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**Summary**

## Introduction

On April 4, 1996, the newly created Constitutional Court of South Africa declared unanimously that the Gauteng Education Bill, a bill prohibiting language discrimination and protecting religious freedom within the public schools in the Gauteng Province in Johannesburg, was not unconstitutional. This decision was the first by the Constitutional Court to make mention of religion and its outcome bodes well for the future of religious freedom in South Africa.

The court reviewed the Bill after a dispute over its constitutionality arose in the Gauteng Provincial legislature. The Bill was passed before it was reviewed by the Constitutional Court, but the disputed sections were not put into operation. The petitioners, including the South African Foundation for Education and Training (an Afrikaner organization), felt that the Bill was unconstitutional for several reasons, one of which was its policy requiring religious education in public schools to reflect the diverse cultural and religious traditions in South Africa and contribute to the development of national democratic culture. The Afrikaner petitioners were concerned with the protection and preservation of Afrikaner language, culture and religion. Prior to the implementation of democracy, public education nurtured all of these aspects of Afrikaner life.

The petitioners thought that the Bill violated section 32(c) of the Constitution which states that everyone has the right "to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there be no discrimination of the ground of race." The petitioners argued that this clause supports a positive obligation by the state to establish public schools based on common language, religion and culture. As the executive director of the Foundation wrote in an *amicus curiae*:

The information on the Gauteng case is located at the following World Wide Web site:  
<http://www.law.wits.ac.za/judgements/gauteng.html>

The mission of the Foundation is to support a Christian value system and prescribe to the principle of mother tongue education. The Foundation also aspires to promote education in the South African community as a whole with special reference to the Afrikaans medium education.

The Foundation and the petitioners felt that a goal like the one stated above might not be reached under the Gauteng Bill. The Bill guaranteed that if at any time the freedom of religion or conscience of one student was violated, then the religious instruction had to be reformulated.

They felt that the Bill undermined the Constitutional provision (32c) for the creation of schools based on a common culture or religion. The Court argued that the petitioners were misunderstanding the Constitutional provision. As Deputy President Mahomed, writing for the Court, wrote, "the section (32c) does not say that every person has the right to have established by the state educational institutions based on such a common culture, language or religion. What it provides is that every person has the right to establish such educational institutions." The Constitutional stance on religious education in the schools is that is ought to reflect the religious and cultural nature of the students. And "where practicable," people have the right to create educational institutions based on a common culture, language or religion. Thus the freedom to establish such schools is the exception, not the rule; it is a freedom of the individual, not the duty of the state.<sup>1</sup>

How does this case add to our discussion of the legal role religion will play in the new South Africa? As mentioned earlier, the *Gauteng* case is the only one in the two-year history of the Constitutional Court to deal with religious freedom. And although this case deals with the future of *religious education* in South Africa, the opinion of the court and the interpretation of

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<sup>1</sup>The information on the *Gauteng* case is located at the following World Wide Web site: <http://www.law.wits.ac.za/judgements/gauteng.html>

the Constitution offer insight into how the court intends to handle the freedom of religion. In a separate consenting opinion, Judge Albie Sachs writes that “there is little hard international rights law to back a generalised claim on State resources for the promotion of...religious diversity, and none at all to support a legal entitlement to separate state funded schools.”<sup>2</sup> Thus the claim that the State is responsible for promoting and protecting the identity of religious groups, minority or otherwise, is not likely to hold water with the Constitutional Court.<sup>3</sup>

In a recently published book entitled *Rights and Constitutionalism: the New South African Legal Order*, Bertus de Villiers, Charles Dlamini and other South African legal scholar explain in detail the role religion will have in the new South African legal order. The right to religion, says Dlamini, is a negative right; the right requires that the “state...tolerate different religions and not...impose any religious belief on its people.”<sup>4</sup> In thinking about how religion ought to be protected in South Africa the lawmakers have looked to American and international legislation and experience. For the most part, South African lawmakers have followed these examples, for they have established a secular state, prohibiting the creation of a state religion and promoting religious tolerance. But the South African religion clause is a bit different from the American religion clause. In addition to guaranteeing the right to freedom of religion, the clause permits interaction between the state and religious organizations on matters of common interest.

Moreover, 'religious observances may be conducted at state or state-aided institutions...' thus

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<sup>2</sup>South Africa is using international law and the law of democratic countries as precedent.

<sup>3</sup>[Http://www.law.wits.ac.za/judgements/gauteng.html](http://www.law.wits.ac.za/judgements/gauteng.html)

<sup>4</sup>Dlamini, Charles, “Culture, Education, and Religion,” ed. Bertus de Villiers, et al. *Rights and Constitutionalism: the New South African Legal Order* (Kenwyn, South Africa: Juta, 1994), 592.

ensuring that "prayer and Bible reading are not prohibited in public schools and that South Africa will not follow the example of the U.S."<sup>5</sup> Thus it seems as if there is a kind of paradox in the South African understanding of religious freedom and they have written this paradox into their Bill of Rights; for what the clause says essentially is that everyone shall be free to believe what he or she chooses and that the state will not favor one religion over another, but at the same time, religious activity is permitted at state funded institutions. The danger here is what we refer to in the U.S. as 'establishment' - where does one draw the line between legitimate 'religious observance at a state funded or aided institution' and the promotion of one religion over others by the state? Finding answers to questions like this one is the task facing the South African judiciary in the years to come.

This paper seeks to examine how religion and religious freedom will fare in the new democratic South Africa. This is not an easy task, for the democracy is young and religious freedom is not a burning issue at the present moment. Thus this paper relies on observation and speculation informed by historical understanding; it also takes into account the experiences of other democratic countries, the United States included, under the assumption that the problems that have arisen in other democracies may arise in South Africa. The first two sections of the paper will acquaint the reader with South Africa, its political and legal heritage and its diverse religious traditions. The third section draws upon these two sections and the future of religious freedom in the new South Africa is considered.

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<sup>5</sup>Dlamini 597.

## I. The Political and Legal Heritage of South Africa

Speculation on the legal role religion will play in the new South Africa begins with an understanding of the legal tradition of the country. A socio-historic look at the development of the legal tradition is vital to the discussion on religion and law in South Africa, for one cannot talk about the future of law without studying its past. But before discussing the country's legal history, I want to offer a sketch of the country's political history.

### Political Heritage

Long before European settlers set foot in South Africa, native African tribes inhabited the land. Typically broken down into Khoisan and Bantu-speakers, the African tribes were organized into patrilineal clans and chiefdoms.<sup>6</sup> The Khoisan inhabited the dry and arid western half of the country and were largely pastoralist, while the Bantu-speakers, who lived in the fertile eastern part, were agriculturalists.<sup>7</sup> Politically the clans were under the control of the chief. In the Khoisan clans, the chief had restricted power, for he had to have the support of all the other senior clan heads to enforce decisions.<sup>8</sup> In the Bantu speaking clans, however, the chief was the ultimate authority; all administrative and legal decisions were made by the chief. He was the lawmaker, the judge and the religious leader of the clan.<sup>9</sup> When a clan became too large or there

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<sup>6</sup>Omer-Cooper, J.D, *The History of Southern Africa* 2nd ed. (London: James Currey, 1994), 11.

<sup>7</sup>Bantu-speaker includes Zulu, Xhosa, Tswana, Sotho, and others.

<sup>8</sup>Omer-Cooper 6. *The Mind of South Africa* (New York: Knopf, 1990), 38.

<sup>9</sup>Ibid 13. Cooper 17-8.



was factional disagreement over power or succession, the clans would split. Sometimes, the new clan would maintain relations with the main clan and other times it would sever ties completely and move away. It is known that Khoisan and Bantu speakers were in contact with one another; sometimes this contact resulted in warfare and tribal extermination, but other times trade and intermarriage were the results.

The first European to “discover” Southern Africa was Bartholomew Dias in 1487 as he searched for a route from Portugal to India. And after Vasco da Gama’s successful voyage to the East in 1497, the Cape of Good Hope became a stopping point for many European vessels on their way to the East. In the 17th century, the European countries competing in the spice trade sought to establish more permanent camps on the Cape. In 1620, the officers of the English East India Company laid claim to Saldanha Bay in the name of King James.<sup>10</sup> But because the claim was not followed up, the Dutch East India Company sent Jan van Riebeeck to establish a post in the same area in 1652. Intended to be little more than a watering hole for Dutch ships sailing to and from the Indies, the settlement began modestly.<sup>11</sup> By 1662, however, the settlement had expanded and had changed from a temporary stopping point to a permanent camp, laying the foundation for the eventual European colonial domination of the Cape.<sup>12</sup>

These early Dutch settlers, mostly farmers, began spreading out to the North and to the East. Known as burghers or Boers, the farmers became more self sufficient as the years passed; they were increasing agricultural production, trading with one another, and developing local

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<sup>10</sup>Ibid 17-8.

<sup>11</sup>Sparks, Allister, *The Mind of South Africa* (New York: Knopf, 1990), 38.

<sup>12</sup>Omer-Cooper 17-8.

identities. As their numbers grew, tensions between the burghers and the Company escalated, for the burghers no longer wanted to be controlled by the Company. They resented the regulations the officials passed and hated the monopoly the Company had on the limited Cape market; as a result the period from 1662 to 1795 was marked by the growing tension between the burghers and the Dutch East India Company.

Moreover, relations with the Khoi and other African groups were worsening. During the early stages of settlement, relations between the settlers and the Khoi were amiable; they traded with one another and sometimes the Khoi would work for the Dutch farmers, usually to gain more cattle, a sign of wealth within the Khoi community.<sup>13</sup> With the first large import of slaves from the East Indies in 1658, however, the nature of the relationship changed. The settlers began to think of themselves as above menial labor and delegated the hard labor to the slaves and to the growing number of Khoi workers.<sup>14</sup> On the frontier, settler expansion meant expulsion and oftentimes destruction of the Khoi clans who inhabited the area outside of the Cape. By 1717, most of the Khoi clans around the Cape were gone.<sup>15</sup> As the burghers spread east, they came into contact with the Bantu-speaking peoples, the Xhosa and Zulu in particular, who were not as tolerant as the Khoi had been of the patronizing and racist whites who wanted to take their land and employ them as servants. The tension resulted in a number of wars between the settlers and the Xhosa in the 1780s.<sup>16</sup> These conflicts with the Xhosa and the Khoi added to the tension

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<sup>13</sup>Ibid 7.

<sup>14</sup>Sparks 43.

<sup>15</sup>Omer-Cooper 28.

<sup>16</sup>Ibid 33.

between the Company and the burghers, for the Company tightened control on the frontier in an effort to stop the fighting. Angered by the constant Company interference the burghers began to revolt against the Company. By 1795 the Company officials were no longer able to suppress the rebellions of the settlers.<sup>17</sup>

Thus when the British fleet sailed into Table Bay in Cape Town in September of 1795 demanding the Dutch hand over power, the Company officials capitulated for they knew that they did not have the support of the settlers. The British, fearful that the recent French occupation of Holland would lead to French control of the Cape, were anxious to gain control of Southern Africa in order to secure their lucrative trade with India.<sup>18</sup> In 1802, the Cape was returned to Holland under the terms of the Treaty of Amiens. By 1806, however, the treaty had broken down and Great Britain regained control, beginning a rule that would last until 1910.<sup>19</sup>

The Dutch settlers, already anti-government, were certainly not happy about the British occupation. Moreover, they had very little use for the humanitarian efforts of the British missionaries who sought to emancipate the African slaves from their Boer masters. In 1820, a large number of British settlers came to the Eastern Cape. The establishment of a British community with its direct ties to England led to the anglicization of the Cape government. English replaced Afrikaans as the official language of the courts, the justice system was revised according to British standards and the burgher senate was abolished. These changes largely isolated the Dutch-speaking whites and increased their resentment toward the British government.

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<sup>17</sup>Ibid 34.

<sup>18</sup>Ibid 36.

<sup>19</sup>Ibid 35.

The last straw for the Boers, however, came in 1834 when slavery was abolished by the British government. Six years earlier in 1828, the government had passed Ordinance 50 which had ended the pass system for the Khoisan and had given the slaves equal status to Whites. These two actions by the British government outraged the Boers, for Boer agricultural production and economic prosperity were dependant on the slave system.<sup>20</sup> In reaction to these British policies, the Boers began to leave the Cape in great numbers. The Boers wanted to escape British control and establish their own territories. They moved inland to the East and to the North, in the territories which would later come to be known as the Transvaal and the Orange Free State. This massive migration, known as the Great Trek, is usually cited as the first major split between the Dutch and the British South Africans, a split that would deepen throughout the next one hundred years.<sup>21</sup>

One reason the Boers were so adamant about establishing an independent political community was that they disagreed ideologically with the British government. They believed that their future lay in frontier farming and not in the commerce and capitalism of Europe.

Furthermore, they did not believe in the egalitarian philosophies present in Britain and the Cape; instead they thought that by enslaving the Africans, they were preserving the "natural order" of man, as proclaimed by God. In setting out on the great journey away from the Cape, many trekboers thought they were carrying out God's will and likened themselves to the Israelites who

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<sup>20</sup>Sparks 105.

