Routledge Studies in Religion and Politics

RELIGION IN THE ERA OF POSTSECULARISM

Edited by
Uchenna Okeja

Religion in the Era of Postsecularism

Edited by Uchenna Okeja

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2020
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
52 Vanderbilt Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

© 2020 selection and editorial matter, Uchenna Okeja; individual chapters, the contributors

The right of Uchenna Okeja to be identified as the author of the editorial material, and of the authors for their individual chapters, has been asserted in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

Trademark notice: Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
Names: Okeja, Uchenna B., 1983– editor.
Title: Religion in the era of postsecularism / edited by Uchenna Okeja.
Description: Abingdon, Oxon ; New York, NY : Routledge, 2020. | Series: Routledge studies in religion and politics | Includes bibliographical references and index. | Summary: “Exploring the viability of new perspectives on secularisation and the idea of postsecularism, this book reflects on their relevance when considered in the context of different societies within and outside the West”—Provided by publisher.
Identifiers: LCCN 2019021124 | ISBN 9781138339194 (hbk) | ISBN 9780429441226 (ebk)
Subjects: LCSH: Secularism. | Postsecularism. | Religion.
Classification: LCC BL2747.8 .R4555 2020 | DDC 211/.6—dc23
LC record available at https://lccn.loc.gov/2019021124

ISBN: 978-1-138-33919-4 (hbk)
ISBN: 978-0-429-44122-6 (ebk)

Typeset in Times New Roman
by Apex CoVantage, LLC

Contents

Contributors vii

Introduction **1**
UCHENNA OKEJA

1 **The aporias of global democracy** **10**
NEERA CHANDHOKE

2 **Religion's public sphere: postsecularism and the world society** **25**
EDUARDO MENDIETA

3 **Beyond legislative postsecularism in the West: custom and constitution in an African context** **41**
THADDEUS METZ

4 **To be secular and neutral: the challenge of religion in South Africa** **64**
ENYINNA S. NWAUCHE

5 **Religion, culture and secularism: beyond the Western paradigm** **83**
MALACHY OKWUEZE

6 **Superstition and modernity: the conflict thesis, secularization thesis, and anti-Catholicism** **103**
SCOTT E. HENDRIX

7 **Religion and the postsecular: reflections on the Indian experience** **123**
RINKU LAMBA

8 "God reloaded": the Pentecostal political transgression and Africa's non-secularity 148
ASONZEH UKAH

Index 171

3 Beyond legislative postsecularism in the West

Custom and constitution in an African context

Thaddeus Metz

Introducing South African postsecularism

There is a saying that has been common in the West since the time of ancient Greece: '*Ex Africa semper aliquid novi*', usually translated as 'There is always something new coming out of Africa'. The statement was initially made in reference to the kinds of animals discovered on the African continent, which seemed strange, and for that reason by and large unwelcome, to the Greeks.[1] The negative and biological connotations of the statement have dropped away, so that now it tends to indicate ideas, things and practices, particularly from south of the Sahara Desert, that are different and potentially admirable. It is in this sense that I use the statement to introduce this chapter, for there is a species of postsecularism found in South Africa that provides a fresh and interesting perspective in comparison to Western approaches.

A large majority of the literature on the postsecular up to now has focused on the works of theorists such as Jürgen Habermas, John Rawls and Charles Taylor and on the situations of the West, by which I mean Europe, North America and countries influenced by them, such as Australia. Here, the dominant normative debate has been about respects in which legislative bodies in countries that were substantially liberal in the post-war era should now adopt statutes for the sake of those with strong religious commitments or permit religious considerations to enter into democratic debates in the public sphere. It turns out that South Africa has faced a similar kind of issue, but has approached it in a somewhat different way.

Specifically, with the transition from autocratic apartheid to a democratic polity in 1994, South Africa had to determine how to deal with the tension between secular and religious interests. Unlike European countries, the South African state had not first been substantially liberal for many decades and then considered whether to make allowance for religion. Instead, it was upon the recent transition to a constitutional order that South Africa adopted a kind of postsecularism, in the broad sense of seeking to reconcile demands for impartiality and equality on the part of the state, on the one hand, and a concern to live religiously, on the other. In addition, South African postsecularism has been significantly influenced by religious claims grounded on not merely the Christian and Muslim traditions but also

'traditional' and specifically animist forms of religion held by many indigenous black people,[2] on which I focus in this chapter.

Neither of these points, however, constitutes the most striking difference between South African and Western postsecularism, which is that South Africa has often sought to reconcile the secular and the religious through the courts, and not merely the legislature. As I explain ahead, South Africa's Constitution, which is otherwise famously liberal (in the sense, for example, of being the only African country that both forbids the death penalty and permits gay marriage) explicitly deems customs, including religious ways of life, to count as one source of law to be enforced.

In the following, I critically reflect, in moral-philosophical fashion, on the desirability of South Africa's under-explored version of postsecularism. I use the most space to spell out how its Constitution counts traditional religious ways of life as customary law with an authority comparable to statutory law and to evaluate the central arguments that South African jurists have made in favour of such an approach. I contend that these arguments do a poor job of justifying the ascription of legal status to religious lifestyles, but then sketch new ones that I maintain are more promising. I am not really aiming to demonstrate in this chapter that South Africa's judicial postsecularism is justified; I am, in contrast, supposing for the sake of argument that there is something morally attractive about it and seeking strong accounts of what that might be.

Note that I do not engage in historical or sociological analyses of which varieties of secularism there are or why they have arisen,[3] whether the concepts of secularity and postsecularity are indeed useful for contemporary reflection[4] or how secularism has influenced law in general.[5] In addition, I aim neither to present a comprehensive account of how religious considerations have influenced law in post-apartheid South African, nor to address how South Africa came to adopt a constitution that treats custom as law. Instead, I describe just enough of contemporary South Africa's legal system to be in a position to undertake the normative-jurisprudential project of considering what promising arguments there are for a form of postsecularism that is salient there but not so much in the West.

In the rest of this chapter I begin by defining key terms, such as 'postsecular', 'religion', 'custom' and the like, which I have used freely in this introduction, after which I provide an overview of South Africa's legal context insofar as it concerns the postsecular (second section). Specifically, I indicate how there are plural sources of law in South Africa, articulate the basic features of African traditional religion, and sketch three court cases illustrating how South African courts have, or in some cases could have, resolved tensions between secular interests and religious customs by deeming the latter to count as a kind of law. Then, I critically examine the two major arguments that are influential among jurists in South Africa for deeming religious lifestyles to count as law, which appeal to ethical principles of respect for individual choice and for individual identity, arguing that they have weaknesses that prompt a search for a stronger rationale (third section). Next, I sketch some new arguments for South Africa's treatment of the

customary as the legal, grounded on under-explored African and communitarian ideals, that are more promising (fourth section). I conclude by indicating some issues that need to be addressed next in order to determine conclusively whether South Africa's form of postsecularism merits retention there and adoption in other contexts (fifth section).

The postsecular in South Africa

In this section I clarify what I mean by key terms, and then spell out the fact that customs, and particularly sub-Saharan traditional religious ways of life, already count as law by South Africa's Constitution. I also illustrate how such customary law operates, or could do so, in the context of three cases on which courts there have ruled. Although I express sympathy for the South African approach to the postsecular, I do not address arguments for it until the following sections.

Defining terms to frame the debate

In order to make it clear how discussion of South Africa's legal system bears on postsecularism, particularly as discussed in Western contexts, I need to define some terms. After all, as I discuss ahead, according to Jürgen Habermas's definition of the term 'postsecular', South Africa's politics and law cannot count.[6] I explain why Habermas's definition is overly narrow, as well as provide additional definitions, before proceeding further.

By 'postsecularity' I refer to an empirical phenomenon or a situation, roughly one in which religious attachments have persisted and perhaps even become more influential in a liberal sociopolitical context. I focus by and large on a political phenomenon and not a social one – that is, the influence of religion on society, which has also been widely discussed.[7] So, a state that is broadly liberal exhibits more postsecularity, the more that it has in fact made allowance for religious considerations.[8] By 'postsecularism', in contrast, I mean a normative view according to which a generally liberal state should make allowance for religious considerations in some way.

