

# THE RIGHT TO RITUAL SLAUGHTER IN AFRICA: A COMPARATIVE CONSTITUTIONAL ANALYSIS

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## ABSTRACT

Using examples of ritual slaughter recognized by different religions in Africa, this paper examines the regulated and unregulated exercise of the right to ritual slaughter as a manifestation of the right to freedom of religion in three constitutional traditions in Africa.

This article commences with an evaluation of the existence of the right to ritual slaughter either as a freestanding right or a derivative right from the right to freedom of religion in the bills of rights of African constitutions. The article argues that the ritual slaughter at this stage of constitutional development in Africa is at best a derivative right partly anchored on the communal dimensions of the right to freedom of religion. The article closely examines the bearers and content of the right to ritual slaughter through a brief overview of the practices of ritual slaughter recognized by African traditional religion and Islam. In addition, the syncretic nature of religious practice in Africa identified as the multiple or concurrent witness to different faiths is also considered to provide a realistic account of ritual slaughter in Africa.

Since the right to ritual slaughter is identified as a derivative right from the right to freedom of religion, the article examines different constitutional traditions in Africa to determine how religion is conceived in constitutional governance that in turn affects the feasibility of the right to ritual slaughter within constitutional designs and capacity of other public interests such as animal welfare to limit the exercise of the right to ritual slaughter.

Three constitutional designs of the role of religion in constitutional governance are identified in this regard. The article concludes on a number of points, including the recognition of the importance of the articulation of the human rights that underpin animal welfare concerns and the fact that a regulated right to ritual slaughter appears feasible in a number of African countries.

**KEYWORDS:** ritual slaughter, Africa, right to freedom of religion, animal, constitutional law

## INTRODUCTION

This article critically evaluates how the right to ritual slaughter is protected as a manifestation<sup>1</sup> of the right to the freedom of religion under three different constitutional designs in Africa. Two

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1 While there appears to be no case in which religious slaughter has been directly recognized as a manifestation of the freedom of religion in Africa, there are many decisions across the world that have recognized ritual slaughter as a manifestation of the right to freedom of religion. See, for example, the Grand Chamber of the European Court of

important points need further clarification. The first is that ritual slaughter is the slaughtering of animals in a religiously permissible context, even if the consumption of the animal is also an intended objective. It is the religious context of the slaughter that distinguishes ritual slaughter from private slaughter, which occurs without religious significance and principally for food. Secondly, yet another form of slaughter can be described as *cultural* slaughter, in which practices and processes for killing animals are recognized and adhered to, including the person, place, and time for slaughter.<sup>2</sup> The difference between cultural and ritual slaughter is not always an easy one to make in many African countries and is often contested. This may be because the terms *culture* and *religion* are used interchangeably in Africa, with the latter often regarded as part of the former, especially with regard to traditional African religion. At the root of this characterization is the reluctant recognition of traditional African religion as a religion. Accordingly, traditional African religious practices are characterized as incidents of culture rather than religious practices, thereby recognizing religion and culture as equal social fields.

It would appear that religion is constitutive of culture in some instances, just as culture can also be constitutive of religion. Langa CJ in *MEC for Education: Kwazulu-Natal v. Pillay* recognized this point when he stated, “the borders between culture and religion are malleable and . . . religious belief informs cultural practice and cultural practice attains religious significance.”<sup>3</sup> Thus, as stated above, whether a slaughter is ritual or cultural can be a matter of contestation. For example, Jewel Amoah and Tom Bennett point to the widespread characterization of the slaughter of a bull as an incident of culture rather than “an event that has religious significance.”<sup>4</sup> They point to this unsatisfactory state of affairs and argue for the need to distinguish between the right to religion and the right to culture, because the two rights are protected differently in the South African Constitution<sup>5</sup> and because “those working under the influence of modern human rights take religion more seriously than culture”<sup>6</sup> Be that as it may, this article conceives religion to be different from culture and evaluates ritual slaughter mainly as a religious event while acknowledging the possibility of the influence of cultural practices.

Since animals are at the core of ritual slaughter, in this article I consider animal rights and welfare as plausible factors in determining the nature and extent of ritual slaughter. A crucial factor in this exercise is the statutory regime of the protection of animals, slaughter regulation, and exemptions for ritual slaughter that were well in place before the salience of human rights and constitutionalism in African states. It is therefore important to examine how this statutory regime aligns with the recognition of the freedom of religion. The broader context of this inquiry is the extent to which a state should defer to religious norms in statecraft.

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Human Rights in *Jewish Liturgical Association of Cha'are Shalom Ve Tsedek v. France* (App. No 27417/95), and the German Federal Constitutional Court in *BVerfGE*, I BvR 1783/99, Jan. 15, 2002.

2. Examples include practices that have developed to address environmental concerns, such as the use of slaughterhouses and the protection of commons, such as rivers, streams, and other sources of water. Culinary practices specifying appropriate animals for recipes and the anatomical dissection of animals would also qualify as cultural slaughter. Also part of cultural slaughter are gendered assumptions about the killing of animals. In this regard, see, for example, Jovian Parry, “Gender and Slaughter in Popular Gastronomy,” *Feminism and Popular Psychology* 20, no. 3 (2010): 381–96.
3. 2008 (1) SA 474 (CC) (South Africa) (hereafter *Pillay*).
4. Jewel Amoah and Tom Bennett, “The Freedoms of Religion and Culture under the South African Constitution: Do Traditional African Religions Enjoy Equal Treatment?” *African Human Rights Law Journal* 8, no. 2 (2008): 357–76, at 358.
5. O’Regan in *Pillay* states that “it does seem to me that our Constitution recognises that culture is not the same as religion, and should not always be treated as if it is.” *Pillay*, 2008 (1) SA 474 (CC), para. 143.
6. Amoah and Bennett, 358.

In the next section, I sketch an overview of the right to slaughter as a manifestation of the right to freedom of religion. Then, I turn to a consideration of how three constitutional traditions in the protection of the right to freedom of religion in Africa would affect the right to ritual slaughter. In this central part of the article, I also examine the protection of the right to freedom of religion within the reality of Africa's religious demography and whether animal rights and welfare can limit or affect the right to ritual slaughter. In the last part of the article I provide concluding remarks.

### THE RIGHT TO RITUAL SLAUGHTER IN AFRICA

Ritual slaughter is a sacerdotal practice, which is recognized by different religions. For the faithful, fidelity to such ritual is crucial as an affirmation of their identity and a renewal of their faith in a religious community. Ritual slaughter constitutes a discharge of a religious duty and brings meaning and structure to the life of the faithful. Ritual slaughter involves a number of activities, among them the manner in which the animals are transported and held before the slaughter; the process of slaughter; and post-slaughter activities, including the disposal of the carcass and the certification of the slaughter by religious authorities or their intermediaries, especially where slaughter is principally for food. While a reference to *ritual slaughter* could entail all these activities, this article focuses on the process of killing the animal.

Three issues are crucial for ritual slaughter in Africa. First, ritual slaughter is recognized as a manifestation of the right to freedom of religion as a human right within the bills of rights of African constitutions. Accordingly, the constitutional text and attendant jurisprudence protecting the right to freedom of religion is crucial to the right to ritual slaughter. The ritual slaughter seeks to ensure that citizens of African states are able to worship as they see fit, within legitimate government objectives and boundaries. What these objectives and boundaries amount to is partly the focus of this paper. Secondly, ritual slaughter is significantly affected by Africa's religious demography because of syncretic practices that amplify the size of African Traditional Religions relative to Christianity and Islam, which are Africa's main religions, in a way that suggests for African Traditional Religions ritual slaughter is dominant in Africa. Finally, the awareness of animal welfare and rights in African states is important in constructing these issues as legitimate public policy objectives.

Of these three major religions in Africa—Christianity, Islam, and African Traditional Religions—it would appear that Christianity and Islam are Africa's major religions and would ordinarily have more ritual slaughter than the faithful of African Traditional Religions. Africa's religious demography reveals that there are more African Traditional Religions faithful because Christians and Muslims are syncretic and engage in many rituals of African Traditional Religions, including ritual slaughter. The Pew Forum on Religion and Public Life has drawn attention to the fact that “sub-Saharan Africa is clearly among the most religious places in the world”<sup>7</sup> and also to the fact that “many of those who indicate that they are deeply committed to the practice of Christianity or Islam also incorporate elements of African Traditional Religions into their daily lives. For example in four countries (Tanzania, Mali, Senegal, and South Africa) more than half the people surveyed believe that sacrifices to ancestors or spirits can protect them from harm”<sup>8</sup>

7 See Pew Forum on Religion and Public Life, *Tolerance and Tension: Islam and Christianity in Sub-Saharan Africa*, Pew Research Center, April 2010, 4 (Access full report at <http://assets.pewresearch.org/wp-content/uploads/sites/11/2010/04/sub-saharan-africa-full-report.pdf>).