<sup>21</sup>Dyzenhaus, David, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (New York: Oxford University Press, 1991), 32.

fled from Egypt to find a Promised Land.<sup>22</sup> As Sheila Patterson writes:

To the Boers the Old Testament was like a mirror [sic] of their own lives. In it they found the deserts and fountains, the drought and plagues, the captivity and the exodus. Above all they found a Chosen People guided by a stern but partial Deity through the midst of the heathen to a promised land.<sup>23</sup>

In 1838, the trekboers fought the powerful Zulu kingdom in the Battle of Blood River, one of the most important battles in Afrikaner history. Legend says that the Afrikaners prayed to God the day before the battle and asked that He guide them to victory. The trekboers won the battle and the day has come to be known as the "Day of Covenant," and to the Afrikaners, this day, 16 December, is "the most important and sacred civil holiday in South Africa."<sup>24</sup>

By the end of the nineteenth century, control of the country was divided. The British controlled the Cape and the Province of Natal, which they had annexed in 1845, while the Boer s governed themselves in the inland areas of the Orange Free State and Transvaal. This solution, though not without problems, seemed to work fairly well until 1868, the year diamonds were discovered in the Transvaal.<sup>25</sup>

The discovery of diamonds and the subsequent discovery of gold in 1886, brought the tension between the two groups to an all-time high. As both discoveries were made in Boer republics, the British claimed that the Boer governments were illegitimate and that the whole

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<sup>22</sup>Omer-Cooper 72.

<sup>23</sup>Patterson qtd in Hexham, Irving, *The Irony of Apartheid: The Struggle for National Independence of Afrikaner Calvinism Against British Imperialism* (New York: Edwin Mellen, 1981), 1.

<sup>24</sup>Venable, Howard P, "Justifying Ethnic Domination: Reflections of Myth, History, and Communal Conflict in South Africa," *International Law and Politics* 5 (Summer 1993) : 895.

<sup>25</sup> Omer-Cooper 101.

country was actually under British control. The British sought to exert their power over the Boers by unifying South Africa under the British crown, but the Boers would not acquiesce. In 1899, tensions erupted into the Anglo-Boer War, a long and bitter battle fought to determine which group would control the country. By 1902 the British had defeated the Boers, but had used tactics that included burning their houses and farms and confining their women and children in concentration camps.<sup>26</sup> Between the Great Trek and the mistreatment suffered during the war, the Boers had grown to despise the British. This anti-British attitude was one of the foundations making up the identity the Boers were to later carve for themselves as Afrikaners.

The British placed the two Boer republics under the auspices of a particularly insensitive man named Lord Alfred Milner, whose attempts to unite the two Boer provinces with the two British territories failed miserably. By 1908, both the Orange Free State and the Transvaal were granted self government.<sup>27</sup> One year later the four provinces, the two Boer territories along with the Cape and Natal came together to form the Union of South Africa, with one government and one legal system. Though legally bound together under the British crown, for South Africa was still a colony, the Boers and the British were culturally split.<sup>28</sup> The formation of the Union had very little effect in healing the scar between the two groups. And with the onset of World War I, relations worsened as many of the Boers saw the Germans to be their ideological ally and the British their worst enemy.

The years between World War I and 1948 were ones of partisan tension in the South

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<sup>26</sup>Dyzenhaus 33.

<sup>27</sup>Omer-Cooper 150-5.

<sup>28</sup>Dyzenhaus 35.

African Parliament. The British parties sought to unify South Africa while the Boer or Afrikaner groups fought to maintain an Afrikaner identity. The Afrikaners did not want South Africa to be unified, for since the British had control of Parliament, unification meant anglicization. The National Party and its leader, J.B. Hertzog worked hard to preserve Afrikaner culture and by the end of World War I, groups like the Broederbond had formed for the purposes of "Afrikaner cultural preservation."<sup>29</sup> The Afrikaners' political power received a boost in 1924, when the National Party merged with the Labor Party. And when the National Party joined the powerful South Africa Party in 1934, the newly elected Hertzog finally had the Parliamentary majority needed to disenfranchise black South Africans, which he did in 1936.<sup>30</sup>

No one really expected the National Party to win the 1948 election, for the United Party had the majority. But the United Party was a bit overconfident about its power and did little to organize for the election. The National Party on the other hand was reaching out to people on all levels, businessmen, farmers, mine workers and intellectuals. The apartheid policies of the party appealed to many who were concerned about the race issue; the intellectuals considered 'separateness' to be the solution for governing a multicultural society, while the often racist Afrikaner farmers and businessmen sought to keep blacks in their 'proper place.' And because of tension between black and white workers in the mining fields, the National Party received the support of many of the white miners, who, though not necessarily supporters of apartheid, agreed with the economic policy of the Nationalists. When the results of the election were in, the Nationalists had won a majority by a few seats. They appointed Dr. D.F.Malan, an ultra right-

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<sup>29</sup>Omer-Cooper 167.

<sup>30</sup>Ibid 175.

wing Nationalist as the majority leader. The era of apartheid had begun.<sup>31</sup>

The apartheid years (1948-1990) can be divided into three phases: *'baaskap'* or 'white supremacy' from 1948-1960, 'separate development' from 1960 to 1974, and 'multi racial co-option' from 1974 to 1990. The first phase was led by Dr. Malan and later by J.G Strydom.

During this phase the government sought to legally reinforce the superiority of the white race.

The 'goals' of the government were to improve the condition of the poor white Afrikaner, protect the Afrikaner language and culture, and promote Afrikaner business and economic activity.<sup>32</sup>

Legislation passed during this phase was racist, forcing separation of the races and restricting the rights of all non-Whites. The Prohibition of Mixed Marriages Act on 1949 and the Immorality

Act of 1950, which made sexual relations between whites and Coloureds a criminal offense,

sought to limit contact between people of different races. The Native Laws Amendment and the

Abolition of Passes and Consolidation of Documents Act both severely restricted the movement

and freedom of non-Whites. Perhaps the most repugnant legislation of this phase came in the

form of the Native Resettlement Act, in which all 'Natives' were forced to leave their homes and

move to the newly created townships, like Soweto outside of Johannesburg, a shortened name for

South West Township.<sup>33</sup>

From 1960 to 1974, the focus of apartheid shifted. Instead of creating 'Bantustan' (meaning African) areas or mini-states which would remain under white leadership, the legislation of the second phase sought to establish 'Bantustan' states under black leadership, with the hope

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<sup>31</sup>Ibid 192.

<sup>32</sup>Ibid 192-4.

<sup>33</sup>Ibid 196-8.



that they would eventually be recognized as independent nations and members of the United Nations. The Afrikaner government thought that by dividing South Africa into sections, each ethnic group would have the opportunity to develop along its own lines. The 'architect' of this system of 'grand apartheid' was President Hendrick Verwoerd. Though he was assassinated in 1966, implementation of his 'grand scheme' continued after his death. In a speech given in 1968, Mr. G.F. van L. Froneman, chairman of the Bantu Affairs Commission voiced the government's understanding of the policy of separate development:

The Government's policy is therefore not a policy of discrimination on the ground of race or colour, but a policy of differentiation on the ground of nationhood of different nations, granting to each self-determination within the borders of their homelands-hence this policy of separate development.<sup>34</sup>

But because these newly established 'homelands' were small in area, typically low on resources and politically weak, in comparison to the Nationalist government, they were little more than glorified labor reserves for white employees. This phase of apartheid was indeed one of the cruelest, for continued oppression was disguised as 'separate development.'

International condemnation and sanctions, along with increased internal upheaval led to the third phase of apartheid, that of 'racial co-option.' It was during this last phase that the Tricameral government was established by the 1983 Constitution. This constitution set up three houses in Parliament, one for whites, one for Indians and one for Coloureds. Blacks, however, were not included. Rioting and resistance continued throughout the 1980s. On February 2, 1990, newly elected President F.W. de Klerk stunned his country and the world by announcing that the government would begin plans to end apartheid. De Klerk freed Nelson Mandela and lifted the

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<sup>34</sup>Ibid 212-3.

ban on the African National Congress (ANC), the Pan Africanist Congress (PAC) and the South African Communist Party (SACP). The government, he said, would move towards democracy and universal suffrage.<sup>35</sup>

Since that day the government of South Africa has been laying down the foundation for democracy. A Constitutional Assembly was formed in 1994 to create a Constitution to be completed by May 8, 1996.

### **Legal Heritage**

This brief account of South African political history will serve as the foundation on which to talk about South Africa's legal tradition. If one looks at the legal system as it existed during the apartheid era, prior to the implementation of democracy, one finds a static and seemingly self-serving establishment. Law in South Africa was not a dynamic institution; law was the application of rules. The duty of the advocate<sup>36</sup> was to gather information for the case at hand and present the information to the judge. The duty of the judge was to hear both sides of the case, consult the law and reach a decision.<sup>37</sup> What made South African law seem so inflexible, was that there was

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<sup>35</sup>Ibid 242.

<sup>36</sup>Lawyers in South Africa are broken down into categories, attorneys and advocates. The attorneys do the research and background work and the advocates are the ones who appear in court.

<sup>37</sup>There is no jury system in South Africa; it was abolished in 1969. In criminal cases appearing before the Supreme Court, a judge had the option of summoning one or two assessors to assist him. The use of assessors was mandatory in criminal cases in which the death penalty is being considered. Though assessors were supposed to be people who had "experience in the administration of justice or skill in any matter which may be considered at the trial," they were typically white males with legal background.

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no room in the judicial system for the judges to use judicial review. When a South African judge was sworn into office, he promised to, "administer justice....as the circumstances of any particular case may require, in accordance the law and customs of South Africa."<sup>38</sup> Upon hearing a case, the judge found the appropriate rule and applied it. Even if the rule he was applying was morally repugnant, it was his duty to apply it, for the judge was bound by precedent and law. This strict adherence to written law seems foreign to the American observer who has been taught that the judiciary is the "watchdog" of the government; for in the United States, judges have the right to question law they feel is unjust.<sup>39</sup> In South Africa under apartheid, however, law was unquestionable, indeed almost sacred. Even the most repressive and unfair laws were enforced time and again by South African judges. Why? Why was law regarded as so sacred and untouchable?

### **Legal Theory**

Finding the answer to this question begins with a discussion of legal theory. In contemporary South Africa, discourse on legal theory centers around two opposing concepts of law, legal positivism and legal realism.<sup>40</sup> Legal positivism or classical legal theory is the leading doctrine about the nature of law. South African law professor John Hund identifies the

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Africa." Yale Law Journal 102 (Jan 1993) : 976-9.

<sup>38</sup>Dyzenhaus 49.

<sup>39</sup>Note here that there are 'positivist' judges and lawyers in the U.S. who think that law ought not to be questioned, but at least they have the option to do it. Whereas in South Africa during the apartheid era, the judge was not allowed to question the law at all.

<sup>40</sup>I would like to reiterate that this discussion on legal theory is set in the South African context. When I talk of positivism and realism, I am speaking of them as the legal community in South Africa does.

ideological pillars on which positivism is founded: one, law and politics are separate entities; two, law is a system of rules; three, the task of the judge is to find the proper rule for the case at hand and apply it; four, rules can be “contained” in the form a code; and five, the state is the source of all law.<sup>41</sup> Legal positivism centers around the idea that the law of a land is to be respected and upheld at all times; that is, ‘justice’ is achieved when the law has been followed. Legal positivists do not believe that ideas about ‘natural law’ or ‘natural rights,’ can or ought to preempt codified law. Proponents of legal positivism claim that it “is a doctrine about the nature of law that, correctly understood, can only help to inculcate morally desirable attitudes towards the law in both judges and citizens.”<sup>42</sup> For positivists, law is a set of rules and the duty of the judge is adherence to and application of these rules.

In opposition to legal positivism stands legal realism, sometimes called American legal realism. Legal realism, as a philosophical movement, emerged in the 1920s and 1930s as a growing number of Anglo-American legal scholars were expressing their dissatisfaction with classical, positivist conceptions of law.<sup>43</sup> These dissident writers did not think that law ought to be “a science,” a “pure, complete and elegant” body of laws. These legal scholars set out to “define and discredit classical legal theory and practice and to offer in their place a more

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<sup>41</sup>Hund 34.

<sup>42</sup>Dyzenhaus 1.

<sup>43</sup>In *The Transformation of American Law*, Morton Horwitz writes on page that “it is best to see Legal Realism as simply a continuation of the reformist agenda of early-twentieth-century Progressivism.” In other words, “Legal Realism” is not something that emerged overnight; it is a movement that was named in the 1930s, but ‘realists’ had been around for quite some time. Horwitz, Morton J, *The Transformation of American Law 1870-1960* (New York: Oxford University Press, 1992), 170.

philosophically and politically enlightened jurisprudence.”<sup>44</sup> They drew on the ideas of legal and scholars like Oliver Wendell Holmes, who, writing in the late 19th century, said:

The life of the law has not been logic: it has been experience.... The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.... The substance of the law at any given time pretty neatly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much on the past....<sup>45</sup>

Labeled legal realists after the title of one the writer's articles, these thinkers talked in terms of 'history,' 'experience' and 'changing reality.' For the realists, law was not just simply because it was law; law was just when it produced just outcomes.

Contemporary legal realists think of law as a flexible set of rules that can and ought to be challenged if adherence to them results in injustice. A main difference between the realists and the positivists is in their understanding of the duty of the judge. As mentioned earlier, the positivist views the judge as the impartial rule applicator. For the realists, however, the judge has a moral responsibility to do more than that. The judge is to weigh the factors at hand, and while rule and precedent ought to be the guidelines for his or her decision, there is room for personal judgement and discretion as well.<sup>46</sup> Law is not *a priori* to the realists as it is to the positivists; if a law goes against their understanding of justice, as an abstract and overreaching notion, they are obligated to challenge that law. It is this spirit of realism that brought about the momentous decision in

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<sup>44</sup> Fisher, William, et al, eds. *American Legal Realism* (New York: Oxford University Press, 1993), xiii-xiv.

<sup>45</sup>Holmes qtd. in Fisher *American Legal Realism* 9.

<sup>46</sup>This is not to say that a judge can make a decision on a whim; in the U.S. for example, the decision has to be consistent with the Constitution and the Bill of Rights.