These rough statements require defining what is meant by 'religious'. It is notoriously difficult to specify what religion essentially is, supposing it even has an essence, and I shall not be able to settle such contentious matters here. I merely note that a plausible understanding of it, for the ultimate aim of normative analysis, is this: the positive, social organization of attitudes and behaviours towards values that are deemed to be highest and are characteristically spiritual, ones that obtain beyond the realm of subatomic particles as known by scientific means. By this definition of the word 'religion', it is not a mere belief system, for it typically also includes not merely social but also emotional and somatic elements, which anthropologists and sociologists often chastise philosophers and related theorists for leaving out.[9] The definition is also aptly broad for not requiring any focus on a deity; it includes not only the monotheistic and polytheistic traditions but also large strains of, for example, Buddhism and Confucianism, insofar as their

respective appeals to Enlightenment (*Nirvana*) and Heaven (*Tian*) invoke supra-physical ideals towards which groups of people structure their lives.

Return, now, to the idea that a generally liberal state exhibits more postsecularity, the more it directs itself towards religious ends or accepts religious considerations as grounds for it to act. Although this could conceivably mean that the state uses coercive law to promote a particular religion, a variety of less outright illiberal measures are possible. A state that has been substantially liberal would also be postsecular insofar as it: proffered religious arguments for or against statutes, which would mean appealing to spiritual considerations that in principle are beyond scientific verification; made exceptions to laws for the sake of enabling a religion to flourish; allowed facilitative law, such as that governing marriages, to be determined by religious considerations; used tax money to foster religions, say, with the purchase of texts and maintenance of buildings; or erected religious symbols on public property.

A natural understanding of what it means to speak of political '*post*-secularity' would be a state that was secular in the past no longer is, or at least not to the same degree. The fact that the prefix 'post' literally means 'after' or 'later' is what drives Habermas to posit such a definition when he remarks, 'A "post-secular" society must at some point have been in a "secular" state. The controversial term can therefore only be applied to the affluent societies of Europe or countries such as Canada, Australia and New Zealand'.[10] With respect to political matters, Habermas and many of those who have followed in the wake of his influential texts on the subject usually have in mind conditions such as ways in which it might be permissible for those in a Western state to defend legislation on the basis of religious considerations, or for such a legislature to allow religious groups, such as Islamic communities, to govern themselves with respect to civil matters.

However, I submit that such a construal of 'postsecular' talk is overly narrow, at the very least when transferred to normative debates. Moral-philosophical disagreements about so-called postsecularism are about the proper function and limits of state action – specifically, about the extent to which states, or at least those that are largely liberal, ought to give allowance to religious considerations when making domestic decisions. This core issue does not necessarily mean that states had already been significantly liberal for a long while in the past (and also is not essentially tied to the point that Kantian-liberal philosophers, such as Habermas[11] and Rawls,[12] have changed their views so that they now deem more religious influence on the public sphere to be just). The issue is rather, at bottom, to what extent states ought to make allowance for religious considerations, given broad commitments to liberal values and principles. Certain historical processes in the West (as well as shifts in thinking by some influential Western philosophers) have occasioned engagement with that normative question, but it would fail to structure reflection adequately to reduce the normative question to such changes.

Suppose, for example, that a brand new state has been created, that it is in the process of forming a constitution, and that the drafters need guidance about how to balance concerns for privacy, liberty and equality with religious interests on the part of certain sections of society. The so-called postsecularism theoretical

debates would surely be relevant to their predicament. If so, then the term ought to be used more broadly than Habermas suggests, with the literal sense of the 'postsecular' being synecdochical, a part of the debate, as evinced in Europe, taken to represent the whole.

Although it is not the case that a brand new South African state was created in the early 1990s with the demise of apartheid, which had been underwritten by a conservative, racialized interpretation of Christianity, South Africa did begin to formulate a new constitution then.[13] The government and even broader society, insofar as the latter was consulted about how to create the Constitution, had to decide to what degree the state, bound by a new Bill of Rights, would be secular in the face of a substantially religious populace. South Africa can be viewed as having adhered to a kind of postsecularism when it dealt with the matter in part by according legal status to customary ways of life. Apartheid South Africa had granted legal status to customs in the form of the Bantustans, often ruled by traditional leaders,[14] and it might be that the new Constitution in respect of customary law was more a product of political negotiation (with tribal chiefs wanting to retain power) than of philosophical principle. Even so, one might find South Africa's approach to customary law to be a prima facie attractive way of balancing liberal and religious considerations, and enquire into what deeper justifications might exist for it, as some South African jurists have, critically discussed ahead.

Now, what is meant by 'custom', and how does it relate to what I have labelled 'religion'? For me, and much of the literature I address in this chapter, the concept of custom is larger than that of religion, so that the former potentially, but not necessarily, includes the latter. Customs are long-standing ways of life that are characteristically part of a society's self-conception. Although they should not be understood as being inflexible and utterly unchanging, speaking of 'custom' does clearly connote something more stable and widespread in a society, and more integral to its identity, than a mere fad or even a trend. Customs need not be religious – that is, bound up with social orientation towards highest-order and spiritual values; Halloween hardly is in the United States, for instance. However, as is discussed in the next subsection, they often have been among indigenous peoples in South Africa.

I do not pretend that these definitions will satisfy all reasonable enquirers, particularly ones with historical or social scientific expertise and interests. Instead, I submit them as reasonable bases for moral-philosophical reflection; they should be sufficiently plausible to facilitate normative debate about political postsecularism as it (or at least something like it) has been suggested by South Africa's Constitution.

African traditional religion as a source of law

According to the final South African Constitution,[15] which is grounded on the value of human dignity,[16] there are a variety of kinds of laws, including statutory, common, customary and of course constitutional. The Constitution requires South African judges at every level to apply customary law – that is, norms of long-standing

and prevalent ways of life, when it is relevant. Specifically, the key clause is 'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'.[17] Although courts must balance statutory law and customary law in cases where they conflict, the Constitution also indicates that the Bill of Rights has priority over both, such that, 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.[18] The latter is well known for including the full array of 'negative' rights to non-interference with life, expression, association privacy and property, the standard 'procedural' rights to a fair trial, just administration and political participation, as well as, more unusually, 'positive' rights to housing, healthcare, food, water, social security and education.[19]

In a South African context, many customs among indigenous black peoples have been substantially shot through with religion,[20] and, specifically, they by and large have been informed by animist worldviews that were influential in the pre-colonial era. Scholars often call this collection of perspectives 'African traditional religion',[21] with the word 'traditional' signifying views that have been indigenous and long-standing and 'African' indicating what has been salient in (not essential to) the continent.

The rough idea of animism is that spirits (imperceptible agents) are immanent for living *here* in this world,[22] in contrast to a characteristically Western and Middle Eastern, transcendent perspective according to which, if non-physical beings exist, they do as souls in another realm, perhaps even beyond space and time. More carefully, it has been typical of indigenous southern (and more generally sub-Saharan) African worldviews to maintain that one's basic aim in life should be to become a real person or to exhibit human excellence – that is, '*ubuntu*' as it is famously known in the Nguni languages of southern Africa, where one develops one's humanness (displays *ubuntu*) by prizing community with others, not merely other human beings but also certain agents on earth who in principle cannot be perceived. In particular, self-realization is partly a function of sustaining communal relationships with ancestors, who are thought to be morally wise progenitors of a clan who have survived the death of their bodies and continue to interact with its human members. Africans often call them, as well as others who have more recently passed on, the 'living-dead' to signify that, while their bodies have died, their selves live on in an imperceptible realm that is in routine engagement with the perceptible realm inhabited by us. Sometimes the living-dead are thought to reside where their bones lie, other times to have been reborn in babies, animals or other parts of nature.[23]

Ancestors are not really worshipped in an African context, as they are not characteristically deemed to be essentially immortal, let alone to be gods. Instead, as intermediaries between God and human beings, it is more accurate to say that they are to be 'respected'. Ancestors have moral insight that humans rarely have to the same degree, and so they are deemed able to provide reliable guidance about how we ought to behave. Diviners are trained to consult with ancestors and to receive messages from them – say, by throwing bones, entering into a trance

or remembering a dream. In addition, ancestors are thought to keep watch on the extent to which we behave morally, rewarding those who do and punishing those who do not. Hence, another facet of engaging with ancestors is seeking to conform to their dictates and to appease them if one has angered them. Again, diviners have a central role to play in ascertaining why ancestors have become upset and what human beings must do in order to repair the breach. Note that none of this is a matter of 'worship' in the sense of according ancestors the status of a deity, with most southern Africans in fact accepting the existence of a monotheist God, and deeming ancestors to be close to Him and hence able to convey His state of mind.

