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Introduction

One of the most dramatic changes in the governance of South Africa since 1994 has been the move away from the Christian political theology of apartheid to an explicitly secular, legal and political regime. This process of secularisation has brought South Africa into line with the majority of national polities in the world.

The new South Africa that emerged in the 1990s and its new constitutional and political dispensation is widely acknowledged to be secular. Gone is the heretical political theology of apartheid, gone is Christian nationalism, and gone too is the unholy alliance between the National Party and the Dutch Reformed Church. The post-apartheid constitution, produced by intense negotiation, promises religious freedom and a secular state.

But there has been very little attention to the form of secularism emerging in South Africa; its framing of the presence of religion in public and political life and its forms of governmentality. There has been little academic attention to what it means for a polity to be secular, the formation of secularism or its specific effects. There has been little attention to what happened to the public and political presence of religion and tradition in the process, both normatively and in practice. This thesis endeavours to provide both a framework for thinking about these questions, as well as to make some progress towards answering them.

1. Why study secularism in South Africa?

There can be no doubt that religion and tradition have been intimately connected with both statecraft and political claims in South Africa's history. Despite their many differences, successive regimes of government have made use of Christianity and traditional authority and customary law to secure rule without democratic legitimacy. The historical importance of religion and tradition to South Africa to date, both socially and politically, begs the question of whether and how it is possible for a new state to found itself without the authority or institutions of religion and tradition.

And religion and tradition clearly continue to be important in contemporary South Africa. Traditional leaders continue to govern rural areas, *sangomas* and praise singers are to be found at inaugurations and public rallies, the ANC's relationship with religious groups is contested and increasingly important, the Truth and Reconciliation Commission (TRC) employed overt theologies, and statecraft includes a "Moral Regeneration Movement" that calls on religious partners. With the exception of the TRC, very little of this is adequately researched or conceptualised

What is to be made of the public and political presence of religion and tradition in post-apartheid South Africa, and how does this relate to secularism?

Until quite recently, the vast majority of literature on secularism has been produced by English, European and American writers and is about their societies and European intellectual histories. This deals with secularism in the context of Christianity as a religion and Christendom as civilisation. The secularisation literature, therefore,

attends in great detail to the relationships between God, faith, belief and rationality for example, as well as to political theology. It also increasingly attends to the Christian inheritance embedded in secular epistemologies, and political rationalities and imaginaries. As interest turns to the status and forms of political and pietist Islam, these same debates are conducted amidst family resemblances; the same terms often transcribed in relation to Allah, the Qur'an, and modes of Islamic reasoning and interpretation.

But how we are to understand the genealogy, effects and forms of secularisation outside of the monotheistic or world religions? How do processes of secularisation affect what came to be designated with a raft of 'isms' in the 19th century: Confucianism, Taoism, Animism, Shintoism and what in South Africa became designated as African Traditional Religion?

The great wave of European colonialism radically transformed both religion and tradition across the globe. In southern Africa, the religions that were introduced via slavery, indentured labour, migrations and missionaries were Christianity, Islam, Judaism and Hinduism. And yet these introductions did not entirely eradicate, replace or fully colonise other forms of authority, the unseen, divinity, ancestors and tradition. And certain elements of pre-colonial African life were buffered from influence when policies of indirect rule carried out by colonial and then apartheid governments explicitly preserved and reformed some aspects of traditional authority and customary law from the pressures of modernity.

It is possible to write about secularism in South Africa in relation to its dominant world religions only. But such writing would leave aside important aspects of the religiosity and customs of South Africans. It would also fail to take into account the resources and challenges encountered by modern political forms of state, both historically and in the present. This need to conceptualise secularism in a way that also takes into consideration traditions, political inheritances and religiosities that are not Christian in origin has been the most complex and ambiguous task in this research. I have sought to develop some analytical purchase on the idea of the secular in a post-colonial situation, particularly in relation to politics. In doing this I have sought to conduct an analysis that takes “things African” to use the Comaroffs’ phrase, into account. (2004) Although I will apply it here in relation to South Africa, I hope it also has some usefulness to other post-colonial situations.

2. How to study secularism?

Even the briefest scan of the literature on secularism reveals a wealth of meanings for the term, many of them contradictory. Some are descriptive and others normative. Some write of its firm establishment, others of its weaknesses, limit or impending demise. Given the diversity of meaning and the range of claims made under its name, the first task has to be an articulation of what it might mean for a polity to be secular.

There has been very little academic attention to secularism in South Africa. This thesis therefore sets out to try to provide something of a descriptive account of some aspects of secularism in the country as well as to develop a framework for this and

future studies. It limits itself to what I designate “political secularism.” Drawing from a wide and interdisciplinary literature, I have developed what I call three conditions of political secularism. These are intended as an analytical or heuristic device through which to think about the powers, ambitions and limits of political secularism.

The first condition deals with relationships between states and institutions of religion and tradition; normatively, administratively and legally. I define this first condition as an institutional configuration and normative relationship between religious and state institutions that, through a variety of means and models, subordinate these religious intuitions to the politics of the nation-state.

The second condition relates to the ways in which secular politics and states are founded and legitimated. I define secular foundations as political and legal authority separate from divine sanction or authorisation by religious bodies. The terms of this authority was instituted in the political philosophy of the Enlightenment and captured in ideals such as rights, elections, democracy, representation and social contracts. Such political concepts are supplemented by nationalist or civil religious movements.

These two conditions and their various elements are deeply intertwined in historically variable ways. Together they constitute political secularism as an ideological and administrative system in which religion is placed under the authority of the politics of the nation state. This is the first meaning of the title of this thesis – the state of secularism. Secularism is a mode of state.

It is apparent that political secularism as a system is under a tremendous amount of pressure and that religion an increasingly visible presence in political rule, states, and forms of public theology. The ambitions and mechanisms of political secularism have been eroded in the last half century. In the post-colonial and neoliberal world, the conditions under which the state can institute authority over religion in political space are increasingly hard to maintain. The third condition of political secularism therefore attends to attempts by late modern states to establish or maintain political secularism. It analyses some of the contradictions and ambivalences in this attempt. I call this the condition of secular governance under late modernity.

I will use these three conditions to evaluate the claim that post-apartheid South Africa is secular, one condition at a time. The three conditions provide a methodological framework by identifying where and how one might find evidence for each aspect of secularism or its lack.

In modern political forms of government, the secular foundations of a polity can be located in the country's founding documents and in the processes of their formation; in the constituting and the constitution. It is no accident that to speak about French or American or Indian versions of secularism requires an examination of the French Revolution, and the American and Indian settlements of independence, their constitutions and some of their most important amendments. The first two conditions of political secularism have a great deal to do with state formation and the normative foundations and powers of new states, as well as with new regimes of political-social relations. At least at an ideal or normative level, these are captured in constitutional law in modern states. And in terms of laws regulating the relationship between

religious bodies and the state and between government and the practices of various religious traditions, these too are framed in the constitution and then iterated in legislation and policy.

In South Africa, to examine the content and form of secularism under its first two conditions has required an examination of the process of political transition from apartheid; the constitutional negotiations and the content of the constitution with respect to religion and tradition.

One of the most interesting aspects of South Africa's "becoming secular" in the 1990s is that it took place in the midst of many global assertions of political religion as well as limitations to the capacity of newly independent or transforming states to subordinate religion. The question is not only whether South Africa has instituted a secular constitution. The question is also whether its secularism has been grounded and consolidated in the sixteen years of the post-apartheid period. An assessment of the realisation of the possibility political secularism has, therefore, required attention to developments in law, politics, political rhetoric and the institutions of government after the constitutional negotiations. It also required some explanation of how religious imaginaries and institutions have taken up and contested the spaces the constitution framed and created.

In many ways it may be too early to answer whether South Africa is secular. The balances of power and the capacities of the state are not yet settled, or perhaps, are becoming increasingly unsettled. Not only that, but no one person could possibly offer such a comprehensive answer given the dearth of sociological and political enquiry

into the place of religion and tradition in contemporary South Africa; a dearth that is only now beginning to be addressed. While it will be possible to make quite strong claims with respect to the first and second conditions of secularism, my approach to the third will be far more provisional. I will attempt to frame some ways of enquiring into these questions, and then offer a reading of one or two developments in the post-apartheid period.

3. Methods and sources

This approach has shaped the methods and sources for this research. The majority of data I collected relates to the political negotiations from the late 1980s and the constitution writing process from 1990 to 1996. The negotiations left a trail of documents lodged in archival collections across South Africa. They include minutes, media statements, and submissions from political parties, civil society organisations and individuals, verbatim transcriptions of negotiating meetings, draft constitutional texts, legal opinions, and technical reports. The constitutional negotiations material is the largest part of the data collected for this project.

For the Convention on a Democratic South Africa of 1991 to 1992 (Codesa), and the Multi-Party Negotiations Process of 1993 (MPNP), I relied on the National Archives in Pretoria. Both collections are substantial, 14 and 21 linear meters respectively¹. Both collections were handed to the National Archives by the then Department of Constitutional Development just days before the historic non-racial April 1994 elections. Because of the threat of political violence at the time, the use of these

materials is strictly regulated. As with all National Archive material, access is governed by the National Archives of South Africa Act of 1996, which stipulates that they are not available for use within a 20 year “closed period” without special permission. In addition, a condition of the archives’ procurement of these materials was that permission for their use would have to go through the office of the president of the country.

After the necessary requests, I was given permission to access these collections, and all the files I requested were delivered to me intact. The special conditions did however have two effects. The first is that personal details – telephone numbers, home addresses, and in cases of private individuals, names, were deleted from the files before being delivered to me, although not always consistently. The second is that archivists with security clearance were required to write a report for the president’s office on the material I requested; a process that sometimes caused delays in accessing files and generally extended the time needed in the archives².

After the 1994 elections, both houses of the new Parliament together formed the Constitutional Assembly (CA) and drafted the final constitution. Although housed at Parliament in Cape Town, it also delivered its papers to the National Archives. The deliberations of the Constitutional Assembly were public, and at the time there was a web-based data base of documents and submissions available to the public. This set of records is no longer on-line. I was able access the raw data from this data-base. Unfortunately, many of its ordering principles were lost when they were taken off line, and there are series gaps and errors in the allocation of documents. I therefore returned to the National Archives to access the paper based documents as well as

recordings and other supplementary material from the Constitutional Assembly. Unlike the earlier records, there were no additional security measures over and above the 'closed period' stipulations. Personal names and contact details were however still removed from these documents before they were made available to me³. The very large Constitutional Assembly collection at the National Archive comprises nearly 170 boxes and is yet to be fully inventoried.⁴

While these archives are remarkably complete with respect to written documents, there are a number of limitations and gaps. Many of the political party submissions were not included in the MPNP materials at the National Archives for example, perhaps out of fear that their sometimes volatile contents would be leaked. I was able to access these missing party submissions in a donation of personal papers from Hugh Corder, housed at the Special Collections library at the University of Cape Town (UCT). Corder, dean of Law at UCT at the time of my research, was on the Technical Committee on Fundamental Human Rights during the Transition, and kept an almost complete record of these inputs. I was also able to work with the Sandra Liebenberg papers at UCT. Advocate Liebenberg was a member of the technical committee on Human Rights during the Constitutional Assembly. The materials in this latter collection house no additional material, but provided useful verification of the completeness of the National Archive collection.

Another gap is that towards the end of the MPNP, meeting agendas are not always matched by their minutes, making it difficult to trace some decision making. It appears that the absence of minutes correlates to the difficulty that those meetings had

in reaching decisions in areas of great tension. There are five or six such meetings where proceedings were effectively off record.

Structural limitations have been more intractable. As negotiations progressed over the 1990's, their administration became increasingly bureaucratised. More was recorded and in greater detail in the Constitutional Assembly than the MPNP. Codesa's records are relatively thin by comparison. It is therefore possible to build up a more comprehensive picture of the end of the negotiations than the beginning, particularly because of the availability of verbatim transcriptions of theme committees as well as negotiating forum meetings at the CA. Only plenary sessions were transcribed at the MPNP. This problem is compounded by the lack of media access to Codesa outside of its two plenary sessions, and strict limitations on media access in MPNP.

A related but more serious concern is that many of the early talks were in bilateral meetings between the ANC and NP, and in various informal forums. These are not on record. My analysis of this archival data has therefore been supplemented by a reading of secondary literature. Particularly helpful are the spate of books published in the 1990s that examine the "miracle" of South Africa's transition (Adam and Moodley 1993; Barnes and De Klerk 2002; Cachalia et al. 1994; Cassidy 1995; Ebrahim 1998; Elazar 1994; Friedman 1993; Gloppen 1997; Harber and Ludman 1994; Klug 2000; Shaw 1994; Sparks 1994; Spitz and Chaskalson 2000; Waldmeir 1997). Many were written by people with prominent roles in the negotiations, whether as lawyers, politicians or administrators. In addition, journalists Waldmeir (1997) and Sparks (1994) produced narratives of the process of negotiation up to the 1994

elections. While covering important political processes and actors, most of these secondary texts pay little attention to negotiations around religion or tradition.

