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WORSHIP TO NATIVE AMERICANS" - EXPLORING THE
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ISSN 1727-3781



2015 VOLUME 18 No 1

<http://dx.doi.org/10.4314/pej.v18i1.08>

"JUST PILES OF ROCKS TO DEVELOPERS BUT PLACES OF WORSHIP TO NATIVE AMERICANS"* - EXPLORING THE SIGNIFICANCE OF EARTH JURISPRUDENCE FOR SOUTH AFRICAN CULTURAL COMMUNITIES

MM Ratiba**

1 Introduction

"Our ancestors taught us that if we lose respect for the gods, our clan relationships, and the sacred, we may face starvation, drought, disease, and other catastrophes, just as it happened to the people before us," says Alfred W. Yazzie, a well-known "hataalii", or medicine man. He fears the dominant society's greed is leading to a world out of balance, where everything we can see, smell, touch, and taste is commodified and sold. In his lifetime he has watched the places where he goes to pray, gather medicine plants and make offerings to the deities being devoured by development in the name of "progress".¹

Across the world traditional and cultural communities have over the years witnessed and experienced what in the present writer's opinion can more suitably be referred to as the "worst plague by far" ever to fall upon humankind and to afflict this world. It is perhaps even more destructive and far worse an epidemic than the bubonic plague, which is commonly believed to have been the cause of the Black Death that swept through Europe in the 14th century, killing an estimated 25 million people, which is estimated at being between 30 per cent and 60 per cent of the European population.² This problem, could be exemplified by reference to a variety of acts ranging from the destruction of the Tsimontukwi pilgrimage shrine, named after the Tsimona plant, which has major cultural significance to the Hopi, one of the many Native American peoples,¹ to current threats by Cosigo Resources, a Canadian gold-mining company,

* Borrowed from Taliman 2002 <http://www.sierraclub.org/sierra/200211/sacred.asp>.

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¹ Taliman 2002 <http://www.sierraclub.org/sierra/200211/sacred.asp>.

² Stephanie *et al* 2010 <http://www.plospathogens.org/article/info:doi/10.1371/journal.ppat.1001134>.

against the Yuisi (or La Libertad rapids) situated in the eastern Columbian Amazon district,² or the threat of the construction of a gas pipeline which would tear straight through the Ukok plateau in the Altai, masterminded by the Gazprom conglomerate,³ all of which are threats against to sacred lands.

The purpose of this exposition is to present a view of the responses and reactions of various of the world's cultural communities to the growing scourge described above, and to explore their significance for South African cultural communities. The article is organised in three sections. The first section offers a detailed account of the experiences of only three (out of the countless) international cultural communities as illustrated by the now popularised and internationally acclaimed court cases involving those communities. The communities in question are various Native American peoples in the USA, the Endorois people of Kenya, and the Maya people of Belize. The second section surveys the current status of cultural communities in South Africa and investigates the significance to them of the experiences detailed in the first section. Finally, in the third section, which draws heavily on an analysis made by the present writer in a separate but now already published article dealing with a slightly different topic,⁴ additional South African-oriented solutions and/or arguments that could potentially be applied to the current problem will be reiterated verbatim.

2 International cultural communities: the responses

Internationally most cultural communities are deeply connected to certain places in the natural world. These places are normally referred to as sacred sites. It should be emphasised at the outset that these places or sites are not defined as being sacred simply for purposes of describing them as pieces of land or locating them in certain positions in the landscape. On the contrary, they are called sacred mainly because they carry with them a whole range of rules and regulations regarding people's behaviour in relation to a set of beliefs to do with the non-empirical world, often in

² Gaia Amazonas 2010 <http://www.gaiafoundation.org/partner/gaia-amazonas-colombia-0>.

³ Moscow Times 2011 <http://www.themoscowtimes.com/opinion/article/gazprom-over-nature/447280.html#ixzz1d4AVcaYr%20>.

⁴ Ratiba 2013 *Indilinga*.

relation to the spirits of the ancestors, as well as of more remote and powerful gods or spirits.⁵ Generally such sacred sites constitute part of a particular community's cultural heritage, connecting the land with the cultural values, spiritual beliefs and kin-based relationships of the people in that community. This is precisely why the sacred lakes of the Himalayan region are said to attract visitors and pilgrims from all over the world - for their aesthetic, cultural and spiritual significance.⁶ For this and many other reasons many sacred sites figure prominently in tribal oral traditions. Some mark the place of creation, while others have more recent historical significance.⁷

With time, and also because of their vulnerability to challenges mostly relating to proof of ownership, these sites have become subject to threats of destruction in the interests of what the destructive parties motivate as "development". Needless to say, the reach, nature and depth of the resulting destruction are acutely painful. In most instances, development activities, including the promotion of tourism for socioeconomic improvement, have caused noticeable degradation of natural ecosystems where adequate attention has not been given to environmental conservation. In recent years lakes have been deteriorating due to changes in land-use practices and deforestation in lake watersheds, the impacts of the deposition of sediment, the loss of biodiversity and the removal of valuable components of the ecosystem.⁸ As expected in such circumstances most cultural communities have not taken lightly to the threats and eventual destruction that came out of development plans and endeavours. Most have used every means at their disposal to try and protect their sites, including litigating to the highest relevant judicial authorities -- which has naturally led to a plethora of cases scattered across the globe and eventually to a rapid development of what is most appropriately referred to as earth jurisprudence. The following is therefore a detailed account of earth jurisprudence relating to only three of the many cultural communities who had no option but to tackle their plight through litigation. The relevant

⁵ Carmichael *et al Sacred Sites* 3.

⁶ Maharana, Rai and Sharma 2000 *Environmental Conservation* 269.

⁷ Carpenter 2003 *New Eng L Rev* 620.

⁸ Maharana, Rai and Sharma 2000 *Environmental Conservation* 269.

communities are various Native American peoples in the United States of America, the Endorois people of Kenya, and the Maya people of Belize.

2.1 *The Native Americans*

Admittedly, in the USA the judicial landscape is saturated in rich jurisprudence relating to the protection of sacred sites. From the outset Native Americans have taken an exemplary stance in the quest to protect what they consider, deem and know always to have been held in high reverence by their forefathers. This is self-evident from the considerable number of cases that have been instituted and prosecuted against various US government structures by some Native American tribes. For our purposes, however, because of space constraints, only a sample of these countless cases will be referred to. In a neatly compiled chronicle of the issues at the heart of Native Americans' challenges, Carpenter provides an elegant narration of the summaries pertaining to the cases in question.⁹ According to the relevant commentators of American Indian jurisprudence or history, it is pertinent to note that in the majority of these cases the Native Americans had the misfortune of losing on every point of their main allegations or contentions. Prevalent author sentiment is that these failures could mainly be attributed to the federal courts' crippling lack of understanding of Native American religions, as is evidenced mostly by the often conservative interpretation of the Free Exercise clause.¹⁰ Albeit falling outside the scope and purpose of this article as well as constituting a subject of discussion for a separate and complete article, it is perhaps apposite at this stage to provide a brief explanation of the American Free Exercise Clause in order to foster an understanding of the issues involved herein and thus to ensure that the reader is not lost during the comparative exercise that follows. The Free Exercise Clause is located in the Fourth Amendment to the United States Constitution and is accompanied therein by the Establishment Clause. Read together, the two clauses, which are often referred to as the American religion clauses,¹¹ provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...". The first part of the provision, which contains

⁹ Carpenter 2003 *New Eng L Rev* 620.

¹⁰ Burton and Ruppert 1999 *Cornell JL & Pub Pol'y*.