Even though ancestors are not considered to be gods, interaction with them is clearly a spiritual matter for many black people in South Africa who hold traditional beliefs. Ancestors are imperceptible beings with whom one must commune in order to obtain one's proper highest-order end of exhibiting excellence, which perspective has decidedly influenced sub-Saharan ways of life for centuries when it comes to birth, adolescence, marriage, celebration, death and the like. Since customs include relating to ancestors in particular ways, the South African Constitution, insofar as it recognizes customary law, deems such religious practices to have some legal authority when resolving certain disputes. Southern African metaphysics is of course more complex than I have spelled out, insofar as it includes more spiritual elements than just ancestors and God – for example, imperceptible energies, such as life-force and witchcraft. However, the elements I have sketched should be enough for the reader to understand and evaluate the sort of postsecularism suggested by South African practice, at least upon considering some examples.

Three key court cases

In the cases most relevant to the legal status of African traditional religion, concerns to venerate ancestors and to be close to spirits have figured prominently. In the three that have been most widely analyzed in the literature, the South African courts have neither always ruled in favour of religious interests over secular ones, nor appealed to customary law when they could have. The cases I recount, in chronological order, are ones in which there is a tension between African traditional religion and secular norms and in which an appeal to the legal status of the former either did or could have had an interesting implication. The point is not to argue that custom should have always come out on top, but rather to indicate ways in which it plausibly figured into legal reasoning or could have.

First, there is the case of *Nkosi v Bührmann*,[24] in which an interest in religious burial conflicted with that in retaining control over the land one owns. Grace Nkosi had been a long-time resident on Gideon Bührmann's farm when her son died. She wished to have his body buried in a small plot on Bührmann's land, so that she could keep in touch with him, the thought being that her son's spirit still resides where his body lies. As she put it in the case,

> [I]t is our custom and religious belief that when a member of our family passes away, he/she gets only physically separated from us but spiritually that

> person will always be with us and is capable of sharing a day to day life with us though in a different form. It is against this background that a graveyard to us is not only a place to bury our deceased, but a second home for those of us who live in the world of spirits.[25]

Bührmann denied Nkosi permission to bury her son's body on his land (even though there were already other burial plots that Nkosi had the clear right to visit). The South African courts, concluding with the Supreme Court of Appeal, ruled in favour of Bührmann, not taking the legal status of religious custom into account.

Indeed, not even the lone judge who supported Nkosi in the course of the protracted legal dispute appealed to the Constitution's requirement to deem religious custom to be law, instead invoking the constitutional right to religious freedom.[26] Perhaps no judges did so because they believed that to be subject to customary law, one must be part of the group with the relevant custom, which Bührmann, the white landowner, was not. However, even though Bührmann was not part of a group whose custom it had been to bury relatives close to oneself and to visit them there, Nkosi was.[27] The legal argument would have been different, and perhaps have led to an outcome in favour of Nkosi, had she been viewed as bound by religious customary law to bury her dead son near her, with Bührmann merely permitted by secular law to hang onto every centimetre of his farm.[28] I am interested in a kind of customary law that would be applicable not merely when all disputants share the same customs. Which values or principles promise to justify this sort of postsecular approach, which was, broadly speaking, taken in the next two court cases?

Second, think about *Crossley v National Commissioner of the South African Police Service*,[29] in which the religious interest in burial conflicted with that in securing evidence for a trial. Mark Scott Crossley was indicted for the murder of W. N. Chisale, and sought to interdict his family from burying the deceased and to require the police to take charge of the remains, which Crossley argued constituted vital evidence for his trial. However, Chisale's family wanted to bury him according to traditional burial rites, purportedly demanded by ancestors:

> [W]e want to pray to this Court to allow this destitute family to bury the deceased tomorrow morning at 06:00 which is customary to us . . . It is also customary, your Lordship, that we have already spoken to our ancestors that a person went missing on the 31st of January – if you count the days – has at last been found. . . . We are in the civilised world, yes we agree, but there is one custom again that we feel we cannot go against. It will be against our ancestors to do that. This custom is the custom that we have already seen the deceased and having seen the deceased, having received the deceased, the deceased is now with us. It took us by surprise yesterday, at half past 6, that we were told we could not bury him.[30]

The High Court ruled against Crossley and in favour of Chisale's family, contending, in part, that allowance must be given to African traditional religion:

> African customary law, religious practices and cultural manifestations have not featured much or at all in the mainstream of the country's jurisprudence

> which has largely been dominated by Eurocentric values to the exclusion of almost all other values . . . [I]t is incumbent upon the courts to acknowledge the diversity of religious practices, including burial customs of different religious communities in our country. The burial of the deceased in accordance with African religious custom must surely prevail.[31]

In addition, the court reasoned that preserving a piece of evidence was not necessary to afford Crossley a fair trial, as he would have access to medical reports about the status of the corpse, as well as the ability to challenge them.

For a third and final example of how according legal status to religious custom could help to settle conflicts, consider *Smit v King Goodwill Zwelithini*,[32] which pitted a religious interest in slaughtering a bull with a secular concern for animal well-being. Animal rights groups sought to prevent members of the Zulu people, led by King Zwelithini, from engaging in the ritual slaughter of a bull to express gratitude to ancestors (among other things). The High Court ruled in favour of the Zulus, remarking,

> From a historical perspective applications of the present are nothing new and are symptomatic of an intolerance of religious and cultural diversity. They are often an attempt to force the particular secular views and opinion held by one faction on others. The traditional African form of culture, religion and religious practices may not be embraced by many who subscribe to the mainstream cultures and religions in Western societies, and were historically often discriminated against and in some instances its followers were persecuted and punished . . . [The Applicants have] called into question the legitimacy of the religious and cultural practice and offended the members of the Zulu nation who are now called upon to justify their beliefs and cultural practices. This is particularly harmful to the development of a democracy based upon tolerance and promoting diversity.[33]

Note that the court says that indigenous sub-Saharan religious practices deserve legal protection, and not quite that they have the status of law. Even so, one readily sees how appealing to customary law would have provided all the more support for the court's ruling.

These three cases illustrate the respect in which South Africa's Constitution has the potential to ground a robust form of postsecularism different from the typical sorts discussed in a Western context. As noted earlier, much of the latter discussion has focused on the proper form of democratic debate about which statutes to adopt and especially the propriety of legislatures according religious communities a certain degree of freedom from secular laws. In South Africa, the Constitution always already accords religious ways of life, if they have been customary, the status of law (insofar as they are consistent with other key sources of law, such as the Bill of Rights). Although the foregoing analysis indicates that the lower courts have not always invoked such an interpretation, the relevant clause in the Constitution, that judges are to 'apply customary law when that law is applicable', suggests that they could have.

It is clearly not the only reading of the key clause; one might interpret ‘applicable’ to mean that customary law is relevant only when all disputants accept the same cluster of customs. However, the foregoing three cases demonstrate that adherents to African traditional religion often have their customs impinged by citizens who do not accept them, and it is worth considering whether a refusal to appeal to customary law by the courts would be an extra injustice done to them. I have addressed the cases of *Nkosi*, *Crossley* and *Smit* precisely because the disputants are multicultural, and have set aside the more oft-discussed South African Constitutional Court case of *Bhe and Others v Khayelitsha Magistrate*,[34] in which all disputants were Africans who accepted customary law. I am interested in what there is to be said for a reading of the clause that would have judges appeal to customary law – for example, tenets of African traditional religion – even when only one side of the dispute has lived by it.