8 Ibid.

It is important therefore to explore ritual slaughter in the practices of African Traditional Religions so as to provide much needed context for our discussions. African Traditional Religions includes a number of religious forms that include belief in a God,<sup>9</sup> belief in a number of gods,<sup>10</sup> belief in a number of lesser spirits, and veneration of ancestors.<sup>11</sup> A crucial form of worship in African Traditional Religions involves animal sacrifices, especially on serious occasions, including rites of passage such as the birth of a child and death of an individual. Other occasions include social rites such as marriage, circumcision at puberty for boys and girls,<sup>12</sup> and initiation and fattening rites for boys and girls, respectively. Ancestors are also consulted by the living relatives for protection from harm and for prosperity through animal sacrifices<sup>13</sup> offered by individuals<sup>14</sup> in their private homes in urban and rural areas. Ancestor worship is most prevalent and is a reflection of the belief that death is a continuum of life and that ancestors remain active in the lives of living relatives.<sup>15</sup> Animal sacrifice is also crucial for community protection and prosperity through annual rituals. Well-known examples include the first fruits festival of certain ethnic groups in Southern Africa, where the king or ruler is the first person to taste a new season's harvest. For example, the Southern African groups, such as the Nguni peoples of Southern Africa,<sup>16</sup> including the Bhaca, the Ndebele, Swazi, and Zulu observe this practice of the First Fruits Festival. Among the practices of these groups, the Zulu Kingdom's First Fruits Festival, during which young men are invited to kill a bull with their hands as a form of renewal appeasement and thanksgiving,<sup>17</sup> has generated considerable controversy, including litigation alleging animal cruelty.<sup>18</sup> The Lovedu Rain Queen among the Sotho ethnic group in Southern Africa also sacrifices a black bull to

9 See Edmund Ilogu "Iro Mmuo and Ikpu Ala," in *Traditional Religion in West Africa*, ed. E. A. Ade Adegbola (Ibadan: Sefer Books, 1998), 138–40, at 139 ("Occasional public worship includes sacrifice and atonement. After epidemics of any kind the diviners are consulted to know what had 'spoiled the land.' If no particular individual is accused as being responsible all the village then becomes guilty. Sacrificial animal, sheep and sometimes a ram or male goat is bought with money collected from adult men").

10 See generally Pamela A. R. Blakely and Thomas D. Blakely, "Ancestors, 'Witchcraft,' and Foregrounding the Poetic: Men's Oratory and Women's Song-Dance in Hembá Funerary Performance," in *Religion in Africa: Experience and Expression*, ed. Thomas D. Blakely, Wouter E. A. van Beek, and Dennis L. Thomson (Portsmouth: Heinemann, 1994), 398–442.

11 See generally Choon Sup Bae and P. Van der Merwe, "Ancestor Worship—Is It Biblical?," *Teologiese Studies/Theological Studies* 64, no. 3 (2008): 1299–1325; John S. Mbiti *African Religions and Philosophy* (London: Heinemann, 1969), 178.

12 Female genital mutilation is widely condemned in many African countries that have enacted legislation banning such practice. See, for example, the Sexual Offences Special Provisions Act (Act No. 4/1998) (Tanzania).

13 Nokuzola Mdende, "Spiritual Reality in South Africa," in *Secular Spirituality as a Contextual Critique of Religion*, ed. Cornel Du Toit and Cedric P. Mayson (Pretoria: University of South Africa, 2006), 153–73, at 153.

14 David Chidester would seem to recognize ancestral rituals in organized forms where diviners or traditional healers would participate. See *Religions of South Africa* (London: Routledge, 1992), 9.

15 See J. A. Adedeji, "The Egúngún in the Religious Concept of the Yoruba," in Adegbola, *Traditional Religion in West Africa*, 117–27, at 117 ("The worship of the ancestor is based on a firm belief that the 'spirit' of a human being never dies: It will continue to influence the life of a community from another sphere after it has left the physical body, if at his death the necessary obsequial rites are undertaken").

16 See Keith Snedegar, "First Fruits Celebrations among the Nguni Peoples of Southern Africa: An Ethnoastronomical Interpretation," *Journal for the History of Astronomy, Archaeoastronomy Supplement* 23, no. 29 (1998): S31–38.

17 See Christa Rautenbach, "Umkhosi Ukweshama: Revival of 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: University of Cape Town, 2011), 63–89.

18 See Stephanus Smit NO and Others v. King Goodwill Zwelithini Kabhekuzulu and Others [2009] ZAKZPHC 75 (South Africa) (hereafter *Smit NO*).

facilitate rain and combat drought.<sup>19</sup> Animal sacrifice has become a stand in for human sacrifice among many ethnic groups that have reacted to state revulsion prosecution and punishment for ritual murder. For example, the Edi Festival in Ile-Ife Nigeria, a celebration of the sacrifice of the son of Moremi, a Yoruba heroine in present-day Nigeria, as a thanksgiving for the assistance of the gods in the defeat of an invading army, ends with the sacrifice of a goat to carry away the ills of the city.<sup>20</sup> For a long time, the sacrificial object was a human being.

Even though no objective of ritual slaughter is more important than the other, however, there may be a need to distinguish and interrogate the different objectives of ritual slaughter as a plausible factor in determining a reconciliation of the ritual slaughter and other public policy objectives, such as animal rights and welfare. For example, can it be argued that private ritual slaughter in African Traditional Religions toward sacrificial ends would be more difficult to regulate in Africa? Can it also be argued that communal ritual slaughter in African Traditional Religions would be far more difficult to limit or stop unless the community is convinced that their security and well-being would not be compromised?

Ritual slaughter, as I argue above, is intimately bound with the identity of the faithful and therefore a potential source of conflict in many multiethnic and religious states. While it is a matter of common knowledge that Judaism and Islam recognize ritual slaughter for food purposes, Africa's religious demography suggests that Muslim ritual slaughter is far more commonly practiced than is Jewish ritual slaughter. Accordingly, where Muslims constitute significant parts of many African states, ritual slaughter constitutes and identifies Muslims. Limitations and infractions of ritual slaughter become signposts of sectarian conflict and violence perhaps much more than in states with a dominant Islamic population.

In addition to the religious foundations of ritual slaughter, the state of the animal at the time of slaughter defines ritual slaughter and some of the proposed limitations. Since one of the common facts in ritual slaughter in Africa is that the animal is conscious when killed, advocacy to change the state of the animal at the time of slaughter challenges the religious foundations of ritual slaughter. The statutory regime of animals in African states is overwhelmingly paternalistic, since animals are regarded as objects of the law whose welfare is to be promoted through criminalizing different forms of cruelty. Slaughter regulation and ritual slaughter exemptions reflect public policy choices that ritual slaughter should be exempt from regulatory oversight to ensure animal welfare. Any norm that changes the state of an animal at the time of slaughter challenges the religious foundations of ritual slaughter and brings to the fore the willingness or reluctance of the state to intervene in the sovereignty of religions. Such challenges also express the point that the right to freedom of religion is not absolute. The balance that a state is willing to strike in recognizing certain limitations is not an easy one to articulate. States all over the world have struck this balance in many forms. It can be argued that such a balance already exists in many African states in the form of the statutory protection of animals and slaughter regulation well before African constitutions recognized the right to freedom of religion and ritual slaughter. Part of the challenge African states face is whether to interrogate the statutory balance or to regard such balance as constitutionally compliant.

All modern liberal states either protect religious and nonreligious beliefs in the same provision or in the bill of rights suggesting that none—at least conceptually—is more important than the other.

19 See, for example, Alistair Boddy-Evans, "The Lovedu Rain Queen," *Rain Queens of Africa*, March 9, 2011, <http://www.rainqueensof africa.com/2011/03/the-lovedu-rain-queen>.

20 See Oyeronke Olajubu, *Women in the Yoruba Religious Sphere* (Albany: State University of New York Press, 2003), 29; Zulu Sofola, "Edi: The Carrier as a Saviour among the Ife," in Adegbola, *Traditional Religion in West Africa*, 141–46.

