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The freedoms of religion and culture under the South African Constitution: Do traditional African religions enjoy equal treatment?

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Summary

This article is concerned with traditional African religions, in particular the belief system of the Pondo people of the Eastern Cape Province in South Africa, in terms of the rights to equal treatment and freedom of religion under that country's 1996 Constitution. The authors begin by describing a ceremonial animal sacrifice performed by a former executive member of South Africa's ruling African National Congress in 2007. This ritual brought to light a strong tendency to confound traditional African religions with culture. Although it is apparent that religious beliefs are treated with greater respect than cultural practices, any supposition that culture is less important than religion is not only alien to traditional African societies, but also contrary to the equality provisions in the Constitution. The paper argues that, as a consequence of being consistently overshadowed by the main monotheistic religions in Africa, Christianity and Islam, traditional religions receive far from equal treatment. Hence, instead of being treated equally, as dictated by the Constitution, traditional religions are perceived as incidents of culture, and are subjected to an implicit value judgment: that they are somehow inferior to 'true' religions, which the West would characterise as monotheistic. Full realisation of the freedoms of religion and culture requires that one be distinguished from the other. In proposing a method to do so, it is argued that culture is broader than religion, for

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it embraces everything that marks humans as social beings, whereas religion is not a necessary requirement of social life. In framing the argument for equality in the context of culture, the authors argue that constitutional protection of religion is best attained through the symbiosis of community and culture. In this way, the right to culture and, by extension, faith, is exercised through the identity of the group.

1 Introduction

On Sunday 20 January 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. This time-honoured African ritual was performed as a thank-offering to the Yengeni family ancestors. Animal rights activists, however, decried the sacrifice as an act of unnecessary cruelty, and a public outcry ensued. 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 Chairperson of the South African Human Rights Commission, said that '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.'¹

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 for human rights litigation, partly because the Constitution specifies two separate rights and partly because it seems that those working under the influence of modern human rights 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. In the case of Africa, the first outsiders were missionaries of Christianity and Islam, soon to be followed by European colonial powers. Although the conflation of religion and culture tends to devalue the former, the habit 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, although derived from the United States, is becoming

¹ http://www.iol.co.za/general/news/newsprint.php?art_id=qw1169538120458B2 (accessed 1 January 2007.)

a prominent issue in South African jurisprudence on freedom of belief since the advent of the new Constitution. This doctrine obliges the state to remain neutral on matters of religion. It follows that the courts must refrain from involvement in matters of religious dogma² and, unless absolutely necessary, they may not impose secular laws on religious communities, nor should they attempt to interpret the tenets of religious doctrine.³ 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 deal with religion (and its associated rituals which are considered to be fundamental to Christian, Islamic, Hindu and Jewish marriages) but, in the Commission's preparatory works, African religion was hardly mentioned.⁴ Instead, nearly all of the parties involved in the legislative process assumed that recognition of customary marriages rested exclusively on the right to culture.⁵

Such an approach to African traditional religions is an odd exception to the norm. In most societies, important rites of passage, such as circumcision, marriage and burial, are surrounded by rituals that serve to separate the sacred from the profane and to call down the gods' blessings. And yet, while Islam and Judaism recognise circumcision as a religious rite to be performed shortly after the birth of a male child, it is described as a cultural event in the African context. The same applies to marriage: Although seen by Christianity as a religious ceremony, an African marriage is considered to be a cultural event.

Yet another example is supplied by a leading South African case, *Christian Education, South Africa v Minister of Education*,⁶ which was concerned with the freedoms of religion and culture. Here the applicants began by arguing that a right to use corporal punishment in schools was based on both these rights. 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 religion, presumably on an intuitive assumption that it was the weightier right.

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

³ *Worcester Muslim Jamaa v Nazeem Valley & Others* 2001 JDR 0733 (C) para 109.

⁴ South African Law Commission *Report on Customary Marriages* (1998) Project 90, Government Printer, Pretoria paras 4.4.5ff.

⁵ 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 consequence than 'music, singing or a wedding reception'. See *Sila & Another v Masuku* 1937 NAC (N&T) 121 123 and HJ Simons 'Customary unions in a changing society' (1958) *Acta Juridica* 320 322-5.