I am not suggesting that customary law should be taken to be absolute, overriding all secular law, including human rights, but instead that it is worth considering what might justify giving it some defeasible weight in multicultural disputes. That would be an interesting form of postsecularism to consider, an under-explored way of accommodating religious interests in a constitutional, democratic legal system that is grounded on the value of human dignity.

Extant arguments for treating religious custom as law

Few these days dispute that there should be a legal right to religious freedom. However, for a constitution to deem religious ways of life to have the status of law appears unnecessary to fulfil that right. After all, a right to religion typically means the liberties to believe what one wants and to associate with like-minded people in public; it does not normally include according legal status to long-standing religious ways of life, which requires additional argument.

The central argument for customary law, which can include religious norms, found in the prominent case of *Bhe* is that traditional African practices foster consensus-seeking, family unity and related communitarian goods, and ‘valuable aspects of customary law more than justify its protection by the Constitution’.[35] However, this argument is limited to the particular form of customary law prominent in South Africa, whereas I seek an argument that would in principle justify other, non-African sorts of customary law.

Here are the two most influential jurisprudential arguments in a South African context for a constitutional recognition of customary law, setting its specific content aside. Both have been articulated and advanced by former human rights activist and Constitutional Court Justice Albie Sachs. I argue that they do not ground much reason to believe in the form of postsecularism considered in the previous section, one that instructs judges to treat religious customs as a source of law even in cases where only one of the disputants adheres to them. I also contend that the logic of the arguments ‘proves too much’, according legal status to much more than just custom.

Respect for individual choice

According to one argument for customary law advocated by jurists in South Africa, it allows people to choose their own way of life and hence, in Rawlsian terms, respects their ability to choose a conception of the good or treats people as free and equal citizens. In Sachs's words,

> It is important that democracy not be regarded as a blunt instrument that clubs customary law on the head . . . To recover its original vitality, customary law must respond to the lives that people lead now, to their sense of justice and fairness, and to multifarious and at times contradictory ways in which an actively and evolving culture impacts on the actual lives of actual people. People are not being forced willy-nilly to *modernize* or *develop*; they are being freed to enjoy all the aspects of the modern world to which they voluntarily choose to have access.[36]

This sort of rationale is Kantian in flavour, suggesting that a dignity inheres in our capacity to make voluntary decisions for ourselves, and contending that respect for such a capacity prescribes giving people the option to live according to African traditional religious ways of life. Exercising such an option, in turn, means invoking those norms, when they are chosen, to resolve legal disputes.

However, I submit that there are two serious problems with this argument. One is that it does not easily account for the sort of postsecularism expounded in the previous section, according to which customary law should sometimes be invoked to resolve disputes among multicultural disputants. I seek a justification of the idea that one strong (not necessarily conclusive) legal argument in favour of Nkosi having access to Bührmann's land is that her religious custom requires her to visit her son who is buried there. An appeal to individual choice appears indeterminate when it comes to the question of whether to invoke customary law at all, here. Nkosi would choose to live by African traditional religion and to have it protected by a court, whereas Bührmann would choose otherwise. While it would respect Nkosi's chosen lifestyle to invoke customary law,[37] it would disrespect Bührmann's chosen lifestyle, which, let us presume, would be one of libertarian pride of property ownership, an absence of Africans visiting dead relatives on his property and the non-religious judicial resolution of disputes. The logic of an appeal to individual choice might entail that customary law properly applies to people only insofar as they both consent to be governed by a customary court in lieu of a secular court.[38]

A related concern is that an appeal to individual choice is too broad to justify the moral relevance to law of custom, as a particular *kind* of choice. Intuitively, there is something weightier about religious burial or veneration customs than, say, the choice to spread the colour pink as far and wide as possible. Imagine someone whose highest-order end were to make everything in his vicinity as pink as he can get it (using only permissible means). Pink is the reason for which he gets out of bed in the morning and is the hill on which he is willing to die. If the

relevant moral principle is respect for individual choice, then pink ends should be treated as no less important than religious ends. However, I presume the reader shares my judgement that, if the law should give some protection to religious ends, it does not follow that it should also do so for pink ends. The content of people's choices, even when they are all permissible in respect of morality, seems to make a difference in respect of whether they should count as sources of law. However, voluntary choice as such cannot explain that difference.

Respect for individual identity

Similar objections apply to a second argument for customary law from Sachs and others in South Africa, which invokes a principle of respect not for individual choice but rather for individual identity. Speaking South Africa's recent democracy, Sachs says,

> The idea of not suppressing or exploiting difference, but of welcoming diversity on the basis of equality, is fundamental to our whole new constitutional order . . . Any uniformity of treatment, which comes at the price of suppressing my true self, involves the denial of equal concern and respect for myself as I am, with my characteristics that lie at the very heart of equality. Once more, we return to the concept of basic dignity, which means respecting people as they are and as they identify themselves in the world.[39]

From this perspective, what is to be respected about an individual is not merely or primarily her capacity to choose one way of life rather than another but instead who she is, which includes her participation in religious customs.[40]

As with the previous rationale, it appears on the face of it that an appeal to individual identity is indeterminate, unable to ground a strong reason to invoke customary law. Nkosi's identity is constituted in part by African traditional religion, whereas Bührmann's is not. While it would respect Nkosi's identity to invoke customary law as a weighty consideration when resolving the dispute, it would disrespect Bührmann's identity, which, let us imagine, is one of rugged individualism and Christianity. Similar remarks apply to the animal rights activists in *Smit*. Yes, the identity of the Zulu people would be infringed if they were not allowed to slaughter the bull in order to pay tribute to ancestors, but, then, so would the identity of those with a higher-order mission to fight animal suffering if Zulus were allowed to slaughter the bull.

One might suggest that the aim of the court should be to invoke all considerations of identity as they pertain to the disputants, and to seek a resolution that minimizes its impairment for any given one. Perhaps Bührmann's identity would be disrespected less by appealing to customary law than Nkosi's would by not doing so, for example.

However, this approach would go only so far, for imagine the case were slightly changed, so that central to Bührmann's identity were a hatred of anything religious, or perhaps a racism for wanting to have nothing to do with African

people, or an aesthetic orientation demanding a pristine garden unadulterated by the occasional grieving mum. I seek a rationale that would make sense of why it would be just for a court to invoke religious norms that have been customary to help resolve disputes between two parties even when doing so would threaten the identity of one of them. Certain kinds or aspects of identity probably matter more than others.

Another way to make the point is that an appeal to individual identity 'proves too much', in the sense that it would require a court to take into account considerations that it intuitively should not. An appeal to individual self-conception is too broad to justify the moral relevance to law of custom, as a particular *kind* of self-conception. While people's self-conceptions do provide some reason for a court to appeal to customary law, they comparably, but counterintuitively, provide some reason for a court to appeal to an individual's practice of pinking everything. There is something weightier about religious burial or veneration customs than the choice to spread the colour pink as far and wide as possible. However, if the relevant moral principle is respect for individual identity, where such identity can mean that religious customs have the status of law, then pink identity should be treated as no less important than religious identity. I presume, though, that the reader shares my judgement that, if the law should give some protection to religious identity, it does not follow that it should also do so for pink identity. The content of people's identities, even when they are all permissible in respect of morality, seems to make a difference in respect of whether they should count as sources of law. However, individual identity as such cannot explain that difference.

More promising arguments for treating religious custom as law

My hypothesis is that the reason the two most influential arguments for customary law are weak is that they focus on individualist values – viz, of choice or identity. To defend a way of life, a form of relating, is, on the face of it, more likely to be successful if one appeals to social goods. In the following I sketch two communitarian arguments that, I submit, should be given serious consideration as justifications for treating religious lifestyles as law.