*Brown v. Board of Education*, for the Supreme Court ruled that the existing rule was unjust and therefore created a *new* rule. Such judicial autonomy is not found in positivist traditions. South Africa has long been marked by its adherence to the positivist doctrine of law. And, as Dyzenhaus points out, the legal tradition in South Africa prior to the implementation of democracy was an example of positivism at its worst. Law had become an instrument by which the government could enforce its oppressive ideology.<sup>47</sup> The positivist's slogan of "law is law" paved the way in South Africa for legal authoritarianism and a corrupt legal system in which the fate of the offender hinged more on skin color than guilt or innocence. And while legal positivism does not necessarily lead to the kind of legal oppression found in South Africa during the apartheid era, it does have that potential, for can lead to unquestioning adherence to law. The dominance of positivist thinking in South Africa allowed the politically conservative judges to mechanically interpret law and gave an undeserved status and respect to the racist apartheid laws.

### **Parliamentary Sovereignty**

In addition to the dominance of legal positivism, there were other factors leading to the inflexible and unjust legal system of apartheid. John Dugard, a South African law professor cites the principle of Parliamentary Sovereignty as the defining factor of the South African legal order.<sup>48</sup> This principle, which comes from English common law, states that Parliament has the right to enact legislation, and as long as it is in accordance with Parliamentary procedure, the

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<sup>47</sup>Dyzenhaus 1.

<sup>48</sup>Hund, John and Hendrik W. van der Merwe, *Legal Ideology and Politics in South Africa: a Social Science Approach* (Cape Town: Centre for Intergroup Studies, 1986), 20.

courts may not test or overturn this legislation. The idea of the supremacy of Parliament was brought to South Africa in 1806, with the second British occupation of the Cape; for the policies and rules governing the Cape were determined back in Britain by Parliament. Dugard notes that from 1806 on, the presence of the Union Jack served as a reminder to South Africans that they were at the will of the British Parliament.<sup>49</sup>

Prior to 1806, however, South Africa was governed by the Roman-Dutch law that van Riebeeck had brought with him from Holland. The legal system during the early years consisted of two courts, one for serious crimes and one for petty crimes. The more serious crimes were heard by the High Court of Justice, which was presided over by a council of company officials and two burghers. Lesser crimes were heard by two officials and two burghers.<sup>50</sup> This system remained more or less intact during the initial years of British occupation until 1828, when the British decided to revamp the legal system due to the recent arrival of a large number of British settlers. The judicial reform of 1828 led to the replacement of the Roman-Dutch system by the English system in matters of public law. The jury system was introduced, criminal law was remodeled along English lines and English replaced Dutch as the language of the courts.<sup>51</sup>

As mentioned earlier, the restructuring of the legal system coincided with the passing of Ordinance 50, the act that granted black South Africans equal status before the law, and the subsequent abolition of slavery. Boer outrage and resentment led to the mass migration of the Great Trek and the establishment of the two Boer Republics in the interior of the country, far

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<sup>49</sup>Ibid.

<sup>50</sup>Omer-Cooper 20.

<sup>51</sup>Omer-Cooper 47.

away from British law and British legal theory. Thus the development of the legal tradition in the two Boer republics is a bit different from that of the Cape and Natal. The Orange Free State and the Transvaal passed constitutions in 1854 and 1858 respectively and both followed a continental rather than a British mold, in that the Constitutions contained Bills of Rights<sup>52</sup> and established a unicameral Parliament.<sup>53</sup> Despite their best efforts to rid themselves of British influences, however, the Boers had picked up some aspects of British law, namely the principle of Parliamentary sovereignty. In 1897 in *Hess v The State*, the Chief Justice Kotze of the high court of the Transvaal declared an informal decision of the House of Assembly to be powerless. President Kruger summarily dismissed Kotze and described the testing rights of the court as "satansbeginsel," or the principle of the devil.<sup>54</sup>

Both of the British territories, the Cape and Natal, had been granted responsible self-government by 1893. With responsible self-government came the institution of a bicameral Parliament which could create and enact legislation, as long as it was not in conflict with British law.<sup>55</sup> Thus we see the continued domination of the British Parliament, a domination that certainly affected the South African understanding of the "proper relationship" between Parliament and the "lesser" branches of government.

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<sup>52</sup>By "Bill of Rights" I do not mean the type of egalitarian document we think of today. Instead, the Bill of Rights protected the rights of the Boers from government intervention. One of these rights was the right to own slaves.

<sup>53</sup>Basson, Dion and Henning Viljoen, *South African Constitutional Law* (Cape Town: Juta, 1988), 35.

<sup>54</sup>Basson 179.

<sup>55</sup>Basson 35.



When the four provinces came together in 1910 to form the Union of South Africa, the legal system of the country was united under the Westminster System, the name given to the system of law established in British colonies. The Westminster-style Parliament was permitted to pass laws deemed acceptable by a British governor general. Levenburg notes, however, that a veto by the governor general would have been considered a breach of protocol.<sup>56</sup> The basic concept of this new government was that Parliament was sovereign. Levenburg writes, "even if Parliament declared that the earth was flat...the courts had no right to second-guess it."<sup>57</sup> Dyzenhaus adds that the South African courts, like their British counterparts, followed a strict doctrine of precedent.<sup>58</sup> Early in the history of the Union then we see the lack of judicial review or testing rights, as it is often referred to in South Africa.

The passing of the Statute of Westminster in 1931 further strengthened the power of the South African Parliament. The statute granted the Union full autonomy and equal status with Britain; South Africa was now a member of the Commonwealth of Great Britain and no longer had to answer to the British Parliament. The Union Jack had been replaced by a new national flag.<sup>59</sup> It was with this newly granted power that Hertzog passed the Native Representation Act, which disenfranchised Africans in the Cape. Free from British Parliament and without the threat of judicial review, the South African Parliament had free reign. And by this time the belief in the

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<sup>56</sup>Levenberg, Peter N, "South Africa's New Constitution: Will it Last?" *The International Lawyer* 29 (Fall 1995) : 635.

<sup>57</sup>Levenburg 635.

<sup>58</sup>Dyzenhaus 36.

<sup>59</sup>Omer-Cooper 173.

supremacy of the Parliament had penetrated into the fabric of South African society; a 1937 statement issued by the Supreme Court of South Africa demonstrates the pervasiveness of the belief:

Parliament, composed of its three constituent elements, can adopt any procedure it thinks fit; the procedure express or implied in the South Africa Act [of 1909] is, so far as the Courts of Law are concerned, at the mercy of Parliament like everything else....Parliament's will, therefore, as expressed in an Act of Parliament cannot now in this country, as it cannot be in England, be questioned by a Court of Law whose function it is to enforce that will, not to question it.<sup>60</sup>

Despite the Afrikaners' hatred of all things British, they did not part with the principle of Parliamentary sovereignty when they took power in 1948. One might think that their adherence to this doctrine was a result of the permeation of the British legal system into their understanding of law; as Hund and Dugard point out, however, this is probably not the case. Instead, the Afrikaner government came to realize that it could achieve all of its goals using the British system. As Dugard writes, "[the] National Party leaders became more and more effusive in their praise of British Parliamentary institutions."<sup>61</sup> Both Prime Minister Malan and the Minister of the Interior publicly denounced the concept of testing rights for the judiciary, with the Minister of the Interior declaring that the choice was between "the judicial supremacy as you have in the United States" and "the Parliamentary sovereignty as you have in the United Kingdom."<sup>62</sup>

By the mid 1950s, the political leaders made it clear that they had chosen the latter. When the Nationalist Parliament passed a bill in 1951 which greatly reduced the political power of

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<sup>60</sup>Basson 179-80.

<sup>61</sup>Hund 22.

<sup>62</sup>Ibid.

Coloured voters, several Coloureds protested the constitutionality of the bill. The Appeal Court voted in favor of the Coloureds on the grounds that the bill was unconstitutional. The Court felt as if it had the right to speak out against Parliament, arguing that Parliament was only sovereign when it acted in accordance with the Constitution. Parliament countered by passing the High Court of Parliament Act which gave Parliament the right to override the decision of the Court. The judiciary then declared the Act invalid and Malan let the issue drop. Two years later, Malan's successor Strydom made a move that would guarantee that the courts would not question parliamentary legislation. He expanded the Appeal Court and appointed enough Afrikaner judges who were well disposed towards National Party policy to create an Afrikaner majority. That same year, Coloured franchise was destroyed.<sup>63</sup>

This notion of Parliamentary Sovereignty was even included in the 1983 Tricameral Constitution. Part IV, Section 30 of the Constitution states that "the legislative power of the Republic is vested in the State President and the Parliament of the Republic." The Parliament is "sovereign" and has full power "to make laws for the peace, order and good government of the Republic." The section continues, stating that "no court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament."<sup>64</sup>

### **Implications of the Dominance of the Principle of Parliamentary Sovereignty**

The long history of supremacy of the Parliament over the courts has contributed to the

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<sup>63</sup>Omer-Cooper 201.

<sup>64</sup>The 1983 Republic of South Africa Constitution Act. *Rights 20 (Winter 1996) : 24*  
[<http://www.constitution.org.za.83con.html>]

positivistic interpretation of law; for without testing rights, the courts could do nothing but apply the law that Parliament enacted. Thus the picture of South African law as inflexible has less to do with the legal theory than with the country's political philosophy. The question for political and legal theorists then is why did this principle of Parliamentary Sovereignty go awry? For the tradition of the supremacy of Parliament did come from Britain, and yet there has never been the same sense of unchecked Parliamentary power in Britain as existed in South Africa. As Emily Gaul writes, "the last 40 years in South Africa are an example of the Parliamentary process gone haywire."<sup>65</sup> Why did the South African parliamentary system come to be what some have called a "caricature" of the British system?<sup>66</sup>

The answer, says Hund, is that the doctrine of Parliamentary sovereignty in Britain is qualified by adherence to certain legal values, like equality before the law and freedom from state oppression, that are stated in Britain's unwritten Constitution. Johann Van der Vyver, a South African legal scholar and law professor, writes, that when the Westminster system was brought to South Africa from England in 1910, "it was....lacking the backing of the British liberal tradition and falling short of the very basic principle of representative democracy." Soon, says Van der Vyver, "the South African Parliament was corrupted by favouritism, partiality and sectional bias." And when the Afrikaners took power in 1948, the corruption of Parliament worsened. With their racist attitudes, their history of oppression and fear of being overtaken by the black majority, the Afrikaners sought to create a country over which they would have complete control. In order to secure their position, Parliament had to strip power from every group that was seen as a potential

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<sup>65</sup>Gaul, Emily, "The Quest for a Constitution," *Human Rights* 20 (Winter 1996) : 24.

<sup>66</sup>Quoted in Hund 21.

threat, the judiciary included. Any power that the South African judiciary had had to check to the actions of Parliament had vanished by the mid 1950s.

### Summary

Thus far this paper has focused solely on South Africa's political and legal history. It is important to understand the legal system under apartheid when considering the future of law in the new South Africa. For the last 40 years, the judiciary was merely an extension of the Afrikaner Nationalist government, obligated to apply the law of Parliament. Thus the legal tradition in South Africa must be viewed in context; yes, it was an oppressive and racist institution, *but* it had no other alternative. This is not to say that the judiciary sought autonomy and desired to have testing rights like the American judiciary; in fact, many South African judges and lawmakers considered the right to judicial review found in American and United Nations' courts "illegal, improper" and repugnant.<sup>67</sup> And of course, it is unfair to generalize about all South African lawmakers, judges and lawyers, for there have certainly been some, many of them lawyers, who have called for judicial autonomy and testing rights. It is important to note, however, that the legal tradition in South Africa developed under tight reigns, with little or no room to grow.

With the implementation of democracy, the legal tradition in South Africa is undergoing serious change. The most important changes are the possibility of judicial review and the presence of a Constitution and Bill of Rights consistent with the liberal democratic tradition in Britain and international standards of human rights.

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<sup>67</sup>Hund 54.

II. Religion This explanation of the development of and changes in the South African legal tradition is necessary for a discussion on religion and law in the new South Africa. The switch-over from the former positivistic, subservient legal system to the new realist autonomous legal system has definite implications for the way in which personal freedoms, like religion, will be dealt with by the judiciary.

the reader a sense of the religious groups in South Africa as background information for the third section of this paper that speculates on religion under the law in the new democratic South Africa.

### The Role of Religion in South Africa

South Africa is both a religious and a religiously diverse country. In 1983 the Human Sciences Research Council commissioned a group of South African scholars to conduct a survey to estimate the importance of religion to South Africans. The report concluded that religion is indeed an important part of the life of the South African. The degree of importance varied from race to race with the Coloureds, Indians and Blacks holding religion in higher regard than Whites. When asked if the social influence of religion was important, however, the Whites had the highest number of affirmative responses.<sup>84</sup> The 1983 survey suggests that religion tends to be important on a personal level to non-Whites, while it tends to be important on a societal/moral level to Whites. A survey conducted a year earlier revealed that 90% of all South Africans practice "basic religious activity."<sup>85</sup> While this survey offers a numerical indication of the importance of religion

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<sup>84</sup>Coetzee, J.K. and J.W. de Gruchy, et al, *Religion, Intergroup Relations and Social Change in South Africa* (New York: Greenwood, 1988), 28.

<sup>85</sup>Ibid 29.

## II. Religion in South Africa

This paper now turns to religion and the various religious traditions in South Africa. This section presents the major traditions in the country and offers a brief socio-historic description of each. This section in no way tries to offer the whole of religious history in South Africa; it instead seeks to give the reader a sense of the religious groups in South Africa as background information for the third section of this paper that speculates on religion under the law in the new democratic South Africa.