⁶ 2000 4 SA 757 (CC).

In none of the above situations was it clear who had decided that religion had priority over culture, or why this priority had been introduced. These questions, however, together with the broader issue of how religion and culture are to be balanced, lie at the heart of this article. The framework for the discussion is South Africa's widely acclaimed Constitution of 1996, the centrepiece of which is a fully justiciable Bill of Rights protecting, *inter alia*, the freedom to pursue cultures and religions of choice. We argue that, in spite of these guarantees, traditional religions 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.⁷

2 A traditional African religion: The Pondo

Since colonial times, a major problem with foreign perceptions of African religions has been a tendency to over-generalise, and, in the process, to reduce all the indigenous beliefs to little more than animism and ancestor worship. Any generalisation about a matter as complex as religion, however, especially in a continent as diverse as Africa, is clearly a bold undertaking. We have therefore chosen the religious beliefs of one people, not as representative of all those in South Africa, but rather to assist in understanding the overall nature of this topic.

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 area to surrender sovereignty to British rule, which they did in 1894. Colonial historians and ethnographers included the Pondo in an ethnic category described as 'Southern Nguni', a term denoting various cultural and linguistic similarities⁸ that were considered important enough to distinguish them from the Northern Nguni, a much larger group that is spread over KwaZulu-Natal, Swaziland and as far afield as East and Central Africa. Pondo life has been well documented by two distinguished anthropologists, Monica Hunter⁹ and Fr Heinz Kuckertz.¹⁰

⁷ The Constitutional Court, in *Christian Education, South Africa v Minister of Education* 2000 4 SA 757 (CC) para 24, eg, 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"'.
⁸ The Pondo speak a dialect associated with a cluster of closely-related languages further south, termed generally 'isiXhosa'.

⁹ M Hunter *Reaction to conquest: Effects of contact with Europeans on the Pondo of South Africa* (1936).

¹⁰ Fr H Kuckertz *Creating order: The image of the homestead in Mpondo social life* (1990). Both Hunter and Kuckertz worked in the functionalist tradition, but they took careful note of the effects of colonisation and labour migration on contemporary Pondo society.

Contrary to the preconceptions of outsiders, the Pondo — and the Southern Nguni generally — believe in the existence of a single, supreme being, who is called *uThixo*. This name seems to have been borrowed from the KhoeKhoe. An equivalent Xhosa word is *uDali uThixo* which is a *deus otiosus*, since it¹¹ is too remote from everyday life to be concerned with the immediate welfare of individuals.¹² Hence, the living do not call upon it to intervene in their lives, nor do they have rituals dedicated to its worship.¹³

Missionary influences, however, and the need to identify indigenous beliefs with the Christian message found in *uThixo* a ready Xhosa translation for Jehovah. Thus Soga, a prominent Christian figure 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'.¹⁴ Hunter, on the other hand, was more sceptical. She said that there was¹⁵

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.

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 *abantu base mlanjeni* (people of the river) who seem to have an association with clan ancestors.¹⁶ Even so, Hunter said that they were seldom referred to as *amathongo* (ancestral spirits), but were rather seen as evil manifestations of those spirits.¹⁷

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 behaviour and association with animal familiars. In some

¹¹ 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.

¹² 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 WD Hammond-Tooke 'World View I: A system of beliefs' in WD Hammond-Tooke (ed) *The Bantu-speaking peoples of Southern Africa* (1974) 320-321.

¹³ Hammond-Tooke (n 12 above) 319.

¹⁴ JH Soga *The Ama-Xosa: Life and customs* (1932) 133.

¹⁵ Hunter (n 9 above) 269. The idea of the creator survives in a widely held myth that the supreme being broke off nations from reed beds. See F Brownlee (ed) *The Transkeian native territories: Historical records* (1923) 116 for the Mpondomise.

¹⁶ EJ de Jager & VZ Citywa 'A Xhosa *umhlwayelelo* ceremony in the Ciskei' (1963) 22 *African Studies* 109 110.

¹⁷ Hunter (n 9 above) 263.