The process of collecting and collating through this archive material took the better part of 2008, and involved months at the National Archives in Pretoria as well as three weeks at UCT's Special Collections Library. I accessed all materials I could find to do with traditional leadership, customary law, traditional communities, religious law, religious bodies and institutions, technical and political committees looking at human rights and the Bill of Rights, submissions by religious organisations, processes of negotiation and reports and public debates on secularism, religion, culture and self-determination. For some material I only noted details of dates and events in order to track decision making processes. For data more central to my topic, I had the documents copied in full.

By the time I left the archives, I had copies of just short of nine hundred primary texts from the negotiations alone. They filled eighteen lever arch files and were supplemented by volumes of archive notes on those documents that were not copied. I then numbered, paginated and coded those, using seven categories, each with around a dozen sub-codes. The code categories were derived from the archival sources and included:

- political concepts;
- religion, morality, national symbols and secularity;
- government and state forms;
- society and nation;

- African tradition, culture and indigenous law;
- human rights and the Bill of Rights;
- the negotiating processes;
- media and public participation.

To give some indication of the specificity of the negotiations documents, the religion category included the following sub-categories: Christianity; God and divine intervention; Islam; morality, values and norms; national symbols and the preamble; other religions, agnostics and atheists; the public sphere and state institutions; religion and family law; the religious experience of women; religious needs; religious pluralism and inter-faith; the role of religion in society; religious education; and secularism. The African tradition, culture and indigenous law category included: custom, life worlds and customary communities; customary law and courts; democratic and hereditary principles; ethnicity and tribalism; hierarchies of traditional leaders; homelands; legitimacy and future of traditional leaders; practices and institutions including communal land tenure; the relationship of chiefs to government; women, gender and customary practice; and the roles and functions of traditional leaders.

In addition to these archival sources, I have paid attention to a range of developments that relate to secularism since the completion of the Constitutional negotiations. I have followed the development of the large body of legislation around religious and cultural or customary rights and the role of traditional leaders, collecting data from law, parliamentary debate, public submissions and media. Similarly, I have followed Constitutional Court rulings on related matters.

Aside from these government and public media sources, I have also followed developments, as far as possible, in a range of religious bodies that are state intermediaries. I have therefore collected material from the state's interlocutors such as the South African Council of Churches. I have also been on mailing lists for a range of other religious groups including Christian groups that were formed to mobilize against abortion and same sex marriage, and Ulama groups that support the recognition of Muslim Personal Law. Through my Buddhist community, I have had access to some of the documentation produced by provincial and national religious leaders' forums.

In the last decade there have been a number of events leading to contestations over the role of religious and traditional practices. Where these have come to my attention through the media or from participants and colleagues, I have attempted to follow these stories and the debates they have engendered. Some of the better known include Toni Yengeni's slaughtering of a bull and the response from the SPCA, an organisation that was also involved in attempting to stop the killing of a bull in a ceremony ordained by Zulu King Goodwill Zwelethini. President Zuma's polygamous marriages and blessings for the Soccer World Cup are amongst this list. There are many lesser known events; debates by the ANC youth league about the Christian bias of public holidays in South Africa for example, or supermarket managers forcing black workers to remove animal skin bracelets worn as part of their training as healers.

Not all of this material is reflected in the pages of this thesis.

4. Thesis overview

This thesis is structured in a somewhat unusual way in that it does not begin with or even include a consolidated literature review. Secularism is a complex system that involves law, the political management of relationships, ideologies about religion, politics and power, and a great deal of negotiation, contestation and administrative intervention. To address the range and systematicity of political secularism, my research has had to be interdisciplinary in both method and orientation. This thesis considers a wide range of international and South African literatures. I have brought these bodies of work into the thesis thematically rather than attempting to review them in one place.

Chapter One works with the international literature on secularism, its history, its substance, and some of the current debates about the public place of religion. There isn't a literature on secularism in South Africa as such, either historically or in the present. But I have drawn on many areas of academic writing that are relevant to the question of secularism. In Chapter Two I refer to a body of work on South African political history in general as well as the place of Afrikaner and other churches in it, apartheid's racialised political theologies, and the development of policies of indirect rule, tribalism, ethnicity and customary law. Chapters Three, Four and Five address various aspects of the founding of the new South African dispensation through the political negotiations from 1990 to 1996. Here too there isn't a body of literature on secularism, save a few important but isolated articles. These chapters draw on a broader body of work on the reasons for the negotiations, their unfolding, and aspects of the development of the new South African constitution. This is supplemented by

analytical material on the right to religion, constitutionalism, the Truth and Reconciliation Commission, and reasons for and consequences of the recognition of traditional leadership and customary law in the post-apartheid constitution. Chapter Six then attends to developments that have a bearing on the consolidation or entrenchment of political secularism in the post-apartheid years. Here, a literature on the economic and social conditions of South Africa after the transition has been consulted, along with the slow but increasing trickle of academic articles on church state relations, the development of legislation about traditional leadership and customary law, and the policy, political culture and rhetoric of the ANC with respect to these matters.

Aside from this introduction and a conclusion, there are six chapters to the thesis. Chapter one addresses the concept and history of political secularism, and Chapter Two deals with the history of the place of religion and tradition in South Africa, particularly from the Union in 1910 and through the apartheid years. Chapters Three to Five deal with various aspects of the negotiations through which South Africa set aside race rule and instituted a new democratic dispensation. In these chapters I have written a history of the development of various aspects of the constitution in sometimes violently contested situations. Appendixes One and Two reproduce elements of the interim (1993) and final (1996) constitutions, and are a reference to accompany a reading of the text of the thesis. Chapter Six takes stock of some of the developments in the last sixteen years as South Africa's form of secularism has been tested in a changing political, economic and religious landscape.

Rather than go through each chapter in turn and describe their contents, I will outline some of the major arguments of this thesis as they develop across its chapters.

The nature of political secularism

The first argument concerns the nature, structure and effects of political secularism. I argue that secularism is not, as it is commonly held, an absence or eradication of religion. Political secularism in particular is the development of a normative account of the place of religion in politics and society, and a series of disciplinary interventions that seek to secure that religion is put and kept in that place. Historically, political secularism developed in the context of the end of Catholic hegemony and an appropriation of many of the powers, resources and responsibilities of the Catholic Church to centralising and strengthening states. It developed in the context of antagonistic Christian religious pluralism, and the centralising modern state's intervention to neutralise this antagonism.

This balance of power, I argue, is always incompletely secured and its terms are always contested. But even in its incompleteness and multiplicity, political secularism is a framework of government built into the normative and institutional rationale of the modern state system. It is institutionalised in national and international law and the human rights regime. In this, I argue, it is hegemonic.

Political secularism has been instituted through a range of mechanisms. It has often, I argue, been settled at times of political transition and state formation. Formations of political secularism range from the co-opting arrangements of early modern European states, to the destructive ambitions of Marxist or Maoist states, to the critical and

disciplinary interventions of the French and Turkish policy of *Laïcité* and the later co-options in America and India. All of these in their different ways involve significant administrative intervention into religion. In outlining these formations, I suggest that it is useful to identify two broad areas or conditions of political secularism. The first is the relationship between state and religious institutions and the means, including the assertion of the right to religion, by which religious leadership and institutions are separated from the institutional operation of the powers of modern states. The second refers to the double process of exclusion and re-appropriation of religion in the foundations of nation-states. On the one hand, modern political states are founded on political concepts, ideals of governance and imaginaries of freedom that do explicitly exclude religion. Among these are constitutionalism, democracy, representation and human rights. On the other, through nationalism, modern states draw on some of the structures of affect, ritual and performance derived from older religious and monarchical traditions to create and enchant bonds between members of national political communities and their territory and government.

Much of this argument is to be found in the first chapter of the thesis. The framework developed in that chapter is used to structure the enquiry and argument of the rest of this thesis.

Secularism and South Africa's history of racial rule

My second argument concerns South Africa's history. It is included to provide some contrast with the form of political secularism introduced by the negotiations in the 1990s. In the second chapter of the thesis, I argue that the various South African governments have not, until 1994, claimed to be secular. This is true of the pre-union

colonies, the 1910 Union government and the post 1948 apartheid government. The apartheid state and its two constitutions explicitly asserted that South Africa was a “Christian country” under Christian rule.

I argue that racialised rule in South Africa was not secular. More importantly, I argue, it could not have been secular. White rule could not have been based on the foundational modern political concepts of democracy, universal franchise, the representation of the will of the people or the distribution of political rights because they sought to exclude black people from the political community and deny their holding of political rights. White rule could not be based, to use Karin Field’s useful phrase about modern political government, on a single moral community between rulers and ruled. (1982) As a consequence, institutional relations between the racial state and religious institutions could not be fully instituted as a national ideal. They were constantly turned towards the maintenance of white rule. But the techniques of modern statecraft associated with this condition were certainly appropriated in support of racialised rule. I outline a few important moments in the relationships between the union and apartheid states and the Dutch Reformed, English-speaking, and African Independent Churches in support of this claim.

The ambivalent secularisation of things African

The third argument addresses traditional authority and customary law in South Africa and its relation to political secularism. This argument is probably the most novel of this thesis. Its threads weave through this introduction, and Chapters One, Two, and Four to Six.

I argue that most accounts of political secularism take a differentiation between religion and politics as a given. They locate secularism's problematic in the modes of separation between religion and politics and the forms of their relationship. But secularism is impossible without this differentiation which has its historical roots in Christianity. Most other traditions, and most areas to which colonialism brought the idea and techniques of secularism, did not recognise such a differentiation. It was exported across the globe and into a range of non-Christian traditions through colonialism and then anti-colonial nationalist movements. In Southern Africa, this differentiation was introduced in ambivalent and contradictory ways through successive policies of destruction, "civilisation" and assimilation, indirect rule, segregation, apartheid and "separate development." I argue that this trajectory has had important consequences for the political imaginary and institutional locus of chieftainship and through the codification of what came to be called customary law.

A series of differentiations between religion and politics were introduced in the early destructive and assimilationist colonial interventions. They were later undermined by indirect rule, segregation and apartheid. These later strategies brought traditional authorities and customary law within the mechanisms and institutions of the state. They also intervened in complex ways in the relations between the practices of traditional authority and the metaphysics of their pre-colonial legitimation.

One of the most extraordinary outcomes of South Africa's constitutional negotiations was that traditional leadership was once again included within the institutions of government and its national law. This time, however, they were recognised in the structures of a government that does not base itself on racialised rule or models of

cultural difference. And while the institutions of traditional leadership are included in the state, their ideological foundations of legitimation are not. In Chapter Four I make an argument for why chieftainship was recognised anew in the negotiations. In Chapter Six I address some of the contradictions and ambivalences that result from this inclusion. In particular, I argue that before, during and after the negotiations, the African National Congress tried but failed to secularise the institution of traditional leadership; to differentiate its operations from politics, to separate its institutions from the state, to autonomise it, to transform it, and to wrest its administrative powers and appropriate it for the state.

I conclude in this argument that in terms of institutional relations, things African are not secularised. In contrast, in terms of political foundations, at least in the constitution, they are secularised.

South Africa's formation of political secularism

The fourth argument addresses the assertion of political secularism in relation to Christianity and the other world religions that are present in South Africa. In Chapter Three I argue that the institutional relations condition of political secularism was decisively asserted in the new Constitution. I outline the process in the negotiations by which an individual right to religion and the rights of religious bodies to religious freedom was secured in the constitution. This was one of the few grounds of easy agreement between all the major negotiating parties. In that chapter I conclude that the formation of political secularism articulated in the constitution has a strong resemblance to American first amendment secularism, excepting that it does not introduce a disestablishment clause. It does however support the free exercise of

religion, and is based on the presumption that religion is best served in being autonomous from the state, and that it is a positive social and republican good.

The next chapter argues that the constitution is substantively secular in its political foundations too – that it does not recognise a sanctioning God, or establish an official religion or sectarian bias or a ceremonial religious establishment. Much of the nationalist foundation of South Africa in the transition was also deeply secular and did not require or draw heavily on a religious content for that nationalism. The process of the Truth and Reconciliation Commission and some of the terms of “nation-building” did, however, draw on the conspicuous religiosity of the South African people. In this too, South Africa bears some resemblance to the American formation of political secularism, particularly in its combination of a strictly liberal constitution and some elements of civil religion in its nationalism.

