

## Constitution, Charter and religions in South Africa

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### Summary

*This article discusses the status of religious rights and freedoms under the South African Constitution and the South African Charter of Religious Rights and Freedoms. Following a discussion of the demographics of religious and ethnic pluralism in South Africa, the article discusses the relevant provisions of the Constitution and the Charter and historical antecedents in common law and Roman-Dutch law and the historical and contemporary influence of African traditional religion and customary law that have shaped the current relationship of the Christian church to the South African state. The article concludes with an argument for the recognition of a plurality of religions and religious legal systems in Africa.*

### 1 Introduction: Peoples, religions, Constitution and Charter

This article is about the South African Constitution,<sup>1</sup> the South African Charter of Religious Rights and Freedoms (South African Charter)<sup>2</sup> and religions in South Africa. Unfortunately, I have to limit myself to the constitutional position of just two of the many religions in the country, as space and time do not allow for more. I hope it will become clear why these two religions are important regarding their constitutional position and what the challenges are for South Africa regarding law and religion. The Constitution guarantees freedom of religion for all religious persons and religions in the country.<sup>3</sup> What these rights and freedoms entail is the subject matter of the South African Charter. What the current position of Christianity and African

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1 Constitution of the Republic of South Africa, 1996.

2 South African Charter of Religious Rights and Freedoms, <http://academic.sun.ac.za/theology/religious-charter> (accessed 31 January 2014).

3 Sec 15 Constitution of the Republic of South Africa, 1996.

traditional religion is with regard to the Constitution and the laws of the land is the question which this article will try to answer in the light of their guaranteed constitutional rights and the rights formulated in the South African Charter.

## 2 Peoples and religions of South Africa

South Africa is a country of many cultures and many religions – indeed, a country of pluralities. The total population of about 51 770 560 million is made up of 79,2 per cent black people; 8,9 per cent white people; 8,9 per cent coloured people;<sup>4</sup> 2,5 per cent Indians/Asians; and 0,5 per cent ‘other’.<sup>5</sup> The plurality of cultures within the different cultural groups is reflected in the fact of 11 official languages, which are reflected in the percentage of speakers of each language in comparison with the total population. The languages with their percentage of speakers according to the 2011 census are Isizulu 22,7 per cent; IsiXhosa 16 per cent; Afrikaans 13,5 per cent; Sepedi 9,1 per cent; SeTswana 8 per cent; English 9,6 per cent; SeSotho 7,6 per cent; Xitsonga 4,5 per cent; SiSwati 2,5 per cent; Thshivenda 2,4 per cent; isiNdebele 2,1 per cent; and other 1,6 per cent.<sup>6</sup>

As far as religion is concerned, 79,8 per cent of the population profess that they are followers of a form of Christianity. Among the Christian population, Reformed churches make up 7,2 per cent; Anglicans 3,8 per cent; Methodists 7,4 per cent; Lutherans 2,5 per cent; Presbyterians 1,9 per cent; Congregational churches 1,4 per cent; Roman Catholics 8,9 per cent; Pentecostal churches 7,3 per cent; and other churches 12 per cent. African independent churches have a membership of 40,8 per cent of the total Christian population. Apart from Christian followers in South Africa, there are also 0,2 per cent followers of the Jewish religion; 1,1 per cent Islam followers; 1,3 per cent Hindu followers; and 0,1 per cent Buddhist believers. There is also a large segment of African traditional religion. It is estimated that 12 per cent of the total of African traditional religion followers are in South Africa.<sup>7</sup> In April 1997, Kauuova gave the figure of 17,7 per cent as the percentage of African traditional religions,<sup>8</sup> but he did not specify whether this percentage was in relation to the total population of South Africa or in relation to the religious population in South

4 ‘Coloured’ South Africans are a people of mixed lineage. They are descendents of slaves who were brought to the country from East and Central Africa; the indigenous Khoisan, who lived in the Cape at the time, indigenous Africans and whites. The majority speak Afrikaans. See <http://www.southafrica.info/about/people/population.htm> (accessed 31 January 2014).

5 As above.

6 As above.

7 *South African Christian handbook 2007-2008* (2007) 69-74.

8 WR Kauuova *The religions of Southern Africa. A synopsis of their basic beliefs* Institute for Reformational Studies Series 1.1, Study Pamphlet 352 (1997) 1.