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.¹⁸

For all the Pondo, the spirits of *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.¹⁹ While the ancestors may be the shades of people recently or long departed, not all deceased become *amathongo*. The spiritual destiny of children and young persons, for instance, is vague,²⁰ 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 *ithongo* (soul) or *umphefumlo* (breath).²¹ Although there is no clear hiatus between the states of life and spirit,²² death is obviously necessary for the emergence of an *ithongo*. The *ukubuyisa* ceremony, which occurs sometime after burial, is a time 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.

All the living and the dead are thus believed to be linked together in an enduring relationship. Some of the spirits, however, exert a special influence, and they continue to communicate regularly with the living. The power to intercede with them vests principally in the family head, who combines ritual and temporal powers in one office, and provides a channel of communication with the ancestors through notionally unbroken ties of blood.²³ In order to maintain this relationship, the living are obliged to perform certain rituals.²⁴

Although the major rituals coincide with the principal rites of passage — birth, initiation, marriage and death — intervention by the ancestors is also invoked when the family wants to give thanks for an escape from death or ill-fortune. All these occasions are celebrated by

¹⁸ Hunter (n 9 above) 275ff.

¹⁹ See Hammond-Tooke (n 12 above) ch 10.

²⁰ Hunter (n 9 above) 231.

²¹ Hunter (n 9 above) 232.

²² As above.

²³ See, generally, A Shorter 'African Christian theology' in JR Hinnells (ed) *A handbook of living religions* (1991) 431 and, for another example, I Schapera *A handbook of Tswana law and custom* (1955) 61-62.

²⁴ See, generally, Shorter (n 23 above) 434 and VW Turner *The ritual process* (1969) ch 1 on the Ndembu of Zambia.

the ritual killing of cattle or goats.²⁵ The family then gathers, sometimes with neighbours, to share a feast or a fresh brew of beer.²⁶

Ritual is the key to understanding veneration of the ancestors. Communication demands the performance of certain rites according to predetermined customs. Thus the Pondo religion — like all traditional African religions — is characterised by ‘right action, not right belief — orthopraxis rather than orthodoxy’.²⁷ This distinguishing feature has contributed, in no small measure, to the outsider’s tendency to confound traditional religion with culture.

3 The devaluing of traditional African religions

Because traditional African religions are perceived as mere incidents of culture, they have been subjected to an implicit value judgment, that they are somehow inferior to the monotheistic faiths.²⁸ The reasons for thinking in this way are, of course, complex, but it is nevertheless clear that colonialism laid the foundation. In the European measure of things, neither African religion nor African culture amounted to much. This view of Africa was endorsed by evolutionist theory, according to which religion progressed from animism, through to ancestor worship, polytheism and, finally, to the pinnacle of development: monotheism.²⁹ 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.

²⁵ The ceremonies are hedged around with various rituals, such as the method for slaughtering particular types of animal and the belief that the bellowing summons the ancestors. See Hunter (n 9 above) 240ff.

²⁶ Beer, although a lesser offering than a beast, is another significant feature in the ceremonies associated with veneration of the ancestors. 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. See Hunter (n 9 above) 253ff.

²⁷ W Menski *Comparative law in a global context: The legal systems of Asia and Africa* (2006) 414 415. 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 internally. The right to engage in this internal determination is something that must also be protected in the name of culture.

²⁸ 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 stigmatised as ‘schismatic’, ‘sects’, ‘cults’ or (even worse) ‘heresies’.

²⁹ This scale of development derives from EB Tylor *Primitive culture; researches into the development of mythology, philosophy, religion, language, art and custom* (1920) 1. Despite the practical use of this scale of development, the legitimacy of this scale should be accepted with caution, as it is premised upon evaluating one culture by the standards of another. Such an exercise leads one to wonder how well Western cultures would fare if judged against a standard derived from African cultures. The point is that ‘the other’ cannot be faulted for being different, when that is the very nature of their character. See also n 82 below, and the discussion of essentialism.

It was hardly surprising that traditional religions compared unfavourably with the monotheistic faiths. They had no clearly differentiated system of morality on a par with Christianity and Islam.³⁰ They laid no claim to universal validity; rather, they were localised and specific to particular communities. 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.

