in criminal trials, when accused persons invoked belief in the power of spirits or witches as defenses to criminal charges or as mitigating factors in sentencing.³⁵ Even then, the courts tended to treat their claims as superstitions,³⁶ or some other form of aberration, not as part of an acceptable religious system.

30. Nor for that matter do other religions such as Buddhism. See M. Southwold, *Buddhism and the Definition of Religion*, 13 *Man* 362 (1978). See also J. Goody, *Religion and Ritual: The Definitional Problem*, 12 *Brit. J. Sociology* 142 (1961).

31. The same was true of other states. See P. Horwitz, *The Sources of Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 *U. Toronto Faculty L. Rev.* 1, at 5 (1996).

32. For instance, *S v. Lawrence* 1997 (4) SA 1176 (CC) challenged a contravention of § 90(1) of the Liquor Act 27 of 1987, which restricts the hours and days on which liquor may be sold.

33. See *S v. Abrahams* 1982 (3) SA 272 (C); *Hartman v. Chairman, Board for Religious Objection & others* 1987 (1) SA 922 (O).

34. *Lawrence*, *supra* n. 32, ¶¶ 90-98.

35. See J. Burchell, *Principles of Criminal Law* 535 & 536 (3^d ed., Juta & Co. 2005); T.W. Bennett & W.M. Scholtz, *Witchcraft: a problem of fault and causation*, 12 *Comparative & Intl. L. S. Afr.* 288 (1979).

36. See *R v. Mbombela* 1933 AD 269 which held that "a genuinely held superstitious belief" might have deprived the accused of the "capacity to appreciate the wrongfulness of his conduct."

The 1996 Constitution devotes two separate sections to religion. Section 15(1) provides that “[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion.” Section 31(1) continues with a provision that:

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—(a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

Although similar rights may be protected under these two sections, they contain significant differences. Section 15 protects an individual’s freedom to hold whatever faith or belief she may choose, while Section 31 embraces a community’s freedom to practice a religion of choice, which suggests an outward manifestation of an inner belief. The South African courts have elaborated this difference by breaking down the freedom of religion into the following components: the rights “(a) to have a belief, (b) to express that belief publicly and (c) to manifest that belief by worship and practice, teaching and dissemination.”³⁷

For obvious reasons, the first component is not readily amenable to legal regulation.³⁸ The second and third components, however, which are protected in conjunction with culture under Section 31(1), are easier to assess and control. Indeed, although all the rights in the Constitution are subject to a general limitation clause,³⁹ Section 31(2) provides explicitly that: “[t]he rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”⁴⁰ It is noteworthy, then, that the South African courts have tended to refrain from using the limitation clause when analyzing rights under Section 15,

37. Iain Currie & Johan De Waal, *The Bill of Rights Handbook* 339 (5th ed., Juta & Co. 2005). This formulation was taken from the Canadian case, *R v. Big M Drug Mart* [1985] 1 SCR 295 at 336, by Chaskalson J in *S v. Lawrence* 1997 (4) SA 1176 (CC) ¶ 92. It was followed in *Prince v. President, Cape Town L. Socy.* 2002 (2) SA 794 (CC) ¶ 38 and *Christian Educ. S. Afr. v. Minister Educ.* 2000 (4) SA 757 (CC) ¶ 19.

38. See Currie & De Waal, *supra* n. 37, at 344 citing D. Meyerson, *Rights Limited* 2 (Oxford U. Press 1997). This difficulty accounts for the courts’ reluctance to question an individual’s sincerity of belief as a requirement for upholding § 15. The judgment of the court a quo in *Christian Educ. SA v. Minister Educ. Gov. RSA* 1999 (9) BCLR 951 (SE) 957-8 is the exception to the rule. See Currie & De Waal, *supra* n. 37, at 341.

39. Sec. 36(1) provides that:

[t]he 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 . . .

40. Currie & De Waal, *supra* n. 37, at 344-346.

since it involves the imponderable task of weighing faith against reason, not to mention distinguishing the religious from the secular.⁴¹ Instead, they have restricted the scope of the right.⁴²

From another perspective, the difference between Sections 15 and 31 can be couched in terms of absolute versus relative rights,⁴³ where Section 15 represents the absolute right to religious freedom that has become one of the hallmarks of Western human rights. The relative right provided for in Section 31, on the other hand, represents the manifestation of a practice that is characteristic of a particular group. In other words, where absolute rights protect the concept of belief in general, relative rights are associated with the manifestation or practice of that belief.