This fact is buttressed by the prohibition of discrimination on the grounds of opinion. No state, it can be argued, should trivialize nonreligious beliefs such as those put forward by animal welfare and rights advocates because they deserve worthy consideration especially if the state treats all beliefs equally. When such beliefs call on the state to recognize animals as subjects of the law, the arguments that are put forward are compelling and cogent. It is not surprising that animal welfare and rights advocates turn to the protection of their beliefs as a worthy objective of constitutionalism. After all, if constitutionalism is understood as a curb on the awesome power of the state, animal welfare goals may actually be a misuse of state power and therefore unconstitutional. The reality, however, is that religious beliefs seem to trump nonreligious beliefs on a continent where religion is significantly constitutive of society.

### THE PROTECTION OF THE RIGHT TO FREEDOM OF RELIGION IN AFRICAN STATES

To examine the constitutional basis of the right to ritual slaughter, it is helpful to have a comparative overview of constitutional designs that protect the right to freedom of religion. Generally, African states protect the manifestations of beliefs, thought, conscience, and religion through two related mechanisms. The first is a human right that recognizes the freedom of individuals to hold any belief and profess any religion, as well as manifest that belief and religion. The second mechanism is the prohibition of discrimination on the grounds of religion, which operates to ensure that all beliefs and religions are equal in the eyes of the law. If discrimination were allowed on the basis of religion, the freedom of religion could be meaningless, as particular religions—especially those considered to be minority religions and beliefs—would be discriminated against. In addition, to ensure that dominant religions that are most likely to be closely related to the power structure do not employ this relationship against other religions, many African states adopt a third mechanism: separation of religion and the state by declaring that the state is secular. Fourthly, the bills of rights in African constitutions recognize a limitation of rights that ensure that appropriate public policy objectives are protected. Below, I explore these four objectives through a comparative consideration of three constitutional designs in Africa that protect the right to religion.

#### *States with Religion as Statecraft*

The first constitutional design is found in African states who recognize a particular religion as crucial in governance (a form of religious establishment), even as they declare a multi-religious ethic and protect the right to the freedom of religion. These states actively use religious norms and some institutions in public life. I offer three examples—Sudan, Egypt, and Benin—to illustrate this first type of constitutional design.

#### Sudan

The first example is the Republic of Sudan, whose 2005 Interim National Constitution provides in Article 5(1) that national legislation shall be based on Islamic Sharia. Article 6 specifically provides for religious rights that include the right to “worship or assemble in connection with any religion or belief and to establish and maintain places for these purposes.”<sup>21</sup> It is instructive that Articles 5 and

21 INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF SUDAN (2005), art. 6.

6 are found in Part 1 of the 2005 Constitution, which sets out guiding principles of the State of Sudan. Accordingly, the freedom of creed and worship found in Section 38<sup>22</sup> make sense only within the context of Islam, which is clearly the state religion. The right to ritual slaughter would be of significance in Sudan, with its population 97 percent Muslim,<sup>23</sup> some of whom also confess and practice a number of African Traditional Religions. In such a deeply religious state, issues of animal welfare would probably be of less significance except that these concerns are pursued within the Islamic traditions. Since Article 48 of the Constitution does not permit a derogation from the bill of rights, it would appear that ritual slaughter as a religious practice is firmly entrenched in Sudan, and its further elaboration, restriction, and the promotion of animal welfare issues would proceed within the recognition of Islam as a state religion. In this regard, Article 11 (2) of Chapter 2, of the Constitution would be significant because it provides that “the state shall not pursue any policy, or take any action, which may adversely affect the existence of any species of animal or vegetative life, their natural or adopted habitat.”<sup>24</sup>

## Egypt

Another example of the first design, illustrating the importance of animal welfare issues within the constitutional design of African States of an Islamic tradition, is found in Article 45 of the 2014 Egyptian Constitution, which commits the Egyptian state to the prevention of cruelty to animals. Arguably this constitutional provision would influence national legislation, which at present does not include slaughter regulation. Such a national legislation would face considerable challenge in a country that recently laid misdemeanor charges of disdaining the Islamic religion against a critic of the Muslim Eid Al-Adha tradition of slaughtering sheep.<sup>25</sup> Even at that, numerous calls for improved animal welfare conditions in the slaughter of animals may be well received, as Islam has rules for humane slaughter.<sup>26</sup> Given Egyptian constitutional jurisprudence, it is entirely plausible that animal welfare legislation would be introduced in the near future.<sup>27</sup> Until that is achieved, demands for animal welfare without Islamic justification would be considered a minority claim

22 Section 38 of the Interim National Constitution of the Republic of Sudan, 2005 provides that “Every person shall have the right to the freedom of religious creed and worship, and to declare his/her religion or creed and manifest the same, by way of worship, education, practice or performance of rites or ceremonies, subject to requirements of law and public order; no person shall be coerced to adopt such faith, that he/she does not believe in, nor to practice rites or services to which he/she does not voluntarily consent.” INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF SUDAN (2005), § 38.

23 See “Sudan 2014 International Religious Freedom Report,” Bureau of Democracy, Human Rights, and Labor, United States Department of State, 2014, 2, <http://www.state.gov/documents/organization/238478.pdf>.

24 INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF SUDAN (2005), art. 11.

25 See “Egypt to Put Critic of Muslim Ritual of Slaughtering Sheep on Trial,” *Abram Online*, December 27, 2014, <http://english.ahram.org/NewsContent/1/64/118911/Egypt/Politics-/Egypt-to-put-critic-of-Muslim-ritual-of-slaughter.aspx>.

26 See, for example, World Organisation for Animal Health, “Compatibility between the OIE Standards and the Requirements of Islamic Law with Special Reference to the Prevention of Cruelty to Animals during Transport and Slaughter,” 2011, [http://www.oie.int/fileadmin/Home/eng/Animal\\_Welfare/docs/pdf/Others/Religious\\_Slaughter/A\\_Religious\\_slaughter.pdf](http://www.oie.int/fileadmin/Home/eng/Animal_Welfare/docs/pdf/Others/Religious_Slaughter/A_Religious_slaughter.pdf); Hassan Aidaros, “Proper Application of Halal Slaughter,” OIE [World Organisation for Animal Health], 2013, <http://www.oie.int/doc/ged/D13883.pdf>.

27 Guidance for such legislation would include a fatwa issued by Dr. Muhammad Sayyid Tantawy, the shaiikh of Azhar, one of Islam’s most revered institutions, in response to an inquiry from Ahmed El Sherbiny, chairperson of the Egyptian Society of Animal Friends, as to the position of animals in Islam. Society for the Protection of Animal Rights in Egypt, “The Fatwa for Animals,” August 15, 2008, [http://www.sparelives.org/index.pl/the\\_fatwa\\_for\\_animals](http://www.sparelives.org/index.pl/the_fatwa_for_animals).



given the fact that over 90 percent of Egyptians are Sunni Muslims and Article 2 of the 2014 Constitution declares Islam as the state religion and the principles of Islamic Sharia as the principal source of legislation. With respect to the right to ritual slaughter, Article 3 of the Constitution recognizes “the principles of the laws of Egyptian Christians and Jews as the main source of laws regulating their personal status, religious affairs and selection of spiritual leaders.”<sup>28</sup> When these provisions are read with Article 64, which recognizes that freedom of belief is absolute and that the freedom of practicing religious rituals and establishing places for worship of revealed religions is a right, clearly there is no contemplation of the rituals of African Traditional Religions. Article 92 of the Egyptian Constitution is the limitations clause, declaring that no right may be suspended or reduced and that any law that regulates the exercise of rights and freedoms may restrict them so that their essence and foundation are not infringed. Read together the 2014 Egyptian Constitution entrenches the right to ritual slaughter. Outside the framework of Islam as a state religion and the limited recognition given to Judaism and Christianity as revealed religions, it is difficult to imagine how animal welfare concerns can be accommodated.

### Benin

The Republic of Benin provides another example of African states that confess a religion as part of its statecraft. It is of interest that the Republic of Benin, a country with significant Muslim and Christian communities, in January 1996 set aside January 10 as a public holiday to celebrate the National Vodou Day, placing Vodou on the same pedestal as Christianity and Islam.<sup>29</sup> With a population of 10 million people, Benin’s religious demography is such that over half of its citizens are Christians, while Muslims make up a quarter of that population. Even though Vodou practitioners are said to constitute about 17 percent of the population, it is to be noted that many individuals who profess to be Christians and Muslims also practice Vodou. The 1990 Republic of Benin Constitution protects the right to freedom of religion in Article 23. This protection is anchored on the secularity of the state and an autonomy for religious societies. In addition, Article 26 prohibits discrimination on a number of grounds, including religion. There is no express provision for the limitation of rights even though it is likely that the Constitutional Court will engage in such exercise as it balances the rights recognized by the Benin Constitution. Within this constitutional framework, it would also appear that the right to ritual slaughter in African Traditional Religions is significant because of the recognition of Vodou. While it may be argued that Vodou is not a state religion, it is widely practiced without state restriction. The absence of animal welfare legislation in Benin would seem to further support the assertion of the entrenchment of ritual slaughter in African Traditional Religions. The same arguments apply to Muslim ritual slaughter.