The sustainability of political secularism

The first argument in this thesis concerns the nature and effect of political secularism. I argue that it defines a form of politics of the nation state which frames and disciplines religion and also appropriates some of its powers. Both logically and historically, the possibility of political secularism depends on the capacity of states to mobilise ideological, administrative and institutional mechanisms to frame and discipline religion. Both logically and empirically, its sustainability also depends on the forms and ambitions of religion that are present within each nation state, their sub-national and transnational links, and how willing and able they are to contest or approve of the place to which they have been allocated.

With respect to both the capacities of late-modern states and the ambitions of late modern forms of religion, this balance of powers is increasingly contested. I have addressed these issues as a third condition; that of political secularism under conditions of late modernity. In this, South Africa presents a very interesting case. Its political transition in the 1990s strongly asserted a co-opting political secularism as an ideal and as a structure of relationships between the envisaged post-apartheid government and religion.

In Chapter Six I give some indication of the social, economic and political context in which political secularism is being attempted after apartheid. I then ask whether the formation of political secularism that was asserted in the negotiations and encapsulated in the final constitution has been consolidated or undermined in the post-apartheid period. In many ways there is not yet enough information on which to make such an assessment, and the relative positions of the state and religious and traditional bodies are quite labile and unsettled. I make a series of preliminary conclusions. I argue, for example, that within law, the religious rights have been legislated in ways that are consistent with the constitution, but in a context in which countermajoritarian rights such as to sexual orientation are increasingly politicised. I argue that the post-apartheid state has sought to appropriate the moral legitimacy of the churches while at the same time disciplining them. And I argue that in more recent years in which the ANC has entered a period of a crisis in its legitimacy and its capacity for government, it and its leadership have taken on new religious interlocutors that are pushing against some of the constitutional provisions of the formation of political secularism. In contrast, most attempts to discipline and transform traditional authority have failed, and traditional leadership is an increasingly potent governmental and political force.

But because traditional leadership and customary law are recognised to be part of the state, they are uniquely subject to the equality legislation. This may well lead to political difficulty as well as increasing pressure on the separation of and relations between executive and judicial branches of government.

The thesis concludes with a very brief summative re-engagement with these arguments. Its object is not to recount or summarise the thesis, but instead to point to the many theoretical and empirical questions that it raises. The conclusion seeks to identify the many areas in which more thought or analysis or research is needed.

Chapter one: What is secularism?

At the entrance to the field of secularisation, there should always hang a sign 'proceed at your own risk'.
José Casanova⁵

It seems obvious before you start thinking about [secularism], but as soon as you do, all sorts of problems arise.
Charles Taylor⁶

1. Introduction: The State of Secularism

There is a double meaning in the title of this dissertation; *The State of Secularism*. On the one hand it infers that secularism is a mode of state. On the other, it opens to an evaluation of the state in which secularism finds itself today. This chapter seeks to lay a theoretical foundation for the examination of both meanings.

As the quotes at the head of this chapter suggest, the terms of secularism are extraordinarily complex. A cluster of concepts such as state, politics, religion, secular, secularism, church-state relations, differentiation, and establishment are essential to the project of this dissertation. But they are difficult and ambiguous. They are complicated by the variety of ways in which they have been used normatively, descriptively and at different times, and by the fact that many of their usages are currently under challenge. An explication of the scope of their meaning would constitute a thesis on its own if not the life's work it has been for Casanova, Taylor and Asad. And, as already mentioned in the introduction, an investigation of secularism in South Africa also requires attention to African traditions, religious and political.

A polity, an individual, a form of subjectivity, an epistemology, a tradition, a text, or a mode of reasoning can all be secular. And historically as well as normatively, the various objects of the secular are deeply inter-twined and co-produced. My task in this chapter is therefore twofold, of which the first is to define an object of enquiry. The second is to make the concepts operational by specifying and delimiting various aspects of secularism as a heuristic device.

My interest is primarily political in nature, and it is the political scope and dimension of secularism that will occupy this thesis. Its object will be political secularism in South Africa. But this delimitation provides little clarity on its own. It requires an articulation of what political secularism means and some analytical tools with which to examine it. This requires that secularism be articulated into analytically useful components. This is more difficult.

There have been a number of such attempts to date. Talal Asad, for example, in his *Formations of the Secular*, makes a distinction between the secular, secularism and secularisation. In this book, he refers to the secular as “an epistemic category.” (2003:1) Secularism on the other hand, he conceives of as a political doctrine. Secularisation in his analysis is the application of this epistemic category and political doctrine to other forms of social and political life, a process he investigates in this book in relation to Muslim and Colonial law in British Colonial Egypt among other things. His principle object is secular political rationality and its effects on subjectivity, power and sociality.

For his part, José Casanova in the book *Public Religions in the Modern World* differentiates between three versions of secularisation theory. The first, he suggests, is the “differentiation and secularisation of society” which speaks to the emergence of autonomous spheres of state, market and religion. (1994:21) The second is that of “the decline of religion.” The third is what he calls the “privatisation thesis” which posits a marginalisation and interiorisation of religion in the modern world. By separating out these three meanings, he is able to assert the validity of the first meaning of differentiation, while questioning the second and third, and positing a contemporary “deprivatisation” of religion. (1994:211) His principle object is the wave of recent Christian movements that seek to re-occupy the public realm, and he develops a normative argument for their validity.

Charles Taylor’s more recent *A Secular Age* covers an extraordinary range of meanings of the term. But here too he needs to develop some analytical differentiation within the secular which he examines almost entirely in the context of the “West.” He introduces three families of meaning. The first refers to common institutions and practices of the separation of church and state and the development of “a political society that includes believers and unbelievers alike.” (2007:2) The second corresponds largely to Casanova’s decline of religion. His third, and his principle object, is faith under conditions of modern subjectivity.

All three of these conceptual schemas casts too wide a net for this thesis, engaging with objects further afield than politics and the state. Had there already been an interdisciplinary body of literature on secularism in the South African context, it might have been appropriate to engage in such a wide-ranging enquiry. Given that

there is not, it is important to define a narrower field, develop appropriate conceptual tools for its investigation, and in their application, take into account non-monotheistic religiosity and tradition. Given the object I have taken, none of these already existing schemas contains the degree of specificity I think is necessary to examine the secularity of a polity.

2. Defining political secularism

In order to unpack the concept and make it analytically useful, I have created three conditions of political secularism. The first two describe the domains and means through which states and their political operators have sought to separate religion from the exercise of political power.

The first relates to the relationships between the state and religious organisations. I call this the condition of “secular institutional relations.” I define it as *an institutional configuration and normative relationship between church and state or between religious and state institutions. There are a variety of forms of political secularism, but they all subordinate religious institutions to state power.*

The second relates to modern political foundations in Enlightenment thought as well as in nationalist and civil religious movements. I have called this the condition of “secular foundations.” I define secular foundations as *political and legal authority separate from divine sanction or authorisation by a religious body. Secular foundations for political legitimacy through rights, elections, democracy and*

representation are often supplemented by nationalist or civil religious movements in modern states.

These two are deeply intertwined. Together they constitute political secularism which I define as *an ideological and administrative system in which religion is placed under the authority of the politics of the nation-state.*

Like any system, political secularism is always incomplete and contested. It is constituted through a variety of mechanisms including violence, law and ideology. Secularism operates under multiple modalities. It is neither singular nor monolithic, nor is it ever achieved in such a way as it eliminates the possibility of being undermined in the future. But even in its multiplicity and incompleteness, political secularism is a framework of government built into the normative rationale of the modern state system. It is institutionalised in international law through modern constitutionalism and the human rights regime. And in this sense at least, political secularism is virtually hegemonic.

Historically, political secularism was achieved most decisively in processes of European and American state formation. It was then consolidated as these states consolidated; deepening and entrenching secular political cultures and institutional relations. Some of these countries were also colonial or imperial powers. But the logics of secular rule were not applied equally to metropolitan and colonial situations. Nor were most people that were subject to colonialism Christian. Both these characteristics of colonialism have important and little understood consequences for secularism as a global political norm and practice.

It is increasingly commonsense that political secularism is at something of a limit; its ideological and administrative capacities questioned and strained. The ambitions and mechanisms of political secularism have been eroded in the last half century. I argue that the post-colonial and neoliberal situations are conditions under which state authority over religion in political space is increasingly hard to maintain.

The third condition of political secularism therefore attends to attempts by late modern states to establish or maintain political secularism. It analyses some of the contradictions and ambivalences in this attempt. I call this *the condition of secular governance under late modernity*.

The remainder of this chapter seeks to give some flesh to these conditions and their historical development. I will use these conditions throughout the thesis as a way of structuring an examination of South Africa's encounters with secularism and its claims to have become a secular polity after apartheid.

3. Differentiating between religion and politics

Any discussion about a relationship between religion and politics needs to identify the basis on which religion and politics are distinguished from one another. It is essential to know that Archbishop Tutu is a religious leader and Nelson Mandela a political leader, especially when Tutu is engaged in politics and Mandela is understood as a

miracle and source of transformation. Without this distinction, secularism is impossible.

But how are religion and politics differentiated? Historically, the roots of this differentiation are to be found within Christianity. Secularism of all kinds developed in a Christian context. It is impossible to narrate the emergence of the secular without taking Christian history into account. For the original secular differentiation between religion and politics was a Christian differentiation. And this differentiation has a history.

Christianity started off as a Jewish messianic cult. In its beginnings, Christianity was separate from and persecuted by Rome. It was, to quote Lilla, an “apocalyptic sect in a pagan empire.” (2007:43) After the death of Jesus and under the authority of the Apostle Paul, the early church split from Judaism and asserted itself as a vehicle for universal salvation. This transformation took place in its spread to the many non-Jewish groups in the Roman Empire; the communities to which Paul wrote his Epistles. It was only with the conversion of Constantine and many of the Roman elite in the fourth century that Christianity was Hellenised, became a state religion, acquired its empire and thus became Christendom. (Lilla 2007) Its subsequent history and theology bound the cult and the empire together.

The traces of the earlier differentiation between a messianic cult of Jesus and the politics and culture of the Roman Empire can be mapped in tensions between the Christological Kingdom of God, the Papal realm of Church authority, and the monarchs. Relations of power and authority between the church and the princes were

both administratively and theologically contested. As Casanova puts it, “The theocratic claims of the church and spiritual rulers to possess primacy over the temporal rulers and, thus, ultimate supremacy and the right to rule over temporal affairs as well, were met with the caesarapopist claims of kings to embody sacred sovereignty by divine right and by the attempts of temporal rulers to incorporate the spiritual sphere into their temporal patrimony and vassalage.” (1994) While there were clearly differentiations between prince and cardinal for example, in Western Europe from the fourth century until the seventeenth, the exact location of this differentiation between religion and politics was contested.

One of the ways in which to trace a history of secularisation is through changes in the meaning of the words that refer to it. The etymological root of the terms secular, secularity and secularism – the Latin word *saeculum* – means time or age. As a theological term it designates the time from Jesus’ incarnation until his second coming. (Lilla 2007; Casanova 1994) Paradoxically, it refers to a time without God, a worldly time, but within the context of a broader theological narrative.

In the Canon Law of the Middle Ages, *sarcularisatio* came to designate the release of a cleric from the obligations of his order and into the status of a secular priest. It was, in other words, an inter-ecclesiastical transition from religious to secular priesthood, the latter to work “in the world.” (Blumenberg 1966; Asad 1999; Casanova 1994) This “world” was nonetheless thoroughly Christian. Once again the term had the double meaning of a worldliness that was nonetheless asserted from an ecclesiastical point of view. Unlike the temporal meaning already mentioned, this meaning has a

spatial dimension that refers to the worldliness beyond the monasteries' walls and religious participation in that worldliness or laity.

This initial secularisation as laicisation was part of the major upheavals in medieval Christianity. The Medieval Catholic church sought, as Asad suggests, the “subjection of all practice to a unified authority” that could discern truth and falsehood (1993:37). This authority was policed by excommunication; tantamount to social and political as well as religious banishment, and accusations of heresy. The latter were not only about incorrect belief. They were also about a failure to respect the power of the church to authorise truth. A manual for inquisitors in 1248 refers to a heretic as “he who believed in the errors of heretics and is proved still to believe them and because, when examined or when convicted and confessing, he flatly refused to be recalled and to give full obedience to the mandates of the Church.” (Reproduced in Lopez 1998:25)

The Medieval Catholic Church was both non-voluntary and territorial; its borders marked a polity and a population. Its functions and privileges included “the allocation of administration of judicial matters, education, the documentation of life cycle events (such as birth, marriage, death) and social welfare responsibilities.” (Casanova quoted in Gill and Keshavarzian 1999) In practical terms the parish was the functional mode of tax collection and local government. (Taylor 2007)

Between 1450 and 1640, a fire of religious reformation swept through the Catholic world, leading to the emergence of Protestantism. During this period, various reformers attempted to raise “the quality of spirituality of the masses” as Taylor puts it, by increased devotion focused on the Passion of Christ, as well as pilgrimage.