African religions were found wanting, not only in matters of content, but also in matters of form.³¹ In the first place, they operated, at least in pre-colonial times, in oral cultures and, for the rapidly secularising colonial powers, orality was a mark of the primitive. Canonical texts were considered an essential component of a proper religion. In the second place, the traditional religions, of Southern Africa at least, 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,³² and few African languages had a special term for religion.³³ 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, Africans did not consider it necessary to distinguish the sacred from the secular.³⁴

When a society does not differentiate belief from knowledge, it has no need of a professional class to analyse and interpret a specialist subject. Rather, religion (like law) lies within the reach of everyone.³⁵ 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 ‘witchdoctors’ (who specialise in the detection of malevolent forces). Notwithstanding these expert groups, however, there was no authoritative body specifically qualified to pronounce on matters of faith and orthodoxy.

The stage was set for Islam or Christianity to take over. These, the two principal missionary faiths in Africa, denied indigenous religions their

³⁰ See, in this regard, G Obeyesekere *Medusa’s hair: An essay on personal symbols and religious experience* (1981) 82-83. 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).

³¹ The issues enumerated here are derived from F von Benda-Beckmann ‘Who’s afraid of legal pluralism’ (2002) 47 *Journal of Legal Pluralism and Unofficial Law* 37 49-50, with reference to systems of customary law.

³² Hammond-Tooke (n 12 above) 319.

³³ Menski (n 27 above) 413.

³⁴ Menski (n 27 above) 419.

³⁵ AN Allott ‘African law’ in JDM Derrett (ed) *Introduction to legal systems* (1968) 131 135-6.

'own wisdom, insights and values' to inform the lives of believers.³⁶ Muslims and Christians were driven to proselytise 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 proselytise, but, instead, were open to external influence.

In South Africa, colonial policy and Christian evangelism generally worked in harmony with one another, since the moral justification for conquest was the need to persuade the 'natives' to accept the virtues of Christian belief. Evolutionist theory complemented this policy: When suitably educated, Africans would naturally abandon their institutions in favour of superior European counterparts. Even in the post-colonial age, this thinking persists. Because African culture appears to have an 'arrested' development,³⁷ 'good culture ... is defined by the distance of traditional cultures and proximity to Western values'.³⁸

Thus it can be said that the largely undifferentiated, unstructured nature of African religion provided the soil in which seeds of prejudice grew rank.³⁹ 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.⁴⁰ This thinking, however, involves more than a simple hierarchy of inferiority and superiority, however. It involves, according to Mutua, a complete destruction of the inferior, something 'akin to cultural genocide'.⁴¹ Hence,⁴²

[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 delegitimised that it is practically impossible to retrieve.

Not only are traditional religions burdened by the legacy of colonial and evolutionist thinking, but they are also threatened by physical forces.

³⁶ B Tlthagale 'Inculturation: Bringing the African culture into the church' (2000) 14 *Emory International Law Review* 1249.

³⁷ M Mutua 'Limitations on religious rights: Problematising religious freedom in the African context' (1999) 5 *Buffalo Human Rights Law Review* 75 96-97.

³⁸ As above.

³⁹ T J Gunn 'The complexity of religion and the definition of "religion" in international law' (2003) 16 *Harvard Human Rights Journal* 189 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.

⁴⁰ E Bonthuys 'Accommodating gender, race, culture and religion: Outside legal subjectivity' (2002) 18 *South African Journal on Human Rights* 41 52 describes 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.'

⁴¹ Mutua (n 37 above) 75.

⁴² Mutua (n 37 above) 105.

While certain academics and traditional rulers might try to recover a sense of respect for African beliefs,⁴³ 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 proselytising faiths.⁴⁴ Nearly all South Africans hold religious beliefs, but by far the largest majority now professes some form of Christianity: 86% of the population (38,5 million people) belong to a Christian denomination of one kind or another.⁴⁵ Traditional African religions (in a pure form) are now an insignificant factor. They are professed by a mere 0,3% of the population. 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.⁴⁶

The second cause can be traced to the fact that veneration of ancestors is poorly adapted to survive urban conditions.⁴⁷ Municipal regulations prohibiting the keeping and slaughter of livestock make performance of the necessary rituals difficult to perform.⁴⁸ (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.⁴⁹

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, industrialised societies are highly differentiated. Thus,

⁴³ RB Mqeke 'Myth, religion and the rule of law in the pre-colonial Eastern Cape' (2001) 34 *De Jure* 81.