¹¹ Sherry 1996 *J Contemp Legal Issues*.

the Establishment Clause, not only forbids the government from establishing an official religion, but also prohibits government actions that unduly favour one religion over another. The second part, which includes the Free Exercise Clause, encourages religious tolerance, in that it sensitises the broader American community to the acceptance of any religious belief and most notably reserves the right of American citizens to engage in religious rituals and activities of their choice in a free and democratic manner. As will be shown later, the clauses are relevant to the current discussion in two ways. Firstly, because South Africa lacks an establishment clause, it is naturally expected that erroneously and conservatively decided case law emanating from the United States and premised on the establishment clause will accordingly not find application locally. This constitutes an advantage for previously marginalised religious groups in South Africa in the sense that they will surely experience no barriers in their quest to have the state recognise or even somehow support their religions. In the second place, because the Free Exercise Clause is the distinct equivalent to the South African freedom of religion clause, important legal strategies, approaches and persuasive arguments presented in American case law decided in a similar context can be resorted to by the said marginalised religious groupings in order to advance their cases. Hence the need to explore the Native American cases briefly discussed below.

In the first case, that of *Sequoyah v Tennessee Valley Authority*,¹² the Eastern Band of Cherokees tried to stop the construction of Tellico Dam on property owned by the Tennessee Valley Authority, an agency of the federal government. The main argument of the Cherokees was based on their understandable and logical concern that the project would flood historic Cherokee towns, destroying sacred sites, medicine-gathering places and graves, and damaging the Tennessee River itself. The Cherokees further contended that the proposed project would impose a substantial infringement on their religion and, as a result, required the government to demonstrate a compelling interest in the project and that no alternative could satisfy the government's objective.¹³ The Federal District court quickly dispensed of most of the Cherokees' arguments, concluding that the Cherokees had not established a valid

¹² *Sequoyah v Tennessee Valley Authority* 480 F Supp 608 (ED Tenn 1979).

¹³ Carpenter 2003 *New Eng L Rev* 622.

claim.¹⁴ According to the court's interpretation of the First Amendment issues, to sustain a valid claim thereunder required proof that the government activities complained of (ie the impounding of Tellico Dam) somehow coerced people to engage in activities that would be contrary to their religious beliefs. On the facts as they stood, the court could not find any coercive effect on the Cherokees' religious beliefs and practices arising solely out the government's action of preventing access to certain lands. In the same vein the court reached the conclusion that the government's denial of the Cherokees' access to land which they considered to be sacred and central to their religion did not violate the Free Exercise Clause. In the court's view this was because the government (and not the Cherokees) had ownership rights to the land in question and could therefore use it for any purpose, which included limiting public access to the property, more especially keeping in mind that the Free Exercise Clause was not to be seen as a free licence to enter property that one does not own. On appeal, the Sixth Circuit court took a different approach, nonetheless confirming the decision of the federal court, but on the basis that the Cherokees could not establish that the Valley was central to their religion.¹⁵ The court began by recognising the fact that historically most Native Americans (the Cherokees included) had been subjected to massive forced removals and land dispossession. On this basis the court did therefore not agree with the lower court's emphasis and usage of title to land as being decisive of the claim. However, despite such a recognition of history, the court nevertheless went on to cast doubt on the land's religious significance to the Cherokee community. Equating the Cherokees' reverence of ancestral burial grounds to that of any other ordinary human beings, coupled with fact that some of the Cherokee community did not even know of the existence of the relevant land until after the impounding, the court therefore concluded that the community's attachment to the land in question was more of a personal preference than a conviction shared by an organised group.¹⁶

¹⁴ *Sequoyah v Tennessee Valley Authority* 480 F Supp 608 (ED Tenn 1979) 612.

¹⁵ *Sequoyah v Tennessee Valley Authority* 620 F 2d 1159 (6th Cir 1980) 1164-1165.

¹⁶ *Sequoyah v Tennessee Valley Authority* 620 F 2d 1159 (6th Cir 1980) 1163-1164.

The second case was that of *Badoni v Higginson*.¹⁷ In this case individual members, medicine men and local organisations of the Navajo Nation brought an action for injunctive and declaratory relief against the Secretary of the Interior, the Commissioner of the Bureau of Reclamation, and the Director of the National Park Service. Their claim was that the management of the Rainbow Bridge National Monument, Glen Canyon Dam and Lake Powell violated their rights under the Free Exercise Clause of the First Amendment of the United States *Constitution*. Their complaint included claims that (1) when the existing dam water was impounded to form Lake Powell some of the Navajo gods had been drowned and a sacred prayer spot had been flooded, and (2) by allowing tourists to have access to these sites the government had permitted desecration of the sacred nature of the site. However, as in the Sequoyah case described above, the Navajo claim was dismissed, with the court pronouncing that the ceremonies occurring at the site were not sufficiently organized or intimately related to the daily living of the group to deserve First Amendment protection.¹⁸ As in the Sequoyah case, the lower court began by investigating the title to the land in question and coming to the quick conclusion that the Navajo people had none and most importantly had not even alleged ownership in their documentation put before court. The court went on to hold that in the absence of such an interest in the land the Navajo claim could not be sustained, because to recognise their religious freedoms in such circumstances would be tantamount to trampling the property rights of other people.¹⁹ When the Navajo appealed, the Tenth Circuit court,²⁰ like the Sixth Circuit in Sequoyah, equally downplayed ownership as the sole determining factor in religious freedom matters of the First Amendment, and rather chose to treat it as only one of the factors that may be looked at.²¹ While recognising the central importance of the land in question to the Navajo tribe, it was in agreement with the lower court, however, that the government had compelling interests in maintaining the water levels

¹⁷ *Badoni v Higginson* 455 F Supp 641 (D Utah 1977).

¹⁸ *Badoni v Higginson* 455 F Supp 641 (D Utah 1977) 646.

¹⁹ *Badoni v Higginson* 455 F Supp 641 (D Utah 1977) 644-645.

²⁰ *Badoni v Higginson* 638 F 2d 172 (10th Cir 1980).

²¹ *Badoni v Higginson* 638 F 2d 172 (10th Cir 1980) 176.

of the lake, and therefore found it not necessary to determine whether or not that same action infringed on the Navajo's free exercise of religion.²²

On the heels of the above case came the matter of *Wilson v Block*,²³ in which the Hopi Tribe and Navajo Medicinemen's Association attempted to protect the sacred San Francisco Peaks, located on national forest lands, from development as a ski area.²⁴ The Hopis' argument was premised on the fact that if the United States Forest Service was allowed to grant permits to private interests enabling them to expand and develop a ski area on the San Francisco Peaks, which they had always considered to be home to their Katchinas, the Peaks would ultimately be destroyed and would take with them the natural and environmental conditions necessary for the performance of religious ceremonies and the collection of religious objects.²⁵ Needless to say, the District Circuit court, following the above precedents very closely (more especially the Sequoyah case), found that the Hopi tribe had failed to demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site, and hence dismissed their claim.²⁶

These cases culminated in the matter of *Lyng v Northwest Indian Cemetery Protective Association*.²⁷ In this case the Yurok, Karok and Tolowa Indians sought to stop the building of a forest service road through their sacred "High Country", located on national forest lands in California.²⁸ Historically this "High Country", also known as "Medicine Rocks", is said to have been visited by tribal people to conduct religious ceremonies which *inter alia* included praying, the obtaining of spiritual power from and individual connectivity with the creator, individual purifications, the gathering of medicines, and many other functions. It was understood that these rituals required privacy, silence, and an undisturbed natural setting. However, pursuant to the proposed major timber harvesting project, the United States forestry service planned to construct 200 miles of logging roads in the areas adjacent to the Chimney Rock

²² *Badoni v Higginson* 638 F 2d 172 (10th Cir 1980) 177.