These examples illustrate the religious demography of the African states that recognize a state religion, and they suggest why ritual slaughter is well entrenched, for in reality, such states do not have to restrict or curb ritual slaughter. Limitations of ritual slaughter have better prospects if they arise from or are recognized by religions. Even though animal welfare legislations would constitute an indication of a public consensus on permissible restriction of slaughter, it is clear that animal rights and welfare concerns would be minority views and barely tolerated. Even though

<sup>28</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT (2014), art. 3.

<sup>29</sup> See generally Jean-Baptiste Sourou, “10 January: Political Calculation or Response to a Socio-Anthropological Requirement in Benin,” in *Religious Pluralism, Heritage and Social Development*, ed. M. Christian Green et al. (Stellenbosch: Sun Media, 2017): 91–97.



there are prohibitions on grounds of religion, such minority concerns would face considerable opposition.

### *De Jure Secular de Facto Religious States*

In this section, I address the second constitutional design for the protection of the freedom of religion in Africa by examining African states that declare their secularity under law but are really de facto religious states. A number of African states, such as Nigeria<sup>30</sup> and the Democratic Republic of Congo,<sup>31</sup> expressly state in their constitutions that they are secular states. This category also includes Liberia, which in Article 14 of the 1984 Constitution declares that “consistent with the principle of separation of religion and state, the Republic shall establish no state religion.”<sup>32</sup> Article 7 of the 1995 Uganda Constitution declares that “Uganda shall not adopt a state religion.”<sup>33</sup> An interesting example is Mali, which even though a predominantly Muslim country, declares itself to be a secular state. Article 25 of the 1992 Malian Constitution provides that the state is an independent sovereign indivisible democratic secular social republic. Tanzania declares in the preamble to its 1977 Constitution that one of its foundations is secularism. Section 8 of the 2010 Kenyan Constitution states that there shall be no state religion in Kenya. Below I use Nigeria and Tanzania to explore how the right to slaughter is protected in a secular but de facto religious state that recognizes broad objectives in the limitation of the right to religion.

First however, I must dwell a bit more on the meaning of the word *secular*, as it largely defines the manner in which the right to freedom of religion is protected in the states under consideration. One meaning is that the state is to be impartial to all religions that can thrive on an equal playing field. Along this line, secularity is said to ensure that the state is impartial to all religions at an institutional level. Even when a state has declared that it has no state religion, treating all religions equally ensures that *all religions are able to influence the public policy of the state*. Nonreligious values may also be recognized as part of statecraft on equal terms with religious values. In this way, a secular state will not favor one religion over the other. Another meaning of the term *secular* refers to the removal of all traces of religion from public life or completely privatizing religion as the best tool for ensuring that there is a level playing field, since no state religion will occupy the religious space and therefore affect the manifestation of other religions. This is of course a difficult proposition, because in reality it is near impossible and undesirable to ensure that religion is absent from public life. If religion is a form of constructing identity and constituting the public good, then it is difficult and perhaps undesirable to demand that religion should not be part of the public good.<sup>34</sup> Accordingly, I employ the former meaning of the word *secular*, which recognizes religious and nonreligious values and beliefs on equal terms as a means of ordering things.<sup>35</sup> As a matter of fact, many secular African states are either de facto Islamic or Christian states or both and are not impartial. Even though the reality of state religion should obligate such states to ensure that they

30 Section 10 of the Constitution of the Federal Republic of Nigeria declares that the government of the federation or of a state shall not adopt any religion as state religion. CONSTITUTION OF NIGERIA (1999), § 10.

31 CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO (2005), ch. 2, art. 22.

32 CONSTITUTION OF THE REPUBLIC OF LIBERIA (1984), art. 14.

33 CONSTITUTION OF THE REPUBLIC OF UGANDA (1995), sec. 7.

34 See Rudd Peters, *Islamic Criminal Law in Nigeria* (Ibadan: Spectrum Books, 2003), 33 (“[I]t is generally understood to mean that neither the legislative power nor the executive may in any way be used to aid, advance, foster promote or sponsor a religion”).

35 See Iain T. Benson, “Notes towards a (Re)Definition of the ‘Secular,’” *University of British Columbia Law Review* 33, no. 3 (2000): 519–49.

actively accommodate and promote minority and non-religious values, this does not appear to be the case. Without such commitment, these states strengthen the dominance of the state religion. This is more so for nonreligious values such as animal welfare and rights.

Secular African states *should* offer the conceptual possibility that animal welfare concerns would be seriously considered since they commit to treating rational values as organizing principles of the state. There is little evidence that animal rights and welfare in Nigeria and Tanzania are recognized as worthy constitutional interests. The right to ritual slaughter as a manifestation of the dominant religions in these two countries is well entrenched because both countries are de facto Islamic and Christian states with the faithful engaged in rituals of African Traditional Religions and therefore also qualify as members of states whose constitutional designs adopt a religion as an organizing ethic.

It is plausible to imagine that the limitations clause of the Tanzanian and Nigerian constitutions would recognize nonreligious values as public policy objectives and thus potentially limit or constrain the right to ritual slaughter. This potential could be affected by the broad limitations clause of the Tanzanian and Nigerian constitution. Article 30 of the Tanzania Constitution recognizes limitations to human rights—particularly, that the exercise of a human right must not curtail or interfere with the rights and freedoms of other persons, nor yield to “public safety, public peace, public morality, public health, rural and urban development, planning, the exploitation and utilization of minerals, or the increase and development of property or of any other interests for the purposes of enhancing the public benefit.”<sup>36</sup> In a similar vein, Section 45 of the Nigerian Constitution allows a limitation of the right to freedom of thought, conscience, and religion on the grounds of public safety, public morality, public order, and defense. Broad limitations to constitutional rights on the basis of public order, public health, and public morality present significant possibilities for and against animal protection. How these limitations are understood is important for the ensuing discussion. The jurisprudence on the nature of limitations in Section 45 of the Nigerian constitution has been recognized in academic literature as very broad,<sup>37</sup> vague, and flexible,<sup>38</sup> as are the general condition in the limitation clause that laws that seek to limit a human right should be “justifiable in a democratic society.” A number of cases, including *DPP v. Obi*,<sup>39</sup> *Chukwuma and Others v. Commissioner of Police*,<sup>40</sup> and *Inspector General of Police v. All Nigeria Peoples Party and Others*,<sup>41</sup> suggest that Nigerian courts have not developed a jurisprudence to guide the determination of when the grounds for the limitation of rights are justified. With respect to the right to ritual slaughter within the rubric of the right to religion, it is important to remember that in *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo*,<sup>42</sup> the Nigerian Supreme Court upheld the right of a Jehovah’s Witness to object to a blood transfusion and held that a medical doctor had no right to overrule the patient’s refusal of a blood transfusion on public interest. The Court pointed out that

36 THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA (1977) (as amended), art. 30(1)(b).

37 See Basil Ugochukwu, “Balancing, Proportionality, and Human Rights Adjudication in Comparative Context: Lessons for Nigeria,” *Transnational Human Rights Review*, no. 1 (2014): 1–58.

38 See R. Chude Okonkwo, “The Legal Basis of Freedom of Expression in Nigeria,” *California Western International Law Journal* 8, no. 2 (1979): 256–73.

39 [1961] 1 All NLR (Pt. 2), 186 (Nigeria).

40 [2005] 8 NWLR (Pt. 927), 278 (Nigeria).

41 [2007] 18 NWLR (Pt. 1066), 457 (Nigeria).

42 [2001] FWLR (Pt. 44), 542. See also *Osawe v. Registrar of Trade Unions* [1985] 1 NWLR 755 (Nigeria).