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<sup>68</sup>Coetzee, J.K. and J.W. de Gruchy, et al, *Religion, Intergroup Relations and Social Change in South Africa* (New York: Greenwood, 1988), 28.

<sup>69</sup>Ibid 29.

to South Africans, it does not tell the whole story. As Lyn Graybill writes, the South African is "above all else a 'religious animal.'" Religion is an integral part of the lives of most South Africans; one finds references to God and religion throughout South Africa. As John De Gruchy, a South African scholar of religion, says, theology is "not pushed to the edges of life but operates at the very pulse of South African culture."<sup>70</sup> For many in South Africa, religion is not just a "Sunday activity," it is part of everyday life, of history, of politics, of struggle and of day to day existence.

In addition to being a "religious" country, South Africa is religiously plural. The purpose of this next section is to acquaint the reader with the various religious traditions in South Africa.

### **Religious Plurality in South Africa**

South Africa is often referred to as a Christian country. And with over 66% of its population subscribing to some sort of Christian tradition, such a statement is qualified. But to ignore the plurality of religion both within and outside of the Christian tradition would be a mistake. Within the Christian tradition alone, there are over a dozen different groups, the largest of which, the African Independent Churches, can only claim 33% of Christian population. The second largest group is the Dutch Reformed Church with 18%, followed by the Roman Catholic Church with 11% and the Methodist Church with 8.8% of the Christian population. There are Anglican, Lutheran, Presbyterian and Congregational Churches in South Africa as well. The remaining 25% of the country is comprised of Hindus (1.3%), Muslims (1.1%), Jews (.2%) and

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<sup>70</sup> Qtd in Graybill, Lyn, *Religion and Resistance Politics in South Africa* (Westport: Praeger, 1995), 1.



people who practice traditional African religions (up to 29.7%).<sup>71</sup> Described by a 1986 report by the Human Sciences Research Council as a country without a religious majority, South Africa is instead a society of religious minorities.<sup>72</sup> Thus one has to use caution when calling South Africa a “Christian” country, for that label does not tell the whole story. The discussion of the religious traditions in South Africa begins with the only tradition native to the land, African traditional religion.

### **African Traditional Religion**

Of the 45 million people living in South Africa, it is estimated that up to 13 million people may practice what are referred to as ‘indigenous religions.’<sup>73</sup> The exact number is hard to determine, for most of the census reports on religion list ‘black traditions’ under “none” or “other.” In fact, it has not been until very recently that African traditions have come to be considered and respected as legitimate religions. As a result, it is difficult to discuss African religious traditions. First, because African traditions are non-literate, most of what is known of them has come to us through oral history and through the writings of early, predominantly Christian settlers and missionaries. Second, trying to discuss “African traditions” is comparable to trying to discuss Native American religion; that is, the label “African tradition” refers to many different and distinct groups of people. Third, many of the traditions have undergone changes as

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<sup>71</sup>Numbers come from 1991 census cited in Appendix 2 of Prozesky, Martin and John de Gruchy, eds., *Living Faiths in South Africa* (New York: St. Martin’s, 1995), 237.

<sup>72</sup>Coetzee, et al 58-9.

<sup>73</sup>Estimate comes from Appendix 2 in *Living Faiths in South Africa* 237.

a result of contact with Christianity and other religions. Nonetheless, any discussion of religion in South Africa would be incomplete without a discussion of African or ancestral traditions, as they are often called.

Scholars have typically divided the African indigenous groups into two categories: Khoisan and Bantu speakers. The Bantu speakers are further divided into Nguni, Sotho-Tswana, Tsonga, and Venda. Nguni speakers are broken down into Cape Nguni, Swazi and Zulu while the Sotho-Tswana speakers divide into Southern Sotho, Northern Sotho, Western Sotho, and Tswana. Though these distinctions have been made on linguistic grounds, they are said to reflect physical and cultural differences as well.<sup>74</sup> Indeed each of these linguistic/cultural groups has a long history and rich religious tradition, and a description of each is too large a task for this paper. Instead, I will focus on three aspects of traditional religion that are common to many of the traditions in the hopes of providing a picture of the indigenous traditions: the origin myth<sup>75</sup>, ancestor veneration and the role of sacred specialists.

The origin myths in African indigenous traditions typically center around three story lines. The first is that human beings emerged from a hole in the ground. The Mpondo, the Southern Sotho, Tswana, Venda and Tsonga traditions subscribe to this belief and are able to point to the hole or the rock from which their ancestors emerged. The second myth states that human beings originated from a bed of reeds, breaking off from the source of life. This myth is found in the Zulu, Swazi and Xhosa traditions. The third myth is that humans were created by a high god or

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<sup>74</sup>Omer-Cooper 5-11.

<sup>75</sup>I will use the term origin rather than creation, for as Allister Sparks point out in his book, many of the myths do not include 'creation' by a 'creator.'

gods. For example the origin myth of a northern Sotho tradition says that the high God Kgobe created the world while his son created humans, molding them from a pot of clay. In each tradition the origin myth explains the beginning of human life and the surrounding environment. It is interesting to note how these origin myths may be altered or elaborated upon as conditions around the group change. One Zulu origin myth recorded in the 19th century incorporated white domination of blacks into the explanation of origin. It said that black people emerged from the bed of reeds much earlier than the white people and went out into the world to fend for themselves. Meanwhile, the whites stayed in the reeds acquiring wisdom, recording law, learning how to write, make weapons, wagons and ploughs. Because they stayed in the bed much longer than the blacks, it was easy for whites to dominate the black people. The adaption of this myth shows the pervasive effects of the European presence on many African traditions; for something as sacred and central to the Zulu tradition as an origin myth was altered to account for new 'European truths.'<sup>76</sup>

In addition to myths of origin, most African traditions include some form of ancestor veneration. In almost every tradition, the ancestors are relatives who have died but still have an interest in and an influence on the world of the living. The living typically call upon the ancestors during times of suffering or natural disaster. Often, the ancestors are seen as responsible for illness or suffering; if members of the living community come down with an affliction it is thought that they have done something to invoke the anger of the ancestors. Either the family of the afflicted person or, in some cases, the entire community engages in a ritual to make amends to the ancestors. This ritual may include song and dance and almost always includes an animal sacrifice

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<sup>76</sup>Chidester, David, *Religions of South Africa* (New York: Routledge, 1992), 6-9.

to the gods. The ritual is a way for the living to seek harmony with the ancestors and to restore balance to everyday life. It is through ancestor worship then that people in indigenous traditions connect with the transcendent or spiritual world.<sup>77</sup> Chidester notes that while a Supreme God figure may be present in a tradition, he is rarely called upon for help and guidance. The Supreme god is usually responsible for the creation of the world, while the ancestors take care of the concerns and needs of the people.<sup>78</sup>

The third defining aspect of African traditions is the presence of a sacred specialist. Sacred specialists may be either herbalists, dispensing natural medicines and cures, or diviners, communicating with the spirits and ancestors. The diviner is present in most traditions, including Xhosa, Zulu, and Sotho-Tswana, though his power and techniques may vary. His role is to discover the cause of misfortune, be it the ancestors or a witch in the community. Sometimes the diviners use bones, sticks or seeds to discover answers to their questions; other times, the diviners conduct "truth" sessions to find the cause for misfortune. In the Zulu tradition, for example, the diviner leads a 'smelling out' to locate the cause of the affliction or misfortune. One such ritual was recorded in the 1850s. After receiving permission from the chief, the diviner invited the family of the afflicted to his hut. He sat them down in a semi-circle and questioned them about the affliction. After he had gathered the facts, he retreated into another hut. When the diviner emerged from the hut he had entered into an ecstatic state, dancing trance-like around the afflicted person and his family. At the climax of the ritual dance, the diviner spoke the name of

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<sup>77</sup>Kiernan, Jim, "African Traditional Religions," *Living Faiths in South Africa* (New York: St. Martin's, 1995), 20-3.

<sup>78</sup>Chidester 6.

the person responsible for the misfortune. The accused then had to confess, make arrangements for a sacrifice and pay a guilt fine to the chief. In addition to his role as mediator between the world of the living and the dead, the diviner also acts a judge, settling disputes and restoring communal harmony.<sup>79</sup>

This discussion of African traditions has centered around just three facets of religious life; there are many other features of African traditions, including initiation rites, death rituals and religious festivals and ceremonies. Thus the above discussion is not a complete description of "African tradition," for that broad label covers many different traditions, each with its own history and ritual. As mentioned above, it is difficult to discuss African religions for this exact reason. Moreover, it is difficult to know just how many people are still practicing these traditions, for most reports on religious activity in South Africa simply ignore the African traditions. Finally, it is hard to know to what extent the traditions have changed as they have come into contact with Christianity and other "world" religions. I asked one white British South African what he knew of black indigenous religion and he replied, "Oh the Zionist churches?" When I explained that I was referring not to black Christian traditions, but to African ancestral religions he said, "You mean the witchcraft stuff? Oh, I don't know of anyone who still practices that. They have all switched to Christianity, Zionism actually. Like my maid, she switched last year. She switched because she was afraid of the *isangoma* (the Nguni word for witchcraft or sorcery). The Zionist church told her they could save her from it; I think they are all switching over to Christianity." Whether the observations of this South African are correct or not, it is evident that religious syncretism has blurred the lines separating ancestral traditions from Christian traditions. This

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<sup>79</sup>Ibid 17-20.

paper will examine the resulting syncretic traditions in the next section on Christianity.

### **Christian Traditions**

As mentioned earlier, the Christian majority in South Africa is not a single-minded group. There are serious rifts and ideological differences between many of the Christian groups. The churches in South Africa can be broken down into three main categories: Afrikaans speaking churches, English speaking churches and Black churches.

### **Afrikaans-speaking Churches**

The Afrikaans speaking churches, also known as the Dutch Reformed Churches, are predominantly white, though many Coloureds belong to the DRC as well. The largest and most powerful of the Dutch Reformed Churches is the Nederduitse Gereformeerde Kerk; the Nederduitsch Hervormde Kerk and the Gereformeerde Kerk are smaller branches of the DRC.<sup>80</sup> The Dutch Reformed Church came to South Africa with van Riebeeck and the early Dutch settlers. Van Riebeeck's departure from the Netherlands came at a critical time in the history of the Dutch Reformed Church, when it was reworking its theology due to religious wars with Catholic Spain. Influenced by the German Reformation in the early 16th century, many Dutch Christians were turning to Protestantism. At this time, the Netherlands was under the control of the Catholic King of Spain, who, in 1564, enforced adherence to the Catholic faith. Fighting broke out in 1566 and lasted until 1609. Though the Dutch were fighting for political freedom,

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<sup>80</sup> From here forward, mention of the Dutch Reformed Church refers to the NGK, unless otherwise specified.

religious freedom was at issue as well. During the warfare, the Dutch Calvinists were hammering out their new theology, which they laid out at the Synod of Dort in 1618-19. By 1651, one year prior to van Riebeeck's arrival at the Cape, the Dutch Reformed Church was named the official state Church of the Netherlands.<sup>81</sup>

During the Dutch rule of the Cape (1652-1795) the Dutch Reformed Church was the established religion and all other religious practice was banned.<sup>82</sup> The Church existed as a branch of the government with its ministers doubling as government officials. Chidester notes that the early settlers were not particularly religious, nor were the Churches as strictly Calvinist as the Churches in Holland. Nevertheless, the DRC expanded as the population in the Cape grew. By 1795 there were as many as 6 churches in and around the Cape area.<sup>83</sup> Despite British occupation of the Cape in 1795, the Dutch Reformed Church remained the established religion. In fact, written into the surrender to the British at Table Bay was the provision that the DRC retain its prominence and privilege. It was not until 1848 that the first Anglican church was built in Cape town.<sup>84</sup>

During the first half of the 19th century, however, the DRC began to face ideological difficulties. Granted autonomy from the DRC in Holland, the Church at the Cape had formed its own synod in 1824 to deal with theological issues. One problem the Church faced was what to

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<sup>81</sup>Chidester 76-7.

<sup>82</sup>The Lutheran Church was the only exception. They were permitted to worship publicly in 1778.

<sup>83</sup>Chidester 77.

<sup>84</sup>DeGruchy, John W, *The Church Struggle in South Africa* (Grand Rapids: Eerdmus, 1986), 3.

do with the 'Natives.' There were some, Church officials included, who felt that the DRC ought to welcome any who wished to convert, while others worried that "Christian natives [would not be] such good servants as the wild heathens."<sup>85</sup> In 1829, the Synod stood firm stating that Holy Communion was to be given to "all members without distinction of color or origin." They felt that equal treatment was "an unshakable principle based on the infallible Word of God." By 1857, however, the synod allowed for separate places of worship to accommodate the "weakness of some [members]." What was meant by the Synod to be an exception quickly became a rule and separate "daughter" churches were established for blacks and later for Indians. The 1857 decree allowing for racial separation was a turning point in the development of the DRC, for racism began to creep into the Afrikaner theology. The decree was to have even further reaching effects, for it established what DeGruchy calls "an ecclesiological blueprint for the Nationalist policy of separate development."<sup>86</sup>

At the same time the synod was struggling with its racial policy, it was also trying to assert its independence from the DRC in Holland. Though the DRC had officially cut ties with the Church in Holland in 1824, it was dependent on the Dutch theological seminaries for the training of its ministers. Because the DRC of South Africa broke away from the Church just before Enlightenment ideas started to soften the orthodox Calvinism the DRC in Holland, South Africans were not satisfied with the 'liberal training' their ministers were receiving. This is not to say that Enlightenment ideas did not reach the Cape, but the DRC in the Cape remained much more conservative than its counterpart in Holland. South African dissatisfaction led to the creation of

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<sup>85</sup>Ibid 2.