²³ *Wilson v Block* 708 F 2d 735 (DC Cir 1983).

²⁴ Carpenter 2003 *New Eng L Rev* 622.

²⁵ *Wilson v Block* 708 F 2d 735 (DC Cir 1983) 742.

²⁶ *Wilson v Block* 708 F 2d 735 (DC Cir 1983) 744.

²⁷ *Lyng v Northwest Indian Cemetery Protective Association* 485 US 439 (1988).

²⁸ Carpenter 2003 *New Eng L Rev* 623.

area, a section of which (called the "G-O road") would inevitably traverse the High Country, separating the sacred Chimney Rock from the sacred Peak 8 and Doctor Rocks. After exhausting all possible administrative remedies the respondents, made up of an Indian organization, individual Indians, nature organizations and the State of California, filed a lawsuit in the Federal District Court challenging both the road-building and timber harvesting intentions. Their main allegations were premised on the fact that the completion of the road would violate the Free Exercise Clause by degrading the sacred qualities of the High Country and impeding its use by the relevant tribes for religious purposes. The District Court found in favour of the Indians, indicating that they had successfully demonstrated the area to be indispensable and central to their religion, and that the government use would seriously interfere with their religious exercise. The court consequently concluded that that the Forest Service's actions in the High Country would substantially infringe on the Indians' religion. On both the appeal and rehearing, the Ninth Circuit court confirmed the district court's holding that the road construction and timber project would impermissibly burden the Tolowa, Yurok, and Karok peoples' religious freedoms and most importantly found (as per Judge Canby) that the evidence presented on behalf of the government had not shown the compelling interest needed to justify the infringement of the Indian religious freedoms. When the Supreme Court heard the matter, however, it reversed the lower courts' decisions and in doing so applying a two-legged approach in its reasoning. The first leg of the reasoning centred on the Free Exercise Clause claims. It adopted a stance similar to that taken by the lower court in the Sequoyah case, as described above, resulting in what can be seen as the extreme narrowing of the Free Exercise standards. It is quite surprising that the Supreme Court, while noting that the government action had the potential to hamper the Indians' ability to practise their religion, nevertheless found no Free Exercise Clause violation, because in its view such actions by the government did not have the effect of coercing the Indians to act contrary to their religious beliefs. The second leg of the reasoning entailed an enquiry into ownership of the land in question, with the Supreme Court concluding that the government as owner of the land (and there being no other possible and justifiable competing title to the same public land space) had

the right to use the land according to its own plans. The Court thus effectively used ownership as the basis for denying the Indians' claim. It is worth noting that the Court adopted the view (which in my opinion is suggestive of Establishment Clause undertones) that the granting of the Indians' request in the circumstances would in addition to unfairly encroaching upon the property rights of the government also confer an unfair advantage on the Indians in the form of an indirect subsidy to the Indian religion.²⁹

2.2 The Endorois of Kenya

In the matter of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya 276/2003*,³⁰ the Government of the Republic of Kenya had, in 1974, ordered the Endorois community out of their ancestral land in the Lake Bogoria area. The government had apparently gazetted their land as a wildlife reserve and had done so without consulting the group. The government further promised compensation to the Endorois community, a promise that it had at the date of the action failed to fulfil. Instead, it continued to deny the community access to their pristine pasturelands while subjecting their leaders to harassment, arbitrary arrests and intimidation. The matter was ultimately brought before the African Human Rights Commission. In a landmark ruling the Commission found that the eviction of the Endorois people to make way for a wildlife reserve with minimal compensation violated their rights as indigenous peoples to own their customary lands and to "free, prior and informed consent", as well as to practice their culture and religion. The Commission therefore ordered Kenya to restore the Endorois to their historic lands and to compensate them. According to the Gaia Foundation, this case constitutes:

... the first ruling of an international tribunal to recognise indigenous peoples in Africa and their rights to traditional lands as custodians, and that there had been a violation of the right to development, both as a means and an end, which must be equitable, non-discriminatory, participatory, accountable and transparent.³¹

²⁹ *Lyng v Northwest Indian Cemetery Protective Association* 485 US 439 (1988) 453.

³⁰ ESCR-Net 2014 http://www.escr-net.org/sites/default/files/Endorois_Decision.pdf.

³¹ Gaia Foundation 2010 <http://1jpexperts.wikispaces.com/file/detail/Summary+of+some+Earth+Jurisprudence+developments+globally+2010+updated+March+2011+with+Table+of+contents.doc>.

The organisation therefore believes the case has "major implications for vindicating the right of all indigenous peoples to restitution for lands taken without their consent to create national parks and reserves".³²

2.3 The Maya of Belize

In the matter of *Maya Indigenous Community of the Toledo District v Belize, Case 12.053, Report No 40/04, Inter-Am CHR, OEA/Ser.L/V/II.122 Doc 5 rev 1 at 727 (2004)*,³³ the Mayan people were in opposition to the Belize government's granting a company logging and rigging concessions on land occupied and used by them in the Toledo district. The Mayan community alleged:

... violations of the rights to property, religious freedom, and family, as well as the right to take part in the cultural life of the community, the right to a healthy environment, and the right to participate in government.³⁴

Among the instruments relied upon by the Maya in their presentations to the Inter-American Commission on Human Rights were the *Draft United Nations Declaration on the Rights of Indigenous Peoples* and the International Labour Organisation's *Convention 169*. The Commission ultimately made a finding that the government of Belize had indeed violated the collective property rights of the Mayan people. As it stands the government of Belize has, in what is viewed as a blatant violation of the court's orders, currently issued permits to US Capital Energy in Belize and is allowing the company to continue with oil development activities on Mayan lands. The common sentiment is that in doing so the government is denying the Mayan people's rights to their lands, and is disregarding the authority of the courts and fundamental tenets of democracy such as the security of property and the rule of law.³⁵

3 South African cultural communities and earth jurisprudence

³² Gaia Foundation 2010 <http://1jpexperts.wikispaces.com/file/detail/Summary+of+some+Earth+Jurisprudence+developments+globally+2010+updated+March+2011+with+Table+of+contents.doc>.

³³ University of Minnesota Human rights Library 2004 <http://www1.umn.edu/humanrts/cases/40-04.html>.

³⁴ Carpenter 2005 *UCLA L Rev* 1134.

³⁵ Minority Voices Newsroom 2013 <http://www.minorityvoices.org/news.php/fr/1461/belize-maya-people-return-to-supreme-court-for-protection>.

Places dedicated to sacred memories are a part of all the world's religious and spiritual traditions.³⁶ In South Africa there are so many acknowledged sacred places belonging to and/or linked to almost all of the cultural communities that it is obviously impossible to refer to all of them in this exposition. Consequently only two, chosen mainly because of the recent media publicity they have attracted, located in Limpopo and linked to the Venda communities, will be dealt with in detail in this section. The sacred places in question are Lake Fundudzi and Phiphidi Waterfalls.