⁴⁴ Thus BA Pauw 'Ancestor beliefs and rituals among urban Africans' (1974) 33 *African Studies* 99 103 and BA Pauw 'The influence of Christianity' in Hammond-Tooke (n 12 above) 415ff say that 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"'.⁴⁵

⁴⁵ See Statistics South Africa *Census 2001: Primary tables* <http://www.statssa.gov.za>: 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.

⁴⁶ A Gouws & LM du Plessis 'The relationship between political tolerance and religion: The case of South Africa' (2000) 14 *Emory International Law Review* 657 660.

⁴⁷ Magic and traditional medicines, however, seem to be more easily adapted to urban settings. See E Hellmann 'The native in the towns' in I Schapera (ed) *The Bantu-speaking tribes of South Africa. An ethnographical survey* (1937) 426 and Hunter (n 9 above) 455-458 487 488-496; Pauw (1974) (n 44 above) (n 44 above) 9ff.

⁴⁸ Hunter (n 9 above) 537 547-548.

⁴⁹ See I Hofmeyr 'We spend our years as a tale that is told.' *Oral historical narrative in a South African chiefdom* (1993) 159-160.

when an individual offers his or her different experiences and often contradictory interpretations of life, religion has difficulty 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.⁵⁰

African religions are not alone, of course, in experiencing the trend towards secularism. Their fate is shared by religions in the liberal democracies. The thinking behind these regimes is dedicated to rationalism and, as such, is 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,⁵¹ 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 (section 36(1)) is filled with the language of rationalism.⁵²

4 The freedoms of 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.⁵³ It made its appearance in Europe during the seventeenth and eighteenth centuries in response to persecutions suffered by dissenting groups.⁵⁴

The right to culture, on the other hand, emerged only much later, during the twentieth century. 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.⁵⁵ In the eighteenth and nineteenth centuries, it was taken to mean intellectual

⁵⁰ This general thesis can be attributed to PL Berger *et al* *The homeless mind: Modernisation and consciousness* (1974).

⁵¹ See the argument by P Horwitz 'The sources of limits of freedom of religion in a liberal democracy: Section 2(a) and beyond' (1996) 54 *University of Toronto Faculty of Law Review* 1 22ff, who says 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' (1987) 1 *Duke Law Journal* 997.

⁵² See, too, Horwitz (n 51 above) 33.

⁵³ And it is now preserved in all international human rights conventions. See, eg, art 18 of the Universal Declaration of Human Rights, art 18 of the International Covenant of Civil and Political Rights and art 8 of the African Charter of Human and Peoples' Rights (1981).

⁵⁴ It featured in the Declaration of the Rights of Man and the Citizen (cl 10) which was proclaimed during the French Revolution.

⁵⁵ TW Bennett *Human rights and African customary law* (1999) 23-25.

or artistic endeavour, and so implied a freedom, akin to the freedom of expression, to perform or practise the arts and sciences.⁵⁶

A later meaning — one that is the concern of this article — developed largely in response to the politics of nationalism in Europe.⁵⁷ 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.⁵⁸ Through these means, one group could distinguish itself from other groups.⁵⁹

Culture in the latter sense often develops a close and symbiotic relationship with religion,⁶⁰ and in practice it is far from easy to disentangle the two concepts.⁶¹ Hence religion may function as a marker of culture and *vice versa*.⁶² Nevertheless, for purposes of human rights litigation, the two concepts must be kept separate, partly because they signify different rights and partly because religion has a privileged status. As we have seen, however, when a system of belief is treated as an incident of culture, it will not enjoy this status.

In South Africa, before the 1996 Constitution, the freedom to practise a culture of choice enjoyed no protection, but then it posed no particular problems.⁶³ Religion, too, was seldom an issue, mainly

⁵⁶ See arts 15(1)(a) and (c) of the International Covenant on Civil and Political Rights. See P Sieghart *International law of human rights* (1983) 339 para 23.5.3.

⁵⁷ Thus, culture was linked to self-determination. See art 1(1) of the International Covenant on Civil and Political Rights, which provides that, by virtue of the right to self-determination, all peoples are entitled to pursue their own cultural development.