I do not conclude that they are sound, but rather present them as arguments that merit reflection as more promising than the ones on which South African jurists have focused when specifically addressing customary law. They provide some prima facie explanation of why religious custom might have a good claim to count as law whereas gearing oneself around a certain colour does not.

In addition to not arguing that the following rationales for customary law are sound, I do not even contend that they are clearly the best available ones. I draw on under-considered values and norms in the African tradition to construct fresh accounts of why customary law might be just. Whether these rationales are more powerful than what could be drawn out of, say, Habermas or Charles Taylor[41] in the Western and broadly liberal tradition is something to consider elsewhere.[42]

The worth of communities

According to the first communitarian rationale for customary law, certain groups merit protection and advancement because they are valuable in themselves *qua* groups. This sort of corporatist perspective has a clear tradition below the Sahara Desert, where, for instance, the dominant regional normative framework, the Banjul Charter, accords rights not only to individuals but also to peoples.[43] In addition, sub-Saharan theorists have taken such a perspective seriously, deeming an extended family, clan or lineage to have 'collective rights'.[44] Even a staunch Western liberal, when once speaking in South Africa, has acknowledged that the possibility of groups having a dignity should not be dismissed by adherents to human rights.[45]

If groups such as cultures, peoples or nations could (depending on their configuration) be good for their own sake, and perhaps even have a dignity, then it would make sense for the law to protect them and indeed support them. It would explain why a court should accord legal status to a culture, one that would probably be stronger than an individual's interest in controlling a negligible part of his farm or an aggregate of individuals' interests in seeing animals treated with compassion.

Unlike the rationales for customary law explored in the previous section, which appealed to individual choice and identity, there would be some clear reason to favour an African *custom* relative to an individual's interest in the colour pink. A corporatist rationale would help to explain the intuitive force of an appeal to choice and identity, while also accounting for the limits of these considerations: when people choose to remain members of a certain group or their identity is bound up with being members of a certain group, then there would be extra reason to respect these choices and identities compared to ones lacking a corporate dimension.

My claim is not that communities in fact have an inherent worth, and I do not pretend to have provided real evidence that they do. Remember that I not really trying in this chapter to justify according custom the status of law, so much as supposing there is something appealing about it and trying to specify what could well motivate it. So, my point is instead that the idea that communities can have an inherent worth is a promising explanation of why it would be just for a constitution to ascribe the status of law to custom and for courts to give it substantial weight even when not all individual disputants are members of the group. It is an argumentative strategy that the fan of the sort of postsecularism I have been ascribing to South Africa's Constitution might sensibly try to execute. It would for most of us be quite counterintuitive to think that only communities have an inherent worth, as that would entail that individuals lack human rights and may be used merely as a means to their ends. However, the characteristically African view that both individuals and groups of certain kinds have an inherent value that merits respect deserves more theoretical consideration than it has received up to now, particularly as a way to ground customary law.

The dignity of our communal nature

Here is another communitarian argument for customary law, but one that is not corporatist, instead according dignity to the individual albeit in virtue of features of her that are relational. If people had a social nature that conferred a superlative worth on them requiring respect, then we would have a promising account of why courts would have reason to honour custom *qua* realization of this nature.

Suppose, now, that individuals had a dignity not because of their capacity for choice or their identity, neither of which is essentially social or other-regarding, but instead because of their ability to relate communally with one another.[46] Specifically, suppose that people were worth more than anything else in the animal, vegetable or mineral kingdoms by virtue of being able to be party to relationships of not only sharing a way of life with other people (and perhaps spirits, if they can be shown to exist) but also caring for their quality of life. Sharing a way of life with people means experiencing a sense of togetherness and participating in joint projects, while caring for other people means acting beneficently with regard to them, typically for their sake and consequent to a sympathetic appreciation of their condition.

These ways of relating are characteristic of intuitively desirable families, workplaces and neighbourhoods, and English-speakers might call them forms of 'friendliness' or even 'love' in a broad sense. And individuals are plausibly valuable insofar as they are capable of these ways of relating. If you had to choose between rescuing the life of a typical person or a typical cat, one plausible explanation would be that you should save the former because of its qualitatively richer ability to love and be loved by us.[47] Suppose, further, that you had to choose between saving the life of a person capable of love and a psychopath who is not; imagine the latter is not disposed to cooperate and aid, and is utterly incapable of empathy, sympathy and altruistic motivation. Most would save the former, I presume, with a plausible explanation of why they should being the idea that the latter lacks a worth the former exhibits.

Again, the aim is not to convince but rather to motivate, to show that there is promise. *If* indeed people were important because of their capacity for communal or loving relationships, so construed, then treating them with respect would require giving consideration to the way they have actualized this capacity in the form of actual communities, including religious ones. When a religious way of life is a realization of that which makes individuals dignified, it merits moral protection. Hence, part of what it would be for law to treat individuals as dignified because of their capacity to commune would be to respect, by supporting and otherwise protecting, actual forms of African traditional religion – according ancestral customs in South Africa the status of law.

A need to respect our social nature is what plausibly explains why Nkosi's claim to burial rites is stronger than Bührmann's property right to a small piece of land, and why the Zulu claim to slaughter a bull as a way to pay tribute to ancestors is perhaps weightier than the claim of animal rights activists, who, while

a group of some kind, are probably not a community in the sense adumbrated earlier. It also would account for the difference between religious custom on the one hand and an individual's interest in the colour pink on the other. Although pink could readily be the object of a person's choice, or be central to her identity, it has not been at the core of how people have for a long while shared a way of life and cared for one another's quality of life.

Problems and prospects

I believe that the communitarian rationales are promising, and more so than the more individualist rationales prominent in South African discourse about the legitimacy of customary law. However, there are two prima facie problems to address.

First, as these arguments broadly speaking focus on an ideal of community, they will not be easily able to accommodate the 'religious' interests of isolated individuals. According to some theories of the nature of religion as distinct from, say, mere spirituality, it is essentially a communal project,[48] which would dovetail neatly with the present justification for treating religious customs as law. Indeed, earlier when I defined 'religion' I spoke of it as a characteristically social phenomenon. There are, however, accounts of religion that are not essentially communitarian,[49] which, if plausible, mean that the favoured justifications for customary law would support only a subset of religious interests in relation to secular ones. And, yet, this subset would still be extremely large, and perhaps that reach would be sufficient, insofar as postsecularity is plausibly viewed as a condition of *social conflict* that requires resolution.

A second prima facie problem with the communitarian arguments for customary law is that they do not appeal to anything particularly distinctive about *religious* communities as opposed to other ones. In addition to justifying 'too little' (not all religious interests), the arguments might be thought to justify 'too much', in the sense of not merely communities organized around spiritual concerns but also any long-standing or widely practised ways of life. On the other hand, though, perhaps precisely the right sort of balance between the secular and the religious would be an argument that justifies communities of both sorts.

Conclusion: reflecting further on judicial postsecularism

In this chapter I have laid out and critically explored a form of political postsecularism that differs from the sort that has been most widely discussed in the Western literature. Whereas most normative political and legal theorists have addressed the kinds of statutes that legislatures should pass in order to respond to residents' religious interests and whether they may invoke religious considerations when debating about statutes, I have brought out the fact that, by a straightforward reading of South Africa's Constitution, religious ways of life already count as customary law, an under-explored approach to the issue of how to balance secular and religious interests in societies that are broadly liberal. I illustrated three respects in which the legal status of Traditional African Religion in South Africa has affected

or could have affected the course of judicial argument and conflict resolution, and then critically explored arguments for such an approach. Specifically, I provided reason to doubt that the two moral arguments for customary law most widely invoked by South African jurists will work, and then, drawing on the African tradition, sketched two new rationales, more communitarian in nature, that merit consideration.