3.1 Lake Fundudzi

Lake Fundudzi is located in the Soutpansberg in the Vhembe District. It is found on the eastern side of the road that connects to Musina.³⁷ In a country well known for its lack of blessings when it comes to inland lakes, Lake Fundudzi stands out as the only natural freshwater inland lake in South Africa. Scientifically, the lake is said to have been caused by a landslide and is understood to be one of very few lakes in the world created in that manner. The lake is believed to have come into existence when a 500 metre-long portion of the steep northern mountain range, towering some 240 metres above the lake and already weakened by the Fundudzi Fault, was undercut by the Mutale River.³⁸ In other words it was formed when a mountain next to the Mutale River valley collapsed along an unstable fault line, so blocking the flow of the river.³⁹

The lake has some ritual and/or spiritual values to the Vhatavhatsindi people (also referred to as the People of the Pool), the most predominant of which is as a graveyard or symbolic tombstone – the place of their ancestors – a holy shrine. According to Venda folklore, members of the tribe are first buried in the graveyard near the chief's kraal and then after a number of years their bones are cremated and their ashes scattered on the sacred lake. For these people, this effectively equates looking after Lake Fundudzi to looking after their forefathers, a practice which is highly revered in African communities. Also and in reverence to this sacred place, outsiders when first viewing Fundudzi are expected to bend over and look at the lake upside down through

³⁶ Brockman *Encyclopedia of Sacred Places* xiii.

³⁷ Musehane 2012 *IJEDRI* 82.

³⁸ Van der Waal 1997 *South Afr J Aquat Sci* 44.

³⁹ Loubser "Discontinuity between Political Power and Religious Status" 198.

their legs. Traditionally, outsiders may not visit the lake without prior permission from the chief and may not visit it unaccompanied.

However, over time the Vhatavhatsindi people witnessed a gradual degradation of the lake arising from several threats. It is recorded by Van der Waal that 42 per cent⁴⁰ of the total area of the Godoni and Muiladi catchments has been transformed by human activities. Grassland and forest have become settlements and maize fields; the greater part of the Mutale catchment, including both grassland and patches of forest, has been converted to pine plantations. These have been planted to within 10 metres of minor and major streams and have been left to invade the unique Mutale peat bog, leaving only the upper part of the Mutale River showing no serious impacts. To make matters worse, over a period of time the Godoni River has been subject to water withdrawal, with small weirs, roads and bridges, bank erosion, deterioration of water quality, removal of vegetation, serious invasion of alien vegetation into indigenous riverine vegetation and the close proximity of agricultural fields to the streambed in evidence along its course. Fields have been developed on the lower banks of the Godoni River near the inflow into the lake and patches of forest and swamp burnt and cleared to plant crops and fruit trees. Some of the maize fields are eroded, adding to the rapid siltation of the lake. Firewood has been collected from the slopes directly above the lake, fishing is unrestricted and there is littering along the edges of the lake. As if the foregoing is not enough, in 1995 a road was built right down to the lake giving free access to the lake and thereby nullifying the prerogative of the Netshiavha line of chiefs to restrict access to the lake. Badly planned and constructed roads in the area have added to the erosion problems in the catchment, which erosion is responsible for the heavy siltation of the lake.⁴¹

3.2 Phiphidi Waterfalls

Phiphidi Waterfalls are located at the foothills of the Soutpansberg (Dzwaini), in the rural Limpopo province. The waterfalls are of fundamental ecological, cultural and

⁴⁰ Van der Waal 1997 *South Afr J Aquat Sci* 50.

⁴¹ Van der Waal 1997 *South Afr J Aquat Sci* 50-51.

spiritual importance to one of the nearby Venda communities. An intricate set of traditional laws, rules and rituals, most of which are subject to close guardianship by community elders, govern the traditional communal practice and behaviour at the waterfalls. The most interesting part of the falls has traditionally been off-limits to all but the Ramunangi clan. The Ramunangi clan is acknowledged by the other surrounding Venda communities as the custodian of the waterfall. This is in line with the centuries-old belief among all the Venda people that different clans are tasked with performing certain rituals on behalf of the entire group. Accordingly, the Ramunangi clan is responsible for performing a rain ritual known as "Thevhula", which is considered essential to ensuring a good harvest and rains – and it is believed that only that clan can get the desired results from the gods. Despite such communal acknowledgement, there is presently no legislation giving legal recognition to the custodian status of the Ramunangi clan.

During 2010 Phiphidi Waterfalls became the proposed location for a tourist development project involving the establishment of eight chalets, a bar and a restaurant. The resultant and acutely destructive soil excavation activities – which for the most part were accompanied by the large-scale damaging and/or cutting down of sacred trees – culminated in a lawsuit which for our purposes is titled *Nemarudi v Tshivhase Development Foundation Trust*.⁴² The case was instituted in court by a tribe elder by the name of Tshavhungwe Nemarudi, who was supported therein by an organisation called Dzomo La Mupo (meaning Voice of the Earth), and the developer and others were cited as the opposing parties. The case initially took the form of an application for an interim court interdict requiring the developers to stop building the tourism complex at the waterfall and in the surrounding forest, pending a full hearing. The interdict was granted. On 22 February 2011, following a breach of the court order,

⁴² The reader's attention is brought to the fact that this matter is unreported and was at the time of writing hereof still pending before the court in an interim application format. To the best of the present writer's knowledge there is currently no report on the status of the main case including the results thereof (if any). In the matter that initially served before the court, Nemarude was the first applicant in the application brought against six organisations, which included the Trust; Khosi Tshivhase; the Tshivhase Traditional Council; the traditional leader of Phiphidi, Jerry Tshivhase; the provincial departments of economic development and tourism; and the minister of rural development and land reform.

the South African High Court extended the temporary court interdict, instructing the builders once again to halt the illegal development at Phiphidi Waterfalls.

3.3 The significance of earth jurisprudence for South African communities

It is apparent from the above discussions that some of the traditional communities of South Africa continually find themselves in more or less similar predicaments to those of their counterparts described above. Even though the growth in the number of activities threatening traditional cultural aesthetics is a relatively recent phenomenon in South Africa, arising mainly as a result of industrial and economic development, the logical question to be posed concerns the significance to the South African traditional communities of the experiences of those communities dealt with earlier. The following is therefore a brief discussion of several factors that may have future relevance to the local communities in their quest to fight off threats to their sacred sites. As will be indicated later, some of the points noted here have to do with the various shortcomings or weaknesses in how the previously discussed communities implemented and conducted their litigation efforts, plans and strategies. In that vein, the cases discussed above are significant to local traditional communities in one or more of the following respects.

The first significance for South African communities is how legal arguments can be formulated and/or the style of drafting legal pleadings in such matters. Extrapolating from the *Lyng* case, one may conclude that in circumstances where it is clear to the traditional communities that they don't own the property on which the sacred site is located, arguments for the protection of the group's cultural rights should never be formulated in such a way that they end up indirectly pleading ownership of the land in question. This is because doing so may surely lead the courts to evaluate the ownership principle, which is not desirable - because the court's understanding of the native religions and belief system would then certainly become blurred. In other words the communities should devote a large part of their arguments to trying to educate the court about their cultural practices, thereby possibly persuading the court to view their religious and cultural beliefs with respect, and thus prioritising their religious beliefs in the case. They have to portray their culture in such a way that the court

appreciates its value in terms of constitutional ideals, as opposed to arguments based on plain ownership. The thrust of these sentiments is put more crisply by Carpenter in the following:

In *Lyng*, for example, the Supreme Court was particularly concerned about the Indians' claim that they needed "undisturbed naturalness" to practice their religion in the sacred High Country, located within the national forest. In the Court's view, this claim challenged the federal government's right to use the land according to its own plans. Justice O'Connor explained: "No disrespect for these practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property." In reality, the Indians were not actually claiming ownership rights, such as the right to exclude others. Instead, they requested that the federal government manage *its* property in a way that would protect the "privacy and solitude" necessary for Indian religious practices. But the majority held that the Indian position would require a "diminution of the Government's property rights, and the concomitant subsidy of the Indian religion." While the Court speculated that Indians *might* have some rights, "[w]hatever rights the Indians may have to use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land."⁴³

In the second instance and in the absence of ownership, traditional communities should, where circumstances allow, search for the existence of and explore other common law or even statutory principles that may have a bearing on or may have the effect of somehow strengthening their claim to access their sacred lands, and thus try to frame their arguments around such principles. Prescription, for instance, is but one example of such a principle. Ordinarily prescription is defined as an original way of acquisition of ownership in terms of which a real right is acquired in respect of movable or immovable things by means of their open and undisturbed possession or the exercise of rights in respect thereof for an uninterrupted period of 30 years.⁴⁴ Two Acts apply to prescription in our law, namely the *Prescription Act* 18 of 1943 and the *Prescription Act* 68 of 1969. Because of the practical possibility (which is very real in the case of practices at sacred places and shrines) that the provisions of both Acts may need to be used regarding the same period of prescription, it is deemed expedient to refer to both here. For prescription periods that commenced before 1970, according to section 2(1) of the 1943 Act, acquisitive prescription ("prescription") is the acquisition of ownership through the possession of another person's movable or

⁴³ Carpenter 2003 *New Eng L Rev* 624-625.