<sup>86</sup>Ibid 7-9.



the Theological Seminary at Stellenbosch in 1859; the DRC could now control theological teaching and preserve its conservative character.<sup>87</sup>

There were some, however, who thought that the DRC in South Africa was not conservative enough. Because of the presence of some Scottish Presbyterian ministers in the DRC, the Church was becoming more evangelical than some DRC members would have liked. The more orthodox Calvinists were skeptical of the foreign pietist influence and turned instead to the ideas of Dutch theologians like Groen van Prinsterer and Abraham Kuyper, neo-Calvinists who recalled the orthodox policies of the Dort synod. One South African particularly influenced by Kuyper was the Reverend S.J du Toit. In 1859, after the Great Trek, du Toit and a handful of followers left the DRC to form the Gereformeerde Kerk or Reformed Church in the Transvaal. Members of the Reformed Church believed that every sphere of life, education, art, economic affairs and family life existed by the grace of God. The Reformed Church was a proponent of Christian nationalism and a forerunner of the Afrikaner Nationalist movement. The third branch of the DRC, the Nederduitsch Hervormde Kerk was also created after the Great Trek, though a few years prior to the GK in 1853. The NHK was the Church of the trekboers who were anxious to escape both the governmental and religious bureaucracy of the Cape. The NHK became the "volkskerk", or people's church of the South African Republic.<sup>88</sup>

Today there are over 3 and a half million South Africans, white (37%), coloured (26%), Indian (0.5%) and black (6.5%), who belong to the Dutch Reformed Church (NGK). Approximately 9 thousand South Africans belong to the two other DRC branches, the NHK and

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<sup>87</sup>Ibid 20-1.

<sup>88</sup>Ibid.

the GK, both of which are exclusively white.<sup>89</sup>

### **English-speaking Churches**

In addition to the Dutch Reformed Church, or Afrikaans speaking Church, there are English speaking Churches in South Africa. A bit of a misnomer, "English speaking" refers to Protestant Churches that had their origin in England. For the majority of these Churches, English is the official language (just as Afrikaans is the official language of the DRC), though the services are more frequently conducted in African languages than in English. The English speaking Churches with the largest memberships are the Roman Catholic, Methodist Church and the Anglican Church, though there are Presbyterian, Lutheran and Congregationalist churches in the country as well. The Anglican faith came with the British in 1795 but the first Anglican Church was not built until 1848. The development of the Anglican Church was due in large part to a bishop named Robert Gray, who was responsible for the building of the first Church. By 1853, there were bishops in Grahamstown and Natal and by 1857 Gray had "transplanted the system and organization of the Church of England to [the] land."<sup>90</sup>

Methodism came to the Cape around 1810, but did not really flourish until the arrival of the 1820 settlers. The Methodists were concerned with the Christianization of the blacks and set up Methodist missions all along the Eastern frontier. As a result of its extensive missionary work, the Methodist church has the second largest number of black African members among the

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<sup>89</sup>Statistics from Coetzee 22.

<sup>90</sup>DeGruchy 16-7.

mainline denominations.<sup>91</sup>

The Roman Catholic Church is often grouped with the English speaking Churches. Approximately 11% of the Christian population subscribes to the Roman Catholic faith.<sup>92</sup> During the early years of Dutch rule of the Cape, the practice of Catholic worship was severely restricted due to lingering anti-Catholic sentiment from the Dutch war with Catholic Spain. In fact the first Catholic Church in South Africa did not appear until 1822, when South Africa was under British rule.<sup>93</sup> The level of tension between the Protestant churches and the Catholic Church fluctuated throughout the 19th and early 20th centuries. Catholicism during this time focused much of its energy into mission work. As a result, the Catholic Church ranks just above the Methodist Church in its number of black members.<sup>94</sup>

As Afrikaner Nationalism grew and the Dutch Reformed Church became more and more exclusive, the split between the Catholics and Protestants deepened. The DRC was suspicious of the Catholic Church because of its large black membership and what the DRC perceived to be 'liberal views.' Afrikaners feared *die Roomse gevaar* almost as much as they feared communism. The irony is that the Catholic Church was much less vocal than the other English-speaking Churches in their condemnation of Nationalist ideology. After the Afrikaners took control in 1948, almost every English speaking Church denounced the racist policies of apartheid. The Roman Catholic Church, however, did not think that the church should take a political stand

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<sup>91</sup>DeGruchy 14.

<sup>92</sup>Appendix 2 in *Living Faiths* 237.

<sup>93</sup>Chidester 151.

<sup>94</sup>Coetzee, et al 22.

against the government. They changed their tune in 1957, after the passing of the Bantu Education Act in 1953, which cut funding to their mission schools, and the implementation of the Native Laws Amendment Act 1957, which made interracial worship nearly impossible. The Roman Catholic Churches joined up with the other English speaking churches to speak out against apartheid; this union began the ecumenical movement among the churches in South Africa that would unite Churches both in the country and around the world in the struggle against apartheid.<sup>95</sup>

### **African Independent Churches**

The third group of churches in South Africa are what are commonly called Black or African Independent churches and they may be divided into two groups: black mission churches and African Indigenous churches. The black *mission* churches are descendants of the early missionary churches and are found in most every denomination, Dutch Reformed and English speaking. The black *indigenous* churches, also called the Independent Churches have the largest following among all the Christian groups, with 33.5% of the Christian population.<sup>96</sup> But one has to be careful in calling them Christian, for the independent churches are a combination of Christian and ancestral traditions. They are good examples of the religious syncretism that often emerges in a multi-religious society.

Jim Kiernan explains that the indigenous churches arose out of the failure of the

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<sup>95</sup>De Gruchy, John, "Twentieth-century Christianity," *Living Faiths in South Africa* (New York: St. Martin's, 1995), 91-5.

<sup>96</sup>Number from Appendix 2 in *Living Faiths* 237.

conventional churches to meet the spiritual needs of many of the African people. Around the beginning of this century, the mission churches began to focus on education of black Christians. The idea was to create an educated elite among African Christians in the hope that the African Christian communities could one day be self-sufficient. As a result, many African Christians were sent to mission schools, where they received Western education and training. When these educated black Christians returned to their churches, ready to assume leadership positions, they found the white missionaries reluctant to relinquish power. The missionaries were slow to ordain African pastors and even slower to abandon their paternalistic attitudes toward their black congregations. This led to high levels of frustration in the black Christian community, a frustration that ended in schism and the formation of the African Independent Churches. These Churches that emerged as a result of leadership disputes in the mission churches are called Ethiopian Churches. Kiernan notes that Ethiopian churches developed rapidly and across all Protestant denominations.<sup>97</sup>

The name 'Ethiopian' comes from Psalm 68:31, which reads, "Ethiopia shall soon stretch out her hands to God." Ethiopia was also associated with the figure Cush, son of Ham and the great ancestor of all Africans.<sup>98</sup> Thus the Ethiopian Churches established their own link to the Bible. As these Churches developed they sometimes incorporated the cultural and religious heritage of their members into Christian teaching. Tribal Chiefs were often appointed as heads of

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<sup>97</sup>Kiernan, Jim, "The African Independent Churches," *Living Faiths in South Africa* (New York: St. Martin's, 1995), 116-21.

<sup>98</sup>The leaders of the Ethiopian Churches reinterpreted the story of Cush so that he was not an outcast as white supremacist theology taught, but the "grand ancestor" of all African Christians.

these churches. They sought to unite all Africans and de-emphasize tribalism. Though the Ethiopian Churches were formed for religious purposes, they took on a political edge in the early part of the century. Many Ethiopian church members were said to have participated in the Bambatha rebellion in 1906, a rebellion against the authorities in Natal, and the formation of the ANC has been linked to the early Ethiopian Churches. These political ties were soon cut as many churches struggled internally over leadership positions and factional division. As a result, the Ethiopian churches lost power and subsequently lost political motivation. As the years have passed, they have become "the tame disciples of the doctrine of separate nationalism."<sup>99</sup>

In addition to the Ethiopian Churches, another group of black independent churches emerged at the turn of the century: Zionist Churches. Unlike the Ethiopian churches which were started by educated African Christians seeking leadership roles in the church, the Zionist Churches came out of the migrant experience of the working class blacks. Zionism came to South Africa from America. A man named John Alexander Dowie founded the Christian Catholic Apostolic Church in Zion in Chicago in 1896, in which he practiced divine healing and preached of the second coming of Christ. Missionaries from Zion City came to South Africa and within years the Zionist faith had become extremely popular among urban black South Africans. The Zionist Churches offered much needed spiritual nourishment and community to the urban blacks who alienation and exploitation as members of South Africa's lowest working class. The Zionist Churches appealed to many black South Africans because they combined Christian practice with familiar tribal practice, focusing on the ritual of healing.<sup>100</sup>

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<sup>99</sup>Kiernan "The African Independent Churches." 120-1.

<sup>100</sup>Chidester 123-4.

Today Zionist churches are cohesive and exclusive. They readily take in new members, but limit their interaction with outsiders. As a result the Zionist churches are not politically active; "their objective is not to undo the system...[but is instead to] rescue and salvage...on a voluntary basis."<sup>101</sup> Typically a Zionist church is led by a charismatic minister who uses prophetic flair and elaborate healing rituals to relate to his congregation. Zionists believe sorcery is the ultimate danger to one's soul and that the power of the Holy Spirit can save them from it. Zionist Churches are noted for their often ecstatic and energetic services, in which the sick are healed and the congregation joins in prayer to engage the power of the Holy Spirit.

Just as the Ethiopian churches have splintered, so have the Zionist Churches, for the only way an aspiring minister can hope to lead a congregation is to form his own. Thus with both the Zionist and Ethiopian Churches, there are thousands of separate churches scattered all over the country, without much cohesion.<sup>102</sup>

### Other Traditions

The remaining 5% of the religious population in South Africa is comprised of Muslims, Hindus and Jews, as well as small populations of Buddhists, Confucianists, Jains and Parsees. Though their numbers are relatively small, each of these groups has survived and prospered in South Africa despite years of religious and racial persecution. Islam is the oldest of these "other" traditions in South Africa, arriving in the mid-seventeenth century with the slaves brought from Indonesia by the Dutch East India Company. The earliest Muslim community was made up of

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<sup>101</sup>Ibid 124.

<sup>102</sup>Ibid.

slaves, prisoners and political exiles. One such political exile was the Indonesian religious and military leader, Shaykh Yusuf who was sent to the Cape in 1694. A Sufi Muslim, Yusuf was largely responsible for centralizing the Muslim community on the Cape, since the farm on which he lived became a popular meeting place for Muslim slaves and exiles. When he died in 1699, his tomb became something of a shrine to the Muslims living in South Africa; it became a focal point for the community, a sacred center around which the community was to grow.<sup>103</sup> The Muslim community continued to expand throughout the years, though the first Muslim mosque was not built until 1798. By the middle of the 19th century, there were 6,435 Muslims in Cape Town, making up over one third of the population of the city. Their large numbers were largely a result of a law passed in 1770 that prevented the buying and selling of Christian slaves. In reaction to this law, many slave owners prevented their slaves from converting to Christianity; the slaves turned to Islam instead.<sup>104</sup>

Since their arrival on the Cape, Muslims were victims of religious persecution. Under the rule of the Dutch East India company, legal controls were placed on religious worship. Because the Dutch were struggling against Muslim leaders for control of the spice trade, Islam was considered dangerous and in direct opposition to Dutch Protestant values. In 1657, Cape Governor John Maetsuycker passed an edict that forbade Muslims to practice Islam. The Muslims were also forbidden to convert people to Islam. Punishment for violation of this order was death. It was not until the British occupation of the Cape in 1795, that restraints on Muslim

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<sup>103</sup>Ibid 158-9.

<sup>104</sup>Moosa, Ebrahim, "Islam in South Africa," *Living Faiths in South Africa* (New York: St. Martin's 1995), 129-131.



religious life were lifted. It was shortly after the British took power, that the first Mosque was built. But by the 1850s, the Muslims were facing persecution again. This time, the concern was for public health and safety. The dispute between the Muslims and the British Cape government began when the annual festival of *Khalifa* was banned in 1856. *Khalifa* was a celebration of the birthday of Abu Bakr, the successor of the Prophet Muhammad, in which Muslims engaged in rituals of self-torture to demonstrate spiritual strength and devotion. Concerned for the public's health, the municipal authorities banned the festival as 'dangerous to the law and peace of the community.' There was also growing concern for the burial practices of the Muslims. Again, in the name of public health and safety, local authorities closed the Muslim cemetery in 1883. Muslim burial practice requires that the body of the deceased be carried through the streets to the local cemetery. With the recent outbreaks of small pox, however, public officials did not want corpses paraded through the streets. Each group had its own concept of religion, health and law. Not surprisingly 'reconciliation' of the differences between the groups took the form of subordination. The Muslims were forced to abandon their rituals and follow the British standard.

Another area of conflict between the Muslim community and the local government was over succession of leadership in many of the mosques. Unable to resolve the conflicts among themselves, the disputing Muslims often took their cases to local British courts. In an effort to settle these disputes fairly, the Cape government brought in an expert in Islamic law from outside of South Africa. The problem, however, was that the expert was trained in Hanafii jurisprudence, while the Cape Muslims were of the Shafi'i school of law. This 'solution' created more problems than it solved and heightened tensions between the Muslim community and Cape government.<sup>105</sup>

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<sup>105</sup>The information in both of the above paragraphs is from Chidester 161-5.

By the beginning of the twentieth century, Muslim communities were growing in other cities outside of Cape Town. In Natal, a large Muslim community of traders and merchants had developed. And by the 1920s and 1930s, the established communities had begun to cooperate with the government. The Muslims agreed not to resist the government as long as they were allowed to practice the basic requirements of their faith, daily prayer, tithes, fasting and pilgrimage to Mecca. With the implementation of apartheid in 1948 the Muslims, with their dark skin and non-Christian faith, suffered heavy persecution.