Questions to consider in future work include: Are the foregoing objections to the communitarian arguments damning, or are my tentative replies satisfactory? Are the communitarian arguments grounded in African thought the best ones available for customary law? Would judicial postsecularism of the sort I have discussed be 'anti-democratic' and hence less preferable compared to the statutory form that predominates in European discourses? Or, in contrast, is religious customary law so important as to merit constitutional protection from the vagaries of majoritarian will? How might considerations of dignity help to resolve that dispute? For instance, would according religious custom the status of law fail to treat people as equals, or would it in fact be necessary to do that? If it were indeed right for a constitution to count religions as law, how strong would that source of law be relative to other sources? In particular, should elements of a bill of rights ever give way to customary law, in contrast to what South Africa's Constitution prescribes? Supposing that social relationships are owed respect, how would that orientation be balanced against individual interests? I trust the reader will agree that reflection on the postsecular would be enriched by further consideration of the sub-Saharan constitutional and customary approach explored in this chapter.[50]

Notes

1 Harvey Feinberg and Joseph Solodow, 'Out of Africa', *Journal of African History* 43.2 (2002): 255–261.

2 As well as Rastafarianism, on which see Constitutional Court of South Africa, *Prince v President of the Law Society of the Cape of Good Hope and Others* [2000] ZACC 28; and more recently High Court of South Africa, *Prince v Minister of Justice and Constitutional Development and Others* [2017] ZAWCHC 30.

3 On which see especially Charles Taylor, *A Secular Age* (Cambridge, MA: Harvard University Press, 2007); Michael Warner, Jonathan VanAntwerpen, Craig Calhoun, eds, *Varieties of Secularism in a Secular Age* (Cambridge, MA: Harvard University Press, 2010); and Craig Calhoun, Mark Juergensmeyer and Jonathan VanAntwerpen, eds, *Rethinking Secularism* (Oxford: Oxford University Press, 2011).

4 For example, Veit Bader, 'Post-Secularism or Liberal-Democratic Constitutionalism?' *Erasmus Law Review* 5.1 (2012): 5–26; and Philip Gorski, David Kyuman Kim, John Torpey and Jonathan VanAntwerpen, eds, *The Post-Secular in Question: Religion in Contemporary Society* (New York: New York University Press, 2012).

5 For work featuring 'histories of the legal secular' as well as ethnographies of the legal system of various countries, see Winnifred Sullivan, Robert Yelle and Mateo Taussig-Rubbo, eds, *After Secular Law* (Palo Alto: Stanford Law Books, 2011).

6 Jürgen Habermas, 'Notes on a Post-Secular Society', *signandsight.com* (2008), http://print.signandsight.com/features/1714.html.

7 For discussion of social postsecularity, often contrasted with political facets of postsecularity, see Habermas, 'Notes on a Post-Secular Society'; Bryan Turner, 'Religion in a Post-Secular Society', in *The New Blackwell Companion to the Sociology of Religion*,

ed. Bryan Turner (Oxford: Wiley-Blackwell, 2010), 649–667; and Craig Calhoun, Mark Juergensmeyer and Jonathan VanAntwerpen, 'Introduction', in Calhoun, Juergensmeyer and VanAntwerpen, eds, *Rethinking Secularism*, 3–30.

8 Cf. the claim, 'In all cases, secularism is defined in tandem with its twin concept, religion', encountered in Calhoun, Juergensmeyer and VanAntwerpen, 'Introduction', 6.

9 For just two examples, see Turner, 'Religion in a Post-Secular Society'; and Craig Calhoun, 'Secularism, Citizenship, and the Public Sphere', in *Rethinking Secularism*, eds Craig Calhoun, Mark Juergensmeyer and Jonathan VanAntwerpen (Oxford: Oxford University Press, 2011), 75–91.

10 Habermas, 'Notes on a Post-Secular Society'. Whether Habermas's description of the European context is accurate is a separate matter.

11 Jürgen Habermas, 'Religion in the Public Sphere', *European Journal of Philosophy* 14.1 (2006): 1–25; and 'An Awareness of What Is Missing', in Jürgen Habermas et al., *An Awareness of What Is Missing: Faith and Reason in a Post-Secular Age*, tr. Ciaran Cronin (Malden, MA: Polity Press, 2010), 15–23.

12 John Rawls, 'The Idea of Public Reason Revisited', *University of Chicago Law Review* 64.3 (1997): 765–807.

13 Constitution of the Republic of South Africa, Act 200 of 1993, which is usually called the 'interim Constitution'.

14 For just one, influential discussion, see Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Cape Town: David Philip, 1996).

15 Constitution of the Republic of South Africa, Act 108 of 1996.

16 For the most systematic discussion of the respects in which South Africa's jurisprudence is dignity-based, see Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Cape Town: Juta Law, 2012).

17 Constitution of the Republic of South Africa, sec. 211(3).

18 Constitution of the Republic of South Africa, sec. 39(2).

19 Constitution of the Republic of South Africa, ch. 2.

20 For a comprehensive discussion of South African customary law, see T. W. Bennett, *Human Rights and African Customary Law under the South African Constitution* (Cape Town: Juta and Company Ltd., 1999).

21 For discussion of African traditional religion in the sub-Saharan region, see John Mbiti, *Introduction to African Religion*, 2nd edn (London: Heinemann Educational Books, 1991); Harry Garuba, 'Explorations in Animist Materialism: Notes on Reading/Writing African Literature, Culture, and Society', *Public Culture* 15.2 (2003): 261–285; Ezra Chitando, Afe Adogame and Bolaji Bateye, eds, *African Traditions in the Study of Religion in Africa* (Farnham: Ashgate, 2012); Christopher Ejizu, 'African Traditional Religions and the Promotion of Community-Living in Africa', www.afrikaworld.net/afrel/community.htm; and Godfrey Onah, 'The Meaning of Peace in African Traditional Religion and Culture', http://beeshadireed.blogspot.com/2012/08/the-meaning-of-peace-in-african.html. For discussion of it in South Africa in particular, see Gerhardus Oosthuizen, 'The Place of Traditional Religion in Contemporary South Africa', in *African Traditional Religions in Contemporary Society*, ed. Jacob Olupona (New York: Paragon House, 1991), 35–50; Philippe Denis, 'The Rise of Traditional African Religion in Post-Apartheid South Africa', *Missionalia* 34.2/3 (2006): 310–323; T. W. Bennett, ed., *Traditional African Religions in South African Law* (Cape Town: UCT Press, 2011); and Ilze Keevy, '*Ubuntu*: Ethnophilosophy and Core Constitutional Values', in *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence*, ed. Frank Diedrich (Claremont: Juta, 2011), 24–49.

22 The immanence of animism does not render it secular, since religion, as construed earlier, is characteristically spiritual, including reference to beings beyond the realm of subatomic particles as known by scientific means.

23 For discussion of the latter strand of thought, see Credo Mutwa, *Indaba, My Children* (repr. Edinburgh: Payback Press, 1998; first published 1964), 590–610.

24 Supreme Court of Appeal of South Africa, *Nkosi and Another v Bührmann* (2001) ZASCA 98. For critical commentary on the case, see A. J. van der Walt, 'Property Rights v Religious Rights', *Stellenbosch Law Review* 13.4 (2002): 394–414; Gardiol van Niekerk, 'Death and Sacred Spaces in South Africa and America: A Legal-Anthropological Perspective of Conflicting Values', *Comparative and International Law Journal of Southern Africa* 40.1 (2007): 30–56.

25 Supreme Court of Appeal of South Africa, *Nkosi v Bührmann*, para. 6.

26 High Court of South Africa, *Bührmann v Nkosi and Another* (1999) 3 All SA 337; 2000 (1) SA 1145 (T).

27 Cf. the *Crossley* case, discussed next, in which the court did apply customary law to resolve a dispute with a litigant who did not identify with African traditional religion.

28 In response to the *Nkosi* case, South Africa's Parliament amended an existent act so that an occupier of land may bury another occupier according to his or her religion, if such an established practice exists. The latter has been interpreted to mean that the landowner has allowed such burials in the past, not that custom requires such burials. The amendment was upheld as not violating the constitutional right to property in Supreme Court of Appeal of South Africa, *M Dlamini and Another v P J Joosten and Others* (30/05) [2005] ZASCA 138.