When it comes to religious freedom, however, there is no definite hierarchy between absolute and relative rights, because, as will become apparent below, some religions may emphasize practice and others belief. Protection must surely exist for both aspects. The interesting twist occurs in cases such as the Yengeni incident, however, where the physical expression of belief becomes the focal point of a debate between culture and religious rights.

II. A TRADITIONAL AFRICAN RELIGION: THE PONDO

Since colonial times, a major problem with foreign perceptions of African religions has been a tendency to over-generalize and, in the process, to reduce all the indigenous systems to little more than animism and ancestor worship. However, any generalization about a matter as complex as religion, especially in a continent as diverse as Africa, is clearly an audacious undertaking. We have therefore chosen to focus on the religious beliefs of one people, not as representative of all those in

41. Meyerson, *supra* n. 38, at 34.

42. Currie & De Waal, *supra* n. 37, at 341-342.

43. The basis for this distinction is whether obligations are imposed on everyone or only on certain persons or groups. The distinction applies to rights other than human rights—for instance, copyrights are absolute, and contractual rights are relative, although neither of them is a fundamental human right. For purposes of human rights, however, the absolute rights always include the state, while relative rights exclude all other obligors but the state. O.S. Ioffe, *Human Rights*, 15 Conn. L. Rev. 687, at 736-737 (1983) (explaining that, when dealing with a human right of an absolute nature, the state must behave at least as well as other obligors, unless contrary regulations are introduced). As for human rights of a relative character, the situation changes, so that the only actions that can be demanded of the state are those which it has agreed to accomplish under concrete circumstances according to publicly adopted legal regulations. Ioffe says that “without such a prerequisite, relative human rights risk being transformed into hollow propagandistic declarations.” Based on this definition, the right to religion is absolute. But why is the right to culture instinctively considered to be relative and not absolute?

South Africa, but rather as useful in understanding the dilemma posed by the distinction between religion and culture.

The Pondo are a people living in the eastern portion of what used to be Transkei (now part of the Eastern Cape Province of South Africa). They were the last nation in the Transkei to surrender sovereignty to British rule, which they did in 1894.⁴⁴ Colonial historians and ethnographers included the Pondo in an ethnic category described as “Southern Nguni,” a term denoting various cultural and linguistic similarities⁴⁵ that were considered important enough to distinguish them from the Northern Nguni, a much larger group that is spread over KwaKulu-Natal, Swaziland and as far away as Central Africa.⁴⁶ Pondo life has been well documented by two distinguished anthropologists, Monica Hunter⁴⁷ and Fr. Heinz Kuckertz.⁴⁸

Contrary to the preconceptions of outsiders, the Pondo—and the Southern Nguni generally—believe in the existence of a single, supreme being, who is spoken of as *uThixo*.⁴⁹ This name seems to have been borrowed from the KhoeKhoe. An equivalent Xhosa word is *uDali*. *uThixo* is a *deus otiosus*, since it⁵⁰ 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 rituals dedicated to its worship.⁵²

Missionary influences and the Western need to identify indigenous beliefs with the Christian message found in *uThixo* a ready basis for a Xhosa translation of Jehovah. Thus Soga, a prominent Christian figure

44. T.R.H. Davenport, *South Africa: A Modern History* 147-148 (5th ed., MacMillan 2000).

45. The Pondo speak a dialect associated with a cluster of closely related languages further south, termed generally *isiXhosa*. Tony Yengeni, for example, is a Xhosa speaker.

46. N.J. van Warmelo, *The Classification of Cultural Groups* 60ff (W.D. Hammond-Tooke ed., 2^d ed., Routledge & Kegan Paul 1974).

47. M. Hunter, *Reaction to Conquest: Effects of Contact with Europeans on the Pondo of South Africa* (Oxford U. Press 1936).

48. Fr. H. Kuckertz, *Creating Order: The Image of the Homestead in Mpondo Social Life* (Witwatersrand U. Press 1990). Both Hunter and Kuckertz worked in the functionalist tradition, but they took careful note of the effects of colonization and labor migration on contemporary Pondo society.

49. *Id.* at 270.