⁴⁴ Van der Walt and Pienaar *Law of Property* 133.

immovable property, or the use of a servitude in respect of immovable property, continuously for 30 years *nec vi* (without force), *nec clam* (openly), *nec precario* (without the owner's consent).⁴⁵ For the periods that extended to after 1970, section 1 of the 1969 *Prescription Act* provides that a person acquires ownership over property that has been possessed openly and as if he or she were its owner for an uninterrupted period of 30 years or for a period which, together with any periods for which such a thing was so possessed by his or her predecessors in title, constitutes an uninterrupted period of 30 years.

Another example of a common law principle to which traditional communities can resort in an effort to strengthen their arguments in court pleadings is the concept of immemorial use (*vetustas*), which is one of the common ways in which public servitudes such as the right to picnic in certain spots are established. As described in the case of *Forellendam Bpk v Jacobsbaai Coastal Farms (Pty) Ltd*, this concept indicates the exercising of entitlement in respect of land by the public for such a long time that there is no knowledge of any other state of affairs.⁴⁶ The strength of the argument based on this concept lies in the fact that, if it is acceptable for picnic spots created through *vetustas* to gain legal protection and enforcement as evinced by case law, then surely, and even if the land encompassing the sacred place is said to be privately owned or held in trust by the traditional leaders, in principle nothing stands in the way of an implied recognition that the traditional community's right to perform cultural rituals and practices at the relevant place has similarly been created by *vetustas*.

The traditional communities could in appropriate circumstances further determine and/or establish the existence of some legal and/or codified duty on the state to protect the communities and their rights, and accordingly plead such a duty instead of alleging ownership rights, as is the norm. One example of such a duty in our law arises in the context of the *Interim Protection of Informal Land Rights Act* 31 of 1996, which was designed as an interim measure to protect people with insecure tenure

⁴⁵ Marais *Acquisitive Prescription* 37.

⁴⁶ *Forellendam Bpk v Jacobsbaai Coastal Farms (Pty) Ltd* 1993 4 SA 138 (C) 143D-F.

rights pending longer-term legislation's being put in place. According to Cousins, the Act recognises that most people in the former homelands, as well as in other areas such as South African Development Trust land, despite the fact that they occupy the land as if they were its owners and are recognised as such by their neighbours, are unable to establish a clear legal right to the land due to the legacy of discriminatory laws and practices and of administrative disorder referred to above.⁴⁷ Pending the confirmation of these informal rights, the Act provides for defensive mechanisms against their loss, for example, by the illegal sale of communal land by corrupt chiefs, or development projects initiated without consultation with the holders of the land. It is apposite to confirm that currently the Minister for Rural Development and Land Reform has under section 5(2) of the same Act duly extended the application of the provisions thereof for a further period of 12 months ending on 31 December 2014.⁴⁸ Because informal land rights are still a highly contested issue in this country, future extensions are therefore a real possibility. Also, seeing that consideration is now being given to making this piece of "protective" legislation a permanent feature of our legislative archives,⁴⁹ it follows that if a traditional community such as the Ramunangi clan described above, which clearly falls squarely within the ambit of this legislation, can formulate their course of action on the provision of the applicable legislation, they will dramatically increase their chances of getting appropriate relief - which by the way would also have the effect of permanently protecting a cultural site such as Phiphidi Waterfalls.

A further significance for South African communities, and arising specifically out of the cases of the Endorois people of Kenya and the Maya of Belize described above, includes going beyond the domestic borders and looking at international law instruments that are geared towards protecting sacred sites. The most significant and persuasive instrument of the international law regime towards protection of indigenous peoples is *Convention 169*, that is the *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations*

⁴⁷ Cousins 1997 *IDS Bulletin* 64.

⁴⁸ Item 1 in Gen N 556 in GG 36724 of 8 August 2013.

⁴⁹ Cousins 1997 *IDS Bulletin* 64.

in Independent Countries, of the International Labour Organisation. In Article 14.2 thereof the Convention gives due and full recognition to "the right of the [indigenous] peoples to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities". Similar sentiments are echoed in Article 26 of the *Draft United Nations Declaration on the Rights of Indigenous Peoples*, which provides thus:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands ... which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

The declaration also contains further provisions which the traditional communities can refer to in their mission to protect their cultural sites. Firstly, there is the right of indigenous peoples to "maintain and strengthen their distinctive spiritual and material relationships with the lands they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations", contained in Article 25 thereof. Then there is the "right to the conservation, restoration and protection" of indigenous lands and, in Article 28, a general prohibition against the use of those lands for military projects without indigenous consent. In the third instance there are the right to practice cultural traditions, the right to maintain their cultural property, and the right to pursue cultural and spiritual development in Articles 12 and 29 respectively. Over and above these rights, provision has been made in Article 37 for the "restitution of spiritual property taken without their free and informed consent or in violation of their laws, traditions, and customs".

In the final analysis, and mostly in instances where the owner of the land has already taken positive steps to deprive the traditional community in question of the right to access the sacred area for the purpose of conducting religious practices, the relevance and implication of the decision in the Endorois matter for the traditional communities in South Africa is twofold. First, if the development activities on Phiphidi Waterfalls have resulted in the total dispossession of the site for the clan, the court may order

the restoration thereof. Secondly, where such a development has not led to dispossession but has had the effect of rendering the waterfalls unsuitable for the purposes and use to which they were previously put, then the court may have to consider ordering compensation and/or appropriate rehabilitation thereof. It is self-evident that combined relief measures may be necessary in instances where such development has led to both results.

4 Responses relevant to South Africa

As previously asserted and declared by the present writer in another setting and repeated verbatim herein,⁵⁰ for traditional communities in South Africa there are in effect two possible ways to approach and deal with the threats levelled at sacred sites. First, there is the constitutional approach (which entails enquiry into religious freedoms and rights to self-determination). This is followed by the legislative approach, in terms of which certain relevant provisions of the *National Heritage Resources Act* 25 of 1999 are available to the cultural communities.

4.1 The constitutional approach

The ideals of justice, equality, decency and morality are espoused in the South African *Constitution* under two headings, namely the free exercise of religion, and cultural rights. It follows therefore that, irrespective of how the sacred sites dispute is classified and framed, the courts are provided with a major opportunity to recognise and attend to the interests of those communities who have some form of connection to and interest in the sites in question.