29 High Court of South Africa, *Crossley & Others v National Commissioner, SAPS and Others* (2004) 3 All SA 436 (T); key parts of this case are reprinted in *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence*, eds Drucilla Cornell and Nyoko Muvangua (New York: Fordham University Press, 2012), 277–284. For discussion, see Lourens du Plessis, 'Affirmation and Celebration of the "Religious Other" in South Africa's Constitutional Jurisprudence on Religious and Related Rights', *African Human Rights Law Journal* 8.2 (2008): 376–408 at 393–396.

30 High Court of South Africa, *Crossley v National Commissioner*, para. 9.

31 High Court of South Africa, *Crossley v National Commissioner*, para. 17–18.

32 High Court of South Africa, *Stephanus Smit and Others v King Goodwill Zwelithini Kabhekuzulu and Others* (2009) ZAKZPHC 75, http://www.saflii.org/za/cases/ZAKZPHC/2009/75.html. For analysis, see Christa Rautenbach, '*Umkhosi Ukweshwama*: Revival of a Zulu Festival in Celebration of the Universe's Rites of Passage', in *Traditional African Religions in South African Law*, ed. T.W. Bennett (Cape Town: UCT Press, 2011), 63–89; Sarah Smith, 'Balancing the Bull: Smit NO v His Majesty King Goodwill Zwelithini Kabhekuzulu [2010] JOL 25699 (KZP)', *Southern African Public Law* 27.1 (2012): 70–87.

33 High Court of South Africa, *Stephanus Smit and Others v King Goodwill Zwelithini Kabhekuzulu and Others*.

34 Constitutional Court of South Africa, *Bhe and Others v Khayelitsha Magistrate and Others*. Case No. CCT 49/03, [2004] ZACC 17.

35 Bhe and Others v Khayelitsha Magistrate, para. 45.

36 Albie Sachs, 'Towards the Liberation and Revitalisation of Customary Law', in *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence*, eds Drucilla Cornell and Nyoko Muvangua (New York: Fordham University Press, 2012), 303–323 at 311. See also the dissent in *Bhe and Others v Khayelitsha Magistrate and Others*, para. 230.

37 A different sort of objection would question whether customs are in fact freely chosen. Few of South Africa's residents freely choose to live in a certain area such as a rural village, since they lack the resources to move to a different place. Consider David Hume's poignant remark, 'Can we seriously say that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires?' (*Of the Original Contract*

[1748], www.constitution.org/dh/origcont.htm). What goes for a country might apply just as well to the countryside.

38 Suggested in Chuma Himonga, ‘African Customary Law in South Africa’, in *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence*, eds Drucilla Cornell and Nyoko Muvangua (New York: Fordham University Press, 2012), 388–404 at 403, and by the minority in *Bhe and Others v Khayelitsha Magistrate and Others*, when it says that ‘the question whether indigenous law is applicable should in the first place be determined by agreement’ (para. 239).

39 Sachs, ‘Towards the Liberation and Revitalisation of Customary Law’, 309. See also the dissent in *Bhe and Others v Khayelitsha Magistrate and Others*, para. 235.

40 Note that it is plausible to suggest that people’s identities would demand respect regardless of whether they were freely chosen. If so, then the present rationale for treating custom as law can probably avoid the concern, expressed in note 37, that customs are not freely chosen and so would not, by a principle of respect for free choice, merit protection.

41 Charles Taylor, ‘The Politics of Recognition’, in *Multiculturalism*, ed. Amy Gutmann (Princeton: Princeton University Press, 1994), 25–73, as well as *A Secular Age*.

42 In addition, I do not pursue the possibility of teasing an argument for customary law out of South Africa’s Constitutional Court case law prescribing the resolution of legal disputes through the meaningful participation of those involved, as one anonymous reviewer has suggested. I do not do so since the customary dimension would on the face of it go unaccounted for, upon mere appeal to deliberative democratic considerations. For discussion of the participatory strain of South Africa’s jurisprudence, see Stu Woolman, *The Selfless Constitution* (Cape Town: Juta & Co, 2013).

43 Organization of African Unity, *African Charter on Human and Peoples’ Rights* (Banjul, 1981), www.africa-union.org/root/au/Documents/Treaties/Text/Banjul Charter.pdf.

44 For example, Claude Ake, ‘The African Context of Human Rights’, *Africa Today* 34.1/2 (1987): 5–12 at 9.

45 Jeremy Waldron, ‘The Dignity of Groups’, in *Dignity, Freedom and the Post-Apartheid Legal Order*, eds A. J. Barnard-Naudé et al. (Cape Town: Juta, 2008), 66–90.

46 A view that I have articulated and applied to human and group rights issues (although not to customary law and postsecularism) in, amongst other places, Thaddeus Metz, ‘African Conceptions of Human Dignity: Vitality and Community as the Ground of Human Rights’, *Human Rights Review* 13.1 (2012): 19–37, and ‘African Values, Human Rights and Group Rights: A Philosophical Foundation for the Banjul Charter’, in *African Legal Theory and Contemporary Problems: Critical Essays*, ed. Oche Onazi (Dordrecht: Springer, 2014), 131–151. For other relational accounts of dignity from the African tradition, see Joseph Cobbah, ‘African Values and the Human Rights Debate’, *Human Rights Quarterly* 9.3 (1987): 309–331; and H. Russel Botman, ‘The OIKOS in a Global Economic Era: A South African Comment’, in *Sameness and Difference: Problems and Potentials in South African Civil Society*, eds James Cochrane and Bastienne Klein (Washington, D.C.: The Council for Research in Values and Philosophy, 2000), 269–280.

47 Cats and most animals can be objects of communal relationships – that is, we can enjoy a sense of togetherness with them, further their ends, help them and do so for their sake, but they cannot be subjects – that is, relate in these ways towards us. It could be that intuitively ‘higher’ animals, such as chimpanzees, can, but to a lesser degree. For more discussion of animals, marginal cases of humans and the like, see Thaddeus Metz, ‘An African Theory of Moral Status: A Relational Alternative to Individualism and Holism’, *Ethical Theory and Moral Practice* 15.3 (2012): 387–402.

48 For example, Robert Fuller, *Spiritual but Not Religious: Understanding Unchurched America* (New York: Oxford University Press, 2001), 5.

49 For example, Jim Stone, ‘A Theory of Religion Revised’, *Religious Studies* 37.2 (2001): 177–189.

50 For written comments on an earlier draft of this essay, I thank Uchenna Okeja and an anonymous reviewer for Routledge. For oral comments, I am grateful to participants at the Workshop on Cosmopolitanism, Human Rights and Religion in Post-Secular Societies held at Goethe University and participants at the Seminar Series on Philosophy and Religion hosted by the University of Johannesburg Department of Religious Studies.

References

Ackermann, Laurie, *Human Dignity: Lodestar for Equality in South Africa* (Cape Town: Juta Law, 2012).

Ake, Claude, 'The African Context of Human Rights', *Africa Today* 34.1/2 (1987): 5–12.

Bader, Veit, 'Post-Secularism or Liberal-Democratic Constitutionalism?' *Erasmus Law Review* 5.1 (2012): 5–26.

Bennett, T.W., *Human Rights and African Customary Law Under the South African Constitution* (Cape Town: Juta and Company Ltd.

Bennett, T.W., ed., *Traditional African Religions in South African Law* (Cape Town: UCT Press, 2011).

Botman, H. Russel, 'The OIKOS in a Global Economic Era: A South African Comment', in *Sameness and Difference: Problems and Potentials in South African Civil Society*, ed. James Cochrane and Bastienne Klein (Washington, DC: The Council for Research in Values and Philosophy, 2000), 269–280.

Calhoun, Craig, 'Secularism, Citizenship, and the Public Sphere', in *Rethinking Secularism*, eds Craig Calhoun, Mark Juergensmeyer and Jonathan VanAntwerpen (Oxford: Oxford University Press, 2011), 75–91.