50. Linguistically, it is impossible to determine the gender of the supreme being, since the prefix *-u-* in Xhosa denotes both male and female. The masculine attributes of the being could well have been acquired through the influence of Christianity.

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 governing people's lives. See W.D. Hammond-Tooke, *World View I: A System of Beliefs*, in *The Bantu-speaking Peoples of South Africa* 320-321 (W.D. Hammond-Tooke ed., 2^d ed., Routledge & Kegan Paul 1974).

52. *Id.* at 319.

in Transkei, could write that this being “is the creator of all things, controls and governs all, and as such is the rewarder of good and the punisher of evil.”⁵³ Hunter, on the other hand, was more skeptical. She 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). They had two words, umdali (creator) and umenzi (maker), which might suggest a belief in a creator, but there is no system of rites or complex of beliefs connected with these words.⁵⁴

Various free spirits associated with particular animals and places play a lively part in the beliefs of most peoples in South Africa. With the Pondo, however, such beings are of little relevance. The most important are the “people of the river” (*abantu base mlanjeni*), who seem to have an association with clan ancestors.⁵⁵ Even so, Hunter said that they were seldom referred to as *amathongo* (ancestral spirits), but were rather seen as evil manifestations of those spirits.⁵⁶

As with all the other indigenous belief systems in South Africa, the Pondo acknowledge the malign force of witchcraft. They believe that practitioners of this art can be detected through physical stigmata, aberrant social behavior and association with animal familiars.⁵⁷ In some systems, individuals are thought to have the power actively to attract and exploit dark forces. In others, they are thought to be born with it. In either event, witches are seen as a prime source of evil, whether in the social or the natural world.⁵⁸

For all the Pondo, the spirits of deceased members of the clan (*amathongo*) are the most immediate influence on daily life. They are sources of wisdom, security and authority; and their presence is most strongly felt when they visit retribution on those who infringe rules of good conduct.⁵⁹ While the ancestors may be the shades of people recently or long departed, not all the deceased become *amathongo*. The spiritual destiny of children and young persons, for instance, is vague;⁶⁰

53. J.H. Soga, *The Ama-Xosa: Life and Customs* 133 (Lovedale Mission Press, Alice 1932).

54. Hunter, *supra* n. 47, at 269. The idea of the creator survives in a widely held myth that the supreme being broke off nations from reed beds.

55. E.J. De Jager & V.Z. Gitywa, *A Xhosa Umhlwayelelo Ceremony in the Ciskei*, 22 *African Stud.* 109, at 110 (1963).

56. See Hunter, *supra* n. 47, at 263.

57. M. Gluckman, *The Logic of African Science and Witchcraft*, in *Witchcraft and Sorcery* 322 (M.G. Marwick ed., Frank Cass 1970).

58. *Id.* at 275ff.

59. See Hammond-Tooke, *supra* n. 51, at ch. 10.

60. Kuckertz, *supra* n. 48, at 231.

and some of the departed, especially those who enjoyed positions of authority, exercise special powers.

Veneration of the ancestors involves acceptance of a form of life after death, together with a notion of spirit or "soul" (*ithongo* or *umphefumlo* (lit. breath)).⁶¹ Although there is no clear hiatus between the states of life and spirit,⁶² death is obviously necessary for the emergence of an *ithongo*. The *ukubuyisa* ceremony, in particular, which occurs sometime after burial, is essential for settling a deceased person's estate and laying his spirit to rest. The spirit can then join all the others who constitute the agnatic clan, some of whom continue to communicate with the living, and will therefore be specifically invoked in rituals.⁶³

All living people and the spirits are believed to be linked together in an enduring relationship.⁶⁴ The power to intercede with the ancestors, however, vests principally in the family head, who combines ritual and temporal powers in one office and provides a channel of communication with ancestral forebears through notionally unbroken ties of blood.⁶⁵ In order to maintain this relationship with the departed, the living are obliged to perform certain rituals.⁶⁶

Veneration of the ancestors coalesces around the major rites of passage: birth, initiation, marriage and death.⁶⁷ Their presence is also invoked, however, when individuals wish to offer thanksgiving for an escape from death or ill fortune. All these occasions are celebrated by the ritual killing of cattle or goats.⁶⁸ The family then gathers, sometimes with neighbors, to share a common meal.