Muslim resistance to apartheid was minimal until the 1980s when Islamic militant groups emerged and voiced their disdain for the National Party government. Many Muslim resisters joined forces with other religious peoples, Protestants, Catholics, Jews and Hindus to form a united religious front against apartheid.<sup>106</sup>

In addition to Muslim communities, there is a sizable segment of the population which adheres to the Hindu faith. Hindus first came to South Africa in the middle of the 19th century seeking economic opportunity as indentured servants on the sugar plantations. Most of the early Hindu immigrants were members of the lower castes and saw South Africa as an escape from the oppressive social system of India.<sup>107</sup> Though one Christian journalist writing on Indian life in the Kimberley diamond fields wrote of the 'chanting [of] devotions in the whine of primitive piety' that could be heard from the Hindu quarters, there is not much evidence of religious practice

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<sup>106</sup>Moosa 146-151.

<sup>107</sup>Maxwell, Patrick, et al, "Hinduism in South Africa," *Living Faiths in South Africa* (New York: St. Martin's, 1995), 146-151.

among the early Hindu immigrants.<sup>108</sup> In the following years, a second group of Hindu immigrants came to South Africa. These were wealthier members of the higher castes who came as traders, merchants and entrepreneurs. It was this second group that was really responsible for the founding of a Hindu community in South Africa, for they were responsible for the building of Hindu temples.

Hinduism in South Africa was not a unified movement in its early years in South Africa, for the immigrants came from different parts of India. They spoke different languages and practiced different forms of Hinduism. Moreover, some Hindus in South Africa were affected by the various Neo-Hindu movements coming out of India during the mid nineteenth century. In 1912, however, the various Hindu groups united when their religion was threatened by the South African legal system. In 1912 a South African court ruled that all polygynous marriages were invalid and illegal in South Africa. The following year, a court declared that only marriages performed under Christian or civil rites were valid, thus invalidating every non-Christian religious union. The Hindu communities had been at odds with the government for several years over land for temples. Outraged at the discrimination they were facing, Hindus organized resistance movements throughout South Africa.

Leadership for this resistance came in the form of Mohandas K. Gandhi who lived and practiced law in South Africa from 1893 to 1914. An advocate of human rights, Gandhi appealed to the South African government on the grounds that the recent action of the courts was in clear violation of British morality and justice. Gandhi organized a massive resistance campaign in South Africa based on the passive ideology of *satyagraha*, or strength in truth. The strikes and

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<sup>108</sup>Chidester 168.

protests led by Gandhi in 1913 led to the government's Act 22 of 1914. Known as the 'Indian Relief Bill,' this act granted legal validity to Hindu marriages. Though Gandhi left South Africa weeks after the Relief Bill was passed, his legacy of *satyagraha* and non-violent resistance continued into the apartheid years. The Hindu community was one of the religious groups in the unified religious front against apartheid.<sup>109</sup>

The Jewish community in South Africa has also suffered persecution and alienation, though not as much as some of the other non-Protestant groups. Their smaller numbers and economic prosperity probably account for their better treatment. Though Jews were living in South Africa as early as 1800, the first synagogue was not built until 1849. The Jewish community, centered in Cape Town remained relatively small until the turn of the century. A period of heavy immigration from 1880 to 1914, increased the number of Jews living in South Africa from 4,000 to 40,000. Most of these Jews settled in and around Johannesburg.

Of these immigrants, over half were Lithuanian Jews who were escaping political and religious persecution from the Russian government of Lithuania. The economic and social conditions of these Jews was markedly different from the Jews coming out of Germany, England and the Netherlands. As a result, there were Jews on either end of the social scale in Johannesburg. On one end were the wealthy merchants, mining capitalists and civic leaders and on the other were the poor mostly Lithuanian mine workers. The disparity between these two groups of Jews was furthered by political differences. The wealthier Jews sought assimilation into South African society; they formed the Jewish Board of Deputies in 1903, aligning themselves

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<sup>109</sup>Ibid 169-75.

with most government policies, even that of white supremacy. Moreover, the Western European Jews denounced the behavior of the Eastern European Jews, urging them to forget their former language and customs. The Lithuanians, however, tended to hold on to their heritage and to join political groups that did not lend themselves to assimilation, like the Socialist movement and the Jewish Zionist movement. Though politically opposed to one another, they were both denounced by the Jewish Board of Deputies, which now backed the South African nationalist movement. Jewish Socialists were mostly Yiddish speaking members of the working class. Victims of capitalist exploitation on the mine fields, the Socialists formed the Jewish Workers Club to promote the socialist reorganization of South Africa. The Zionists, on the other hand, were members of the larger Zionist movement to create a Jewish state in Palestine.

Thus within the Jewish community, as with the Muslim and Hindu communities, there were ideological differences. These differences were glossed over by D. F. Malan and his antisemitic Afrikaner Nationalist party, who were influenced by the Nazi ideology of their longtime ally Germany. Defending 'Christian Civilization,' the Nationalists thought of all Jews as a "dangerous alien element which must be subjected to strict control." The Transvaal National Party banned Jews from membership in 1943 only after receiving a substantial number of Jewish votes the year before. The mood of the Nationalists changed when the state of Israel was formed in 1948, for they saw Israel as the model for separate development. In 1951 the ban on Jewish membership in the Transvaal was lifted; even Malan rethought the Jewish situation, stating that every Jew could be "a good South African as well as a true son of Israel." Receiving better treatment from the government, the Jewish community flourished in South Africa. By the 1980s,

the country was home to Orthodox Jews, Reform Jews, and several ultra-orthodox groups.<sup>110</sup>

### Summary

Thus South Africa is a country with many different religious traditions, Christian and non-Christian. As stated earlier, it is a country comprised of religious minorities, 66% of which fall under the heading 'Christianity.' And it is a religious country; references to 'religion' and 'God' are found all over South Africa, in political documents, in resistance speeches, in literature and even in the public schools. For the first time in the history of the country all of these religious traditions will be equal before the law. The New Constitution guarantees that the Dutch Reformed Church will no longer dominate the religious scene and that people will be free to believe as they choose.

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<sup>110</sup> Prior to the formation of the Union, both the Transvaal and the Orange Free State had branches of the DRC as established churches. In the Transvaal the NRC was the official church from 1858 to 1889, and only members of this church were granted franchise. In the Orange Free State, the NRC was the established Church until 1866 when the NGK took its place as the established church until 1902. In the Cape, establishment was barred in 1875, with the passing of the Cape Voluntary Bill which ended state funding to churches, both Dutch Reformed and

Baron, Johann, "Religion," *The Law of South Africa* (Durban: Butterworths, 1989), 179.

<sup>110</sup>Ibid 175-180.

### III. Religion in the New South Africa

Armed with both an understanding of the legal and political heritage of South Africa and a knowledge of the religious conviction and plurality of her people, one can now begin to think about the role religion will play in the new South Africa.

#### Freedom of Religion Then and Now

There is no official established church in South Africa, nor has there been one since the Union was created in 1910.<sup>111</sup> During the apartheid era, however, the Dutch Reformed Church though not *de jure*, was indeed the *de facto* established Church of the state. When the Afrikaner Nationalists took power in 1948, they considered it their duty to God to lead the country of South Africa in a manner consistent with Calvinist theology. They implemented a policy of Christian National Education in the public schools, to inculcate Afrikaner ideals in young South Africans. The Nationalists used Calvinist theology to justify their racist oppression of non-Whites. Though they were fairly tolerant of other religious groups, this tolerance hinged on the extent to which the religion of the 'other' was consistent with 'Godly morality.' For example, Marriage Act 25 of 1961 declared legal only those marriages "solemnized according to Christian, Jewish, or Islamic rites or according to the rites of any Indian tradition;" missing from this list are the 'rites' of the

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<sup>111</sup> Prior to the formation of the Union, both the Transvaal and the Orange Free State had branches of the DRC as established churches. In the Transvaal the NHK was the official church from 1858 to 1889, and only members of this church were granted franchise. In the Orange Free State, the NHK was the established Church until 1866 when the NGK took its place as the established church until 1902. In the Cape, establishment was banned in 1875, with the passing of the Cape Voluntary Bill which ended state funding to churches, both Dutch Reformed and Anglican. From Van der Vyver, Johann, "Religion," *The Law of South Africa* (Durban: Butterworths, 1986), 179.

many indigenous African religions, religions which may include polygyny.<sup>112</sup> And polygyny was certainly not in keeping with the Afrikaners idea of Christian morality, because polygyny was 'reprobated by the majority of civilized peoples, on the ground of morality and religion.'<sup>113</sup> The Dutch Reformed Church received was indeed the favored Church of the government, as most government officials were members of the DRC.<sup>114</sup>

With the implementation of democracy, however, there can be no established religion, *de jure* or *de facto*. Religious freedom is vital to any democratic state, for the right to belief and thought are often considered to be the most sacred of freedoms.<sup>115</sup> The new Constitution of South Africa ensures the freedom of religion in Chapter 2, section 15 (Appendix A). For the first time in the history of the country every religious tradition will be protected by the law from discrimination and unfair treatment. Section 15 guarantees that the Dutch Reformed Church will no longer dominate the religious scene and that people will be free to believe what they choose. No longer will Muslim, Xhosa, Buddhist, Methodist, atheist and agnostic children be forced to study Calvinist theology in public school. No longer will the entire population of South Africa be forced to celebrate the sacred civil holiday of 'the Day of the Covenant,' a remembrance of victory for the Afrikaners, a reminder of defeat and loss to the Zulus. All religions will be

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<sup>112</sup>Van der Vyver 201.

<sup>113</sup>From a decision from the Appellate Division *Seedat's Executors v The Master* quoted in Sinclair, June, "Family Rights," *Rights and Constitutionalism: the New South African Legal Order*, (Kenwyn, South Africa: Juta, 1994), 561-2.

<sup>114</sup>This point will be elaborated upon in the upcoming section on the importance of religion to the Afrikaners.

<sup>115</sup>Dlamini 592.



respected and will enjoy equal status before the law in the new South Africa.

### **Thoughts on the Future of Religious Freedom**

Despite these optimistic hopes for religious equality and harmony, one must think about the situation realistically. As mentioned in the introduction to this paper, there is potential conflict written into the religion clause, in that the clause calls for religious freedom but yet allows for religious observance at state, or state aided institutions. And if South Africa follows the trend of countries like India and Canada, which within five or six years of establishing religious freedom have had a religion case reach the high court, South Africa too will be confronting the issue of religion head on. No matter how well the protection of religious freedom is written into a Constitution, problems are bound to arise when one religious practice interferes with another religious practice, or with the majority's opinion of 'acceptable behavior.'

For example, what would happen if a Shiite Muslim community in South Africa were to assert its new found religious equality by celebrating the festival of *Ashara*, the ritual remembrance of the death of the *imam* Hussein? Included in this remembrance is a street procession in which the participants inflict wounds on themselves to commemorate the pain and suffering of Hussein. Parading through the streets in an almost ecstatic frenzy, the participating Shiites are covered in blood to show their willingness to become a martyr in the name of Allah. To those not familiar with Shiite belief or practice, the festival is frightening in its militancy and violence. If, at the urging of non Muslims or in the interest of public health and safety, provincial or national legislature were to pass a law banning the festival, the Shiites could question the constitutionality of the law under Chapter 2, section 17. Whether the Shiites would win the case

or not cannot be determined; the point, though, is that for the first time Shiites and other religious groups have a constitutional protection that allows them to question laws that they feel are in violation of their religious conviction and expression.

One could come up with a number of hypothetical situations in which religious practice might be called into question and appear before the courts. The pressing question is how will the South African Constitutional Court determine what is 'acceptable' religious behavior? The Supreme Court in the U.S. has a large body of cases and opinions on which they have constructed a definition of religion and have created boundaries and guidelines for religious practice. The South African Constitutional Court must do the same. Once the Court has a body of cases with which to work, one will be able to see the form religious freedom will take in South Africa. Until actual cases arise, however, one can only speculate as in the hypothetical Shiite case, as to what types of cases will appear before the Court and what decisions the Court will make.

Yet in thinking about the types of cases that may come before the court and therefore in thinking about the way in which religious freedom will manifest itself in the democratic South Africa, there are some things to consider. Looking at the South African society, its history and its ideas for the future, there are some hints and indications that point to areas in which problems may arise, where cases may develop. In the following section, four of these 'potential problem areas' are examined.

### **Potential Problem 1 - Ambiguous Language in the Religion Clause**

Chapter 2, Section 15 of the Constitution of the Republic of South Africa, 1996 guarantees that:

*Constitution of the Republic of South Africa Bill, 6 May 1996.  
http://www.zaconstitution.org.za/drafts/2Bill656.htm#CHAP2.*

- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions provided that - (a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary.
- (3) (a) This section does not prevent legislation recognising- (i) marriages concluded under any tradition or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion. (b) Recognition in terms of paragraph (a) must be consistent with this section and other provisions of the Constitution.<sup>116</sup>

Part 1 of Section 15 is fairly clear in that protects the right of people to think and believe what they choose. The ambiguous language begins in (2) which allows for 'religious observances at state or state-aided institutions,' as long as they 'follow rules made by appropriate public authorities,' are 'conducted on an equitable basis' and 'attendance at them is free and voluntary.' The first problem is in allowing religious observance at institutions funded by the state. Where is the line drawn between 'allowed' religious observance and 'established' religious observance? Any time government money is being used to support a religion, there is potential conflict. Moreover, who are the 'appropriate authorities?' And what exactly is meant by 'equitable?' And what of (3), the part of the religion clause on marriage and family law? This part does not guarantee the protection of marriages formed under traditional practice; it instead 'does not prevent legislation recognising' these marriages. Moreover, such legislation must 'be consistent with....the provisions of the Constitution.'