(2007:65) The gap between the laity and the priesthood was breached in this process, and what had previously been elite theological concerns over divine judgement on individuals for example, became laicised. Salvation became presented in individualistic terms. There was a turn towards inward personal devotion which brought with it a widespread fear of death and a concern with sexual purity. (Taylor 2007; Aries 1975) With this individual emphasis came a critique of sacraments and church magic.

Among these Catholic movements were to be found various attempts at institutional reform; the foundation of new orders such as the Jesuits in 1534, the intensification of practices of individual piety that began with the medieval mystics, and Church approval for the study of Greek, Latin and Hebrew texts, (Lilla 2007) many of which had been preserved by Muslim scholars through the Christian dark ages. Many writers have identified the origins of modern political thought and modern interiorised subjectivity in these developments. The rediscovery of the classics animated the Enlightenment. And Foucault, for example, examined the laicisation of confession practices, their intensification and spread. He located interiorised reflexive subjectivity that authorised first the novel and later psychology's talking cures in these forms of discipline. (Foucault 1986) The seeds of church reforms were to bear fruit outside the churches in the emergence of modern subjectivities.

The late 15th Century also saw the development of the natural sciences through which the ocular human universe was decentred with the inventions of the microscope and telescope. Geological sciences cut away at the biblical foundations of creationism. The early modern states engaged in exploration, trade and then early mercantile

colonialism. (Anderson 1991) Expanded trade routes became the source of information that was hard to reconcile with Biblical narratives. China, for example, proved to be verifiably “older than any civilisation mentioned in the Bible.” (Lilla 2007:60) All of these developments undermined the authority of the church as purveyor of truth about God and nature, and gave authority to other newer sources of knowledge.

a. The politics of Christian pluralism

The Reformation began when Martin Luther pinned up his 95 theses on the door of the Wittenberg Cathedral in 1517. It was the first heretical movement that the Catholic Church was unable to suppress, and it led to a split in Latin Christendom. The complex monopoly of the Roman church was broken. (Casanova 1994) For the first time, Europe became the site of Christian pluralism.

The Reformation liberated the spheres of economy, society, science and politics from religious control by breaking the monopoly of the Catholic Church. As Louis Dumont argues “medieval religion was a great cloak. Once it became an individual affair, it lost its all-embracing capacity and became one among other apparently equal considerations, of which the political was the first born.” (Quoted in Asad 1993:27)

It is not possible to go into the theological debates that founded Protestantism. But the centre of gravity in Christian practice moved, in the thought of Luther and Calvin and under the later Enlightenment critiques of religion, from the sacraments and rituals to inner transformation or salvation through “personal faith.” In Luther’s fiery

movement, it was only the inner realm that could guarantee freedom and the possibility of salvation. The outer person was subject to systems of worldly power that could only corrupt it. (Casanova 1994) Many sacraments and the doctrines of intercession by saints and celibate priesthood were abandoned.

Much of the Enlightenment's conceptions of freedom, maturity and rationalism come from the anti-Catholic polemics of Protestant reformers. But the critique of Catholicism was not only ideological or theological. It was also a reaction against the Roman See's political role, and the consequent weakness of the republican Princes. According to Stark "When Luther nailed up his theses, the north-western German princes and electors had no legal power to staunch the flow of funds to Rome or to limit the expansion of Church lands... By turning Protestant and confiscating church property and income, as Luther advocated, they reversed their unfavourable situation vis-à-vis the church..." (Quoted in Gill 2008:77)

Until the Reformation, Western European religious and political communities and territories were coterminous. The split in the church therefore had violent political repercussions. The wars that broke out after the Reformation were not only contests over individual souls, but for the affiliation of polities and territories. France, for example, suffered a series of civil wars from 1562 to 1598 over this matter. Religious conflicts fed into the English Civil War of 1642-51. All across Western Europe, the Vatican, the princes and the new Calvinist and later Congregationalist, Quaker and Lutheran reformers sought to assert their truth and power.

There were a number of attempts to pacify the violence. The Netherlands supported religious toleration after its independence in 1579, becoming a haven for Protestant dissidents across Europe. The Dutch declaration of independence asserted that “no man may be molested or questioned on the subject of divine worship.” (Gill 2008:81) In 1598 King Henry IV of France signed the Edict of Nantes. It gave the Huguenots, the minority French Protestants, “a guarantee of non-persecution for their faith.” (Gill 2008:1) Almost a century later, Louis XIV rescinded the Edict, unleashing a wave of violence against the Huguenots that resulted in the emigration of nearly 400,000 across Europe, North America and later to what was to become South Africa. In England in 1689, the crown passed an Act of Toleration as the dissenting Anabaptists, Presbyterians and Quakers increased in number.

Out of the resolution of religious war was born the modern notion of individual religious liberty. (Gill 2008) By granting individuals the right to practice their religion and thereby separating religious from political affiliation, religious pluralism could be tolerated and neutralised in the state. Individual religious freedom, freedom of conscience in other words, was a political necessity and a secular right. This freedom recognised conscience as the essential part of religion; the dematerialised and interiorised ‘faith’ that was established in the Reformation, and that could, at least theoretically, be separated from its social, territorial and political embeddings.

In order to bring peace to a Western Europe ravaged by the Thirty Years’ War, a peace treaty was signed between the Vatican, the Princes, and some representatives of the Reformation churches. In settling this Peace of Westphalia in 1648, the nascent early modern state was founded on the boundaries of the earlier principalities. Still

under the control of monarchs, they gained autonomy from the Vatican and had the capacity to decide the religious affiliation of the polity. It was possible, in other words, for them to establish either a Protestant or the Catholic Church as their official religion. This is the source of the modern establishment of official religions.

The Peace followed the earlier Dutch and French examples and granted individuals “the liberty of conscience” and the “freedom of religion.” While not providing equality of citizenship, it did provide some protection for religious dissidents. John Stuart Mill, writing his *On Liberty* in the late 1850s, explains the development. “Those who first broke the yoke of what called itself the Universal Church, were in general as little willing to permit difference of religious opinion as the church itself. But when the heat of the conflict was over, without giving a complete victory to any party, and each church or sect was reduced to limit its hopes to retaining possession of the ground it already occupied; minorities, seeing that they had no chance of becoming majorities, were under the necessity of pleading to those whom they could not convert, for permission to differ. It is accordingly on this battle-field, almost solely, that the rights of the individual against society to exercise authority over dissentients openly controverted.” (Mill 1859:6)

In the aftermath of the religious wars a new meaning of the word secularisation came into being. For the first time in the terms of the 1648 Peace treaty, the term secularisation was used to denote the large-scale transfer of church lands and resources to the Princes. (Madan 1987) This meaning went almost un-noticed in writings about secularism until the 1960s when Blumenberg initiated a critique of intellectual histories of secularism as the natural consequence of truth overcoming

darkness, attending instead to the institutional and economic balance of power that shifted dramatically with this Peace. (Blumenberg 1966)

Across Western Europe, the institutional, legal and territorial hegemony of the Catholic Church was broken, most markedly in the new Protestant nations but also in Catholic Spain and France. Not only had the Catholic Church lost their hold on the authorisation of truth, but also on their resources and public function. The emerging early modern states appropriated monasteries, land and fixed property, as well as a vast network of social and governmental functions including, gradually, the collection of taxes, education and welfare. (Blumenberg 1966) As a result, the term secularisation gained a new meaning after the Reformation. (Arendt 1958; Casanova 1994) Not only did it mark the strengthening of the state through the appropriation of the powers, resources and property of religion, it also came to signify “the transfer of ecclesiastical real property to laypersons, that is, to the ‘freeing’ of property from church hands into the hands of private owners, and thence into market circulation.” (Asad 1999:186)

Although the term secularism is often taken to mean “without religion,” political secularism is only possible in the presence of religion. It is a designation for a certain kind of relationship between politics and religion. Secularism critiqued religion as a contender for “worldly” power. The question of political secularism is the question of what place religion should take in the polity, and how it should come to take that place. The question of what the state ought to do about religion therefore remains in a secular polity.

4. Two conditions of political secularism

Secularism, as the ‘ism’ suggests, is an ideology; a coherent normative account of what place religion ought to have in a nation-state. This normative account is paired with interventions by political and religious actors to achieve this place or contest it. A variety of possibilities are secular in as much as religion becomes appropriated and subordinated to the state and the nation and does not compete for political power. But the form that political secularism takes depends on the conditions of the state and religious groups. It depends on whether there is a single dominant religion or religious pluralism. It depends on the forms of religion and their political theologies. And it depends on various ambitions of the state according to its liberal or socialist ideologies.

a. Condition one: Secular institutional relations

This condition of political secularism denotes an institutional configuration and a normative relationship between church and state or between religious and state institutions. There are a variety of formations of political secularism. But whatever their form, secularism in the Christian trans-Atlantic world has involved three elements; the management of relationships between the institutions of state and religion; some legislation on the place of religion that sets it apart from government; and administrative interventions into the affairs of religion. Four historical formations of political secularism emerged in Europe and North America. In order of appearance they are establishment secularism, American first amendment secularism, Laïcité, and

Jacobin communist secularism. Each of these constituted a sort of ideal type; a model or aspiration for other countries in their formation and consolidation.

i. Establishment secularism

During the middle ages, Christian Europe was ruled by Austro-Hungarian, Russian and British Empires. On their borders lay the Ottoman Empire. In these areas, populations were ethnically and linguistically diverse. Rule was monarchic and dynastic. There were at least three centres of power in these pre-modern polities; feudal lords, the monarchy and the church. Lawmaking was shared between the monarchs and the church. And control over the means of violence was shared between the monarchs and the lords.

The massive changes of the late middle ages and early modern period, of which the Reformation was an essential part, gave rise to increasing centralisation of powers under the monarchs. They defeated or co-opted other sources of power within their territories, including the churches and lesser nobility. With the end of the monopoly of the Catholic Church, lands and other resources were appropriated to these early modern states. Where the Church had provided local government over populations, particularly the registration of births and deaths, healing, and education, these became the duty of the state. Important elements of the modern state were established in this period; standing armies, a central taxation system, diplomatic relations, and the development of state economic policy in the form of mercantilism. In addition, the boundaries between states became increasingly delineated, and movements of nationalism and cultural homogenisation sought to create nations. There were

increasingly centralised and bureaucratic forms of monarchical rule in 17th and 18th centuries.

Establishment secularism was the earliest modern attempt to resolve the tension between these centralising and consolidating powers of the state and Christian religious pluralism. On the one hand, the monarchs adopted official religions, Protestant or Catholic, in the Peace of Westphalia. And these official religions were an important part of the legitimation of their sovereignty. (Anderson 1991:19) But at the same time, subjects were granted a certain degree of civil freedom and the right to practice their religious choice or conscience independent of that official religion. The right to religious freedom was, in other words, the first individual political right. And the political communities of these early modern nation-states came to include believers and unbelievers alike, Protestant and Catholic. Establishment secularism asserted a separation between a public or national sanctioning role of religion and the constitution of a multi-religious or denominational political community.

This formation of political secularism has been enduring. Much of Western Europe still practices establishment secularism and some of the establishments constituted at the Peace of Westphalia remain in place today. In England and Norway, for example, the Monarch is head of both the state and the church in ceremonial terms. In the latter, Evangelical Lutheranism is the state religion, in the former, the Church of England.

Parliaments would later replace the monarchs as the real centres of political power. But in many cases, the older link between monarchical sovereignty and religious sanction was maintained. (Foucault 1997) As a remnant of an earlier form of political

authorisation and legitimacy, establishment secularism has, Casanova suggests, done no favours to religion. He maintains that the establishment churches are in the unenviable position of being almost completely unable to change and adapt to new social realities, and that their membership has fallen dramatically (Casanova 1994) In fact, writes Casanova, “One might say that it was the very attempt to preserve and prolong Christendom in every nation-state and thus resist modern functional differentiation that nearly destroyed the churches in Europe.” (1994:29) Levels of individual religiosity in Europe are extraordinarily low.

The Enlightenment revolutions

The second half of the seventeen hundreds ushered in the age of revolution based on the ideas of the Enlightenment. First were the American and French Revolutions. The Russian revolution followed a little over a century later. Each of these resulted in a new formation of political secularism. Each sought to exclude religion from participating in the state or exercising political power. But they used divergent strategies and differing degrees of violence and co-option to achieve this.

I will engage with some of the developments of Enlightenment political thought in the next section on secular political foundations. But in terms of institutional relations one significant change needs to be mentioned. The centre of power shifted from the monarchs as the holders of political right to “the people” as rights bearers in modern states. In these three Revolutions, monarchy and establishment were eradicated. And states gained new political controllers and a new logic of legitimacy. The state became authorised through democratic means; violent popular or revolutionary overthrow. It then became legitimated through social contracts expressed in

constitutions; elections to parliaments and senates, and the mediation of political parties.