Beer, although it is a lesser offering than a beast, is another significant feature in the ceremonies associated with veneration of the ancestors.⁶⁹ It may either be consumed or offered as a libation. In the former case, it is difficult to distinguish its use as ritual from a general social lubricant.⁷⁰

61. *Id.* at 232.

62. *Id.*

63. *Id.* at 230.

64. *See generally* Hunter, *supra* n. 47, at 231-235.

65. *See generally* Aylward Shorter, *African Christian Theology*, in *A Handbook of Living Religions* 431 (J.R. Hinnells ed., repr., Penguin 1991) and, for another example, I. Schapera, *A Handbook of Tswana Law and Custom* 61-62 (2^d ed., Oxford U. Press 1955).

66. *See generally* Shorter, *supra* n. 65, at 425 & 434; V.W. Turner, *The Ritual Process* ch. 1 (U. Chi. Press 1969) on the Ndembu of Zambia.

67. *See* Hunter, *supra* n. 47, at 240.

68. The ceremonies are hedged around with various rituals, such as the method for slaughtering particular types of animals and the belief that the bellowing summons the ancestors. *See* Hunter, *id.* at 240ff.

69. *See* Hunter, *supra* n. 47, at 253ff.

70. Indeed, in comparison with the slaughter of beasts, there is greater variation in the

Ritual lies at the heart of ancestor veneration. Each occasion demands a fresh performance according to predetermined rules. Thus the Pondo religion—like all traditional African religions—is characterized by “right action, not right belief—orthopraxis rather than orthodoxy.”⁷¹ This distinguishing feature has been largely responsible for the outsider’s tendency to confound traditional religion with culture.

III. THE THREAT TO TRADITIONAL AFRICAN RELIGIONS

Over the last century and a half, belief in and practice of traditional African religions has been seriously undermined. Although certain academics and traditional rulers are currently attempting to recover a sense of respect for African beliefs,⁷² there is every indication that they are in danger of disappearing. Four principal causes can be isolated.

First, traditional religions are, by nature, syncretistic, and, as a result, they are always liable to give way to proselytizing faiths.⁷³ Nearly all South Africans hold religious beliefs, but by far the largest majority now professes some form of Christianity: eighty-six per cent of the population (38.5 million people) belong to a Christian denomination of one kind or another.⁷⁴ Traditional African religions (in a pure form) are now an insignificant factor. They are professed by a mere 0.3% of the population.⁷⁵ Notwithstanding these figures, many South Africans are both traditionalists and members of established Christian churches, and most belong to one of the independent African churches. This group accounts for 11.1% of the population.⁷⁶

occasions when beer is produced and the rituals surrounding its consumption. *See id.*

71. W. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* 414 & 415 (2^d ed., Cambridge U. Press 2006). The determination of “rightness” or “correctness” is established by the religion concerned. There can be no external, or even universal, scale against which religious practice and/or belief is deemed to be correct or appropriate. Instead, this is determined inside the religious community. The right to engage in this internal determination is something that must also be protected in the name of culture.

72. R.B. Mqoke, *Myth, Religion and the Rule of Law in the Pre-Colonial Eastern Cap*, 34 *De Jure* 81 (2001).

73. Thus B.A. Pauw, *Ancestor Beliefs and Rituals Among Urban Africans*, 33 *African Stud.* 99 at 103 (1974); & B.A. Pauw, *The Influence of Christianity*, in *The Bantu-speaking Peoples of South Africa*, *supra* n. 51, at 415 ff says many African Christians combine “regular prayer to God the Father of Jesus Christ, with a sense of dependence on their ancestors, believing that ‘God and the ancestors work together.’”

74. *See* Statistics South Africa, *Census 2001: Primary Tables*, www.statssa.gov.za (accessed Jan. 23, 2008). 8.2 % of the population is Pentecostal/Charismatic, 24.4% belong to established churches and 36% to “other Christian” denominations. 1.5 % of the population professes Islam and smaller minorities profess such religions as Hinduism and Judaism.

75. *Id.*

76. A. Gouws & L.M. du Plessis, *The Relationship Between Political Tolerance and Religion: The Case of South Africa*, 14 *Emory Intl. L. Rev.* 657, at 660 (2000).