[t]he right to freedom of thought, conscience or religion implies a right not to be prevented without lawful justification from choosing the course of one’s life, fashioned on what one believes, and the right not to be coerced into acting contrary to one’s belief. The limits of these freedoms, as in all cases, are where they impinge on the rights of others or where they put the welfare of society or public health in jeopardy . . . . Law’s role is to ensure the fullness of liberty when there is no danger to public interest. Ensuring liberty of conscience and freedom of religion is an important component. The courts are the institutions society has agreed to invest with the responsibility of balancing conflicting interests in a way to ensure the fullness of liberty without destroying the existence and stability of society.<sup>43</sup>

Tanzanian courts have also recognized the principle of proportionality in the limitation of human rights. In the case of *Kukutia Ole Pumpun v. AG and Another*, the Tanzanian Court of Appeal held as follows:

Thus consistent with that approach, the Court in *Pete’s* case [*Director of Public Prosecutions v. Daudi Pete*] laid down that a law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will have special requirements; first, such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principal of proportionality.<sup>44</sup>

These judicial interpretation of limitations clauses suggest that the right to freedom of religion and the right to ritual slaughter are not absolute and can be limited by a number of factors that constitute legitimate policy objectives. Animal welfare would qualify given a tradition of ensuring the humane treatment of animals in the statutory framework for animals in both countries. Of the two countries, Tanzania has a far more elaborate framework for slaughter and animal welfare in its 2008 Animal Welfare Act. Section 29(1) provides that

an animal shall be slaughtered through a method which—

- (a) involves instantaneous killing; or
- (b) instantaneously rendering the animal unconscious and ends in death without the recovery of consciousness.<sup>45</sup>

Pre-slaughter stunning is permitted with respect to solipeds, such as horses and ruminants, such as cattle, sheep, goats, and pigs. Section 30 of the Tanzanian Animal Welfare Act provides a complete exemption for ritual slaughter if

- (a) it is performed by a person in possession of necessary knowledge and skill;
- (b) it is performed exclusively in the presence of a veterinarian in charge of slaughtering and meat inspection;
- (c) it is performed in a way that the large blood vessels in the throat area are opened with one single cut; equipment is available to ensure that the animals intended for such slaughtering can be brought into the position required for slaughtering without any delay . . . ; and

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43 Ibid.  
 44 *Kukutia Ole Pumpun and Another v. Attorney General and Another* [1993] TLR 159 (Court of Appeal) (citing *Director of Public Prosecution v. Daudi Pete* [1993] TLR 22 (Court of Appeal)).  
 45 Animal Welfare Act, Tanzania 2008, sec. 29(1).

(d) it is performed so that other animals waiting for slaughter do not witness the slaughtering process.<sup>46</sup>

It is important to note the geographical peculiarities of the religious exemption to slaughter provisions. Tanzania has a Muslim majority in one of its constituent parts, the island of Zanzibar, and this perhaps explains why the Animal Welfare Act does not extend to that island. Similar animal welfare provisions can be found in Section 495 of the Criminal Code of Nigeria, which prohibits animal cruelty,<sup>47</sup> except for acts done in the course of slaughter for food and that are achieved without unnecessary suffering. It can be argued that ritual slaughter would qualify for exemption from criminal prosecution, as it could also be argued that ritual slaughter qualifies as “necessary suffering.” It should be noted that other forms of ritual slaughter in African Traditional Religions, such as ritual slaughter for sacrificial purposes are not protected within the statutory framework for slaughter. On the other hand, ritual slaughter would find justification under the constitutional protection of the freedom of religion and the prospects of a successful criminal prosecution would be slim. That said, Nigeria’s broad limitation objectives contemplate animal welfare and rights concerns. In Nigeria, a religious demography of significant African Traditional Religions and Muslim ritual slaughter would pose considerable obstacles. The same point applies to Tanzania, where extensive ritual slaughter exemptions suggest a more elaborate recognition of ritual slaughter. Along this line, the more recent animal welfare legislation suggests that the statutory framework was reached taking the right to freedom of religion into consideration.

The legislative exemptions of ritual slaughter suggest salience of the right to ritual slaughter and the manner in which it is intricately woven into the identity of Muslims and Christians in Tanzania and Nigeria. Tanzania provides a compelling example of the manner in which ritual slaughter is crucial to the construction and defense of religious identity. For example on February 11, 2013, Pastor Mathayo Kachili of the Tanzanian Assemblies of God Church was beheaded by irate Muslim youth in the town of Buseresere in the course of clashes between Muslims and Christians. Christians had slaughtered a cow and two goats to be sold in the local market.<sup>48</sup> Following these clashes, the Tanzanian Government affirmed the customs and laws that prohibit Christians from slaughtering animals, a practice reserved for Muslims.<sup>49</sup> Available evidence suggests that, historically, only Muslims were allowed to publicly slaughter animals in Tanzania. The attacks on Christians occur in spite of the fact that in most cases the slaughter of animals is for ritual purposes. While there is no evidence of sectarian violence around ritual slaughter in Nigeria,<sup>50</sup> sectarian

46 Ibid., sec. 30.

47 These include cruelly beating, kicking, overloading, infuriating, or terrifying an animal, as described in 495(1)(a). Section 495(1)(b) creates an offense of failure to act, prohibiting wantonly or unreasonably doing or omitting to do any act that causes unnecessary suffering (or as the owner, permitting an act that causes unnecessary suffering). Also prohibited are the transportation of animals in a manner that causes unnecessary suffering, administration of poison, operations performed without due care, and actions associated with animal fighting.

48 See Moshe Terdiman, “Slaughtering of Animals: A Bone of Contention between Muslims and Christians in Tanzania,” *RIMA Occasional Papers* 1, no. 8 (2013), <https://muslimsinfrica.wordpress.com/2013/03/27/slaughtering-of-animals-a-bone-of-contention-between-muslims-and-christians-in-tanzania-dr-moshe-terdiman/>. Other attacks were reported in June 2015. See “Tanzanian Christians Unlawfully Arrested Attacked and Killed for Their Faith,” *The Barnabas Fund*, August 20, 2015, <http://www.barnabasfund.org/news/tanzanian-christians-unlawfully-arrested-attacked-and-killed-for-their-faith>.

49 See “Can Christians Be Butchers? Tanzania’s Islamist Tensions Continue,” *WorldWatch Monitor*, May 23, 2016, <http://www.worldwatchmonitor.org/2016/05/can-christians-be-butchers-tanzanias-islamist-tensions-continue/>.

50 It would appear that ritual slaughter and associated practices are not seriously contested in Nigeria. For example, there is little or no regulation of Halal certification in Nigeria. See Carrie Amani Annabi and Jinadu Lolade

violence over other matters of religious identity suggest that this is entirely plausible.<sup>51</sup> The Tanzanian experience suggests a crisis could occur in the event of the curtailment or restriction of the right to ritual slaughter.

### *States Where Equality of Religions and Beliefs Is an Objective*

In the third category are those states that do not make the categorical constitutional affirmation of secularism but by practice have not adopted a state religion. These states can also be described as secular states. These states are not de facto religious states because there is a demonstrable ethic toward the equality of religions and beliefs. South Africa presents the best example to explore jurisprudence that illustrates the potentials of the protection of the right to ritual slaughter within a constitutional design that aspires to equality of religions and beliefs. While it is true that all the countries that I use above as examples of constitutional designs for the protection of the right to freedom of religion can legitimately claim religious equality, South Africa remains the best example of a significant commitment to equality of religions and beliefs through respect for and a recognition of diversity of religious beliefs. One way to recognize diversity is to interrogate the burden legislation would place on a religious practice and to protect a religious practice that otherwise would burden the faithful and significantly interfere with their faith. (I return to this point later.) In South Africa, the protection of the freedom of religion is found in Section 15(1) of the Constitution of the Republic of South Africa.<sup>52</sup> There is also the equality clause in Section 9(3), which guarantees equality and prohibits discrimination on different grounds, including religion. In addition, Section 31(1) of the South African Constitution provides that persons belonging to religious communities may not be denied the right to practice their religion. Accordingly, serious attention is devoted to recognizing religious practices such as ritual slaughter. Significant jurisprudence on the protection of the right to freedom of religion suggests that the state bears a duty to take measures to protect religious practices.<sup>53</sup> This is mediated toward respecting and recognizing unique

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Ahmed, "Halal Beef Handling in Nigeria: The Abattoir Workers' Perspective," *Journal of Emerging Economies and Islamic Research* 3, no. 2 (2015), <http://www.jeeir.com/v2/images/Vol3No22015/CarrieAmani.pdf>.