The point of this exercise is not to criticize the wording of the religion clause, but to point to language in the clause that holds potential conflict.

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<sup>116</sup>Constitution of the Republic of South Africa Bill, 6 May 1996.  
<http://www.constitution.org.za/drafts/2bill656.htm#CHAP2>.

## Potential Problem 2 - Religion is More Than Just a 'Right' to Many South Africans

As mentioned in the earlier section on religion, religion is an integral part of the lives of many South Africans. Religion manifests itself in many spheres of life in South Africa, not just in the place of worship. One of these spheres is politics; in almost every political party and resistance movement, religion is present. To begin, the role of religion in Afrikaner nationalism is examined.

There is a some debate over the extent to which one can link apartheid to the pre-Enlightenment 16th century Calvinism that the earliest Dutch settlers brought to South Africa from Holland. But most scholars agree that the ideological roots of Afrikaner nationalism are found in Calvinism. And the Afrikaner Nationalists agree. National Party polemicist Piet Meyer wrote in 1940 that "the Afrikaner People are in truth the only People who have been born and have developed out of a Calvinist way of life." Twenty years later, after the Nationalists took power, the leader of the Party was quoted saying "we believe that the only road is that which fulfills the demands of our Calvinist creed" in order to justify the racist and exclusive policies of his Afrikaner government.<sup>117</sup> References such as these are endless; the point is that Calvinism and the Dutch Reformed Church have been integral and defining factors in Afrikaner Nationalist ideology.

From the very start, the Boers were influenced by religion. Coming to South Africa, they brought with them the conservative Calvinist ideas and values that had been laid down at Dort, among these ideas was the doctrine of predestination. According to some psychologists, it was this doctrine that was responsible for the Boers understanding of themselves as a "chosen people."

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<sup>117</sup>Both quotes are from Hexham 2.

Implicit in their understanding was the inequality of men; for some are saved, while others face eternal damnation. Psychologist Eric Fromm says that Calvinism and its doctrine of predestination leads to a sense of powerlessness and inner doubt and induces a psychological need to allay these doubts by asserting that one's own community is surely among the Saved.<sup>118</sup> And while there has been some question of the extent to which the early Boers were religious, Allister Sparks says:

all the circumstantial evidence suggests this [Calvinist theology] is something the early Afrikaners brought with them from Holland, and that it was reinforced when they found themselves among people they considered dark, sinister, heathen, shiftless and unclean - thus conspicuously lacking in the outward signs of grace.<sup>119</sup>

Despite disagreement over the religiosity of the early Afrikaners, it is certain that Calvinist ideology and the idea of the Afrikaners as God's Chosen People had entered the Afrikaner identity by the time of the Great Trek and the subsequent Anglo-Boer War. Thus by the beginning of the 20th century, the time that Afrikaner nationalism was starting to emerge and its leaders were "myth-making," there was a long history of struggle and religious vision upon which to draw. From the turn of the century up through apartheid, the dependence of the Afrikaner identity on Calvinist theology began to snow ball. By the time Daniel Malan came to power in 1948 the identity of the Afrikaner people was inextricably linked to Christianity:

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<sup>118</sup>Sparks 37.

<sup>119</sup>Sparks 30.

Our history is the greatest masterpiece of the centuries. We hold this nationhood as our due for it was given to us by the Architect of the universe. [His] aim was the formation of a new nation among the nations of the world....The last hundred years have witnessed a miracle behind which must lie a divine plan. Indeed, the history of the Afrikaner....makes one feel that Afrikanerdom is not the work of men, but the creation of God.<sup>120</sup>

From 1948 forward, the Afrikaners used their position of power to ensure that "God's creation" would continue, that the Promised Land would never be taken away from them. Thus in the schools they implemented a policy of Christian National Education in 1952. Every subject that was taught in the public schools reinforced the Afrikaner understanding of the world. All students were forced to learn Afrikaans and every subject was taught from the Afrikaner Nationalist point of view. In history class, for example, students learned how God had chosen the Afrikaners to lead South Africa. Calvinist ideology was worked into education, so that the religious justification of Afrikaner Nationalism was perpetuated. As Prime Minister Verwoerd said, "Education must train and teach people to live in accordance with their opportunities in life." Christian Nationalist education then reinforced to the blacks that "there is no place for the [Blacks] in the European community above the level of certain forms of labour."

In addition to the Afrikaners, there are other political groups in South Africa for whom religion has played a key role. Beginning in about the 1950s, just as the reality of apartheid was setting in, religion appeared in another political movement - black or African nationalism. It is ironic that these two groups who were ideologically diametrically opposed used the same source as justification for their respective cause - Christianity; talk about the problems of hermeneutics.

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<sup>120</sup>Sparks 31.

Some say that the main influence of religion on the African communities was negative, that it taught patience and passivity. And while there was some of that, "at no time did black South Africans accept the condition of oppression as an expression of the will of God."<sup>121</sup>

Under the leadership of Bishop Tutu, Albert Lutuli, Robert Sobukwe, Steve Biko and others, counter-theologies arose to combat the racist and exclusionist theology of the Dutch Reformed Church. While the Afrikaners saw God as the protector of order and structure, the Africans viewed Him as liberator. Within the African resistance movement, several different theologies developed. Some, like those of Tutu and Lutuli were strictly Christian theologies that advocated multiracial 'brotherhood' of all South Africans, as they were all children of God. These theologies taught that hatred of the white man and violence against him were unjustified and immoral given the "sacredness of the human person made in God's image." As Bishop Tutu said, "we cannot afford to use the methods of which we will be ashamed when we look back."<sup>122</sup>

Other black leaders like Sobukwe and Biko were not content with the passive nature of these theologies. They rejected cooperation with the whites, religious or otherwise, because they felt that the paternalism of the whites undermined the dignity and potential of the African. They felt that Tutu, Lutuli, and others like them perpetuated racial inequality by remaining passive. Working with white Christians, the Black Christian could never be equal, for God and all of the Biblical figures were white. So that Black Christians were not exactly children of God, rather His "step children." The leaders of these "Africanist movements" as they are called, called for love of Africa and advocated violence to win it back from the white man. Once the black majority was in

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<sup>121</sup>Graybill 2.

<sup>122</sup>Ibid 5.

power, the white man would be treated as a brother, but until then violence was the lesser of two evils.<sup>123</sup> From this movement, other theological movements were spawned, including those of Anton Lembede and others, that combined elements of African religion with elements of Christianity. These theologies “celebrated a Christianity that recovered and embraced certain values associated with the rural, village based, peasant societies of Africa.”<sup>124</sup>

At the same time, other more volatile theological movements were developing out of the need to address the horrible living and working conditions of many poor blacks. Among these were Black Theology and Liberation Theology. These theological movements stemmed from the Black Consciousness movement in the US and the emergence of liberation theology in Latin America. These movements gained popularity as offenses against the Black community increased. After the Soweto incident in 1976, an All African Conference of Churches met in Zambia and advocated “a holy war [against the Nationalist Government] because its aim is to free both the oppressed and the oppressor in order to bring forth justice, freedom, progress and stability to the people irrespective of their race.”<sup>125</sup> In 1985, the Institute for Contextual Theology in South Africa led by Frank Chikane, a minister of the Apostolic Faith Mission, issued the *Kairos Document*. It was an internationally praised document that radically rejected the ‘state theology’ of the Nationalist government and the apathy of many English speaking Churches. Government reaction to the document was quick and sharp. Many who had signed the document were put in jail and the government denounced the document as part of an ‘anti-Christian revolution.’ De

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<sup>123</sup>Ibid 6.

<sup>124</sup>Chidester 246.

<sup>125</sup>Ibid 252.



Gruchy writes that it was the *Kairos Document*, that "gave theological direction and impetus to those progressive political activists who were to be Christian in the struggle against apartheid."<sup>126</sup>

Thus for many in South Africa, white and black alike, religion is an important part of life. Religion has been turned to again and again and in different ways by those who have been oppressed by the political party in power. The Afrikaners were ardent Calvinists and when they finally gained power in 1948, they made sure that the religion that had helped them overcome their oppression would not be lost. Today too, one sees religion in the forefront of South African politics. Who have been the leaders of the transition from apartheid to democracy? Mingled in amongst the politicians and lawyers, religious leaders like Archbishop Tutu have played a role in the transition. Nelson Mandela too is a highly religious and spiritual person; indeed, his religious faith helped him to persevere throughout his years of persecution and imprisonment.

### Potential Problem 3 - Religion as a 'Collective Right'

In working toward building a new nation, the leaders of South Africa will be facing many difficulties, one of which is the protection of group or collective rights. In recent years, international human rights organizations have come to realize that individual freedoms, like the freedom of religion, are not well suited to many indigenous populations. In the Zulu tradition, for example, it is not important that everyone have the right to free speech and freedom of conscience. What is important to the Zulu people and to many indigenous populations is the cohesiveness of the group. The good of the individual in these traditions is subjugated to the good of the community. The emphasis on 'negative rights' then is out of place in these cultures

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<sup>126</sup>De Gruchy "Twentieth-century Christianity." 107-9.

and to force individual rights and freedoms is to add to the breakdown of these cultures.

Thus the idea of the protection of collective rights has entered into international discourse. In many countries, South Africa included, small cultural and religious minorities are appealing to their governments and to international law for legal protection of identity. This is seen mostly in indigenous groups in countries like Brazil and India. In South Africa however, it is not the indigenous groups, the Zulu, the Xhosa, the Tsonga and the many other indigenous African groups that calling out for collective rights and protection of group identity. Instead it is the white Afrikaner Nationalists who, once the controllers of the country, now find themselves a powerless minority. They are the ones calling for the protection of group rights and have succeeded in pressuring the ANC government to include such protection in the new Constitution. Negotiations between ANC lawmakers and the Afrikaners were made on 19 April 1996. Standing before ANC leaders an emotional Constand Viljoen, leader of the Afrikaner Freedom Front and former Chief of the Army under President Botha, called for the preservation of Afrikaner culture, stating that "the recognition of group of collective rights could defuse conflict between the government and his Calvinist, white minority."<sup>127</sup> Viljoen is the mouthpiece for many white Afrikaners who are concerned about the future of their language, culture and religion. ANC lawmaker Essop Pahad responded to Viljoen by saying that "The recognition of collective rights has not been built into the Bill, but it certainly will be. It will be introduced by way of an amendment."<sup>128</sup>

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<sup>127</sup>Reuters April 19, 1996; nexis news search [nexis; mdeaf;curaws, "south africa and constitution and date aft 4/1/96"]

<sup>128</sup>Reuters World Service, April 22 1996; nexis news search, *supra*.

It is rather ironic that the Afrikaners are calling for protection under a right that has traditionally been used to protect indigenous brown or black skinned peoples from white majority oppression.<sup>129</sup> And while they are the only ones calling for the right at this point, there is the potential that once the amendment is in place, other minority groups like the Veda, the Tsonga, the Swazi and others will seek protection under it.

The implications of the proposed amendment for the legal role of religion are many. Because the collective right allows for cultural and religious preservation, the lines between what religious activity is allowable under Chapter 2, section 15 of the new Constitution and what is necessary to preserve cultural heritage are blurred. Think back to the early 20th century when the government banned Muslim burial practices because they threatened public health. Were that case to reappear today, the Constitutional Court might be forced to make a different decision. Under the religion clause, the practice might still be disallowed, for public safety would overrule free exercise of religious practice. But under the collective rights amendment, the answer is not so clear. The Muslims could argue that the burial practice is a defining part of their religion and to abandon it would be to abandon a vital part of their religious heritage. Under the amendment, the Courts might have to allow the practice, or establish some alternate way to allow the Muslims religious autonomy. Thus the amendment would change the way the Constitutional Court would look at freedoms for minority groups - Afrikaners included. The right to collective identity and 'cultural preservation' could cloud the issue of religious freedom and will no doubt increase the number of religion cases to be heard by the South African judiciary.

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<sup>129</sup>Collective rights discourse also appears in reference to Eastern Europe.

#### **Potential Problem 4 - South Africa is a 'Christian Country'**

Of all the 'potential problems' that have been discussed thus far, this one is the most dangerous for the future of religious freedom, for it is the most subtle and silently subversive. This problem is introduced with an example from Zimbabwe, a country close to South Africa in both proximity and colonial experience. Zimbabwe gained independence from Great Britain in 1980 and has since been governed by a democratic Constitution and, like the new South Africa, an independent judiciary. The white English-speaking Chief Justice of the Zimbabwe Supreme Court Anthony Gubbay recently spoke in town and talked of all the reforms he and his Court had implemented in Zimbabwe. When asked about the problem of religious freedom, he answered, "Problem? There is no problem. Zimbabwe is a Christian country." But a 1995 census reports that only 55% of the population are Christians, while the remaining 45% of the population subscribe to either Judaism or traditional African beliefs.<sup>130</sup> Zimbabwe then is not a Christian country, but a country with a slim Christian majority. And while the country has the freedom of religion written into its Bill of Rights, it seems that this freedom has not yet been tested or tried, at least on a Constitutional level. Either all elements of society are running smoothly and all religious groups exist in harmony or there exists a lingering imperialist legacy that ignores and therefore quiets the traditional African religions.