The second cause can be traced to the fact that veneration of ancestors is poorly adapted to survive urban conditions.⁷⁷ The absence of livestock, and regulations prohibiting the keeping and slaughter of animals, make performance of the necessary rituals difficult.⁷⁸ (The Yengeni affair is a striking example.) What is more, communication with the ancestors requires constant reference to the objects and places they inhabit, whereas the anonymity and transience of modern urban life cuts people off from their past.⁷⁹

The third, and more general, cause is an increasingly secular attitude in society at large. In pre-colonial times, societies were tightly knit; people had shared interests and expectations; and everyone worked with the same set of meanings. The experiences of work, education and religion were therefore integrated within a family context. By contrast, modern, industrialized societies are highly differentiated. Thus, when an individual offers his or her different experiences and often contradictory interpretations of life, religion has difficulty with integrating them into a single, plausible framework of meaning. Plurality of this nature leads to uncertainty, and uncertainty inevitably threatens a religion's claim to authority.⁸⁰

African religions are not alone, of course, in experiencing the trend towards secularism. Their fate is shared by other religions in the liberal democracies. These regimes are dedicated to rationalism, and, as such, are not disposed to listen to or understand *any* religious beliefs. The South African Constitution itself would encourage such a tendency. Whereas the value of rationality is unstated and implicit in most other constitutions,⁸¹ in South Africa, it is explicit. Section 31(1) of the Constitution expressly subjects the practice of all religions to the Bill of Rights, and the limitation clause (§ 36(1)) is filled with the language of rationalism.⁸²

77. Magic and traditional medicines, however, seem to be more easily adapted to urban settings. See E. Hellmann in *The Bantu-speaking Tribes of South Africa* 426 (I. Schapera ed., Routledge 1937); & Hunter, *supra* n. 47, at 45545-8, 487, 488-496. Cf. Pauw, *Ancestor Beliefs and Rituals Among Urban Africans*, *supra* n. 73, at 99ff.

78. Hunter, *supra* n. 47, at 537 & 547-548.

79. See I. Hofmeyr, 'We Spend Our Years as a Tale That is Told' *Oral Historical Narrative in a South African Chieftdom* 159-160 (Wits U. Press & Heinemann 1993).

80. This general thesis can be attributed to P.L. Berger, B. Berger & H. Kellner, *The Homeless Mind: Modernization and Consciousness* (Penguin 1974).

81. See the argument by Horwitz, *supra* n. 31, at 22ff. Horwitz claims that, in liberal democracies, there is a "tendency to treat rationalism and liberalism as a bedrock epistemology, a mode of thinking that tolerates other modes of experience but ultimately asserts its superiority over them." He cites, in this regard, S. Fish, *Liberalism Doesn't Exist*, 1 Duke L.J. 997 (1987).

82. See *S v. Lawrence*, *supra* n. 32. See also Horwitz, *supra* n. 31, at 33.

The fourth, and perhaps the most serious, cause of weakened religions is a tendency to regard traditional religions as something less than “proper” religions. Although they may provide answers to the fundamental questions about human existence and experience, which are matters considered to be essential to most faiths,⁸³ they may well fail to meet all the criteria of the typically essentialized definition of religion. All too often, however, that definition is, as we have seen, a product of Western thinking.⁸⁴

Whether or not African faiths fall within an accepted definition of a proper religion is only part of the problem. Even more serious is an implicit value judgment that they are somehow inferior to the main monotheistic religions.⁸⁵ The most immediate explanation for this prejudice is to be found in the colonial past. On a European scale of values, neither African religion nor African culture was perceived in positive terms. According to evolutionary theory, religion progressed from animism, through to ancestor worship, polytheism, and, finally, to the pinnacle of development: monotheism.⁸⁶ African religions were thought to be situated at the lower end of this scale, and were therefore expected to be replaced by beliefs of a higher order.

In such a context, the stage was set for Islam or Christianity to take over. These, the two principal missionary faiths in Africa, denied indigenous religions their “own wisdom, insights and values” to inform the lives of believers.⁸⁷ Muslims and Christians were driven to proselytize a “true” belief on the understanding that potential converts were either depraved or lacking a proper faith. For their part, African religions were predisposed to succumb. Being syncretistic in outlook, they had no sense of a need to proselytize, but instead were open to external influence.

In South Africa, colonial policy and Christian evangelism generally complemented one another, since the moral justification for conquest entailed persuading the “natives” to accept the virtues of Christian belief and European ideas of civic responsibility.⁸⁸ This policy was also

83. Freeman, *supra* n. 26, at 1553.

84. Cf. the distinction made by Gunn, *supra* n. 26, at 194 between essentialist definitions (identifying a set of elements before something can be said to qualify as a “religion”) and polythetic definitions (conceding that there is no single feature common to all religions, but accepting some shared features).