Africa. Prozesky and De Gruchy, with reference to the 1980 and 1991 census in South Africa, include African traditional religion under the headings of 'Nothing/Object' as being 3,1 per cent in 1980 and 2,97 per cent in 1991 as percentages of the total. With reference to the 1980 census, they mention a figure of 14,4 per cent under the heading of 'Uncertain', which then includes African traditional religion.<sup>9</sup> It is clear that there is no certainty about the number of believers in African traditional religions. Thus, not only is there a plurality of cultures, as is shown by the fact that the country has 11 official languages, but there is also a plurality of religions which all claim their legitimate share of the public space.

### 3 The South African Constitution and religion

The South African Constitution of 1996 brought about what can be called a paradigm change for religions in South Africa. It is a Constitution for every citizen of the country, and includes a Bill of Rights. For the first time, all religions in South Africa were guaranteed freedom of religion.<sup>10</sup> Religions, cultures and languages are entrenched in the Constitution in sections 9(3), 15(1) to (3), 30, 31, 185 and 234. Section 7(3) of the Constitution obliges the state to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>11</sup> Religious groups also have the right to limit certain rights of their members in compliance with the conditions set out in the Constitution.<sup>12</sup>

### 4 South African Charter of Religious Rights and Freedoms

Very soon after the Constitution was enacted in 1996, the question was asked what the implications of article 15 are for the religions of the land as well as for the whole of society. These questions led to the formulation of the South African Charter of Religious Rights and Freedoms.<sup>13</sup> Already in 1990, Judge Albie Sachs wrote:<sup>14</sup>

Ideally in South Africa, all religious organisations and persons concerned with the study of religion would get together and draft a charter of religious rights and responsibilities – it would be up to the participants themselves to define what they consider to be their fundamental rights.

9 M Prozesky & J de Gruchy (eds) *Living faiths in South Africa* (1995) 237.

10 Sec 15 Constitution of the Republic of South Africa.

11 Secs 7, 9, 30, 31, 185 & 234.

12 Sec 36.

13 South African Charter of Religious Rights and Freedoms.

14 A Sachs *Protecting human rights in a new South Africa: Contemporary South African debates* (1990), 46-47.

Without being aware of what Judge Sachs had written, a South African Charter of Religious Rights and Freedoms was drafted over a period of several years by a Continuation Committee of academics, religious leaders, government commissioners and international legal experts in consultation with all the major religions in South Africa, human rights groups and media bodies. The Charter was publically endorsed at a ceremony on 21 October 2010 in the presence of the Honorable Justice Dikgang Moseneke, Deputy Chief Justice of South Africa. At that occasion, 91 leaders, representing religious, academic, legal, human rights and media organisations in South Africa, as well as international advisors, endorsed the Charter. The signatories included representatives of the Jewish religion; 24 Christian denominations; the Muslim Judicial Council; the Ismaeli Community; the Jami'atul 'Ulama (the Council of Muslim Theologians); the Hindu faith (the Arya Samay SA, the Hindu Co-ordinating Council, the Sri Sathya Sai Baba Council, the Tamil Federation); the National Spiritual Council of the Baha'is of South Africa; African traditional religion; African independent churches; the National Commission for Culture, Language and Religion; women's organisations; youth movements; the education desk of the Dutch Reformed Church; the Griekwa National Council; the Griekwa Independent Church; the Commission for Religious Freedom of the Evangelical Alliance of South Africa; the Evangelical Alliance of Southern Africa; Trans World Radio; media production houses; the Christian Network; the Jesuit Institute; the Elected School of Amadlosi; and the Interdenominational Ministries. The total of practising religious believers represented by the signatories is estimated to be approximately 10,5 million of the total South African population of approximately 52 million.

The South African Charter defines the freedoms, rights, responsibilities and relationship between the state of South Africa and her citizens of religious belief. The Bill of Rights recognises that everyone has the right to freedom of religion, while article 234 makes allowance for civil organisations to draw up charters of rights, to be drawn up by civil organisations, which may then be enacted by Parliament. The South African Charter of Religious Rights and Freedoms is the first such charter to be developed in South Africa. Apart from addressing the freedoms and rights of religion over and against the state, the Charter is also very useful for organising the relationship between the different religions of the land. It helps them to understand that the Charter is not trying to bring about one religion in the country. The Charter defines the rights and freedoms that each religion in the country can claim while working together with other religions in the public sphere for the common good of the country. The Charter is also a very useful tool for religions to determine their own identity in terms of the rights and freedoms that they can legitimately claim. If religions do not use this tool, they will find that their rights and freedoms will be determined by the courts. Even if parliament does not enact the Charter, religions can always

make it part of their own body of rules and regulations, which then will have to be taken into account by the courts.