This example of the Zimbabwean Chief Justice is mentioned not to speculate on lingering imperialistic prejudice, but instead to show how difficult it is to move from imperialist law to law based on democracy and human rights. It seems as if the lawmakers had checked off 'the right to religious freedom' on the 'human rights check list,' but that the implications of that right had not

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<sup>130</sup>"Zimbabwe," *Africa South of the Sahara 1995* (London: Europa, 1995), 1052.

fully set in to the understanding of those in power; the Chief Justice had the impression that Zimbabwe was a Christian country, but the numbers state otherwise. One wonders how the African traditions are faring in Zimbabwe.

I mention this example because the Chief Justice was trained in the positivistic school and is therefore not unlike many of the white judges in the South African judiciary. And like the Chief Justice, many of the judges probably have the impression that South Africa is a Christian country, or at least, that it ought to be guided by Christian values.<sup>131</sup> And the judges are certainly not the only ones in South Africa who feel this way. The debate over the Preamble to the new Constitution offers a rather revealing look at the values and impressions of those creating the new South Africa. The Preamble of the 1983 Tricameral Constitution of the apartheid government states:

In humble Submission to Almighty God, Who controls the destinies of peoples and nations, Who gathered our forebearers together from many lands and gave them this their own, Who has guided them from generation to generation, who has wondrously delivered them from the dangers that beset them,  
We declare that we  
Are conscious of our responsibility towards God and man; Are convinced of the necessity of standing united and of pursuing the following national goals:  
To uphold Christian values and civilized norms...<sup>132</sup>

The 1993 Interim Constitution, drafted by the ANC led government of National Unity begins, "In humble submission to Almighty God, the people of South Africa declare that..." And the early working drafts of the new Constitution began with this phrase as well.

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<sup>131</sup>A highly speculative statement, but if one remembers that the majority of the judges of white Afrikaner males, then the statement seems less speculative and more probable.

<sup>132</sup>The Tricameral Constitution of the South Africa  
[<http://www.constitution.org.za/83con.html>]

In following the progression of the drafts as they were published and made available on the World Wide Web, one notices that the above Preamble was gone from the second and third drafts where it had been in place in the original draft. The word 'Preamble' appeared and under it was written, "Note: Preamble under discussion." For the next several drafts, there was no Preamble. It seemed as if the lawmakers had realized that using the word "God" in the opening paragraph went against the inclusive nature of the document and the right to freedom of religion stated in Chapter 2, section 15. An appeal to God would exclude some members of the South African society, including Buddhists, Jains, Parsees and nonbelievers. A news report from the April edition of Africa News confirmed this impression, stating, "another key breakthrough came in when the ANC and the National Party agreed to a compromise on the reference to God in the Preamble...Non-believers have objected to the wording, while members of Christian, Muslim and other faiths have insisted upon it."<sup>133</sup> But the most recent draft of the Constitution, published on April 29, 1996, less than two weeks before the May 8 deadline, begins as follows:

We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; and Believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to - Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. **May God protect our people. Nkosi Sikelel'iAfrika. Morena boloka sechaba sa heso. God seën Suid-Afrika. God bless South Africa. Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.**<sup>134</sup>

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<sup>133</sup> *Africa News*, April 1996; Nexis news search, see note 128.

<sup>134</sup> The Constitution of the Republic of South Africa, 1996  
[<http://www.constitution.org.za/drafts/bill2946.html#PREAM>]

Religious language appears once again in the Preamble; after 6 months of 'discussion' the leaders opted to use language they know excludes some members of society.

Public responses to the controversy over the use of the word God varied. One Mrs. J Steadman wrote, "I hereby wish to record my objection to the proposed deletion of a sovereignty of God in the preamble to the constitution. A person who does not acknowledge God will not prosper or have peace."<sup>135</sup> Another submission to the CA written by Louis H. Van Loon, the Chairman of the Buddhist Institute of South Africa, reads:

The present Preamble to the Constitution...represents a majority view that excludes very significant minorities, such as the Buddhists, Jains, Taoists, etc., as well as those who for non-religious reasons, feel uncomfortable with such a strictly and exclusive theistic form of address. The stated intention to separate religion and the state is in fact nullified in this type of preamble.<sup>136</sup>

The majority of the submissions were more like that of Mrs. Steadman's rather than Mr. Van Loon's. And so the Constitutional Assembly took what they thought to be the appropriate course of action and included a reference to God in the Preamble. Apparently the blessing of God was more important to the South African lawmakers than the inclusion of every South African citizen in the Preamble. And while leaders like Mandela and Tutu recognize the various cultural and ethnic groups in their "rainbow nation" and promote cultural diversity and tolerance, it seems as if they may have fallen short in their goal to include every South African in the new nation; respect to religious freedom. This statement is certainly not intended to criticize President Mandela and Archbishop Tutu, for both are remarkable men. Nor is it to suggest that they are narrow-minded

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<sup>135</sup>"Submissions to the Constitutional Assembly," search "preamble"  
[<http://www.constitution.org.za/cgi-bin/vdkw CGI/x875bb33b-95/Search/3009040/29#HLO>]

<sup>136</sup>*Supra* [<http://www.constitution.org.za/cgi-bin/vdkw CGI/x875bb33b-104/Search/2798620/39#HLO>]

or insensitive to the country's religious diversity. The point remains, however, that to use theistic language in the Constitution is to exclude some members of South African society.

### **Summary**

The previous section has highlighted several areas of potential conflict or problem in the establishment of religious freedom in the new South Africa. It is out of these areas of potential difficulty that legal cases may arise and come before the courts. Once religion cases do start to appear before the courts, the judiciary can begin to draw some lines and to develop a blueprint for the interpretation of religious freedom.

### **Conclusion - Further Implications of the Freedom of Religion for South Africa**

Beyond the cases that may arise and the difficulty the South African judiciary may have coming up with a workable solution to guarantee religious freedom, the switch-over from an authoritarian government with a *de facto* established church and a sense of religious purpose to a secular, democratic one has enormous implications for the way South Africa will define itself in the future. Under Afrikaner Nationalist rule, the leaders of South Africa considered themselves to be the agents of God. The laws they enacted were to establish order as God willed. Judges were to apply these laws with little or no question, for to question the law would essentially be to question the will of God, or at least the will of His agents. In South Africa during apartheid, the Nationalist government did not separate religion from politics, for behind every political action, inclusive or racist, fair or oppressive, was religious justification.

But times are different now. The Calvinist Afrikaners are out of power and the Government of National Unity is working to build a new nation. In order to make this new nation



a nation in which every South African is included, the leaders must focus not on cultural, religious and ethnic differences, but on the common goal of democracy and equality before the law. Thus the change from apartheid to democracy brings more than just a change in leadership, it brings a change in the whole *raison d'être* of the state. There is a new public theology in South Africa, a new sense of identity. The state that was once guided and protected by God is now guided and protected by democratic ideals and international standards of human rights.<sup>137</sup>

This change in the national identity of the South Africa is certain to have many effects on the country. One can already see how the change is affecting many religious people, as theologians are devising 'new' theologies based on harmony, equality and inclusiveness to ease the transition from apartheid. Another area affected by the change from apartheid to a secular democracy is the South African legal order. While this paper has examined the structural changes that are taking place, it has not yet discussed the philosophical changes. As explained in Section II of this paper, the South African legal tradition under apartheid was dominated by positivist philosophy. Now legal positivist philosophy is being replaced, or at least significantly challenged, by legal realist philosophy. There are various reasons for this philosophical shift, one of which is the Constitutional guarantee of religious freedom. In guaranteeing religious freedom, South African lawmakers have separated Church and State. By doing this, they have guaranteed that the State will never again be ruled by a group like the Afrikaners who used religious justification of Calvinism to enforce their political agenda. Without religious backing, laws become much less 'sacred' and 'permanent.' Laws may now be questioned if they seem unjust, for they are no

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<sup>137</sup>One could (and many do) argue that democracy is God's will. But the appeal is not directly to God, like it was for the Afrikaners.

longer the untouchable laws of a Calvinist God; they are the laws of collective human wisdom based on democratic experience and international standards. Thus the way that people think about law in South Africa is changing. Law is no longer sacred simply because it is law; law has to produce the desired result of justice. Thus there is a shift from legal positivism to legal realism. And the move from a state governed by a group with a religious sense of purpose to a secular state with religious freedom is at least partially responsible for that shift.

### Summary

This paper has examined law and religion in the country of South Africa and has considered the effects that the move from apartheid to democracy might have on the future of religion and religious freedom in the country.

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<sup>12</sup>Constitution of the Republic of South Africa Bill, 6 May 1996.  
<http://www.constitution.org.za/safrica2bill656.htm#CHAP2>

## APPENDIX A

### Selected Bibliography

Chapter 2, Section 15 of the Constitution of the Republic of South Africa Bill, 1996 states that:

*Africa News*, April 1996. [www.africa-news.com/1996/04/040401.htm](http://www.africa-news.com/1996/04/040401.htm), "South Africa and constitution"

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions provided that -

(a) those observances follow rules made by the appropriate public authorities;

(b) they are conducted on an equitable basis; and

(c) attendance at them is free and voluntary.

(3) (a) This section does not prevent legislation recognising-

(i) marriages concluded under any tradition or a system of religious, personal or family law; or

(ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and other provisions of the Constitution<sup>138</sup>

Dyzenhaus, David. *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy*. New York: Oxford University Press, 1991.

Fisher, William W. III, Morton Horwitz, and Thomas Reed, eds. *American Legal Realism*. New York: Oxford University Press, 1989.

Gail, Emily. "The Quest for a Color-Blind" *Human Rights* 20 (Winter 1993): 22-25.

Graybill, Lyn S. *Religion and Apartheid: Protest in South Africa*. Westport, CT: Praeger, 1995.

Hexham, Irving. *The Irony of Apartheid: The Struggle for National Independence of Afrikaner Calvinism against British Imperialism*. *Essays and Studies in Religion*. New York: Edwin Mellen, 1981.

Huebner, Marshall S. "Who Decides? Restructuring Criminal Justice for a Democratic South Africa." *Yale Law Journal* 102 (Jan 1992): 901-990.

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<sup>138</sup>Constitution of the Republic of South Africa Bill, 6 May 1996.  
<http://www.constitution.org.za/drafts/2bill656.htm#CHAP2>.

## Selected Bibliography

*Africa News*, April 1996; nexis news search [nexis; mdeaf; curnws, "south africa and constitution and date aft 4/1/96"]

Basson, Dion, and Henning Viljoen. South African Constitutional Law. Cape Town : Juta, 1988.

Chidester, David. Religions of South Africa. The Library of Religious Beliefs and Practices. New York : Routledge, 1992.

Coetzee, J.K., John W. de Gruchy, et al. Religion, Intergroup Relations, and Social Change in South Africa. Human Sciences Research Council, Work Committee: Religion. Contributions in Ethnic Studies, No. 24. New York : Greenwood, 1988.

Constitution of the Republic of South Africa Bill, 6 May 1996.  
<http://www.constitution.org.za/drafts/2bill656.htm#CHAP2>.

de Gruchy, John W. The Church Struggle in South Africa. 2nd. ed. Grand Rapids : Eerdmus, 1986.

de Villiers, Bertus, John Dugard, et al. Rights and Constitutionalism; the New South African Legal Order. Kenwyn, South Africa : Juta, 1994.

Dyzenhaus, David. Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy. New York : Oxford University Press, 1991.

Fisher, William W. III, Morton Horwitz, and Thomas Reed, eds. American Legal Realism. New York : Oxford University Press, 1993.

Gaul, Emily. "The Quest for a Constitution." Human Rights 20 (Winter 1993) : 22-25.

Graybill, Lyn S. Religion and Resistance Politics in South Africa. Westport, CT : Praeger, 1995.

Hexham, Irving. The Irony of Apartheid: The Struggle for National Independence of Afrikaner Calvinism against British Imperialism. Texts and Studies in Religion. New York : Edwin Mellen, 1981.

Huebner, Marshall S. "Who Decides? Restructuring Criminal Justice for a Democratic South Africa." Yale Law Journal 102 (Jan 1993) : 961-990.

Horwitz, Morton J, *The Transformation of American Law 1870-1960* (New York: Oxford University Press, 1992), 170.

Hund, John and Hendrick W. van der Merwe. Legal Ideology and Politics in South Africa: a Social Science Approach. Cape Town ; Centre for Intergroup Studies, 1986.

*In Re Gauteng Education Bill* [ <http://www.law.wits.ac.za/judgements/gauteng.html>]

Levenberg, Peter N. "South Africa's New Constitution: Will it Last?" The International Lawyer 29 (Fall 1995) : 633-658.

Omer-Cooper, J.D. History of Southern Africa. 2nd ed. London : James Currey, 1994.

Prozesky, Martin, and John de Gruchy, eds. Living Faiths in South Africa. New York : St. Martin's, 1995.

Reuters World Service, April 19, 1996; nexis news search [nexis; mdeaf;r;curnws, "south africa and constitution and date aft 4/1/96"]

Reuters World Service, April 22 1996; nexis news search [nexis; mdeaf;r;curnws, "south africa and constitution and date aft 4/1/96"]

Sparks, Allister. The Mind of South Africa. New York : Knopf, 1990.

"Submissions to the Constitutional Assembly;" search "preamble"  
[[http://www.constitution.org.za/cgi-bin/vdkw\\_cgi/x875bb33b-95/Search/3009040/29#HLO](http://www.constitution.org.za/cgi-bin/vdkw_cgi/x875bb33b-95/Search/3009040/29#HLO)]

The 1983 Republic of South Africa Constitution Act.  
[<http://www.constitution.org.za.83con.html>]

Venable, Howard P. "Justifying Ethnic Domination: Reflections of Myth, History, and Communal Conflict in South Africa." *International Law and Politics* 5 (Summer 1993) : 887-947.

"Zimbabwe." Africa South of the Sahara 1995. 1032-1057. 24th ed. London : Europa, 1995.