85. From the perspective of the particular believer, of course, other religions must necessarily be ranked. Thus, typically, within the major monotheistic religions, different beliefs may be stigmatized as “schismatic,” “sects,” “cults” or (even worse) “heresies.”

86. This scale of development derives from Tylor, *supra* n. 20.

87. Tlhagale, *supra* n. 24, at 1249.

88. Edgar H. Brookes, *The History of Native Policy in South Africa from 1830 to the Present*

heavily influenced by evolutionist theory: when suitably educated, Africans would naturally abandon their institutions in favor of superior European counterparts. Even in the post-colonial age, this thinking persists. Because African culture appears to have an “arrested” development,⁸⁹ “good culture . . . is defined by the distance of traditional cultures and proximity to Western values.”⁹⁰

Over these presuppositions, it followed that African religions were bound to compare unfavorably with the established monotheistic faiths. They had no clearly differentiated system of morality on a par with Christianity and Islam.⁹¹ They did not insist on universal validity, nor did they pose as ultimate issues the contest between sin and virtue, or justification in a final judgment and the possibility of eternal salvation. They were local and specific to particular communities.

African religions were found wanting not only in matters of content but also in matters of form.⁹² In the first place, they operated, at least in pre-colonial times, in oral cultures. For the rapidly secularizing colonial powers, orality was a mark of the primitive, and canonical texts were considered an essential component of a proper religion. In the second place, the traditional religions of southern Africa lacked system and institution, and, what is even more to the point, a sense of different, specific forms of knowledge.

In other words, Africans did not separate religion from everyday life. There was no theology,⁹³ and, indeed, few African languages had a special term for religion.⁹⁴ Given the holistic nature of this world view, the norms and standards—which Westerners would regard as religious, legal or social—operated in harmony, not in conflict. Thus, for Africans, it was unnecessary to distinguish the sacred from the secular.⁹⁵

When a society does not differentiate belief from knowledge, it has no need of a professional class to analyze and interpret a specialist

Day 91-92 (Natl. Press 1924).

89. Makua wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, 5 *Buff. Hum. Rights L. Rev.* 75, at 96-97 (1999).

90. *Id.*

91. See in this regard G. Obeyesekere, *Medusa's Hair: An Essay on Personal Symbols and Religious Experience* 82-83 (U. Chi. Press 1981). Thus, pre-literate religions did not construct systematic theories of sin, virtue, judgment and salvation (a rite of passage whereby the individual attains an ultimate status beyond suffering).

92. The issues enumerated here are derived from F. von Benda-Beckmann, *Who's Afraid of Legal Pluralism*, 47 *J. Leg. Pluralism & Unofficial L.* 37, at 49-50 (2002), with reference to systems of customary law.

93. Hammond-Tooke, *supra* n. 51, at 319.

94. Menski, *supra* n. 71, at 413.

95. *Id.* at 419.

subject. Instead, religion (like law) lies within the reach of everyone.⁹⁶ Admittedly, the conduct of rituals might require particular skills, and might also entail privileged access to supernatural powers. Indeed, the practice of many African religions involves diviners, spirit mediums, herbalists (who understand not only the physical but also the mystical powers of plants) and “witch doctors” (who specialize in the detection of malevolent forces). Notwithstanding all these expert groups, however, there was no authoritative group specifically qualified to pronounce on matters of faith and orthodoxy.

Thus, it can be said that the largely undifferentiated, unstructured nature of African religion provided the soil in which the seeds of prejudice grew rank.⁹⁷ The colonial period established a set of preconceptions about Africa; and these have been perpetuated into modern times: whatever is produced in the West must be superior to the African counterpart.⁹⁸ This thinking, however, involves more than a simple hierarchy of inferiority and superiority. It involves, according to Mutua, a complete destruction of the inferior, something “akin to cultural genocide.”⁹⁹ Hence, “[f]or those Africans who choose not to be Christians or Muslims, [traditional religion] is not really an option: it was so effectively destroyed and delegitimized that it is practically impossible to retrieve.”¹⁰⁰

In summary, the traditional African type of religion does not fit comfortably into the model of religion contemplated for human rights advocacy. In fact, the blanket protection offered under a universal definition of religious rights serves, in practice, to prioritize some religions over others. Hence, constitutional protection may have the effect of itself discriminating against religions that do not conform to a certain type.