The Charter consists of a Preamble of eight articles which express the needs for a charter. This is then followed by the Charter itself, comprised of 12 articles with sub-divisions, stating the religious rights and freedoms of religious people and communities in South Africa. The Charter expresses what freedom of religion means to religious believers and religious organisations within a South African context, as well as the specific rights, responsibilities and freedoms that are associated with freedom of religion. These include, amongst others:<sup>15</sup>

- the right to gather to observe religious belief (article 1);
- freedom of expression regarding religion (article 6);
- the right of citizens to make choices according to their convictions (article 2);
- the right of citizens to change their faith (article 2);
- the right of persons to be educated in their faith (article 7);
- the right of citizens to educate their children in accordance with their philosophical and religious convictions (article 7);
- the right to refuse to perform certain duties or assist in activities that violate their religious belief (article 2(3)); and
- the rights of religions to institutional freedom (article 9).

Currently the Charter is available in Afrikaans, English, Zulu, Xhosa, Sotho, Tswana and also in German.

After the public endorsement of the Charter, a South African Council for the Promotion and Protection of Religious Rights and Freedoms was established to oversee the process of the Charter being formally enacted into South African law. The passing of the Charter into law will officially mean that every religious believer and organisation will have legal impartiality and protection to practise all elements of religious belief under the Constitution. Currently the Council for the Promotion and Protection of Religious Rights and Freedoms is engaging with various financial, academic and cultural bodies in society as well as with various trade and labour unions for their support in taking the Charter to Parliament. Eventually political parties will also be engaged to inform them about the Charter and the effort to have it enacted by Parliament.

## 5 Christianity in South Africa and the Constitution

Christianity is the religion of the people who follow Jesus Christ as their Saviour and Lord who, together with the Father and the Holy Spirit, is the Triune God. Out of love for this world, the Father sent the Son to the world where He died for the sin of the world. As the Lord who was raised from the dead, Christ is the head of the whole of creation – the kingdom of God. Christ was at the same time also given as the head of the church, His body, the fullness of Him that fills

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15 South African Charter of Religious Rights and Freedoms.

everything in everybody. They who believe in Him are His church and at the same time also members of His kingdom, called to witness to the world in every aspect of their life about Jesus Christ, the Lord of the whole of creation. For Christians, the Bible is the Word of God which guides them in their religious and moral life in all spheres of life. Christianity reached South Africa at a very early time in the Western time calendar. The Reformed religion came to the southern tip of Africa from Western Europe in 1652, through the establishment of a refreshment post for their ships at the Cape of Good Hope by the Dutch East Indian Company.<sup>16</sup>

### 5.1 Church and state: The current situation

In South Africa, official state law consists of a Western and an African component. The Western component entails common law, which is Roman-Dutch law, as influenced by English law and adapted and further developed by court decisions. The African component consists of that customary law which has been incorporated into legislation and the decisions of courts.<sup>17</sup> This constitutes the official legal pluralism in South Africa. Apart from this official state law, there is also a plurality of other unofficial laws, including the laws of the Hindu, Muslim and Jewish religions, as well as the so-called living customary law and the people's law. It is very interesting that legal scholars<sup>18</sup> mention only the Hindu, Muslim and Jewish laws as so-called unofficial legal systems, but do not include the numerous other religions that also exist in South Africa, all of which have their own laws on how they are structured, what they expect from their members and according to which they claim the right to operate in society. Even stranger is the fact that Christianity is not mentioned as a separate unofficial legal system. This is probably due to the history of the relationship between church and state in South Africa, according to which the legislation of the state was, and perhaps still is, uncritically seen and accepted as complying with Western values which are, in turn, equated with Christianity. How did this come about?

### 5.2 From history

When the Protestant Reformation of the sixteenth century took place under the leadership of people like Martin Luther and John Calvin, much of the theological content of the teachings of the Roman Catholic Church was translated into a new paradigm of salvation through faith in Christ alone. However, when it came to the important issue of the relationship between church and state, it can

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16 For a list of important events in the history of South Africa's religions, see Prozesky and De Gruchy (n 9 above) 229.

17 C Rautenbach *et al* *Inleiding tot regspluralisme in Suid-Afrika* (Introduction to legal pluralism in South Africa) (2010) 3.