- 51 These would include the desecration of the Qu'ran that often results in vigilante killing. An example is the recent case of Mrs. Bridget Agbahwe, who was killed for blasphemy against Prophet Mohammed on June 2, 2016. See Danielle Ogbeye, "Muslims Allegedly Behead Woman Who 'Blasphemed' against Prophet Mohammed in Kano," *Daily Post*, June 3, 2016, <http://dailypost.ng/2016/06/03/muslims-allegedly-behead-woman-who-blasphemed-against-prophet-mohammed-in-kano/>.
- 52 THE CONSTITUTION OF SOUTH AFRICA, 1996, sec. 15(1). The text reads as follows:
- (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 the other provisions of the Constitution.
- 53 See, generally, Paul Farlam, "Freedom of Religion, Belief, and Opinion," in *Constitutional Law of South Africa*, ed. Stu Woolman and Matthew Bishop, 2nd ed., 5 vols. (Cape Town: Juta, 2002) 3:411–41–55; Lourens du Plessis, "The Constitutional Framework for the Protection of Religious and Related Rights in South Africa," in Bennett, *Traditional African Religions in South African Law*, 90–111; David Bilchitz and Alistair Williams,

features of different religions and by not treating all religions alike. It can be argued along this line that ritual slaughter is unique to a number of religions, and the state bears a responsibility to ensure that this practice is respected recognized and protected. To do otherwise would be to significantly burden the African Traditional Religions, Muslim, and Jewish faithful, for example, by interfering with their religious practices. It can be argued that the statutory exemption for ritual slaughter as described below represents the positive accommodation of such faithful in recognition of their right to freedom of religion. Even if such exemption was in place before the Constitution, such exemption passes constitutional muster because it lifts the substantial burden that would otherwise be placed on religious believers.<sup>54</sup>

The framework for ritual slaughter exemption can be described as follows. Section 2(1) of Animals Protection Act 1962 of South Africa provides for a number of criminal offences arising from the inhumane treatment of animals, without a specific provision for slaughtering. General law-enforcement agencies, for example the police force and specific law enforcement agencies, such as the National Council of Societies for the Prevention of Cruelty to Animals in South Africa,<sup>55</sup> are saddled with the task of promoting humane treatment. Other legislation that has an impact on ritual slaughter include the Meat Safety Act (No. 40 of 2000), which in Section 7(1) stipulates that animals may be slaughtered only in abattoirs. However, Section 7(2) of this law exempts ritual slaughter, as well as personal and other cultural slaughter. There are other exemptions, such as those found in the Animal Slaughter Meat and Animal Products Hygiene Act of 1967. A distinction is drawn in these exemptions for ritual slaughter in abattoirs and outside abattoirs. Regulation 10 of Part VI (as amended) of the Standing Regulations under the Animal Slaughter Meat and Animal Products Hygiene Act stipulates that ritual slaughter of animals as practiced by Jews and Muslims may be undertaken with the permission of the superintendent of the abattoir and the designation of an appropriately qualified person by the religious community; the use of appropriate appliances; and appropriate disposal methods. Outside abattoirs, Government Notice No. 900 of 1978 exempts Muslims who are recognized landowners from the provisions of the Act as long as the ritual slaughter occurs on recognized Muslim holidays, permission of local public health authorities is obtained, and appropriate disposal methods are used. For black people, Government Notice No. 1968 of September 10, 1982, exempts them from the legislation on the condition of prior written permission from local public health authorities and

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“Religion and the Public Sphere: Towards a Model that Positively Recognises Diversity,” *South African Journal of Human Rights* 28, no. 2 (2012): 146–175.

54 See Sachs J in *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757 (CC) para. 37; *Prince v. President Cape Society* 2002 (2) SA 794 (CC).

55 As established by the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 § 3, the council is endowed with the following objectives:

- (a) to determine, control and co-ordinate the policies and standards of societies, in order to promote uniformity;
- (b) to promote co-operation among societies;
- (c) to prevent the ill-treatment of animals by promoting their good treatment by man;
- (d) to promote the interests of societies;
- (e) to take cognizance of the application of laws affecting animals and societies and to make representations in connection therewith to the appropriate authority;
- (f) to do all things reasonably necessary for or incidental to the achievement of [its objectives].

In *National Council of Societies for the Prevention of Cruelty to Animals v. Openshaw* 2008 (5) SA 339 (SCA) para. 40, Cameron JA recognized the council as the guardian and voice of animals.

appropriate disposal and hygienic practices. Conceptually, the extent to which the Animal Protection Act is a credible limitation on the right to ritual slaughter is doubtful, because ritual slaughter could potentially be regarded as “unnecessary suffering,” as the exemptions for ritual slaughter characterize ritual slaughter as “necessary suffering”<sup>56</sup> and reflect a legislative belief that such slaughter as determined by religious traditions is appropriate. It appears that a limitation analysis of the extent that the Animal Protection Act limits the right to ritual slaughter appears unsuitable because of the statutory exemptions that immunize ritual slaughter to questions of unnecessary suffering. As stated above, the statutory exemption serves a constitutional function.

The fact that ritual slaughter is constitutional is supported by a combined reading of *Smit NO*<sup>57</sup> and the 2009 *Guidelines Report on the African Ritual of Animal Slaughter (Ritual Slaughter Report)* issued by the Commission for the Promotion and Protection of the Rights of Cultural Religious and Linguistic Communities.<sup>58</sup> Because *Smit NO* and the *Ritual Slaughter Report* involved African Traditional Religions slaughter, it could be assumed that other ritual slaughter, such as the Jewish and Islamic ritual slaughter, are quite acceptable, especially from the perspective of the humaneness of such slaughter. Be that as it may, the *Ritual Slaughter Report* is important because it speaks to all ritual slaughter in South Africa. In *Smit NO*, a South African court denied an application to interdict the slaughtering of a bull or any animal at the Ukweshwama, or First Fruits, festival. The ritual slaughter involved in this festival consisted of the killing of the bull by young Zulu men using their bare hands. The bull’s eyes, genitals, and tongue are ripped out while it is still alive, and sand or mud is thereafter forced down its throat in an apparent attempt to suffocate it while it is trampled, kicked, and beaten to death. The bull dies after being subjected to such treatment for approximately forty minutes. In determining that the balance of convenience lay with the Zulu Kingdom, the court affirmed the salience of the religious nature of the practice and the fact that stopping the festival would significantly affect the Zulu Kingdom. It is interesting that the respondents strenuously argued that the bull is ritually slaughtered in a humane manner, suggesting that the bull is killed in a quick and painless death, “No bloodletting of any kind is

56 See David Bilchitz, “When Is Animal Suffering Necessary?” *Southern Africa Public Law* 27, no. 1 (2012): 3–27. Bilchitz demonstrates how unnecessary suffering is a key principle of the South African Animal Protection Act, and how this can be reinterpreted in an inquiry toward establishing when animal suffering is necessary and animals can lawfully be subjected to suffering. His excellent analysis identifies two broad concepts, the first of which is the objective for which suffering is sought weighed against the harm to the animal; the second is a means-end test that considers different alternatives in realizing the objective of animal suffering and the least harmful manner through which the objective can be achieved. *Ibid.*

57 *Smit NO*, [2009] ZAKZPHC 75

58 Commission for the Promotion and Protection of the Rights of Cultural Religious and Linguistic Communities, *Guidelines Report on the African Ritual of Animal Slaughter* (2009) (hereafter *Ritual Slaughter Report*). The objects of the commission are found in the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002 § 4 (South Africa) as

- (a) to promote respect for and further the protection of the rights of cultural, religious and linguistic communities;
- (b) to promote and develop peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association;
- (c) to foster mutual respect among cultural, religious and linguistic communities;
- (d) to promote the right of communities to develop their historically diminished heritage; and
- (e) to recommend the establishment or recognition of community councils.



allowed nor is dismemberment of any kind whatsoever part of the ritual slaying.”<sup>59</sup> It is also interesting to note the argument by the applicants in *Smit NO* that bull slaughter is part of Zulu culture, while the respondents made their case relying on the religion and culture of the Zulu people. Thus, the applicants appear to have proceeded on the basis that the right to culture is more tenuous than the right to religious freedom. Even though the court did not dwell on this distinction, South African legal scholar Christa Rautenbach is correct to conclude that the First Fruits festival is religious,<sup>60</sup> as well as to note the “revolt brewing in the background which would have erupted had they been prevented from doing so.”<sup>61</sup> One fundamental lesson of *Smit NO* lies in the manner in which the ritual slaughter practiced in African Traditional Religions is emblematic of the identity, dignity, and worth of many African communities and individuals. Suggestions that the ritual slaughter practiced in African Traditional Religions is just a cultural tradition that can be easily tossed aside miss this point. The ritual slaughter practiced in African Traditional Religions demonstrates how religious freedom is significant for the existence of communities and individuals.

The *Ritual Slaughter Report* affirms that ritual slaughter is a key part of African Traditional Religions<sup>62</sup> and supports the contention that the Animal Protection Act, as well as other legislation, limits the right to ritual slaughter in order to promote humane slaughter. According to the conclusion of the report,

[n]one of the country’s legislation discourages people from conducting the ritual slaughter of animals. On the contrary, the legislations cited in this report encourages people to practise their religion and to conduct ritual slaughter. The municipal by-laws remind whoever is going to slaughter, especially in cities, to ensure that they obey the requirements of the by-laws prior to and after slaughtering.