Relationships between religious and political institutions in early modernity were forged between the church and the monarch as the head of a state. The monarch was also the titular head of the official church. New actors of the institutional relations between religion and politics were to be found after the revolutionary period. Relationships were now forged between religious institutions and governments and political parties. And the idealisation of this relationship between religion and the state was usually framed in law at some point in the formation of modern republican states, and became a significant element of their political culture.

ii. American First Amendment secularism

The Congregational puritans who founded the American colonies in the 1600s modelled their relationship with colonial government on the establishment between the Church of England and the monarchical state. “They [Congregationalist churches] expected the state to support public worship and suppress heresy.” (Gill 2008:64) They made laws that impinged on the religious freedom of Anglicans and Quakers. Early colonial franchise was restricted to church members. As waves of Catholic and other immigrants arrived in the colonies, Congregational churches attempted to assert a monopoly on state religion. In 1646 for example, a Massachusetts law required all inhabitants to attend church. Baptists and Quakers were regularly arrested and beaten, and some were tortured and killed. In Virginia, the Church of England was officially established and was supported by citizen taxes. Preachers of the First Great

Awakening in the late 1700s were barred from founding churches and holding political office.

Between 1775 and 1783, the American colonies fought a war of independence from England and the Crown. In the aftermath of the American Revolution the founding fathers articulated a new regime for relations between religions and the state inspired by the Virginia statute. This was a political necessity driven by the pluralism of religious affiliation and the inability of any one group to establish a religious monopoly. It was also informed by Locke's liberalism. This articulation is to be found in the First Amendment of the American Constitution. Ratified in 1788, it begins as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof ..." (Quoted in Sullivan 2002:390) The first foundation of modern American secularism is Jefferson's "wall of separation" or disestablishment. There was to be no official religion in America; a historical first. This forbids the government from having anything to do with religion by way of legislation. The second is the "free exercise" clause that grants a high level of autonomy to religion.

It took a while for the American state to consolidate this arrangement. It was only in 1833 that the Congregational church was disestablished for example. (Gill 2008) But the first amendment has been an enduring feature of American public life and political culture since then. Religion is not allowed in the government itself, at least administratively and legally. School prayers and bible classes are not allowed in state schools, and the US census bureau is not allowed to ask about religious affiliation.

In contrast with this strong institutional exclusion, American public, political rhetoric, media and nationalism are awash with religiosity. This will be discussed again below under the second condition of political foundations. The assertion of political secularism and disestablishment did not lead to a reduction in levels of individual religiosity or a reduction in the visibility of religion in the public as it did in Establishment secularism in Europe. In this model there are high levels of individual religiosity, and very strong legal protections for the right to religion and conscience and their free exercise.

The free exercise clause means that there are few grounds for the critique or curtailment of religion by the state. Religion is understood to be a positive social contributor to what Bellah calls the development of Republican virtues. (1980) A political and legal framework for the flourishing of religion is supported. Because of the enabling framework for religious organisations in this model, the appearance of “bad” religion is very threatening whether in the form of Jim Jones, The Branch Davidians, George Bush or political Islam. State and society have few means other than violence to limit the scope of religious activities. Perhaps the closest country to this American model is India with its pluralistic religious communities, high levels of religiosity, and strong legal protections for the right to religion.

iii. Laïcité

Inspired by its American predecessor, The French Revolution was the most radical version of the eradication of a European monarchy and its alliance to Rome. The French Catholic Church and its Marionist Counter-Reformation was very powerful, and the battle between proponents of a secular republic and the church was fierce. It

led to outright violence against church buildings and against the bodies of clergy, alive and buried. Anticlerical laws were passed in many Catholic states, banning religious orders, religious education, the wearing of clerical robes and the clergy from either voting or criticizing government officials. (Burleigh 2006:124) Unlike the Protestant countries where these processes were more diffuse, in France the revolution ripped social, juridical and material resources from the hands of the church. (Leatt 2008) In 1789, it was announced in the Revolutionary National Assembly that “all ecclesiastical goods were at the disposal of the nation.” (Madan 1987:748)

This arrangement has been consolidated in France under the name of *Laïcité*. In this system, religious groups, including the Catholic Church, are under strict administrative control by the government and in law. There is an extensive registration process which discriminates against small and new religious institutions, and the state is involved in the sanctioning of religious education curricula. And it pressures religious groups to “organise themselves into a single centralised church-like institutional structure that can be regulated and serve as interlocutor to the state, following the traditional model of the concordat with the Catholic Church.” (Casanova 2007:2)

Laïcité is characterised by strong sanctions against public religion, and a very circumscribed zone of privacy in which religious practice is tolerated. Even the surface of the body is not considered sufficiently private for displays of religiosity, as the recent banning of veils and crosses and other religious attire and decoration attests. While the right to religion or religious liberty is affirmed, heavy limitations are placed on its practice such that only the most hidden and interior elements of religiosity are

tolerated or sanctioned. Where religion appears in public, as it does in the built environment and the historical churches, the state maintains very tight administrative control and in many cases, ownership. The state maintains a general critique against religion; an attitude established when the church really was a threat to the possibility of the modern state.

Revolutionary Turkey modelled its relations with Islam along the same lines and adopted the policy of *Laïcité*. From 1938, it passed a series of secularising laws which banned the use of Arabic script, the call to prayer, higher religious education, Shari'a law and the Islamic brotherhoods. Polygamy was banned and veiling strongly discouraged. The government instituted a version of the Swiss civil code, and women were given equal rights to vote in 1934, well before women got the vote in France, Italy or Sweden. (Keddie 1997:31) As is the case in France, Turkey's population became less observant and less religious in the wake of such secularising policies. (Keddie 1997)

iv. Jacobins: Marxist, Leninist and Maoist

When the Bolsheviks seized power in the Russian Revolution in 1917, they immediately set about crushing the Russian Orthodox Church. An official state church since 988 CE, it ran the country's parish primary schools and, until 1905, leaving the church was an offence punishable by state law. (Gill 2008) No less a figure than Trotsky was given the job of cracking down on religion. The church was disestablished, and according to Gill, more than 25,000 religious buildings were closed in two decades, assets seized, publications banned, and priests were among those most often executed on political grounds under Stalin's pogrom. By 1940, there

were 90 per cent fewer priests than there had been at the time of the revolution. Other religious groups such as Jehovah's Witnesses and Seventh-Day Adventists were also persecuted under a regime of state-sponsored atheism under the League of Militant Atheists. (Gill 2008)

In some respects, the Marxist formation of secularism is similar to *Laïcité* in its disdain for religion, its strong political culture of secularism and the removal or policing of religion from the public sphere. But the Marxist critique of religion as false consciousness and as opiate of the masses added another layer of critique. Religion was not only policed in the public spheres, but there were attempts to eradicate it from the private sphere too and those zones of conscience that were recognised as the locus of religious freedom in post-Reformation thought. Perhaps to be more accurate, the Jacobin aspiration to a total remaking of society made privacy impossible, and the state sought to saturate society in the making of new men and women. In extreme manifestations, Soviet and Maoist communists conceived of the possibility of the total eradication of religion and a reliance on the state for the creation of ideal society and individual happiness. Socialist utopias, while themselves mimicking some of the structures of religious language and imagination, promised a future free from religion, in which human development could be entirely self-motivated. (Leatt 2008) As a consequence, freedom of religion was extremely restricted or limited so severely as to have the same effect.

Communist ideology sparked a series of further revolutions. Most significant was Mao's 1949 revolution in China. In Mao's consolidation over almost all institutions of state and society, religious institutions and property were destroyed and Confucianism,

Taoism and Buddhism banned. The height of this destruction came in the Cultural Revolution. A number of anti-colonial independence movements across Asia and Africa took this communist secularism as their model. Of these only North Korea has retained this totalitarianism. In Southern Africa, both Mozambique and Angola instituted communist anti-colonial revolutions and sought to destroy or nationalise the institutions of religion and traditional leadership. (Haynes 1996) With the fall of the Berlin wall a decade ago, and the collapse of the Marxist polarity of the old world order, Jacobin-style suppressions of religion are on the decrease. (Casanova 1994)

Administrative interventions

While there are various forms of secularism as political ideology and practice, they share some common administrative strategies. As Mahmood puts it “secularism has entailed the legal and administrative intervention into religious life so as to construct religion; its spatial entailments, in its worldly aspirations, and the scope of its reasoning along certain lines.” (2005:77) There are legal, administrative and regulatory restrictions on the practice of religion in all modern states whether explicitly secular or not, and whether religion is viewed positively or negatively in ideological terms.

These include limitations on what are considered to be undesirable sects such as Christian Science in France or Snake Handling churches in the USA. And in many countries, religious groups need to register as such, giving governments the power to grant legitimacy to religious organisations. Law rather than religious texts or religious authorities often now arbitrate religion in public disputes. (Sullivan 2005) Tax exemptions, the registration of ownership of property, and access to chaplaincy

positions in state institutions such as prisons, army, police and hospitals may be dependent on such registration. (Gill 2008) In some places, holding public office may be officially restricted by religious affiliation.

On the other hand, the state can grant preferential endorsements to selected religious groups through financial subsidisation, most usually through welfare and education services, the payment of clerical salaries and the maintenance of religious buildings, as is the case in France and Turkey as well as many parts of Latin America in the 19th Century. Where there is an established church, such as in Germany or the UK, mandatory tax finances the public functions of these institutions. (Gill 2008)

Secular states ban religious practices such as wearing the veil (France and Turkey), snake handling (USA), caste and untouchability (India), the use of Peyote or marijuana (USA, South Africa), and the use of religious language or script (Turkey). Some practices are banned outright, while other are discouraged through zoning laws, taxation, and a bevy of industry, health and public morality regulations. In Europe it can, according to Gill, take up to a decade to get planning permission to build a non-traditional religious building, for example. (2008:16)

The common ground of this condition of political secularism is therefore that the state is able, through some combination of law, violence and administrative intervention, discipline religious groups and practices. Some of this discipline is relatively benign; more co-option than compulsion. This is particularly the case in the American model in which religion is considered to be a basis for social and civic good. The Jacobin and Marxist models show this discipline in its more violent and coercive aspects.

The presence or visibility of religion in the public or political sphere is not, per se, an indication that there is no secularism. Instead, to determine the presence of political secularism is to evaluate the ends to which religion is participating, who is setting the agenda, and who frames the terms in which such presence is realised. And these terms are always both mobile and contested.

b. Condition two: Secular foundations

The second domain of political secularism deals with the legal and ideological foundations of political legitimacy of modern states. It involves two closely related arenas of secularism. The first is Enlightenment political ideas, their secular foundation for political authority and government. And the second is nationalism and, in some cases, civil religion.

i. Enlightenment foundations of political theory

Enlightenment thinkers provided the rationale for the anti-monarchic democratic revolutions of the late 18th Century. They re-introduced political concepts from classical Greece and Rome into European philosophy and political thought. The idea of citizenship was taken from the Greek-city states. From Athens, the idea of direct democratic government gained purchase. The idea of republics, constitutionalism and a distinction between public and private spheres came from Roman antiquity.

Inspired by political thought from antiquity, Hobbes provided a route out of Christian political theology. His book *The Leviathan* posited a state of nature that politics could constrain through a combination of violence and political rationality without any detour through religious institutions or dogmas. The text of *The Leviathan* begins on the surface of the body with human sensory capacity; a subsequent chain connecting perception, imagination, labelling and reason. The “world” in Hobbes’ work is given to us individually and through bodily sensation and perception. Common life is not guided by any transcendent principle or design or purpose; not by providence and not by natural law.

“Hereby it is manifest” he wrote “that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war is of every man, against every man.” (Hobbes 2006:84) Violence is therefore the primary condition of the political in Hobbes’ conception. Where there is no common power, he thought, there can be no peace, no justice, no culture, no law. This is a state in which each “man” has a natural right to commit violence. And this is a right that “he (sic) will willingly and rationally lay down in the interests of peace, prosperity, a long life and protection.”

In order to avoid a realisation of this state of war, Hobbes’ recommended that a person or assembly be granted total sovereignty such that each individual may be protected and flourish. As he puts it: “The only way to erect such a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another, and by the fruits of the earth, they may nourish themselves and live contentedly; is, to confer all their power and strength upon one man, or upon one

assembly of men, that may reduce all their wills, by plurality of voices, unto one will..." (Hobbes 2006:114) In this common power, the religious would be subsumed by the sovereign in the total control over members of the polity. He suggested, in other words, that religion could and should be completely subjugated and incorporated into the sovereign political principle. "The sovereign would have total monopoly over ecclesiastical matters, including prophecy, miracles, and the interpretation of scripture. He would also declare that the only requirement for salvation was complete obedience to himself." (Lilla 2007:86)

Locke's work is the next decisive step in the genealogy of secular humanist political thought. Instead of arguing that the state of nature is war, Locke suggested a basic human goodness that could be cemented through a contract based on individual liberty that respected the liberty of all others. Sovereignty was not, therefore, to be maximised in one person, but rather to be distributed among all within a social contract which, he hoped, would supplant violence as the foundation of common life. (Gill 2008) In his 1689 *Letter Concerning Toleration* he made a case for the disestablishment of state religion on this basis. He proposed that respect for individual rights and the defence of property, liberty and life would be improved in a state with widely distributed authority and an elected representative body. In this model, which is foundational for modern liberalism, religion is a matter of individual good, a right to be exercised in private and in such a manner that the social contract can secure a common good.