⁵⁸ This definition is derived from the founder of cultural anthropology, EB Tylor *Primitive culture: Researches into the development of mythology, philosophy, religion, language, art and custom* (1920) 1, and continues to be taken as a core concept of this discipline. See HA Strydom 'The international and public law debate on cultural relativism and cultural identity: origin and implication' (1996) 21 *SA Yearbook of International Law* 1 4ff.

⁵⁹ Hence, culture is inherently oppositional, and consciousness of culture arises only through close interaction between two or more social groups. EE Roosens *Creating ethnicity: The process of ethnogenesis* (1989) 12.

⁶⁰ Culture in this sense is protected by art 27 of the International Covenant of Civil and Political Rights, 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 practise their own religion, or to use their own language'.

⁶¹ Progress towards definition is not, of course, assisted by the fact that lawyers, theologians and social scientists tend to work independently. See JM Donovan 'God is as God does: Law, anthropology, and the definition of "religion"' (1995) 6 *Seton Hall Constitutional Law Journal* 23 70ff regarding the legal and anthropological approaches.

⁶² 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 Tlhagale 'Inculturation: Bringing the African culture into the church' (2000) 14 *Emory International Law Review* 1249.

⁶³ Indeed, the apartheid regime had used culture as the basis for restructuring the South African state. Bennett (n 55 above) 7.

because it was usually taken to be a matter of personal conscience, and the state had little interest in regulating private affairs.⁶⁴ Occasionally, when religious beliefs manifested themselves as practices offensive to the common weal — notably breaches of the Sunday observance laws⁶⁵ and conscientious objection to military service⁶⁶ — the courts ruled that individual freedom had to give way to broader public interests.⁶⁷

Traditional African beliefs 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 defences to criminal charges or as mitigating factors in sentencing.⁶⁸ Even then, the courts tended to treat the claims as superstitions,⁶⁹ or some other form of aberration, not as part of an acceptable religious system.

The 1996 Constitution, however, elevated both culture and religion to the Bill of Rights. Two separate sections are devoted 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:

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

Although the content of the rights protected in these sections may be similar, the two provisions have significant differences. Section 15 protects an individual's freedom to hold whatever faith or belief he or she has chosen, while section 31 embraces a community's freedom to practise a religion of choice, which suggests an outward manifestation of an inner belief. The 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;

⁶⁴ The same was true of other states. See Horwitz (n 51 above) 5.

⁶⁵ Eg *S v Lawrence* 1997 4 SA 1176 (CC) challenged a contravention of sec 90(1) of the Liquor Act 27 of 1987, which restricts the hours and days on which liquor may be sold.

⁶⁶ *S v Abrahams* 1982 3 SA 272 (C) and *Hartman v Chairman, Board for Religious Objection & Others* 1987 1 SA 922 (O).

⁶⁷ *Lawrence* (n 65 above) paras 90-98.

⁶⁸ See J Burchell *Principles of criminal law* (2005) 535-536 and TW Bennett & WM Scholtz 'Witchcraft: A problem of fault and causation' (1979) 12 *Comparative and International Law of Southern Africa* 288.

⁶⁹ 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'.

and (c) to manifest that belief by worship and practice, teaching and dissemination.⁷⁰

For obvious reasons, the first component is not readily amenable to legal regulation.⁷¹ 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,⁷² 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'.⁷³ It is worth noting, then, that the South African courts have tended to refrain from using the limitation clause when analysing rights under section 15, since it involves the imponderable task of weighing faith against reason, not to mention distinguishing the religious from the secular.⁷⁴ Instead, they have restricted the scope of the right.⁷⁵

From another perspective, the difference between sections 15 and 31 can be couched in terms of absolute versus relative rights,⁷⁶ where section 15 represents the absolute right to religious freedom that has become one of the hallmarks of the Western human rights culture. The

⁷⁰ I Currie *et al* *The Bill of Rights handbook* (2005) 339. This formulation was taken from the Canadian case, *R v Big M Drug Mart* [1985] 1 SCR 295 336, by Chaskalson J in *S v Lawrence* 1997 4 SA 1176 (CC) para 92. It was followed in *Prince v President, Cape Town Law Society* 2002 2 SA 794 (CC) para 38 and *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 19.