4.1.1 Religious freedoms

Before delving into the subject matter of the constitutional protection of religious freedoms, it is worth mentioning in passing that most African scholars have throughout the years always regarded African cultural practices such as the "Thevhula" ceremony already mentioned as religious in themselves. For instance, Sweet provides a detailed

⁵⁰ Ratiba 2013 *Indilinga*.

account of specific "Angolan" and especially Mbundu ritual practices and beliefs, divinations, ritual practices, cures and so on. They are presented as forms of religion and spirituality used by Africans in 17th-century Brazil as ways of dealing with their problems and, generally, as the most potent weapon at their disposal to fight the institution of slavery.⁵¹ In addition, there is a general acknowledgement by some authors that, although African religion had no sacred writings, the religion was nevertheless expressed in some or all of the following: the rituals, ceremonies and festivals of the people, their shrines, sacred places and religious objects, their proverbs, riddles and wise sayings, their names for people and places, their myths and legends, their beliefs and customs, and many other areas of African life.⁵² This fact is ultimately driven home by Oduyoye who recognises the existence of "masses of people in Africa who hold to the traditional religious beliefs and practices of their forebears to the exclusion of the missionary religions".⁵³ Having thus uncovered and legitimised the true nature of African cultural practices as containing an element of religion, the next step is to explore and ascertain the constitutional protection afforded religious practices.

The South African *Constitution* protects freedom of religion through a variety of provisions. Section 15(1) of the 1996 *Constitution* unequivocally enshrines the right to religious freedom by providing that "everyone has the right to freedom of conscience, religion, thought, belief and opinion". This provision – which is believed to be similar to the norms given in international documents on religious freedom⁵⁴ – goes beyond protecting the right to freedom of religion in its narrow connotation: it also guarantees freedom of conscience, thought, belief and opinion and is said to probably include the right not to observe any religion at all.⁵⁵ Arguably, this can further be understood to

⁵¹ Sweet *Recreating Africa* 6-7.

⁵² Mbiti *African Religion* 20-30.

⁵³ Oduyoye 1977 <http://academic.regis.edu/jbrumbau/readings/OduyoyeAfrica.pdf> 240-241.

⁵⁴ Goodsell 2007 *BYU J Pub L* 128. Without restating the relevant provisions due to space restraints, reference to international documents in this regard is hereby made but not limited to the following: Aa 18 of both the *Universal Declaration of Human Rights* (1948) (UDHR) and *International Covenant on Civil and Political Rights* (1966) (ICCPR); A 9 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) (ECHR); A 1 of the *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981) (UN 1981 Declaration).

⁵⁵ Du Plessis 2001 *BYU L Rev* 449.

mean that everyone has a right to believe what he or she wants to believe, irrespective of how bizarre it is or how uninformed or harmful to others it may turn out to be. In fact it is precisely because of the protection brought about by this section that one often sees people of varying denominations striving to bring the "good news" of their own beliefs to those around them by shouting it from the rooftops or on the trains, and publicly practising the tenets of their religious beliefs. South Africa is characterised by a proliferation of many Christian and other mainstream religious beliefs⁵⁶ that appear to be inexplicable, to run demonstrably against some of our constitutional ideals, and to be deeply hurtful, offensive or even harmful to other people.⁵⁷ Evidently, it is possible to interpret some passages in the Bible and the Koran as containing hate speech against women and gay men and lesbians and thus in contravention of the *Equality Act*. At the same time they may appear to incite violence, either directly or indirectly, against women and gay men and lesbians. For example, Leviticus 18:22 in the Christian Bible states that homosexuality is an abomination which cannot be condoned under any circumstances. Exodus 35:2, on the other hand, states that people working on Sundays should be put to death. Then there is the widespread practice among Muslims and Jews to cut off a part of a baby boy's penis shortly after birth.⁵⁸ Yet all are admittedly and indiscriminately protected by the section. Based on these observations, it would not seem far-fetched or unreasonable under the circumstances to expect that courts should fairly and justifiably strive to afford the same protection to African religious practices.

The above is, however, not the end of the story. Section 15(2) of the same *Constitution* goes further and provides for:

... religious observances to 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.

⁵⁶ Goodsell 2007 *BYU J Pub L* 115.

⁵⁷ De Vos 2012 <http://constitutionallyspeaking.co.za/some-religious-beliefs-are-more-equal-than-others/>.

⁵⁸ De Vos 2012 <http://constitutionallyspeaking.co.za/some-religious-beliefs-are-more-equal-than-others/>.

At this point it is considered relevant and perhaps important to keep in mind the contention of some commentators that a proper reading of a clause such as the one in section 15(2) immediately gives rise to a suggestion that South Africa, like many European countries, has no "establishment clause" limitation on freedom of religion⁵⁹ akin to the one contained in the First Amendment of the US *Constitution*. Most have been very express and vociferous in their belief that there are "compelling reasons for holding that [this section] of the Constitution does not entail an establishment clause".⁶⁰ Equally so, other scholars have made strong assertions to the effect that "it was clear that the multi-party negotiators had no intention whatsoever of using the Constitution or the Bill of Rights to erect a wall of separation between church and state".⁶¹ The end result of that absence has been the clear and significant effect of making South Africa extremely accommodating in its approach to religious groupings. This implies, therefore, that it may support such groups, as long as its support is fair and even-handed⁶² and it has a valid reason for doing so.⁶³ Another advantage of the lack of an establishment clause is the assurance that, despite the fact that the interpretive clause of section 39(1) makes the consideration of international standards for the protection of all rights (including religious rights) obligatory while permitting resort to the law (including the jurisprudence) of other jurisdictions, some potentially adverse foreign jurisprudence can still be distinguishable on that point. Obviously, major cases involving religious freedoms such as the USA's *Lyng v Northwest Indian Cemetery Protective Association*, which in dealing with the Free Exercise Clause has nevertheless proceeded to make unfortunate and wrongly placed remarks on the First Amendment Establishment Clause,⁶⁴ will definitely not be found to be applicable in the South African setting. Accordingly, there will not be any formidable bar to the protection of South African religious freedoms, irrespective of where and how they are practised.

⁵⁹ Goodsell 2007 *BYU J Pub L* 126.

⁶⁰ Van der Vyver 2000 *Emory Int'l L Rev* 824. The reader is further reminded of and referred to the discussion of the First Amendment Establishment Clause, what it entails, as well as the relevance thereof to the current discussion, as it appears in s 2.1 above.

⁶¹ Blake and Litchfield 1998 *BYU L Rev* 524.

⁶² Gouws and Du Plessis 2000 *Emory Int'l L Rev* 682.

⁶³ Heyns and Brand 2000 *Emory Int'l L Rev* 751.

⁶⁴ *Lyng v Northwest Indian Cemetery Protective Association* 485 US 439 (1988) 453.

In addition, according to section 9(1) of the *Constitution*, "[e]veryone is equal before the law and has the right to equal protection and benefit of the law". Section 9(3) then proscribes unfair discrimination "against anyone on one or more grounds" and proceeds to explicitly list a number of such grounds. Included in this list are "religion, conscience, and belief". Arguably, the protection of religious rights and freedom under the equality clause is also taken to be as significant and indispensable as the protection under section 15(1) above, the only hindrance being that, as evinced and gathered from the survey of South African constitutional jurisprudence on religious rights, the courts have not really had (or have not sufficiently availed themselves of) the opportunity to fully explore the safeguarding potential of the constitutional guarantee of religious equality.⁶⁵ A number of cases serve as excellent examples of this trend. Due to space constraints and most notably because it is beyond the scope of this exposition to act as a case note, current reference to these cases will be limited only to two of such cases⁶⁶ and again only to suitable summaries thereof. In the combined matters of *S v Lawrence*, *S v Negal*, *S v Solberg*, most aptly constituting the first test case before South Africa's Constitutional Court where the protection of religious rights and freedom under the *Constitution* was at issue, the court, perhaps due to procedural errors attendant in the matter serving before it, failed to reach unanimity on the applicability of the guarantee of religious equality to businesses, opting rather to regard the cases as not being relevant to a full discussion of the religious freedoms.⁶⁷ Again in the matter of *Christian Education South Africa v Minister of Education of the Government of RSA*, the appellant appealed the High Court's refusal of an application to declare section 10 of the *South African Schools Act* 84 of 1984 unconstitutional on the basis that its prohibition of corporal punishments in schools encroached on the parents free exercise of their religion. Once again the court (per Sachs J) in my opinion deliberately refrained from expressing any view on what, in constitutional terms, the

⁶⁵ Du Plessis 2001 *BYU L Rev* 450.