As already mentioned, early modern states in Europe were ruled by monarchs over increasingly centralised state apparatuses. The shift between early modern and

modern political forms of government involved replacing monarchs with representative or parliamentary democracy. In parallel, as Schmitt suggests, Machiavelli and Hobbes sought to replace theistic and transcendent conceptions of power and state with theories of violence and interest. (Schmitt 1985, 2007) At first the object of this governance was territory and national economy. But this shifted in the modern period to a new object of governance and normative political theory; the population. This is the other side of “the people” that provide the legitimacy for rule. The genealogy of this transition is thoroughly explored in the work of Foucault. (1965; 1976; 1977; 1985; 1986; 1997; 1991)

In this process, new political rationalities and techniques of statecraft were developed, including statistics, bureaucracy and public administration. (Herzfeld 1992) This further strengthened and centralised political power in the state. Social contract theories that legitimated the power of modern states were developed through theories of the representation of society as the basis for political legitimacy, mediated through political parties and then later, deliberative consensus in the public sphere and civil society. (Mouffe 2000, 2005; Lefort 1988) In this process, new imaginaries of political freedom developed; civil society, democracy, elections, the will of the people, and representative government. These foundations of modern politics are captured in a cluster of civil and political rights and have since become utterly normative in the formal constitution of modern states and the stated logics of the international community.

The Enlightenment asserted a political ethic independent of religious convictions and a political community independent of religious affiliation. (Taylor 2007) The

revolutionary states were inaugurated by people inspired by this political imaginary. And the modern state became the guarantor of these ideals of secular politics. This is why, if we are to look for secular foundations, it is to the formation of the modern state we must turn, and the political principles it claims to embody. And if we are to assert that a polity is secular, it has to be founded on political principles that do not depend on the authority or divine right or the sanction of God or tradition or on a chosen people, a religious franchise, the church or some other religious institution.

ii. Romantic foundations of nationalism and civil religion

Enlightenment political thought is not the only inheritance of the modern secular state. There is a second principle of foundation; one that links population and territory together. This is nationalism and its twin; civil religion. Both drink at that other stream of Western inheritance; Romanticism.

The Romantics critiqued the rationality of the Enlightenment. (Campbell 1987; Jager 2007) They sought to re-introduce a degree of enchantment into what they diagnosed as an increasingly mechanistic, rational and rule bound world. Newton with his mechanistic natural laws was a particular target. Romantic writers said he had “clipped an angels’ wings, disenchanting the world and reducing all life to the status of a machine.” (Campbell 1987:181)

Rousseau was the movement’s foundational thinker, and he wrote that the Enlightenment’s rejection of religion would fail to account for what was best in human beings and encourage baseness. (Lilla 2007) Rousseau did not defend revealed faith, but “man’s” religious instincts. Human capacity for goodness, morality,

conscience, charity and the likes was not dependent on revelation nor, as Kant would suggest, on rationality. Instead, Rousseau suggests, it is dependent on sentiment, on subjective feelings which are an assertion of human freedom. This is the true spirit of humanity. Romanticism was not so much a counter-philosophy, but an aesthetic, a vision of freedom and heroism, and a sentiment. Romanticism was not only a critique of rationalism. It was also a resistance to the levelling or conformity of the social and the Enlightenment principles of equality and exceptionlessness through tropes of heroism and genius. (Arendt 1958)

This Romantic aesthetic was not only applied to individuals, it was also applied to nations. Monarchical rule of the early modern states was legitimated by transcendental concepts and close links with church institutions and leaders. The object of divine sanction was the king and his political rights, or at least the political rights of his office. The Enlightenment revolution changed the subject of political rights and government from the monarch to “the people” and the land. New objects were sanctified under secularism; particularly territory and population. This is the area of nationalism.

The relationship between religion and nationalism is complex, ambiguous and historically variable. Benedict Anderson had the following to say about it: “I am not claiming that the appearance of nationalism towards the end of the eighteenth century was “produced” by the erosion of religious certainties, or that this erosion does not itself require a complex explanation. Nor am I suggesting that somehow nationalism historically “supersedes” religion. What I am proposing is that nationalism has to be understood by aligning it, not with self-consciously held political ideologies, but with

the large cultural systems that preceded it, out of which – as well as against which – it came into being.” (1991:12)

In Europe, the cultural systems from and against which nationalism was asserted were monarchical and religious. In nationalism, affects and imaginaries that have religious roots are read through Romanticism and appropriated by political powers, and are used to bind citizens to each other and the nation. But these affects and imaginaries are secular, no longer connected with religious salvation or religious specialists. Nationalism seeks to create and strengthen a bond between people within a nation, and between “the people” and some idealised essence of that nation.

Technological and economic changes made these bonds possible. Anderson, for example, identified a range of technologies through which people could experience themselves as part of an imagined community. Foremost amongst these were newspapers, print media and novels – all of which gained distribution through new printing technologies as well as the introduction of more universal education. In addition, national languages were standardised, reducing cultural and linguistic heterogeneity. They became a medium of widespread communication and also of affection and identification. (Anderson 1991)

There are two sides to the political imaginary of nationalism. On the one hand, nationalism stimulates and channels affect; connection, bond, identification, love and self-sacrifice. It is political love of a homeland, motherland, national community and its many symbols. This form of affect is best seen in Romantic poetry about the nation, the singing of national anthems, and national events of collective significance. This

affect is collected around national symbols and moments of heightened awareness, and ritualisations of the bond between people in the nation.

On the other, nationalism has also lead to exclusions, death and racism on a scale unimaginable in pre-modern times. The nation and its mystical bond are, above all, something to defend and to die for if necessary. Nobody can embody the national subject better than the war dead; one who had sacrificed everything for the fatherland and the *volk*. In this, nationalism concerns itself with human's place in the cosmos, with species being and with contingency. (Anderson 1991:10) Its racism was to be found, in Europe at least, with the concern to homogenise the people of a nation and its "spirit" and therefore exclude those who don't correspond with the national subject.

Many of nationalism's forms were derived from medieval religion and particularly those elements of Catholic practice that were rejected by Protestants and then re-appropriated by the Romantics. Temporal cycles of the ritual calendar were appropriated as national holidays. Sites of pilgrimage were adopted in terms of national monuments, usually a site of violence. Hymns were adopted as anthems, and coronations as inaugurations. This is secular nationalism.

So much for the forms, but what about the content of nationalism? Some secular nationalism explicitly excludes religious content. Other secular nationalisms draw on an overt repertoire of religious beliefs. Whether religious content is included or excluded relates directly to the formations of secularism already described in the last section. Both Establishment and American first amendment secularism have included

religious content in nationalism, developing what can be called a civil religion. Laïcité and Jacobin Communist forms have political cultures that exclude religious content.

The most extreme version of civil religion in an Establishment state developed in modern Germany, articulated in German Idealism. Hegel, for example, argued that religion motivates and creates society, and that its vital power lies in the shared spirit of a people. Like the Enlightenment thinkers before him, Hegel ranked the quality of the spirit of the people on a hierarchy of progress, asserting that some forms are closer to the deepest truths, to “absolute knowledge.” (Lilla 2007) As we have come to expect of European theorists of progress, it was in deist Christianity that universal or historical destiny was to be found. Kant too thought that Christianity was the most universal, most reasonable, the most moral religion, the true universal church. The problem with it, he suggested, was Judaism, “which should be removed from Christianity to reveal its genuine universalism.” Prefiguring a rich stream of anti-Semitism and racism in secular versions of Christendom, he called this “the euthanasia of Judaism.” (Quoted in Lilla, 2007:157)

For Hegel, the final and consummating phase of human history would take place within Christendom and through Protestantism in the German nation. The latter, he wrote, “perfected the principle of freedom that was implicit in the Christian Incarnation and that would take rational form in modern thought – the principle that ‘freedom is for itself the goal to be achieved, and the only goal of the spirit’.” (Hegel quoted in Lilla 2007) He was intolerant of other religious groups such as Quakers, Anabaptists and particularly Jews whose faith, he suggested “may make it impossible for them to fully take part in the political life of the state.” (Lilla 2007:205) He

proposed a complete abdication of religious autonomy, and the loss of institutional control over religion by the church in its subordination to the state. This, in turn, divinised the modern state as the bearer of the spirit of the German people, thus providing the ideological rationale and the sentimental attachments that were later exploited by Hitler's anti-Semitism.

The carnage of the world wars and the Holocaust reduced the likelihood of Establishment states engaging in this kind of Christian nationalist rhetoric in the post-war period. But this logic is being reasserted in relation to Muslim migrants and a Christian autochthony in Europe again today.

The USA is the second major example of nationalism with an explicitly religious content. Bellah refers to civil religion as "[t]he possibility that a distinct set of religious symbols and practices may arise that address the issues of political legitimacy and political ethics but that are not fused with either church or state." (1980:xi) Elements of the US civil religion include "a widespread acceptance by Americans of a few religiopolitical tenets regarding their nation's history and destiny." (1980:41) These include that God's will can be known through democratic procedures, and that America is God's primary agent in history, giving it a special mission. Mead has called America a "nation with the Soul of a Church" in referring to this form of nationalism with a strong religious content. (1965) There are similarities between America and India with respect to civil religion. In both countries this arrangement has allowed powerful formations of political religion, conservative Protestantism in the USA and Hindutva in India, to challenge and re-appropriate the powers of the modern state.

In the other two formations, Laïcité and Jacobin Communist, the content of nationalism explicitly excludes religion. More than this, they positively incorporate elements of secularism as a political culture and a national identity. The difference between religious and non-religious content of nationalism is the ruling political ideology about religion and the ruling political culture of secularism.

5. Colonial administrations

The history of secularism has usually been written as this European story about Europe. This is the story of the collapse of the power of the Roman Catholic Church under intellectual and institutional critique of the Renaissance, Enlightenment and Reformation, the death of God and the emergence of atheist subjectivities, new epistemologies and science. As it has so often been told, it is the story of universal truth emerging in Europe from the darkness of dogmatic clerics; liberating the universal human and its capacity for technological progress and self-founded self-mastery. Secular modernity is said to have emerged from “a more primitive, religious, caste-and-kin-bound, inegalitarian, unemancipated, bloody, unenlightened and stateless time.” (Brown 2001:6) It is a story of political freedom spread around the world in its liberal free-enterprise or socialist versions. It is a story, in other words, of progress.

But this story is both partial and flawed. It is partial because it leaves out the colonial, imperial and European others on whose land, bodies and practices the idea of secular

Europe was built. Despite the fact that Enlightenment and European thought viewed colonial inhabitants as remnants of the past, the history of mercantile expansion, colonialism and imperialism is utterly entwined and historically coterminous with the process of European secularisation and the formation and consolidation of modern states. The colonised world experienced the Enlightenment “in an indirect manner” through colonialism, imperialism and mission. (Ellis and Ter Haar 2004:16) It has been estimated that by 1930, “colonies or ex-colonies covered 84.6 percent of the land surface of the globe.” (Ellis and Ter Haar 2004:5) The colonial stories of secularism are not marginal either historically or in the present.

There are two issues at stake in thinking about secularism in relation to colonialism. The first is the relationship between politics and religion in the colonies. The second is about the forms and powers of colonial states. These two are closely intertwined, and were enacted in variable ways across the colonial world, and at different times. The next chapter will address this history in South Africa in some detail. For the purposes of this chapter, I will restrict myself to some very general comments to contextualise the discussion.

It is possible to identify three broad kinds of relationship between politics and religion in the colonies. These relationships were conditioned by the degree of strength and forms of colonial government and the kinds of religious life and organisation that colonists encountered.

The first relationship was one of outright destruction and the near eradication of indigenes. Genocides were conducted against indigenous Americans, aboriginal

Australians and Khoi-San in South Africa. These genocides were legitimated, for those who carried them out, by claims that these people were like animals, didn't deserve the lands they inhabited, and had no religion. This "lack" of religion was often coupled in European imaginings by a lack of other defining characteristics such as law, a state, political organisations, morality, marriage, language. (Chidester 1996; Lopez 1998; Masuzawa 2005)

Other indigenes were ascribed religion; but one that was "primitive" or communal rather than individual, a religion that was non-universal and pre-literate. In the European imagination, this religion was a mark of the strange, the backward and lack. The second relationship between colonising powers and people who were ascribed this kind of religion was an attempt to destroy that religion and culture, rather than the people themselves. This destruction, or attempted destruction, came under many names – assimilation, civilisation, conversion.