Calhoun, Craig and Mark Juergensmeyer and Jonathan VanAntwerpen, 'Introduction', in *Rethinking Secularism*, eds Craig Calhoun, Mark Juergensmeyer and Jonathan VanAntwerpen (Oxford: Oxford University Press, 2011), 3–30.

Calhoun, Craig and Mark Juergensmeyer and Jonathan VanAntwerpen, eds, *Rethinking Secularism* (Oxford: Oxford University Press, 2011).

Chitando, Ezra and Afe Adogame and Bolaji Bateye, eds, *African Traditions in the Study of Religion in Africa* (Farnham: Ashgate, 2012).

Cobbah, Joseph, 'African Values and the Human Rights Debate', *Human Rights Quarterly* 9.3 (1987): 309–331.

Constitution of the Republic of South Africa, Act 108 of 1996.

Constitution of the Republic of South Africa, Act 200 of 1993.

Constitutional Court of South Africa, *Bhe and Others v Khayelitsha Magistrate and Others*. Case No. CCT 49/03, [2004] ZACC 17.

Constitutional Court of South Africa, *Prince v President of the Law Society of the Cape of Good Hope and Others* [2000] ZACC 28.

Denis, Philippe, 'The Rise of Traditional African Religion in Post-Apartheid South Africa', *Missionalia* 34.2/3 (2006): 310–323.

Du Plessis, Lourens, 'Affirmation and Celebration of the "Religious Other" in South Africa's Constitutional Jurisprudence on Religious and Related Rights', *African Human Rights Law Journal* 8.2 (2008): 376–408.

Ejizu, Christopher, 'African Traditional Religions and the Promotion of Community-Living in Africa', www.afrikaworld.net/afrel/community.htm.

Feinberg, Harvey and Joseph Solodow, 'Out of Africa', *Journal of African History* 43.2 (2002): 255–261.

Fuller, Robert, *Spiritual but Not Religious: Understanding Unchurched America* (New York: Oxford University Press, 2001).
Gorski, Philip, David Kyuman Kim, John Torpey and Jonathan VanAntwerpen, eds, *The Post-Secular in Question: Religion in Contemporary Society* (New York: New York University Press, 2012).
Habermas, Jürgen, 'An Awareness of What Is Missing', in Jürgen Habermas et al., eds, *An Awareness of What Is Missing: Faith and Reason in a Post-Secular Age*, tr. Ciaran Cronin (Malden, MA: Polity Press, 2010), 15–23.
Habermas, Jürgen, 'Notes on a Post-Secular Society', *Signandsight.com* (2008), http://print.signandsight.com/features/1714.html.
Habermas, Jürgen, 'Religion in the Public Sphere', *European Journal of Philosophy* 14.1 (2006): 1–25.
High Court of South Africa, *Bührmann v Nkosi and Another* (1999) 3 All SA 337; 2000 (1) SA 1145 (T).
High Court of South Africa, *Crossley & Others v National Commissioner, SAPS and Others* (2004) 3 All SA 436 (T), large parts repr. in Cornell, Drucilla and Nyoko Muvangua, eds, *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (New York: Fordham University Press, 2012), 277–284.
High Court of South Africa, *Prince v Minister of Justice and Constitutional Development and Others* (2017) ZAWCHC 30.
High Court of South Africa, *Stephanus Smit and Others v King Goodwill Zwelithini Kabhekuzulu and Others* (2009) ZAKZPHC 75.
Himonga, Chuma, 'African Customary Law in South Africa', in *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence*, eds Drucilla Cornell and Nyoko Muvangua (New York: Fordham University Press, 2012), 388–404.
Hume, David, *Of the Original Contract* (1748), www.constitution.org/dh/origcont.htm.
Keevy, Ilze, '*Ubuntu*: Ethnophilosophy and Core Constitutional Values', in *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence*, ed. Frank Diedrich (Claremont: Juta, 2011), 24–49.
Mamdani, Mahmood, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Cape Town: David Philip, 1996).
Mbiti, John, *Introduction to African Religion*, 2nd edn (London: Heinemann Educational Books, 1991).
Metz, Thaddeus, 'African Conceptions of Human Dignity: Vitality and Community as the Ground of Human Rights', *Human Rights Review* 13.1 (2012): 19–37.
Metz, Thaddeus, 'An African Theory of Moral Status: A Relational Alternative to Individualism and Holism', *Ethical Theory and Moral Practice* 15.3 (2012): 387–402.
Metz, Thaddeus, 'African Values, Human Rights and Group Rights: A Philosophical Foundation for the Banjul Charter', in *African Legal Theory and Contemporary Problems: Critical Essays*, ed. Oche Onazi (Dordrecht: Springer, 2014), 131–151.
Mutwa, Credo, *Indaba, My Children* (repr. Edinburgh: Payback Press, 1998; first published 1964), 590–610.
Onah, Godfrey, 'The Meaning of Peace in African Traditional Religion and Culture', http://beeshadireed.blogspot.com/2012/08/the-meaning-of-peace-in-african.html.
Oosthuizen, Gerhardus, 'The Place of Traditional Religion in Contemporary South Africa', in *African Traditional Religions in Contemporary Society*, ed. Jacob Olupona (New York: Paragon House, 1991), 35–50.
Organization of African Unity, *African Charter on Human and Peoples' Rights* (Banjul, 1981), www.africa-union.org/root/au/Documents/Treaties/Text/Banjul Charter.pdf.

Rautenbach, Christa, '*Umkhosi Ukweshwama*: Revival of a Zulu Festival in Celebration of the Universe's Rites of Passage', in *Traditional African Religions in South African Law*, ed. T.W. Bennett (Cape Town: UCT Press, 2011), 63–89.

Rawls, John, 'The Idea of Public Reason Revisited', *University of Chicago Law Review* 64.3 (1997): 765–807.

Sachs, Albie, 'Towards the Liberation and Revitalisation of Customary Law', in *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence*, eds Drucilla Cornell and Nyoko Muvangua (New York: Fordham University Press, 2012), 303–323.

Smith, Sarah, 'Balancing the Bull: Smit NO v His Majesty King Goodwill Zwelithini Kabhekuzulu [2010] JOL 25699 (KZP)', *Southern African Public Law* 27.1 (2012): 70–87.

Stone, Jim, 'A Theory of Religion Revised', *Religious Studies* 37.2 (2001): 177–189.

Sullivan, Winnifred, Robert Yelle and Mateo Taussig-Rubbo, eds, *After Secular Law* (Palo Alto: Stanford Law Books, 2011).

Supreme Court of Appeal of South Africa, *M Dlamini and Another v P J Joosten and Others* (30/05) [2005] ZASCA 138.

Supreme Court of Appeal of South Africa, *Nkosi and Another v Bührmann* (2001) ZASCA 98.

Taylor, Charles, 'The Politics of Recognition', in *Multiculturalism*, ed. Amy Gutmann (Princeton: Princeton University Press, 1994), 25–73.

Taylor, Charles, *A Secular Age* (Cambridge, MA: Harvard University Press, 2007).

Turner, Bryan, 'Religion in a Post-secular Society', in *The New Blackwell Companion to the Sociology of Religion*, ed. Bryan Turner (Oxford: Wiley-Blackwell, 2010), 649–667.

Van der Walt, A.J., 'Property Rights v Religious Rights', *Stellenbosch Law Review* 13.4 (2002): 394–414.

Van Niekerk, Gardiol, 'Death and Sacred Spaces in South Africa and America: A Legal-Anthropological Perspective of Conflicting Values', *Comparative and International Law Journal of Southern Africa* 40.1 (2007): 30–56.

Waldron, Jeremy, 'The Dignity of Groups', in *Dignity, Freedom and the Post-apartheid Legal Order*, eds A. J. Barnard-Naudé et al. (Cape Town: Juta, 2008), 66–90.

Warner, Michael, Craig Calhoun, eds, *Varieties of Secularism in a Secular Age* (Cambridge, MA: Harvard University Press, 2010).

Woolman, Stu, *The Selfless Constitution* (Cape Town: Juta & Co, 2013).