18 As above.

be said that the Reformers did not formulate profound new insights. They simply went back to the old paradigm of the relation between church and state that existed since the time of Constantine. This meant that they accepted it as the duty of the state to protect the church and its teachings, even with the power of the sword, thereby granting the worldly authorities the power to control the church.

This teaching can clearly be seen in the *Confessio Belgica*<sup>19</sup> (1561), a very important Reformed confession from the sixteenth century, also known as the Dutch Confession of Faith. Article 36 of this Confession sets forth how God has placed the sword in the hands of the government to punish evil people and protect the good (Romans 13:4). It then continues:

And the government's task is not limited to caring for and watching over the public domain but extends also to upholding the sacred ministry, with a view to removing and destroying all idolatry and false worship of the Antichrist; to promoting the kingdom of Jesus Christ; and to furthering the preaching of the gospel everywhere; to the end that God may be honored and served by everyone, as He requires in His Word.

With regard to the duty of subjects of the church, we read the following:<sup>20</sup>

Moreover everyone, regardless of status, condition, or rank, must be subject to the government, and pay taxes, and hold its representatives in honour and respect, obey them in all things that are not in conflict with God's Word praying for them that the Lord may be willing to lead them in all their ways and that we may live a peaceful and quiet life in all piety and decency (1 Timothy 2:2).

This is not to say that the theocratic rule by the Roman Catholic Church that had prevailed since 1075, in which the teachings and order of the church controlled the whole life of state and society,<sup>21</sup> was simply accepted by the different rulers in the West.<sup>22</sup> There is much historical evidence to the contrary. After the Council of Basel (1431), the national states asserted their guardianship over the church. In England, the national church that had existed since the fourteenth century in 1531 became the Anglican State Church under the rule of Henry VIII. In 1478, the Inquisition in Spain was taken over by the state. In Germany, the different provincial rulers had authority over the church within their boundaries – an approach that was formalised with the Peace of Augsburg in 1555.<sup>23</sup> In Geneva, Calvin did try to introduce greater freedom for the church from the worldly authorities, but even there the political authorities insisted on their position of authority over the church. We find proof of this in article

19 *Confessio Belgica* (1561) <http://www.ccel.org/ccel/schaff/creeds3.iv.viii.html> (accessed 31 January 2014).

20 Art 36 *Confessio Belgica* (n 19 above).

21 J Witte Jr 'Introduction' in J Witte Jr & FS Alexander (eds) *Christianity and law: An introduction* (2008), 9-15.

22 H Berkhof & O de Jong *Geschiedenis der Kerk. Negende druk* (1978) 168.

23 Berkhof & De Jong (n 22 above) 115 160.

165 in both the Church Orders of 1541 and 1561.<sup>24</sup> In the Netherlands, we also find that, after many years of fighting and bloodshed, the Reformed Church became the privileged church, protected by, but in fact also subjected to, the political rulers.<sup>25</sup>

This was also the case in South Africa where a situation of Constantinianism in a stricter or lesser sense endured from 1652 to 1994 – first from 1652 to 1795 under the Dutch, and then from 1806 to 1910 under the English. After 1910 came the Union of South Africa, a period in which different governments to a large extent continued the Constantinian model of church state relations through their political agendas. In 1996, South Africa got a new Constitution in which, for the very first time, freedom of religion was guaranteed.<sup>26</sup> Even more importantly, article 234 of the Constitution provides that Parliament can accept separate Bills of Rights in order to enhance democracy.<sup>27</sup>

It can be said that the historical development of the relationship between state and church in the Western world since the sixteenth century, in which the state protected the church but also controlled it, brought about policies of the state that were equated with the Christian point of view. This view was followed in South Africa, too, and that is probably the reason why, given the current legal position in the country, it is deemed unnecessary to pay special attention to the Christian point of view, as in the case of other religions, such as African traditional religion, the Jewish religion, the Muslim religion and the Hindu religion. There is clearly a lot more thinking to be done if we want to speak of real freedom of religion for Christianity as well as other religions in South Africa.

## 6 African traditional religion and the South African Constitution

### 6.1 What is African or African traditional religion?

Dr Nokuzola Mndende, a believer and a diviner in African religion herself,<sup>28</sup> uses both the terms 'African religion' and 'African traditional religion' in her writings to define the religious beliefs and practices of the indigenous peoples of Africa, south of the Sahara desert.<sup>29</sup> According to her, these beliefs and practices permeate all aspects of life of both the individual and of society. One does not convert into

24 Art 165 *Ordonnances Ecclésiastiques* (1541, 1559).

25 See P Coertzen 'Dordt and South Africa – Church and state relations in the Netherlands and in South Africa' (2012) *Dutch Reformed Theological Journal*.