Colonial administration was raw and contested. It was, as Fields puts it, a situation in which "a distinct group of rulers consciously impose their own law and order against the interests and heard objections of a subject population, lately sovereign." (Fields 1982:572) This was not a model of rational or bureaucratic rule. There are other imaginaries that better describe it, such as the one provided by Achille Mbembe. He identifies colonialism as a mode of phallic power; desiring, rapacious and brutalising. (2001:14) Despite much of its ideology, the governmentality of civilising, converting or assimilating retained servitude and racial hierarchy at its essence. Indigenes were groomed, made the object of experimentation, and allowed into a joint world, but they could almost never be equal. (Mbembe 2001)

Colonialism often presented with two faces; the administrator and the missionary. In this it displayed an institutional separation between church and government. And “state” and “religious” elements of colonialism with a “civilising” or assimilationist ambition brought different tools of subordination and extraction. But they often shared a view of those they colonised, particularly those without the religions of the book (particularly Islam) or another World or salvation religion (such as Buddhism).

As Ellis and Ter Haar comment on various colonial administrations in Africa in this vein; “European administrators, operating within Western precepts of order and governance, sought to confine religion to a private sphere within the ambit of cultures that colonial officials tended to regard as discrete systems.” (Ellis and Ter Haar 2004:190) But to do this, it was necessary to introduce a differentiation between religion and politics and between public and private into the traditions of those they sought to rule. (Asad 2003) But they encountered forms of religion in which the relatively well established differentiation within Christendom simply did not exist, directly or by analogy. Traditional Islam, for example, recognises no clergy, and the Muslim *umma* is simultaneously a religious and a cultural community. Processes of destruction, assimilation and indirect rule therefore had extremely complex implications for those religious traditions. (Asad 2003; Ali 2002; Tayob 2009)

Where colonial agents encountered forms of religion or culture they recognised as being institutionally or theologically powerful enough to contest colonial rule, a form of differentiation and secularism was attempted. In such cases, colonialism performed a partial secularisation. These attempts at secularising the religions of colonial

subjects definitely had some institutional success. But in many cases, indigenous imaginaries of legitimacy, and understandings of power and morality were not severed from their religious or cultural embeddings.

Colonial states were simply not strong enough to entirely subordinate religion in the colonies. Nor, of course, did they seek fully to institute the second condition of secular political foundations. It was certainly against the economic, political and strategic interests of colonial powers to sponsor Enlightenment ideals of democracy, universal franchise, or representative government. And incomplete processes of political secularism were often abandoned in favour of indirect rule. Where colonial administrations could not rule directly, they annexed a wide range of local political powers in indirect rule. These included religious and traditional leaders. (Fields 1982:586) In this they almost always sought out the most conservative rendition of religion or culture. And conservative local elites used indirect government as a way to assert control over heterogeneous traditions and create a bulwark against social and economic change.

Colonial rule bears many resemblances to pre-modern forms of political government. Anderson argues, for example, that colonial racism was “pseudo aristocratic” in its solidarity amongst whites and against a racialised underclass. (Anderson 1991:159) Justifications for colonial rule also regularly invoked transcendence, including racialised political theologies. Here, like the early modern states, rulers had political rights that claimed sanctity. The ruled did not have political rights. These forms of rule were the very antithesis of a moral community between rulers and ruled. (Fields 1982)

Colonialism did introduce political secularism across the globe. But it did so in incomplete, contested, ambivalent and hypocritical forms. Only some aspects of secularism were exported, particularly its institutional relations. And colonial states were simply not strong enough, on the whole, to saturate the political and social spaces. For this they annexed other modes of political and social governance and leadership; modes that came with non-secular metaphysics of legitimation.

6. The third condition: political secularism in late modernity

Political secularism is both a configuration of power and an ideal of government. It was developed in the context of modern centralising states in a time of intense religious conflict and pluralism. It is a configuration that formed and consolidated across the Christian trans-Atlantic world. Its application and the introduction of the logics of secularism across the world was part of another configuration of power. Colonial rule introduced some of its elements and ignored others; sometimes attempting and failing to implement its institutional terms, often ignoring or supplementing its ideological core.

But the nationalist movements that sought independence from colonial rule in the 20th century took formations of political secularism as models for modern government and as ways to manage relationships with religion and tradition within newly independent countries. The Revolutionary Turks, seeking to establish a modern state, treated Islam

in the modes of *Laïcité*, drastically curtailing its scope and public presence. After India's disastrous partition, it appropriated the inclusive and co-opting American model which acknowledges religious pluralism but takes on the legitimating religious content of its majority religion into its nationalism. Across Asia and Africa, states that claimed their independence in a wave of communist revolutions attempted to eradicate the institutions and legitimacy of religious and traditional forms in their country. Through such processes, political secularism has become part of a globally hegemonic ideal of national rule.

But there can be little doubt that the conditions for national rule in the late 20th and early 21st centuries are very different from those of the ambitious, consolidating and centralising states of Europe in the 18th and 19th centuries. Many contemporary states are leaking, unbundling and losing their powers, institutions, control and modes of governance. Political secularism developed amidst a revolution in Christian institutions and practice; one that led to religion's interiorisation, privatisation, deregulation and fissiparity. If anything, religious movements in the contemporary period are becoming increasingly public and transnational. It is apparent that the ideological and administrative ambitions of political secularism are being eroded and countered by a wide range of religious forms and aspirations in the trans-Atlantic and the post-colonial worlds. The conditions under which states can assert authority over religion in political space are increasingly hard to assert and maintain.

The first indication that political secularisation was not quite as dependable as had been assumed was the advent of the Iranian Revolution in 1979. Then the 1980s saw not only the tandem rise of political Islam and the Christian Religious Right, but also

Solidarity in Poland, Catholic involvement in the Sandinista revolution and other Latin American conflicts, liberation theology, and all the conflicts that had religious elements: the Middle East, Northern Ireland, Yugoslavia, India, the Soviet Union. (Casanova 1994) Evangelical Protestantism affected presidential elections in Columbia, Guatemala and Peru. (Gill and Keshavarzian 1999) This was followed by the increasing prominence of Christian centre-right parties in Europe. It is impossible to pick up a newspaper anywhere in the world without encountering some version of the political return of religion; 9/11, and the so called “war on terror,” destabilisation in Afghanistan and Pakistan, or increasingly contested zones of encounter between Christians and Muslims in North Africa. But in none of these cases is the designation “political religion” really helpful. It is a compound term, dependent on the opposition of the terms that these events, in their different ways, are disputing.

The future of political secularism is dependent on developments in three areas. The first is the capacity, power and ambition of late modern states. Will they be strong enough to be able to govern in a way that excludes or subordinates religion institutionally and ideologically? The second is the public and political aspirations of new religious movements, institutions and theologies. Will they respect the separation of their institutions from the state, and allow their theologies to be excluded or appropriated by political actors? The third is the fate of the differentiation between politics and religion both in philosophy and in the context of religious traditions that have had this form of differentiation applied to them. Will it be possible to maintain a differentiation between politics and religion that allows for their separation? The various formations of political secularism are all being tested and contested by late modern social, economic, political and religious developments.

Take, for example, the processes of “Islamic awakening” from the 1970s and the emergence of political Islam. (Mahmood 2005:5) Many commentators concur that political Islam is the product of a combination of failed Arab states as well as Islamist religious formations. Both are trans-national phenomena. They are in conflict too with the trans-national effects of US foreign policy, oil interests and the remains of the machinations of the cold war. In such cases, some post-colonial Middle-Eastern states have failed to be able to subordinate religion’s powers within its borders, failing to become a nation-state. Given that in most of the Middle East, Islam constitutes an overwhelming population majority, there is also little political incentive to secularise as a response to religious pluralism. Those conditions that gave rise to secularism in Europe simply not present at the establishment of many Muslim dominated post-colonial and post cold-war states.

Or take the American formation of political secularism, which seeks a strict exclusion of religion from the institutions of state. It presumes a positive role for religion in terms of the development of civil virtue and social morality. It was formed in the context of denominational and privatised forms of Christianity. Since the 1970s in the USA, long established forms of evangelical Protestant Christianity have gained immense following and influence. And they have formed alliance with Conservative Republicans to make up the Religious Right and were influential particularly in US foreign policy under the Bush administration.

In Europe, the issue of political secularism is being played out in relation to migrants and emigrants, many of whom are Muslim. Migration has become the vector for

religious pluralism in Europe through its reversal of colonial flows. Casanova suggests that about ten per cent of Europe's population is foreign born. (2007) In France, conflicts over religious pluralism have been catalysed by issue of the veil and other symbols of the public presence of Islam. As he puts it, "[a]nti-immigrant xenophobic nativism, secularist antireligious prejudices, liberal-feminist critiques of Muslim patriarchal fundamentalism and the fear of Islamist terrorist networks are being fused indiscriminately throughout Europe into a uniform anti-Muslim discourse, which practically excludes the kind of mutual accommodation between immigrant groups and host societies that is necessary for successful immigrant incorporation." (Casanova 2007:6)

Despite the almost complete repression of religion in the Soviet and Maoist states, the end of the Soviet block and the liberalisation of China have both resulted in a revitalisation of religious practice and institutions.

Religious movements are not only contesting the right to hold political power, and religion is not only being politicised in violent conflicts. The last three decades have also seen a growth in what Casanova calls public religions. He argues that there has been a "deprivatisation" of religion over this period. Social movements have appeared which either are religious in nature or are challenging in the name of religion the legitimacy and autonomy of the primary secular spheres, the state and the market economy." (1994:5)

Public religion does not necessarily contest political power as a competitor to the state, but it does seek to alter the terms on which politics is founded through a contestation

around morality and ethics. These can focus either on issues of the family and sexuality, or in the context of corruption, on political virtues and the possibility of political principle as a restraint to a politics of power as its own end. (Casanova 1994) Such movements are not restricted to the better known examples of the American right. The rapidly expanding pietist movements studied by Mahmood in Egypt for example pose a challenge to the “process by which religion is relegated to its own differentiated sphere.” (Mahmood 2005:48)

The consequences of the return of religion are variable, and as yet incompletely worked out. The current public debate tends to be divided between those who interpret some forms of religious involvement in public and political life as a long awaited return of morality and principle to a public politics that has degenerated into nothing other than a principle of power. (Casanova 1994; Madan 1987; Taylor 2007) Others suggest that a return of religion to political life is a return to a dark age of irrationality and violence. (Harris 2006; Huntington 2002; Rorty 2003)

What is certain is that the conditions for political secularism and the techniques through which it is maintained are deeply contested in the late modern period.

7. Conclusion

In this chapter I have argued that political secularism is a mode of state. It is an ideological and administrative system in which religion is placed under the authority of the politics of the nation-state. It operates in two areas. The first is secular

institutional relationships through which religious institutions are excluded from or subordinated to state power. This has been achieved through some combination of destruction, discipline, co-option or exclusion in its various formations. The second area is that of foundational modern political ideals and their accompanying forms of nationalism. Enlightenment political ideals ground political power, legitimacy and authority in secular rather than transcendental concepts and institutions. These include democracy, equality, universal franchise, representation of the will of the people, parliaments, senates and bureaucratic administration. Historically, this form of politics corresponds with modern nation-states. Secularism and the modern-state emerged together. Religion, once it was excluded from state rule institutionally and doctrinally, could be appropriated anew in forms and sometimes in content in nationalist movements that sought to establish and sacralise a bond within national community.

This chapter also raised questions about the state in which secularism finds itself currently. Can late modern states assert or maintain their dominance over religion and prevent it from claiming political power? Can postcolonial states rule without partnering with religious and traditional groups and taking on their bases for legitimation?

These are questions that must be answered with respect to the specifics of state formation and consolidation, and of forms of religious involvement in public and political life across the world.

The rest of the thesis turns to these questions in relation to South Africa. I will use the three conditions outlined above in this examination. Chapter Two addresses South

Africa's colonial and apartheid past. Chapters Three to Five examine the process of state formation through the political negotiations that moved South Africa from apartheid into a democratic dispensation under the ANC. In these three chapters I outline what formation of political secularism was asserted for the new post-apartheid South Africa. Chapter Six then examines moves by the ANC to consolidate its rule and the post-apartheid state with respect to religious and traditional institutions and authority.