⁷¹ See Currie *et al* (n 70 above) 344 citing D Meyerson *Rights limited* (1997) 2. This difficulty accounts for the courts' reluctance to question an individual's sincerity of belief as a requirement for upholding sec 15. The judgment of the court *a quo* in *Christian Education SA v Minister of Education of the Government of the RSA* 1999 9 BCLR 951 (SE) 957-958 is the exception to the rule. See Currie *et al* (n 70 above) 341.

⁷² Sec 36(1) provides: '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 ...'

⁷³ Currie *et al* (n 70 above) 344-346.

⁷⁴ Meyerson (n 71 above) 34.

⁷⁵ Currie *et al* (n 70 above) 341-342.

⁷⁶ 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; eg, 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. OS Ioffe 'Human rights' (1983) 15 *Connecticut Law Review* 687 736-7 explains 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?

relative right provided for in section 31, on the other hand, represents a physical 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 of that belief in behaviour.

Nevertheless, when it comes to religious freedom, there can be no definite hierarchy between absolute and relative rights, because some religions emphasise 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.

How, then, are we to distinguish religion and culture? For a start, it would seem that culture is broader than religion, for it embraces everything that marks humans as social beings,⁷⁷ whereas religion is not a necessary requirement of social life. Thereafter, the process of differentiation generally depends upon determining whether a particular belief fits within an accepted definition of religion.⁷⁸ In this regard, certain faiths have proved to be paradigmatic in setting the criteria. Thus, the essence of a true religion is often taken to be: monotheism, belief in a supreme being, the proclamation of everlasting truth, an explanation of the plight of the human condition.⁷⁹ Perhaps most important is a sense of the sacred.⁸⁰ Religion is regarded as 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.

When the adherents of paradigmatic faiths see no similarities between the forms and structures of their own belief systems and the exotic, they tend to exclude the exotic from the concept of religion. But, as criteria for distinguishing religion from culture, spirituality, fixed creeds and the division between the sacred and profane are more suited to the monotheistic faiths. The religions indigenous to South Africa, however, have no established canons of belief (with the result that questions of

⁷⁷ See nn 58 and 59 and the text above.

⁷⁸ According to some scholars, however, the process of definition is a futile exercise, since religion cannot be defined. See GC Freeman 'The misguided search for the constitutional definition of "religion"' (1983) 71 *Georgetown Law Journal* 1519ff and TJ Gunn 'The complexity of religion and the definition of 'religion' in international law' (2003) 16 *Harvard Human Rights Journal* 189 191. Donovan (n 61 above) 28 goes so far as to say that the exercise is unconstitutional.

⁷⁹ See Freeman (n 78 above) 1553 and Donovan (n 78 above) 60-61, who cite the list of features prepared by the United States' IRS.

⁸⁰ This distinction determines E Durkheim's *The elementary forms of the religious life* (1912). See Donovan (n 61 above) 73.

creed, and the counterpart heresy, do not arise), nor do they maintain a strict distinction between the sacred and profane.⁸¹

It should, in addition, be noted that the problem of definition is generally complicated by a tendency to think in essentialist terms.⁸² Once religion is taken to be predetermined, an idea that existed before human society, there is a tendency to demand a single definitive answer to the problem of deciding what constitutes religion.⁸³ Such thinking precludes the possibility of history and human agency.

A more straightforward approach to distinguishing religion and culture is to ask what function the respective rights perform. In the former case, the answer is complex, but, in the latter, it is relatively simple. Arguing a right to culture implies the right to be different, namely, to deviate from a (notionally national) norm of behaviour. Such an approach contributes to the broader goal of securing equal treatment for traditional religions and, potentially even, their ultimate revival.

5 Conclusion

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. In his lament about this state of affairs,⁸⁴ Mutua calls on Africans to embrace their religions which, before the onset of colonialism, were at the core of their lives. He recommends outlawing proselytising, when it seeks to impose dominant cultures, and he advocates special protection for traditional religions, together with mechanisms for redress.⁸⁵

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.