Personal belief or the working of an individual mind is of little consequence in religious rights litigation. Yet the true realization of

96. A.N. Allott, *African Law*, in *Introduction to Legal Systems* 131, at 135-136 (J.D. M Derrett ed., Sweet & Maxwell 1968).

97. Gunn, *supra* n. 26, 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.

98. E. Bonthuys, *Accommodating gender, race, culture and religion: outside legal subjectivity*, 18 SA J. Hum. Rights 41, at 52 (2002) (describing the “mainstream legal subject” as one steeped in Western culture and beliefs). This person is “represented as innocent of cultural, religious and racial content. He exists outside of a religious or cultural community as an isolated, atomic, epistemic subject. In order to qualify as a legal subject, outsiders have to take on or appear to take on these qualities, norms and behaviours.”

99. Mutua, *supra* n. 89, at 75.

100. *Id.* at 105.

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religious freedom should encompass the right to engage in both the practice and the belief of one's faith in a manner that is prescribed by the religion itself. It should not prescribe a manner that is dictated by outsiders based on their understanding of what constitutes a religion.

Protection of religious practice is to be found under the banner of culture. Hence, if we are to ensure equality for Western and traditional African religions, then we should seek entitlement under the right to culture rather than the right to religion.

CONCLUSION:
SECURING SURVIVAL

Currently, the traditional African religions of South Africa are undervalued, threatened by forces of secularism and in danger of being eclipsed by Christianity and Islam. Nonetheless, it is interesting to note that, compared with the monotheistic faiths, traditional religions offend western notions of morality and religion only in insignificant ways. (Problems seem to arise mainly with regard to burial sites, which may infringe the rights of property owners, and animal sacrifice, which may offend municipal health regulations and animal rights activists.)¹⁰¹ The reason for this state of affairs would seem to lie in the syncretistic character of African religions and the fact that they make none of the dogmatic claims to understanding ultimate questions of existence and morality, which are the issues preoccupying the monotheistic religions.

In his lament about this state of affairs,¹⁰² Mutua calls on Africans to embrace their religions which, before the onset of colonialism, were at the core of their lives. He recommends outlawing proselytizing when it seeks to impose dominant cultures; and he advocates special protection for traditional religions, together with mechanisms for redress.¹⁰³

Less extreme options, however, are available. In the first place, the syncretistic nature of traditional religions will in itself help to secure their survival, albeit in changed forms. Evidence of their resilience is apparent in the rapid development of African Independent churches. (The Zionist church, for instance, which was founded in 1895, is now

101. Classic examples are the Yengeni case cited above and *Nkosi & Another v. Bührmann* 2002 (1) SA 372 (SCA).

102. *Id.* at 97.

103. See Mutua, *supra* n. 89, at 105. He is nevertheless aware of the danger that his proposal to promote African religion may ultimately succeed in establishing a new orthodoxy, thereby destroying diversity (*Id.* at 79.).

the largest denomination in South Africa.)¹⁰⁴ These churches, which have synthesized elements of both Christianity and traditional religions, feature faith-healing, revelation through dreams, baptism in rivers and the wearing of white garments.¹⁰⁵ What sets them apart from their Western counterparts, however, is an indigenous origin through the activities of Africans to cater for particular African needs.

Conversely, established Western churches have absorbed elements of African culture. Indeed, local culture has been used explicitly as a medium through which the gospel message may be more effectively communicated.¹⁰⁶ Proselytizing in this manner is not a creature of Western domination; rather, it is a means for promoting and sustaining all that is African on the understanding that it deserves equal respect. Thus, inculturation becomes an indirect method for protecting traditional African life and beliefs.¹⁰⁷

In the second place, the right to equal treatment, which is enshrined in Section 9 of the Constitution,¹⁰⁸ provides a legal basis for ensuring the survival of traditional religions. While this right clearly seeks to protect individuals, groups also benefit, and so, of course, do the religions and cultures associated with those groups.¹⁰⁹ On this understanding, the Cape High Court, in *Ryland v. Edros*,¹¹⁰ held that Islamic marriages were entitled to recognition on the ground that the state was obliged to promote diversity, and thereby accord equal treatment to all the

104. See the figures given by Statistics South Africa, *Census 2001: Primary Tables* (available at www.statssa.gov.za) where members of the Zionist Christian Church account for 11.1% of the country's population.