26 Sec 15 Constitution of the Republic of South Africa.

27 Sec 234 Constitution of the Republic of South Africa.

28 N Mndende *An introduction to African religion* (2006) 1; N Mndende *I will not surrender!* (2012) Foreword.

29 Mndende, *An Introduction to African Religion* (n 28 above) 1.

this religion. Everyone in African society is believed to be born into the religion and thus becomes an active participant in a spiritual journey which originates from the spiritual world and eventually goes back to the spiritual world.

Mndende argues that African religion includes fundamental beliefs which are common to all Africans, despite the fact that Africa consists of a multitude of nations, complex cultures and dialects. Because of these commonalities based on religion, she suggests that it must always be spoken of in the singular. Kiernan, on the other hand, prefers to speak of African traditional religions in the plural, thereby denoting all the indigenous religions in South Africa, and not only the faiths of the various black African, Bantu-speaking peoples, but also the faiths of people like the San and the Khoikhoi.<sup>30</sup> The term 'indigenous religions' would, of course, apply not only to South Africa, but also to the whole of Africa.

It is believed that African beliefs and practices originated from the spiritual world and were handed down to the physical world by forbears by word of mouth, by practical participation in ritual activities and by the day-by-day teachings of the elderly. There is no founder of African religion. The religion was revealed to the first generation, who were directly created by the supernatural power, or God. It was this supernatural being that gave the first generation all the laws and taboos how to live in harmony with God, other human beings and nature. People were instructed to marry for reproductive reasons and parents were tasked to lead their children by example in a manner that promotes good moral values. When the first generation died, their spirits joined the spiritual world where the Creator lives. This marked the beginning of ancestors who became the messengers of the Creator and also the supervisors of the physical world. The ancestors looked after the welfare of the living mainly through the elderly, who taught the youth orally and through rituals. In this way, the religion got passed on from generation to generation. From time to time, the elders also revealed themselves to the living of all ages through visions and dreams.

According to Mndende, the concepts of *Creator, ancestors* and *ritual performances* for the spiritual world are the basic beliefs for believers in Africa. She discusses these and other aspects of African religion in her book *An Introduction to African religion*.<sup>31</sup> Kauunova notes the core beliefs of African religion as being belief in a *Supreme Being*. Then there are *Divinities* who are derivatives from the Deity. The Divinities each have their own local name 'and were brought into being as functionaries in the theocratic government of the universe'.<sup>32</sup> Theocratic government means that it is the religion that lays down the

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30 J Kiernan 'African traditional religions in South Africa' in Prozesky & De Gruchy (n 9 above) 15-27.

31 Mndende *An Introduction to African Religion* (n 28 above) 1-19.

32 Kauunova (n 8 above) 1.

rules for the whole of society as well as for the whole existence of people. There is also belief in *ancestors* and *spirits*. The dead continue their existence as ancestors in the forms of 'shades' or spirits and these possess the power to affect the living. Some of the spirits are generalised ancestral 'shades', while others are associated with particular animals or other natural objects – there can be ghost spirits, spirits of wishes and guardian spirits.<sup>33</sup> Some of the spirits are witches. Witchcraft is a very serious and often a rude disillusioning reality in Africa. It is said that for Africans, witches are the essence of that which is evil and diabolical.<sup>34</sup> Although Kauunova also mentions their view of life, sin, salvation and ethics as core beliefs of African religion, Kauunova describes salvation as referring to physical welfare and the cosmic saving activities of God. Salvation in African religion 'is not related to Christ, but to rituals which seek to promote fertility, fecundity, healing and other modes of being emblematic of cosmological harmony'.<sup>35</sup> Oosthuizen is of opinion that African religion consists of five core components: (1) belief in a Supreme Being; (2) belief in lesser gods; (3) belief in spirits; (4) ancestral belief; and (5) the practice of magic and medicine, each with its own cult. Oosthuizen also points out that these core components relate to each other, because African thought is always in terms of totalities. Everything is part of a whole and each individual thing only makes sense in as far as it is connected with everything else. This would mean that the physical and the spiritual world are very closely connected in African religion.<sup>36</sup>