The National Society for the Prevention of Cruelty to Animals has stated categorically that it does not intend preventing people from slaughtering animals . . . the National Society for Prevention of Cruelty to Animals calls upon people to ensure that an animal is slaughtered in a humane way, that is, the animal does not suffer when slaughtered. Practitioners may continue to slaughter animals for ritual purposes in the course of practising their religion, but they are obliged to carry out the ritual within the limits of the Law.<sup>63</sup>

As noted in *Smit NO*, reliance on the Animal Protection Act is not to prohibit ritual slaughter, but to ensure that animals are treated humanely as they are ritually slaughtered. Again, as noted above, the statutory exemptions make such an inquiry unnecessary. However, the public health and regulatory conditions for ritual slaughter suggest that other appropriate restrictions can define ritual slaughter. In this regard, there are a number of municipal bylaws and policies that also regulate ritual slaughter through a number of requirements governing aspects, such as the following: notice to the municipal authority, private slaughter, notice and consent of neighbors, using the meat for religious purposes, hygienic handling, and disposal of the meat and carcass, and a day’s window for the exercise.<sup>64</sup> These municipal bylaws and policies are therefore crucial, as ritual slaughter can occur in private homes in urban and rural areas. I return to this point later.

59 *Smit NO* [2009] ZAKZPHC 75, at 12.

60 Rautenbach, “Umkhosi Ukweshama,” 75.

61 *Ibid.*

62 See *Ritual Slaughter Report*, 6.

63 *Ibid.*, 13.

64 These bylaws include the City of Johannesburg Metropolitan Municipality Public Health By-Law GN 830 of GG 179 (21 May 2004) (South Africa). The policies include the Internal Tshwane Policy on Environmental Health Department 2.5b of 2006.

In South Africa, the right to the freedom of religion is subject to the limitation set out in Section 36 of the Constitution. Limitations to a right are in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.<sup>65</sup>

Whether the right to ritual is also subject to such limitation in view of the statutory exemptions for ritual slaughter is doubtful.

Another possibility of limiting or constraining the right to ritual slaughter occurs when there is a clash with other rights. In these circumstances, a court would be requested to balance the two rights. In this regard, the right to belief contained in Section 15 would be in issue and would cover animal rights. The long-term prospects of animal rights as a counterpoise to ritual slaughter featured prominently in the applicant's claim in *Smit NO* and represent an interesting dimension of the interplay between the freedom of belief and the freedom of religion. It may well be important to ask, given the nature of Section 15 of the South African Constitution, whether the different parts of that section are independent or cumulative. If they are independent values, it would mean that Section 15 of the South African Constitution yields different rights that may need to be reconciled. For example, secular beliefs would challenge religious beliefs and practices.

I submit that Section 15 contains independent values. As Farlam notes, Section 15 "should embrace comprehensive views of the good life that are derived from political, sociological or philosophical ideologies as well as purely personal moral codes."<sup>66</sup> Even though the Court in *Smit NO* did not address the status of animal rights, the applicants in that case contended that they were persons who believed in and championed the cause of animal rights that will ensure that animals are protected and saved from cruelty and suffering at the hands of human beings. It ought to be noted that in the case of *National Council of Societies for the Prevention of Cruelty to Animals v. Openshaw*,<sup>67</sup> Cameron JA, in his dissenting judgment, held that the Animal Protection Act and the Societies for the Prevention of Cruelty to Animals Act do not confer rights on animals, but are animal welfare legislation because the statutes "recognise that animals are sentient beings that are capable of suffering and of experiencing pain. ... The statutes thus acknowledge the need for animals to be protected from human ill-treatment."<sup>68</sup> Continuing, he stated that animals are considered as objects of the law but not subjects of the law.<sup>69</sup> However, the last has not been heard of the animal rights campaign. It is suggested that the South African animal rights campaign

65 CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996, sec. 36(1).

66 Farlam, "Freedom of Religion, Belief, and Opinion," 13.

67 2008 (5) SA 339 (SCA).

68 *Ibid.*, para. 38. See Ed Couzens and Adrian Bellengere, "The Sacrificial Blesbok: Towards Greater Understanding of Animal Welfare Law in South Africa: *Openshaw*; Natal Zoological Gardens (Pty) Ltd and Others v. Ezemvelo KZN Wildlife and Others," *South African Journal of Environmental Law and Policy* 17, no. 2 (2010): 125–37.

69 *Openshaw*, para. 39.

will resort to the freedom of belief in terms of Section 15 to pursue its objectives of limiting or abolishing ritual slaughter and other practices. Some arguments advanced along this line are that in the absence of an express recognition of animals in the South African Constitution, transformative constitutionalism can inspire an interpretation of the constitution to protect animals.<sup>70</sup> This interpretative mission could be furthered on the progressive realization of rights<sup>71</sup> and a limitation analysis of animal legislation.<sup>72</sup> The latter would involve a substantive justification of a limitation on animal rights, which, as I have argued above, would appear difficult because of the ritual slaughter exemptions. The constitutional foundations of religious freedom strengthen the right to ritual slaughter and draw attention to its cultural significance in South Africa,<sup>73</sup> which is likely to bolster the statutory framework of ritual slaughter.

Even if the legislative framework for animal welfare does not appear to have constrained ritual slaughter at present, there is anecdotal evidence of the recognition and introduction of some form of humane treatment in the form of pre-stunning to secure halal certification by Muslims in South Africa,<sup>74</sup> but not in respect of Jewish ritual slaughter. According to Hofmeyr, “[b]oth the Muslim and the Jewish communities in South Africa have made drastic concessions in their slaughtering methods due to negotiations with the SPCA. The practice of stunning the animal before Halal slaughter is one such concession, as is the concession to have an animal stunned 20 seconds after the shochet had slit the throat in the Kosher slaughtering.”<sup>75</sup> While it can be reasonably predicted that the voluntary practices described above could be statutorily recognized, religious certification transforms the voluntary practices into soft law in the sense that sustained practice confers a sense of legitimacy and obligation on participants.

I submit, therefore, that religious freedom in South Africa recognizes and strengthens the right to ritual slaughter. The statutory exemptions for ritual slaughter operate to further religious freedom. It is clear, however, that the widespread practice of ritual slaughter is not absolute in accordance with the coherence and structure of the South African Bill of Rights. While the limitations to ritual slaughter by public health law policy and regulations are not in doubt, it would appear that statutory exemptions for ritual slaughter make a limitations inquiry unnecessary. What appears appropriate to further animal welfare and rights is a recognition of animal rights by South African jurisprudence. Such a recognition would require courts to balance ritual slaughter and animal rights.

70 See David Bilchitz, “Does Transformative Constitutionalism Require the Recognition of Animal Rights?” in *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution*, ed. Stu Woolman and David Bilchitz (Pretoria: Pretoria University Law Press, 2012), 173–208.

71 *Ibid.*, 198.

72 *Ibid.*, 200.

73 Thaddeus Metz argues that South Africa’s apartheid past demands compensatory justice for blacks, which can be fulfilled by ensuring that there are no limitations to ritual slaughter. See Thaddeus Metz, “Animal Rights and the Interpretation of the South African Constitution,” in Woolman and Bilchitz, *Is this Seat Taken?*, 209–19, at 209n62.

74 See, for example, Ahmed Laher, “Question Posed at SANHA,” *Al Islam* (blog), accessed January 20, 2018, <http://www.alislam.co.za/qna/question-posed-at-sanha>; see also Shaheed Tayob, “The South African Halal Industry: A Case of Cultural Intermediaries,” *Annual Review of Islam in Africa*, no. 11 (2012): 49, 49–54.

75 Izak Hofmeyr, “Official Slaughtering Methods in South Africa: Farmlink,” *Stockfarm* 4, no. 6 (2014): 64–65, at 65.

## CONCLUSION

The right to ritual slaughter appears well entrenched in Africa given the syncretic beliefs and practices of Africans. For many Africans and their communities, ritual slaughter is not simply about food but is also deeply constitutive of their worldview, identity, and security. Challenges to ritual slaughter are potentially conflict laden and are often considered as deeply offensive and religiously intolerant. Of all religious traditions, the ritual slaughter practiced in African Traditional Religions has come under considerable attack.<sup>76</sup> For example, as the Court pointed out in *Smit NO*, the application before it was symptomatic of an intolerance of religious and cultural diversity. The Court regarded the application as an attempt to force the particular secular views and opinions of a section of the society. The judgment in *Smit NO*, it can be suggested, sought to affirm the dignity of the Zulu kingdom.<sup>77</sup> The sectarian conflicts over ritual slaughter suggest that a key lesson of the salience of ritual slaughter is recognizing that as a derivative of the right to religion, respect of the practice is a necessary condition for meaningful dialogue toward its limitation and change. Outright condemnation and talking down to practitioners of African Traditional Religions could only raise the stakes.