⁶⁶ Other cases in the same category include a mixture of both High Court and Constitutional Court cases such as *Christian Lawyers Association of South Africa v Minister of Health* 1998 11 BCLR 1434 (T); *Case v Minister of Safety and Security* 1996 5 BCLR 609 (CC); *Wittmann v Deutscher Schulverein* 1999 1 BCLR 92 (T).

⁶⁷ As Sachs J noted in *S v Lawrence*, *S v Negal*, *S v Solberg* 1997 4 SA 1176 (CC) para 154: "As I have said, although the section 14 issue of principle is real, the way it came to us was artificial. The objective was to abolish a commercial restraint, not to secure a religious freedom."

implications of parents' own exercise of their religious belief in corporal punishment for their children might be. While reasoning that the purported limitation on free religious exercise imposed by the relevant section was acceptable,⁶⁸ the court ultimately dismissed the appeal.

In the final analysis, the thrust of an argument based on the ideals of religious freedoms as contained in the *Constitution* is that the present South African government accommodates (and has always accommodated) many mainstream and other religious practices. That it does so is consistent with the values underlying the ideals evinced by the traditionally Christian bias of the country's laws.⁶⁹ For this reason, then, it should arguably do the same for African religions within the parameters of the clauses discussed above; hence the guarantee of religious equality clause in section 9. This is especially true if one keeps in mind the binding nature on the organs of state of both the section 9 and section 15 entitlements.⁷⁰

⁶⁸ *Christian Education South Africa v Minister of Education of the Government of RSA* 2000 10 BCLR 1051 (CC) paras 29-52.

⁶⁹ Van der Vyver 1999 *BYU L Rev* 636-642.

⁷⁰ Blake and Litchfield 1998 *BYU L Rev* 526.

4.1.2 *Cultural or self-determination rights*

It is an undeniable fact that ethnic, religious and linguistic communities are afforded the right to self-determination. This right to self-determination is inarguably the basis of most countries' national endeavours to recognise the separate and unique characteristics of cultural communities. The right is also echoed in a variety of international legal instruments. As per the *Covenant on Civil and Political Rights*:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.⁷¹

Similarly, the *Declaration of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* makes reference to:

... the right [of national or ethnic, religious and linguistic minorities] to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.⁷²

In parallel, the duties placed on the government to enforce self-determination rights through constitutional and legal systems are explicitly spelt out in various international legal documents. Included among the obligations placed on the state by the *Declaration of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* are, for instance, the duty to protect and encourage the promotion of the group identities of the minorities concerned, to afford the minorities special competence to participate in their own group decisions, not to discriminate on the basis of identity, and to ensure equal legal treatment.⁷³ A further provision in the Declaration is that:

... States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture,

⁷¹ A 27 of the *International Covenant on Civil and Political Rights* (1966).

⁷² A 2.1 of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1992).

⁷³ Aa 1.1, 4.2, 2.3, 3, 4.1 respectively of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1992).

language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.⁷⁴

In the same vein, the *European Framework Convention for the Protection of National Minorities* guarantees equality before the law and the equal protection of the law, obliges member states to provide "the conditions necessary for persons belonging to national minorities to maintain and develop their culture",⁷⁵ and to "preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage",⁷⁶ as well as to recognise the rights of each person belonging to a minority "to manifest his or her religion or belief and to establish religious institutions, organisations and associations".⁷⁷

In the South African setting and context, the above constitutional sentiments find embodiment in both sections 30 and 31 of the 1996 *Constitution*.⁷⁸ Section 30 provides:

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

On the other hand, section 31 states:

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

Most importantly, the section further dictates: "The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bills of Rights." Quite clearly, in a country where cultural and religious diversity has for decades been a matter of lived reality, this section of the *Constitution* promotes the concept of religious tolerance, among other things. The concept has been seen in some writings as being

⁷⁴ A 4.2 of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1992).

⁷⁵ A 4.1 of the *Council of Europe Framework Convention for the Protection of National Minorities* (1995).

⁷⁶ A 5.1 of the *Council of Europe Framework Convention for the Protection of National Minorities* (1995).

⁷⁷ A 8 of the *Council of Europe Framework Convention for the Protection of National Minorities* (1995).

⁷⁸ *Constitution of the Republic of South Africa*, 1996.

of crucial relevance for the advancement of cultural rights⁷⁹ and, accordingly, has been depicted as "a pacemaker for an adequate understanding of multiculturalism and of the equitable coexistence of different cultural forms of life within a democratic community".⁸⁰ As a result, tolerance in the first place seems to suggest a peremptory need "for people of all faiths to develop the ability, at the very least, to endure the fact that others may believe and live differently within their particular society, or in the wider world, although they might share some core values". More importantly, the concept represents "a guiding principle for state relations regarding religion or belief, referring to the need for the State to accept the existence of a variety of religious traditions and convictions", and is thus effectively "a *minimum* standard or precondition for peaceful co-existence in multi-cultural and multi-religious societies".⁸¹

Despite this, the present author is of the view that the judiciary in South Africa has been neither exemplary nor very forthcoming as regards the concept of religious tolerance. This is evidenced by the fact that judicial pronouncement on this aspect of the *Constitution* in South Africa (and, more particularly, religious rights of African origin) does indeed appear to be very limited and, if anything, of no supportive value at all. Such a lack of judicial precedent on cultural issues in the country could perhaps be best explained by the tendency of our courts to approach all matters that have religious undertones from the point of view of religious freedoms rather than to premise their decisions on the even-handed treatment of religious groups and, as such, give deserved credence to cultural rights issues. This is what gave rise to one analyst's making reference to:

... South Africa's courts' (including the Constitutional Court) tendency to dispose of law and religion issues in a mostly libertarian and individualistic, free exercise vein, thereby underplaying issues related to the even-handed treatment of religious groups.⁸²

⁷⁹ Habermas 2004 *Philosophy Null*.

⁸⁰ Knauth 2011 http://www.theewc.org/uploads/files/State%20of%20the%20Art_Knauth_alt.pdf 19.

⁸¹ Knauth 2011 http://www.theewc.org/uploads/files/State%20of%20the%20Art_Knauth_alt.pdf 20.

⁸² Du Plessis 2001 *BYU L Rev* 465.