Rituals, controlled patterns of action, also play an important role in African religion. There are communal rituals referring to practices like rainmaking, rites with regard to agriculture, purification rites, communion sacrifice and temples and altars, and then there are also personal rites relating to birth, puberty, marriage and death.<sup>37</sup> Just how important these rituals can be in South African society is seen in a report that was published on 29 December 2012 in a national newspaper. It is reported that President Zuma intended to have a national day of cleansing to restore the national morals of the country. Some of the reasons for calling for this ceremony were the Marikana tragedy in which 45 mineworkers died during a strike and encounter with police, the rape of women and the assassination of politicians. The South African National Civics Organisation (SANCO) asked that all the deaths on South African roads also be included in the ceremony. Mr Dumisane Mthlale, the spokesperson for SANCO, asked that the ritual 'Ukuvala Umkhoka' be performed to stop the repetition of bad things. These traditional and cultural customs are used by the

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33 Kauunova (n 8 above) 1-2.

34 GC Oosthuizen *Godsdienste van die Wêreld* (1977) 272.

35 Kauunova (n 8 above) 2.

36 Oosthuizen (n 34 above) 263-264.

37 Kauunova (n 8 above) 2.

ancestors to deal with matters like road accidents and unusual patterns of behaviour:<sup>38</sup>

A national cleansing ceremony will be a positive step for the people of the country and will help to bring back normality through the respect for moral and important African values which will be placed at the forefront of our nation.

Looking at the above-mentioned characteristics, one can say that the main elements of African religion are (1) belief in a Supreme Being or a Creator; (2) belief in lesser divinities who are functionaries in the theocratic government of the universe; and (3) belief in ancestors, belief in spirits, belief in the practice of magic and medicine (each with its own cult) and the performance of all kinds of rituals.

## 6.2 African traditional religion and African customary law

The question to be answered in this section is whether there is a link between African religion and African customary law. Bennett does not mention religion explicitly in his book *Customary law in South Africa*. In his book *Human rights and African customary law*, he states that culture, on the one hand, implies high intellectual and artistic endeavour. At the same time, Bennett argues:<sup>39</sup>

‘[C]ulture’ may also denote a people’s entire store of knowledge and artefacts especially the languages, systems of belief, and laws that give social groups their unique characters. This meaning would encompass a right to customary law, for customary law is uniquely African, in contrast with law of a European origin.

Bennett links this definition of culture very closely to a ‘system of religion’. He also refers to section 14(3) of the draft 1994 Constitution (section 15(3) of the final 1996 Constitution), which provides that nothing in the Bill of Rights precludes legislation recognising ‘a system of personal and family law adhered to by persons professing a particular religion’.<sup>40</sup> Although this provision was especially intended to promote the cause of Islamic and Hindu law, it would in the light of section 31 of the Constitution also apply to African culture, which would then also include the African religious system.

In *Customary law and the new millennium*,<sup>41</sup> Mqoke argues that in African legal systems there is no separation between culture, law and religion.<sup>42</sup>

is widely regarded as an integral part of the African culture. Customary law is reputed as being the law that was handed down from time immemorial from the ancestors and as such represents a collection of precedents and decisions of the bygone chiefs and councillors.

38 ‘Zuma wil die nasie nou laat reinig’ *Die Burger* 29 December 2012 2.

39 TW Bennett *Human rights and African customary law* (1995) 23-24.

40 Bennett (n 39 above) 24.

41 RB Mqoke *Customary law and the new millennium* (2003).

42 Mqoke (n 41 above) 3.

This means that customary law, as embedded in African religion, can be viewed as part of African morality.<sup>43</sup> Although the African legal tradition has been influenced by many factors, including the colonial experience, Western norms and globalisation it is still a force to reckon with – it reflects the African world view and the corresponding conception of law. As a legal tradition in own right, it has a customary and religious basis, a communal tradition and a sense of collective responsibility. In the field of dispute resolution, it features flexibility and reconciliation. It also reflects a non-separation of law, religion and morality, and it makes strong use of symbolism in making the law an effective instrument of social control.<sup>44</sup> This coheres with Mndende's claim that the African beliefs and practices 'permeate all sections of life of both the individual and of the society'.<sup>45</sup> Oosthuizen pointed out that, in African religion, everything is part of a whole and each individual thing only makes sense in as far as it is connected with everything else. This would mean that the physical and the spiritual world are very closely connected in African religion.<sup>46</sup> The remark of Kauuova that the role of divinities in the African religion is that of 'functionaries in the theocratic government of the universe'<sup>47</sup> also underlines the very close relationship between African religion and, for instance, the government of a state. All of this means that African religion as described above is a force to be reckoned with in South African society, the South African legal world, and the relationship between religions, as well as the relationship between the state of South Africa and the other religions in the country.