The right to ritual slaughter is not absolute in any of the constitutional designs in Africa that this article has surveyed. In the main, the legislative cast of ritual slaughter exemptions within animal protection laws seems to reflect a balance articulated by public policy of a legitimate concern for the protection of animals and respect for the freedom of religion. In light of this, it is worthwhile to reflect on whether the dawn of constitutionalism and the protection of rights requires a reconsideration of this balance, seeing it as desirable and fruitful. While it is true that limitations on the right to ritual slaughter vary from one constitutional design to the other, a key point manifest in all of these designs is that limitations on ritual slaughter have not been fully explored in many African countries. An important issue that is crucial in this exploration relates to the features of ritual slaughter from its religious foundations. This point proceeds from an understanding that religious practices are not immutable; they can and do change. Within all religions, there exist enormous contestations and reform trajectories regarding practices such as ritual slaughter. It is therefore important to examine whether ritual slaughter is faithful to religious canons and interpretations.

Perhaps a new hermeneutics of religious text, tradition, and ritual is crucial to this type of understanding. It ought to be remembered for example that in many cases ritual slaughter substituted human sacrifice in many African Traditional Religions.<sup>78</sup> It is difficult to imagine an African Traditional Religion that would in these times insist on human sacrifice as fidelity to any sacred understanding and belief. It is thus plausible and possible, it can be argued, to imagine African Traditional Religions with limited or no animal sacrifice. Thus, it can be argued that over time African Traditional Religions could focus more on the purpose of ritual and not the object of

76 The preponderance of academic opinion in the wake of *Smit NO* reveal interesting insights into the nature of the ritual slaughter practiced in African Traditional Religions. Many commentators would not dignify ritual slaughter as a religious practice. See, generally, Stephen Allister Peté and Angela Diane Crocker, "Ancient Rituals and Their Place in the Modern World: Culture, Masculinity and the Killing of the Bulls—Part One," *Obiter* 33, no. 2 (2012): 278–96; Stephen Allister Peté and Angela Diane Crocker, "Ancient Rituals and Their Place in the Modern World: Culture Masculinity and the Killing of Bulls—Part Two," *Obiter* 33, no. 3 (2012): 580–99.

77 See Thaddeus Metz, "Animal Rights and the Interpretation of the South African Constitution," *South African Public Law* 25, no. 2 (2010): 301–11. Metz argues that apartheid policies of denigrating African religion and tradition require some form of compensatory justice that recognizes practices such as ritual slaughter.

78 See, for example, Olajubu, *Women in the Yoruba Religious Sphere*, 29; Sofola, "Edi: The Carrier as a Saviour among the Ife," 141.

the ritual, thereby allowing the use of fruits, for example, to substitute for animals. Another example is the principle of kindness to animals in Islamic law and what this truly means for ritual slaughter. It is also to be remembered that the Qu'ran contains verses that suggest that animals have a purpose and are part of a spiritual community.<sup>79</sup> Even though the Old Testament of the Bible contains numerous verses of animal sacrifice,<sup>80</sup> it is also true that there are verses about animal welfare.<sup>81</sup> New religious understandings and interpretation recognizing enhanced animal welfare concerns are crucial in African countries of the first design, where religion is actively engaged in statecraft. Without such religious hermeneutics, ritual slaughter is unlikely to yield much to animal welfare concerns.

For African countries of the second and third constitutional designs, religious understandings of the intersection of animal welfare and ritual slaughter are also important in the design of an appropriate framework. Blanket geographical exemption of animal welfare concerns is not recommended. Such exemptions immunize debate of an appropriate balance required by the constitutional recognition of religious freedom and other public policy objectives such as animal welfare. In this regard, it is important to look closely at the wording of limitations on the right to freedom of religion and therefore on the right to ritual slaughter. Such a closer look at the text and jurisprudence of existing animal welfare legislation as the principal limitation across Africa would be crucial in two respects. The first is to determine whether the best possible interpretation of this legislation has been reached with respect to provisions that relate to ritual slaughter. For example, African states could statutorily introduce the requirement of stunning before ritual slaughter. Secondly, even if this is not possible, judicial interpretation of the right to ritual slaughter could recognize animal welfare issues within the two broad limitation and balancing mechanisms in Africa's constitutional traditions explored above. A good example of this type of judicial engagement is the second limitation mechanism found in the South African Constitution, through which there could be a reinterpretation of animal welfare legislation in the light of different objectives of ritual slaughter.

It is also important to think of animal welfare and rights as belief, and that as such it is deserving of protection as religion. The fact that all constitutional texts protect "belief" and "religion" in the same section raises important issues concerning the relative weight of religious and nonreligious "belief." It would appear, at the present time, that "religious belief" far outweighs "nonreligious belief," given the secular basis of the latter. However, even though the secular status of many African states is still unclear, it is plausible to argue that religious and nonreligious beliefs are of equal importance. It is hoped that animal rights and welfare can be rightfully acknowledged as non-religious belief and that doing so will deepen the debate about an appropriate framework of ritual slaughter and animal welfare. For this debate to be meaningful there must be recognition of the deeply held religious beliefs in ritual slaughter. Such recognition in turn would earn the respect and confidence of communities and individuals to engage in meaningful dialogue about animal welfare and ritual slaughter. To trivialize ritual slaughter as a cultural construct and therefore imply

79 See, for example, Qur'an 6:38 (Yusuf Ali, Saudi Rev. 1985) ("There is not an animal that lives on earth, not a being that flies on its wings, but they form communities like you. Nothing have we omitted from the book and they all shall be gathered to their Lord in the end."); Qur'an 55:10 (Yusuf Ali, Saudi Rev. 1985) ("It is He who has spread out the earth for (His) creatures.").

80 See, for example, Leviticus 1:2 (King James Version) ("Speak unto the children of Israel, and say unto them, If any man of you bring an offering unto the LORD, ye shall bring your offering of cattle, even of the herd, and of the flock.").

81 See, for example, Proverbs 12:10 (King James Version) ("A righteous man regardeth the life of his beast: but the tender mercies of the wicked are cruel.").

that it is less worthy of protection, as is suggested by the applicants in *Smit NO*, closes the possibility of dialogue about animal welfare. Indeed, the judge in *Smit NO* hinted at the grave insult felt by the Zulu nation at the attempt to stop a festival of deep religious and cultural significance.<sup>82</sup> How can the Zulu nation be persuaded to introduce animal welfare concerns—assuming this is not present—into its ritual slaughter ceremonies if a modicum of respect is not shown to its beliefs and sensitivities?

It is obvious that the Court in *Smit NO* characterized the bull slaughter as “religious and cultural” in order to strengthen the significance of the ceremony—again implying that cultural constructs are less worthy of protection than religious ones. The suggestion that cultural practices are less worthy of protection than religious practices is a wrong interpretation of the relative weight of the constitutional protection of religion and culture in African states generally and in South Africa in particular. In many respects, culture is as important as religion, and both culture and religion reflect important values and ideas of communities. The communal dimensions of religious freedom find resonance in cultural practices and vice versa, suggesting a complementary interpretation that seeks to discover how both social constructs are a useful means of recognizing and interpreting practices such as ritual slaughter and animal welfare.

Countries such as Tanzania, where ritual slaughter has become emblematic of communal identity politics and violence, suggest that other multiethnic and multireligious countries, such as Nigeria, require deep thought in the articulation of a framework to reconcile ritual slaughter and animal welfare concerns before the former becomes a fault line of sectarian conflict. In countries such as Nigeria, facially it would appear that ritual slaughter presents no problem; however, there are deeper issues about animal slaughter. In such countries, the ineffective implementation of slaughter legislation masks issues of animal welfare and environmental concerns in ritual slaughter. Since private and cultural slaughter could continue outside regulatory frameworks, ritual slaughter would not be an exception to more general laws governing animal slaughter. When slaughter legislation is enforced, constitutional issues of the salience of ritual slaughter would ensue.

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82 The court’s stinging rebuke of the application is evident in this phrase: “I am only too deeply aware of the consequences of vilifying the cultural and religious beliefs of communities and the polarization it causes.” *Smit NO*.