In the only case that had close and proximate bearing on the cultural religious rights, the Constitutional Court came out with a rather strange and ambiguous decision, reflecting an interpretation and application of relevant clauses that was both extremely strict and conservative. In the case of *Prince v President, Cape Law Society*, the Constitutional Court was called upon to decide on the constitutionality of a law prohibiting the possession and use of a dependence-producing drug, cannabis (better known in South Africa as "dagga"), in so far as that legislation was made applicable to its possession and use for religious purposes.⁸³ The appellant had unsuccessfully challenged the constitutionality of this prohibition, both in the Cape of Good Hope High Court (the High Court)⁸⁴ and later in the Supreme Court of Appeal (the SCA).⁸⁵ The appellant was a law graduate whose application for registration of his community service contract – as a prelude to admission as a practising attorney – had been refused by the Cape Law Society. The Law Society judged that he was not "a fit and proper person" for legal practice because of two previous convictions for the illegal possession of cannabis and his stated resolve to continue using the drug. The appellant maintained that he was a member of the Rastafarian religion, that cannabis was regarded by that sect as a "holy herb", and that its use constituted an integral part of Rastafarian rituals. The Constitutional Court acknowledged in the main that the rights to freedom of religion and to practise religion are important rights in an open and democratic society based on human dignity, equality and freedom, and that the disputed legislation placed a substantial limitation on the religious practices of Rastafarians. However, if an exemption were to be made in regard to the possession and use of a harmful drug by persons who do so for religious purposes, the State's ability to enforce its drug legislation would be substantially impaired. In a five-to-four decision, the Court declined to make an exception in favour of persons possessing or using cannabis for religious purposes. One cannot help but clearly note the conspicuously divergent opinions and reasoning of Chaskalson CJ, Sachs J and Ngcobo J in this matter.

⁸³ *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC).

⁸⁴ *Prince v President of the Law Society, Cape of Good Hope* 1998 8 BCLR 976 (C).

⁸⁵ *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA).

In the opinion of the present writer, it should nevertheless be noted that the judges in the above case appear to have been largely influenced by a western ideology, paradigm and outlook in their decisions. That justice Chaskalson could be of the view that "The Rastafari are not well organised as a religion, either in South Africa or elsewhere"⁸⁶ is in my opinion clearly indicative of the extent of the judiciary's non-readiness to embrace the marginalised religions in this country. This is the type of influence that has been decried by scholars such as Burton and Rupert, who have always maintained that the reason for Indian American tribes losing their various battles for sacred lands was, in many cases, purely a lack of understanding on the part of the federal courts of the Native religions.⁸⁷ Ostensibly, "[m]uch of the jurisprudence appears to be grounded in a worldview that separates land from religion, history from spirituality, and belief from practice".⁸⁸ It is this separatist worldview clearly visible in the Prince matter (where the court undoubtedly separated history from spirituality and belief from practice) which explains the resultant overlooking and neglect of an opportunity to test the self-determination provisions practically and thereby advance the cause of local cultural and customary practices. This could, of course, have also assisted in putting to rest any constitutional and jurisprudential uncertainties relating to the issue of cultural rights.

[Indeed] South Africa belongs to that category of political communities where Bill of Rights decrees have been imposed from the top down rather than having grown from the bottom up. That is to say, the rights and freedoms protected by the Constitution have been dictated by internationally recognised norms, based largely on Western perceptions of right and wrong, which are in many instances not in conformity with the moral perceptions and customary practices of sections of the South African population.⁸⁹

This being the case, and also in the light of the strong constitutional foundation for cultural- and self-determination, it follows therefore that once western ideology and thinking is removed from the equation, the traditional communities have at their disposal a strong legal argument working in their favour, in the form of sections 30 and 31 of the *Constitution*, as backed up by various international instruments.

⁸⁶ *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) para 135.

⁸⁷ Burton and Ruppert 1999 *Cornell J L & Pub Pol'y*.

⁸⁸ Carpenter 2003 *New Eng L Rev* 623.

⁸⁹ Van der Vyver 2007 *Emory Int'l L Rev* 110.

Traditional communities could therefore litigate their concerns right up to the Constitutional Court, mainly because "[a] broadly conceived 'establishment' jurisprudence can only develop if religious *groups*, communities, and institutions take their concerns to court".⁹⁰

4.2 The legislative approach

From the legislative perspective there appears to be only one piece of legislation that can be resorted to by traditional communities in their quest to protect their cultural sites and practices. The Act in question is the *National Heritage Resources Act* 25 of 1999, which came into operation in 2000. The Act, which is generally considered to establish an all-encompassing cultural heritage protection regime,⁹¹ generally aims to create an integrated framework for the protection of cultural heritage with regard to its management and development, as well as participation in and access to heritage resources. A statement contained in the preamble of the Act emphasises its main objective:

... [T]o promote good management of the national estate, and to enable and encourage communities to nurture and conserve their legacy so that it may be bequeathed to future generations. Our heritage is unique and precious and it cannot be renewed. It helps us to define our cultural identity and therefore lies at the heart of our spiritual well-being and has the power to build our nation. It has the potential *to affirm our diverse cultures* [my emphasis], and in so doing shape our national character. Our heritage celebrates our achievements and contributes to redressing past inequities. It educates, it deepens our understanding of society and encourages us to *empathise with the experience of others* [my emphasis]. It facilitates healing and material and symbolic restitution and *it promotes new and previously neglected research into our rich oral traditions and customs* [my emphasis].

Accordingly, and in terms of section 2(xvi) of the Act, any place or object that is of cultural significance qualifies as a heritage resource. Section 2(vi) goes further and describes cultural significance with reference *inter alia* and most importantly to the historical, social, spiritual, linguistic or technological value or significance that these resources should possess. A very important qualification that is relevant for our current purposes is to be found in sections 2(a) and (d), which state that the national estate

⁹⁰ Du Plessis 2001 *BYU L Rev* 465.

⁹¹ Kotze and Jansen van Rensburg 2003 *QUTLJ* 135.

may include places to which oral traditions are attached or which are associated with living heritage, as well as landscapes and natural features of cultural significance. It is also worth mentioning that moveable objects, which by implication may emanate from such places or landscapes, are also subject to protection under the Act. As is explicit in the provisions of section 3(l)(ii), those movable objects also include objects to which oral traditions are attached or which are associated with living heritage, ritual or popular memory.

It follows therefore that any traditional community can, on the basis of this legislation and more specifically in terms of section 27(3), submit a nomination to the South African Heritage Resources Agency (SAHRA) for a place to be declared a national heritage site or make a similar submission to the provincial heritage resources authority for the same place to be declared a provincial heritage site. Once such a declaration is made in terms of subsections (5) and (6), then the overall protection made available by the Act will be triggered in favour of the place in question.

5 Conclusion

Over time cultural communities across the world have borne witness to a host of unending and increasingly destructive attempts to alienate their places of worship. This endemic problem has arisen in a number of places, such as in the USA, and in most of the world's former colonies. Having been colonised, South African cultural communities have experienced the same threats to their various sacred sites. This article has argued and demonstrated that cultural communities in South Africa stand to benefit from the properly construed and rich earth jurisprudence arising out of the courtroom experiences of some of the cultural communities identified elsewhere in the world. Whereas some arguments peculiar to South Africa can be advanced by cultural communities seeking to protect their sacred lands, whether or not they will be successful in restraining the deprivations of secular, commercial development of sacred sites remains to be seen.

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LIST OF ABBREVIATIONS

BYU J Pub L	Brigham Young University Journal of Public Law
BYU L Rev	Brigham Young University Law Review
Cornell J L & Pub Pol'y	Cornell Journal of Law and Public Policy
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
Emory Int'l L Rev	Emory International Law Review
ESCR-Net	International Network for Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
IDS Bulletin	Institute of Development Studies Bulletin
IJEDRI	International Journal of Economic Development Research and Investment
Indilinga	Indilinga - African Journal of Indigenous Knowledge Systems: Revisiting the Research Paradigm
Inter-Am CHR	Inter-American Commission on Human Rights
J Contemp Legal Issues	Journal of Contemporary Legal Issues
New Eng L Rev	New England Law Review
QUTLJJ	Queensland University of Technology Law and Justice Journal
SAHRA	South African Heritage Resources Agency
South Afr J Aquat Sci	Southern African Journal of Aquatic Sciences
Stan Env'tl LJ	Stanford Environmental Law Journal
UCLA L Rev	University of California at Los Angeles Law Review
UDHR	Universal Declaration of Human Rights