### 6.3 South African Constitution and African customary law

As mentioned before, in South Africa, official state law consists of a Western and an African component. The Western component entails common law, which is Roman-Dutch law as influenced by English law and adapted and further developed by court decisions. The African component consists of that customary law which has been incorporated into legislation; the decisions included in legislation or confirmed by the courts.<sup>48</sup> According to article 211(3) of the Constitution and article 1(1) of the Law of Evidence Amendment Act 45 of 1988, this includes all customary law which is readily ascertainable with sufficient certainty, not opposed to the Western perceptions of natural justice and public policy and not in conflict with the Constitution. It excludes indigenous law which is found to be discriminatory in terms of the Promotion of Equality and the

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43 As above.

44 Mqoke (n 41 above) 16-28.

45 Mndende *An Introduction to African religion* (n 28 above) 1.

46 Oosthuizen (n 34 above) 263-264.

47 Kauuova (n 8 above) 1.

48 GJ van Niekerk 'Regspluralisme' in Rautenbach *et al* (n 17 above) 3 10.

Prevention of Unfair Discrimination Act.<sup>49</sup> All of this constitutes the official legal pluralism in South Africa.

Throughout the years in which the official customary law was recognised as part of the official state law, it was, however, never seen as equal to common law. Western common law was always seen as the dominant law and the official customary law as the inferior law. Legislation by the state could at any time scrap the customary law and in the case of legal obligations, the common law would always be the victor. It was also the classifications of the common law that was used to explain customary law. Apart from this official state law, there is also a plurality of unofficial laws like the laws of the Hindu, Muslim and Jewish religions as well as the so-called living customary law and the people's law.

Throughout the years, the unofficial laws of the different communities were ignored and provision was made for only the official state law pluralism. In the years after 1994, the courts showed a more lenient approach towards unofficial laws, including unofficial customary law. Nevertheless, someone like Van Niekerk finds it necessary to point out that, even though the Constitution recognises customary law as a source of South African law, it still needs to be awarded official status. The Western legal system is still seen as the dominant system and any development must take place under the guidance of Western values.<sup>50</sup> Bennett, on the other hand, argues that in 1988 the Law of Evidence Amendment Act<sup>51</sup> made customary law applicable in any court of the country. But this did not stop it from still being treated as a subordinate element of the legal system. It was only after 1993 that matters started to change with the new Constitution, when articles 30 and 31 gave litigants the right to demand respect for their culture. There are those who see the treatment of African customary law in the legal system as racist because a particular group continues to be subject to what is nearly always a disadvantageous standard of treatment. Bennett, however, goes on to argue that the Constitution put an end to the assumption that Roman-Dutch law was the general law of the land and that the state had complete discretion in deciding whether to recognise customary law or not. Article 211(3) of the Constitution and *dicta* by the Constitutional Court in cases like *S v Makwanyane & Another*<sup>52</sup> indicate that customary law is a core element of the South African legal system, on par with Roman-Dutch law.<sup>53</sup>

In fact, because customary law is associated with culture, in terms of sections 30 and 31 of the Constitution, its status is now even stronger than

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49 GJ.van Niekerk 'Legal pluralism' in JC Bekker *et al Introduction to legal pluralism in South Africa* (2002) 1.

50 Van Niekerk (n 48 above) 4.

51 Sec 1 Act 45 of 1988.

52 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) paras 365-383.

53 TW Bennett *Customary law in South Africa* (2004) 42-43.

that of Roman-Dutch law; however, an argument could be made for deeming the latter a system of personal law, associated with settler culture.

At the moment some very interesting developments are taking place on the legal scene in South Africa. In a very recent report, the newspaper *Die Burger* of 19 October 2012,<sup>54</sup> in an article 'Voorvadergeeste is 'n geldige rede' ('Ancestors are a legitimate reason') wrote about a woman, Johannah Mmoledi, who had been working for the Kievits Kroon Country Estate for the past eight years. In her own time she attended a course to qualify as a *sangoma* (traditional healer). After this course, she asked for a month's leave of absence from work to attend a full-time course to qualify as a *sangoma*. Her employers refused her request. She decided to attend the course anyway. Before her departure, she handed a letter from a traditional healer to her employers in which the healer declared that he had examined her and had found her to be plagued by the ancestors. On her return to work, there was a disciplinary hearing. She was found guilty of unauthorised absence and fired. She appealed to the Commission for Conciliation, Mediation and Arbitration who found that her dismissal was unfair and reappointed her in her post. The employers appealed to the Labour Court, where three judges found that the employers showed contempt for her culture and religion when they rejected her letter from the traditional healer explaining why she had to attend the course. In their judgment, the judges found that the argument that Western standards were opposed to African culture was misplaced.<sup>55</sup>