⁸¹ Nor for that matter do such other religions as Buddhism. See M Southwold 'Buddhism and the definition of religion' (1978) 13 *Man* 362. See, too, J Goody 'Religion and ritual: The definitional problem' (1961) 12 *The British Journal of Sociology* 142.

⁸² 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 could speak for all religions or, at the very least, that the frame of reference for judging different them should be the western frame. In consequence, religions that do not conform to western-specifications may not be recognised and valued as religions.

⁸³ See the distinction made by Gunn (n 39 above) 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).

⁸⁴ Mutua (n 37 above) 97.

⁸⁵ See Mutua (n 37 above) 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 (Mutua (n 37 above) 79).

(The Zionist Church, for instance, which was founded in 1895, is now the largest denomination in South Africa.)⁸⁶ These churches, which have synthesised elements of both Christianity and traditional religions, feature faith-healing, revelation through dreams, baptism in rivers and the wearing of white garments. What sets them apart from their Western counterparts, however, is an indigenous origin through the activities of Africans to cater for particular African needs.

Allied to this point is the way in which the 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.⁸⁷ Proselytising 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.⁸⁸

In the second place, the right to equal treatment, which is enshrined in section 9 of the Constitution,⁸⁹ 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.⁹⁰ On this understanding, the Cape High Court, in *Ryland v Edros*,⁹¹ 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 country's cultures and faiths.⁹²

To date, however, the guarantee of equality has received scant mention in relation to religious rights. As Du Plessis puts 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

⁸⁶ See the figures given by Statistics South Africa (n 46 above) where members of the Zionist Christian Church account for 11,1% of the country's population.

⁸⁷ The policy of inculturation has long been associated with Christian teaching but, more recently, with Pope John II's encyclical *Redemptoris Missio* (1990). See Tilhagale (n 36 above) 1249.

⁸⁸ As E P Antonio 'The politics of proselytisation in Southern Africa' (2000) 14 *Emory International Law Review* 523 says: 'There is a sense in which the moment of opposition to culture 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.'

⁸⁹ Sec 9(1) provides: '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.'

⁹⁰ Moreover, according to *Taylor v Kurtstag NO* [2004] 4 All SA 317 (W) para 45, the right to equal treatment of religions is horizontally applicable.

⁹¹ 1997 2 SA 690 (C).

⁹² However, O'Regan J (in *Lawrence* (n 65 above, para 122)) said that requiring the government to act even-handedly did not demand a commitment to a scrupulous secularism, or a commitment to complete neutrality.

protection of religious rights in the freedom basket instead'.⁹³ Nevertheless, it is clear that non-discrimination is essential to ensure diversity, and, until equal rights are fully mobilised, diversity will not be attained, nor will traditional religions be revived to compete on their own terms in the free market place of faith.⁹⁴

In the third place, we should be aware that in some societies (as in Southern Africa), it appears not to matter whether we conflate religion and culture (or have no definite way of separating the two). In human rights discourse, however, it does matter, because religion is taken more seriously and is treated with greater respect. Nevertheless, certain peoples have no tradition of thinking about religion and culture as different forms of behaviour.

Admittedly, of course, personal belief or the working of the individual mind is of little consequence in religious rights litigation, but a true realisation of 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. Freedom should not prescribe a manner that is dictated by outsiders based on their understanding of what constitutes a proper religion. Hence, to apply the freedom to traditional religions will bring culture out from under the shadow of religion, and allow culture to shine in its own right.

If the heart of traditional faiths has any hope of beating again, however, then drastic resuscitation efforts will be necessary. The most effective solution to the fall from (Western) grace of traditional faiths requires a frank recognition of the inherent differences that separate African religions from monotheistic models. The former do 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 prioritise some religions over others. Hence, constitutional protection may have the effect of itself discriminating against religions that do not conform to a certain type.

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, because, by its

⁹³ LM 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"' (2001) *Brigham Young University Law Review* 439 450-1. This tendency was evident in the leading case of *Lawrence* (n 65 above), 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 et al* (n 70 above) 350.

⁹⁴ *Mutua* (n 37 above) 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?'

very nature, culture implies 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.

In the long run, we will find that a capacity to adapt is characteristic of the dynamics of community — and of culture. 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.