105. P. Hinchliff, *The Church in South Africa* 90 (SPCK for the Church Historical Socy. 1968), and "Independent Churches" in N. Worden, *A Concise Dictionary of South African History* 78-79 (Francois 1998).

106. The policy of inculturation has long been associated with Christian teaching, but more recently with Pope John Paul II's encyclical *Redemptoris Missio* (1990). See Tlhagale, *supra* n. 24, at 1249.

107. As E.P. Antonio, *The Politics of Proselytization in Southern Africa*, 14 *Emory Intl. L. Rev.* 491, at 523 (2000) says:

[T]here is a sense in which the moment of opposition to tradition gives way to the need to negotiate the new message of Christianity in terms of the symbols, values and idioms of an already familiar framework.

108. Sec. 9(1) provides that: "Everyone is equal before the law and has the right to equal protection and benefit of the law." Subsec. (3) continues:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

109. Moreover, according to *Taylor v. Kurtstag NO* [2004] 4 All SA 317 (W) ¶ 45, the right to equal treatment of religions is horizontally applicable.

110. 1997 (2) SA 690 (C).

country's cultures and faiths.¹¹¹

To date, however, the guarantee of equality has received scant mention in relation to religious rights. As Du Plessis put it, rather than demand that religions be treated equally, “[t]he tendency thus far has been to put all the eggs of judicial argumentation in support of the protection of religious rights in the freedom basket instead.”¹¹² Nevertheless, it is clear that non-discrimination is essential to ensure diversity; and, until equal rights are fully mobilized, diversity will not be attained nor will traditional religions be revived to compete on their own terms in the free marketplace of faith.¹¹³ To apply this right to traditional religions will bring culture out from under the shadow of religion, and allow culture to shine in its own right.

Ultimately, however, drastic resuscitation efforts are necessary if the heart of traditional faiths has any hope of beating again. The most effective safeguard against their fall from (Western) grace requires frank recognition of the inherent differences that separate African religions from monotheistic models. Once these differences are accepted, the argument can be shifted from freedom of religion to freedom of culture.

To suggest changes to the form and content of traditional African religions is to attempt to have them conform to something they are not. But they can remain intact and enjoy a fair degree of protection, if that protection comes under the rubric of culture. By its very nature, culture implies safeguarding the right to be different.

This approach will entail a better awareness of the relationship between religion and culture. Although separation of these concepts may be necessary for forensic purposes—it is, after all, clear that culture does not mean religion, and religion does not mean culture—the two are never completely separate. Thus, the loss of one will affect the existence of the other.

111. However, in *S v. Lawrence* 1997 (4) SA 1176 (CC) ¶ 122, O'Regan J. held that requiring the government to act even-handedly did not demand a commitment to a scrupulous secularism, or a commitment to complete neutrality.

112. L.M. du Plessis, *Freedom Of Religion or Freedom From Religion? An Overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in “the New South Africa,”* BYU L. Rev. 439, at 450-451 (2001). This tendency was evident in the leading case of *S v. Lawrence* 1997 (4) SA 1176 (CC), where a majority of the Constitutional Court judges chose to deal with a prohibition on the sale of liquor on Sundays primarily in terms of the freedom of religion. The equal treatment of all religions appeared in only a minority of the judgments, and then, arguably, only as an obiter dictum. See Currie & De Waal, *supra* n. 37, at 350.

113. Mutua, *supra* n. 89, at 79, however, is skeptical: “How does a body of principles that promotes diversity and difference protect the establishment and manifestation of religious ordering that seeks to destroy difference and forcibly impose an orthodoxy in Africa—as both Christianity and Islam . . . in many cases successfully did?”

A capacity to adapt is characteristic of the dynamics of community and of culture, and, as such, it deserves protection, for it is through this means that the culture of religion has acquired its uniquely African identity. In summary, then, it is the symbiosis of community and culture which warrants the constitutional protection that has come to be associated with faith. It was Yengeni's commitment to his traditional faith that led to the controversy about his sacrifice of the bull early in 2007; and it is a universal adherence to faith (and culture, whichever it may be) which necessitates that protection of religion be extended to culture.