It would be disingenuous of anybody to deny that our society is characterised by a diversity of cultures, traditions and beliefs. This being the case, there will always be instances where these diverse cultural and traditional beliefs and practices create challenges within our society, the workplace being no exception. The Constitution of the country itself recognises these rights and practices. It must be recognised that some of these cultural beliefs and practices are strongly held by those who subscribe [to] them and regard them as part of their lives. A paradigm shift is necessary by the state and also by the courts of the land; one must appreciate the kind of society we live in. Accommodating one another is nothing else but *botho* or *Ubuntu* which is part of our heritage as society.

54 'Voorvadergeeste is 'n geldige rede sê die hof' *Die Burger* 19 October 2012 6.

55 'Changing traditional views' (2012) *De Rebus* 53-54. The case referred to is *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & Others* (LAC) (unreported case JA78/10, 24-7-2012) (Tlaetsi JA). Other cases in which the same trend can be found are *Bhe v Magistrate, Kayelitsha* (Commission for Gender Equality as *Amicus Curiae*); *Shibi v Sithole & Others* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC); *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) BCLR 1 (KH); and *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (KH).

## 7 Conclusion: Recognition of a plurality of religions and religious legal systems

The Constitution of South Africa allows for freedom of religion, indeed, the freedom of all religions in South Africa. There is no established religion which has certain advantages before the law of the land. Neither can any religion in the country claim any theocratic advantages from the state and the courts. Before the law, all religions are equal and must be treated as such.<sup>56</sup>

Every citizen and every legal person in South Africa must take note of the freedom that was granted to religions and they must respect, protect, promote, and fulfil this right towards other citizens, just as the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

A Working Committee drew up the South African Charter of Religious Rights and Freedoms. In this document, which was officially endorsed on 20 October 2010 by most of the religions and Christian denominations in South Africa, the rights and freedoms which can be claimed under the guarantee of religious freedom in the Constitution<sup>57</sup> are spelled out in greater detail. The Charter was formulated after a thorough study of what freedom of religion means, taking into account various other sections of the Constitution, international declarations and scholarly works, and hearing what the signatories themselves had to say about their religious rights and freedoms. The existence of a South African Charter of Religious Rights and Freedoms compels every religious person and organisation to take note of the content and to make sure that they take possession of the rights and freedoms. Failing to do that will result in the government of the country determining religious rights and freedoms and their scope for religious persons and bodies through legislation and the courts of the land deciding what freedoms the religions of the land can claim in terms of the laws of the country.

An examination of the position of Christianity in South Africa reveals that, in spite of the fact that the Constitution allows for a plurality of cultures and religions in South Africa, Christianity is not seen to have an officially-recognised separate religious legal system. The same can be said with regard to African religion although, as we have seen, there are attempts to treat African religion in a separate way and to bring their rights into the legal system of the country. What is clearly needed is a fully recognised system of religious legal pluralities in South Africa, a system where the plurality of religious legal systems are truly recognised and taken into account. This will ask from religions in the country to avail themselves of their position with regard to their religious rights and freedoms and also to avail themselves with regard to their legal position *vis-à-vis* the laws of the

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<sup>56</sup> Sec 7(2) Constitution of the Republic of South Africa, 1996.

<sup>57</sup> Sec 15 Constitution of the Republic of South Africa, 1996.

land. There is clearly a lot of work to be done within the religions of South Africa to ensure that their religious freedom is fully utilised. On the other hand, the legislator will have to take serious note of what freedom of religion entails and will have to make an effort to reflect the fact of religious freedom in the legal structures of the land.

South Africa has never officially had an established religion, although it can be said that for many centuries Christianity was a privileged religion in the country. This changed in 1994 when freedom of religion became the privilege of all religions in the country. We must not move back to a situation of a privileged religion or a theocratic control by one religion over the whole of society. Both the state and the religions in South Africa must take it upon themselves to respect, protect, promote and fulfil the rights and freedoms of all religions in the country.