Chapter Two: A South African Morality Tale: Religion, Tradition and Racialised Rule

The natives must be made clearly to understand and to realise that the presence and predominance of the White race will be preserved at all hazards, and that all attempts to destroy its hegemony, whether overt or covert, such as the Ethiopian propaganda, will be promptly punished, instead of being disdainfully treated, as in the past.
Natal Native Affairs Commission⁷

1. Introduction

South Africa has had a long and complex history of entanglement between religion, tradition and political rule. Until the political transition in the 1990s, it was not secular. Despite their many differences, successive regimes of government made use of Christian political theologies and what I will call here “things African⁸” to secure rule without democratic legitimacy. They attempted a subordination of black interests to white interests by instrumentalising traditional leadership, customary law, Christianity, violence and duplicitous forms of legality. The apartheid government claimed that South Africa was a Christian country ruled, however perversely, in terms of Christian values.

The purpose of this chapter is to provide a brief historical context for the events in South Africa in the 1990s. It will not be a systematic survey of the past. Instead, it will make just three observations about the ways in which religion and tradition were turned towards racialised rule and to traditions of resistance. In these observations I will refer to the first two conditions of political secularism developed in Chapter One.

The first observation is about the impact of the colonial, imperial and apartheid envoys of modernity on black polities and people. They introduced, amongst other things, a differentiation between religion, politics and culture that has had widespread political, legal and distributive consequences. I argue that this differentiation was the basis for a partial secularisation achieved in ambivalent and often contradictory ways through destructive, “civilising,” assimilating, indirect rule, segregationist, and homeland strategies. This trajectory has had consequences for the political imaginary and institutional locus of chieftainship and for the codification of what came to be called customary law.

The second observation deals with political theologies of race. Pre-1994 South African polities were not secular because their various forms of white rule could not be based on modern political concepts of democracy, universal franchise, the representation of the will of the people or the distribution of political rights. White rule could not be based on a single moral community between rulers and ruled. With the very limited exception of some forms of missionary assimilation and the Cape franchise, none of South Africa’s historical forms of rule were interested in racial equality or in political rights for black people. The second condition of political secularism - secular political foundations - was incompatible with the ambitions and strategies of white rule. In this section I make an argument about the logical and practical necessity of nationalist and theological justification for race rule and white “superiority.”

The third and last observation is that secular institutional relations were never fully instituted as a national ideal. There was no idealised or normative relation between

religious groups and the pre 1994 South African state. But the techniques of modern statecraft associated with this condition were appropriated in support of racialised rule. I will outline some important moments in the relationships between the union and apartheid states and the Dutch Reformed, English-speaking, and African Independent Churches in support of this claim.

I conclude that the country was not secular prior to 1994. From the establishment of a national state in 1910, South African governments have consistently required a political theology to legitimate their white rule. And the state instituted a variety of relationships with religious institutions; sometimes appropriating church resources, sometimes drawing on a close relationship with churches for political legitimisation, and sometimes harassing and unleashing violence upon religious groups and leaders. Aspects of modern statecraft were turned towards the anti-democratic politics of white rule.

Writing in these areas requires the uncomfortable but necessary reproduction of racist language. Some of this chapter refers to primary materials of the colonial administration, missionaries and apartheid bureaucrats. The language of these documents is often offensive, referring to “Kaffirs,” “heathens,” “natives,” “Bantu” and the like. I will not reproduce these names in my own voice. But they are referenced in this chapter because it was on these terms that religion and things African were racially marked across time; authorising violence, exclusions and techniques of subjugation.

The chapter ends with some of the events of the 1980s that undermined many of the economic, religious and political foundations of apartheid and white rule. These events led to the negotiations that will be the subject of the next four chapters.

2. Differentiation and separation

In the introduction I raised the issue of how we are to understand the genealogy, effects and forms of secularism outside of Christianity. This is a question that has been usefully addressed in recent literatures on the impact of Colonial and imperial modernity on Islam (Ali 2002; Asad 1993, 2003; Mahmood 2005; Mamdani 2004; Tayob 2009), and the legacies of British rule in India and on what came to be called Hinduism. (Chatterjee 2006; Bhargava 2006; Madan 1987; Nandy 1983, 1988, 2002).

This literature and recent revisionist scholarship within Religious Studies point out that the concept of religion as a universal social phenomenon was produced in modernity and through secularism. (Masuzawa 2005) Religion as such did not pre-exist secularism, available to be destroyed, excluded, privatised, subordinated or co-opted by modern states and in processes of colonial extraction. The distinction between religion and other designations such as politics, economy and culture, is a product of secularism. (Jager 2007)

The founding Christian locus of a differentiation between religion and politics was addressed in the previous chapter. And secularism is impossible without it. (Lefort 2006) But this distinction is extrinsic to the traditions of many of the people who were

colonised. A distinction between religion and politics therefore had to be produced and negotiated. It required conceptual and practical labour. (Asad 1993)

Colonialism and then imperial and apartheid rule performed a partial and ambivalent secularisation of the indigenous traditions of Southern Africa. This was not the result of a coherent strategy. It was produced by a range of sometimes contradictory interventions. But it did have systematic effects. One of the most important has been on the political imaginary and institutional locus of chieftainship and the codification of what came to be called customary law.

For nearly 150 years after the first European occupation in 1652, there was little intention to engage “the natives,” also called “heathens,” beyond the need for trade in meat and other supplies, the elimination of those who were understood to be a threat to the settlers, and the incorporation of those who could become labour in the emerging colony. When settlers first moved north in search of grazing and land, neither settlers nor African polities were able to exert control over one another. This led to a range of early interactions, some of which were relatively egalitarian. Others were coercive and genocidal, particularly on the early northern frontier with the San and Khoikhoi. (Giliomee 1988; Penn 2005; Legassick 1980) But across the board, “[t]he Colonists carried with them to the frontier a set of attitudes, most important of which was the notion that as “Christians” they were culturally superior to the “heathens” who they associated with crudeness, conflict and treachery.” (Giliomee 1988:433)

It was the missionary movement that led to an intimacy and intensification of interactions between colonists and Africans. A combination of the French revolution, Romanticism, British evangelical revivals and a reaction against Calvinism birthed the evangelical missionary societies who “promised liberation to the human masses” through the gospel. They took their Biblical mandate from Mark 16:15 in which Jesus said “Go into all the world and preach the good news to all creation. Whoever believes and is baptised will be saved, but whoever does not believe will be condemned⁹.” Between 1799 and 1857, missions were established across Southern Africa. They came from the London Missionary Society (LMS), the Methodist Wesleyan Mission, the Presbyterian Glasgow Missionary Society, the Church of England, the Paris Evangelical Missionary society and the German Moravian, Rhenish, Berlin and Hermannsburg Societies. There were also a scattering of Norwegian, Swedish, Finnish and Swiss missions as well as the American Board of Missions and eventually also the missions of the Dutch Reformed Churches. (Davies and Shepherd 1954)

The church of early modern Europe provided a template for the definition of religion for missionaries and colonial settlers as well as the emerging social sciences. (Masuzawa 2005) Religion was understood to be monotheistic, revelatory, transcendent, institutionalised, and with theologians and sacraments. The first response by colonials and missionaries to societies that had no written sacred texts or institutionalised religious specialists was to say that they had no religion. Africans were described as Godless heathens whose culture was insufficiently developed to be religious. In early accounts, this reported “lack of religion” was often coupled with a

lack of other defining human characteristics; language, law, marriage, political organisation. It was a fundamentally dehumanising ascription. (Chidester 1996)

The first systematic contact between Boer-trekkers and Xhosa speaking peoples took place around 1702. From then onwards, the term “Kaffir” - derived from the Arabic word for infidel - was used as a European designation for the Xhosa. (Davies and Shepherd 1954:16) It remains a racial slur today. Early missionaries asserted that the people they came to “save” had no religion. Johannes van der Kemp, first LMS missionary to the Xhosa, arrived in 1799. (Ndletyana 2008) He claimed that the Xhosa had magic and superstition, charms, oaths and curses in abundance, but no religion. Without priests, the missionary found himself at a loss for interlocutors. (Chidester 1996) Perhaps the best ethnographic account of a South African colonial frontier is the Comaroff’s *Of Revelation and Revolution*. (1991) This book includes a reconstruction of some elements of a Tswana pre-colonial polity, the Thlaping, who lived between the Vaal and Molopo rivers. It gives a detailed account of their encounter with European non-conformist Missionaries. Their early European missionaries found them to be without religion. (Wilson 1971) Moffat is quoted in 1842 as saying: “The situation of the missionary among the Bechuanas is peculiar, differing ... from any other among any nation on the face of the earth... He seeks in vain to find a temple, an altar, or a single emblem of heathen worship... Thus the missionary could make no appeals to legends, or to altars, or to an unknown God, or to ideas kindred to those he wishes to impart.” (Quoted in Comaroff and Comaroff 1991:202)

David Chidester's 1996 book *Savage Systems* reports that "[t]he discovery of local religious systems in Southern Africa can be precisely correlated with the establishment of control over Africans." (1996:3) He found that across all the earlier frontiers of what was to become South Africa, the "discovery" by various Europeans of local or indigenous religion correlated precisely with the establishment of political control over African polities and their territories. When these were broken by disease, warfare and territorial appropriation, groups that were subsequently called Khoisan, Xhosa, Zulu and Sotho-Tswana were then credited with religion.

But the religion that was ascribed to various inhabitants of Southern Africa was not understood to be equivalent to Christianity. On the contrary, it was called false religion, primitive religion; undeveloped and regressive. This ascription was part of a broader movement of what Chidester calls "Imperial comparative religion" practiced from the European metropole from the 1850s. (1996) It was characterized by the organisation of fragmented and de-contextualised colonial traveller accounts and "ethnographies" into a vast hierarchical system of religious and civilisational progress, the pinnacle of which was Protestantism. This thin comparison reduced complex and multi-faceted traditions to a variety of racial or national "mentalities." The publication of Charles Darwin's *Origins of the Species* in 1859 gave an important impetus to this form of ranking and ordering.

In Southern Africa, the content and form of religion was said to be "primitive" and "communal." There were repeated attempts to identify its "lost" or "weak" ideas of a monotheistic deity in it. Otherwise the "primitive religion" of the inhabitants of Southern Africa was said to be composed of ancestors, and "ancestor worship,"

divination, witchcraft, curses and spells, rainmaking, the protection of warriors by occult means, “witchdoctors” who controlled lightning, and divination by the throwing of bones. These were viewed with contempt and also some fascination by missionaries and travellers.

In opposition to this “false religion” the missionaries sought to bring, as a gift, the “true religion” of Christianity. Where black Africans had been without religion, or tied to a false religion, now they could have Christianity. But missionaries did not only aim at “spiritual” salvation. They had a broader and related object; through conversion and enculturation into modern economic forms, the “savage” could be made “civilized.” Missionaries were interested in the souls of indigenes, but at the expense of almost everything else about them.

Conversion to Christianity was not just about the acceptance of a doctrine or a matter of individual spiritual salvation. It was about the enculturation into an alternative “civilised” and European economy, sovereignty, law and mode of being. Barnabas Shaw, a Methodist missionary writing in 1840 said the following on the subject: “Some have thought that missionaries should take no concern in the temporal affairs of the people among whom they labour, but that they would be exclusively employed in promoting their spiritual welfare. This is correct as it regards nations already in a state of civilisation, but will not apply to the commencement of a mission among savages.” (Quoted in Davies and Shepherd 1954:170)

Early Christian converts left the physical structures of what remained of the land’s traditional polities and moved onto mission stations, and differentiated themselves by

modes of dress and gender roles. Ndletyana, writing about what was to become the Eastern Cape states that “By 1848 ... the colonial administration had issued 70 000 acres of land to mission stations, while another 155 000 acres was held by virtue of tickets of occupation. Individuals could lease mission land and generate income for themselves and to pay rent and taxes.” (2008:4) These mission stations were the first zones of British sovereignty over black subjects. They were also the sites of a Christian community between whites and blacks, albeit with a disenfranchising and paternalistic ranking. Conversion and assimilation promised, as the Comaroffs put it “personal salvation in membership of a world-wide congregation of believers; thus did they become citizens of, and enter into, principled relationships with, a universal moral community.” (1997:33)

Missionaries and many imperial ideologues presumed that these zones of British sovereignty and altered African subjectivity would expand in scope. And in the Cape colony, black inhabitants, freed slaves and labourers came to be included under a common law as British subjects. The height of this non-exclusive polity of Cape liberalism was its non-racial franchise. This franchise nonetheless required that black subjects be Christian; civilized by their religion, landownership, and *de facto* autonomy from chiefs. Conversion and “civilisation” was a way of overcoming the independence of African polities. But the civilising mission always undermined its own project by producing acculturated African elites who became increasingly critical of the limits and hypocrisies of colonial racism. The biographies of many second generation converts and intellectuals, such as Tiyo Soga, attest to the contradictions such men inherited. (Ndletyana 2008)

In these events we can see the identification of religion *as such* in the context of Southern Africa. We can see the introduction of a universal and comparative concept of religion. First there was no religion, then there was false religion, and in contrast there was the “true” religion of Christianity. Heathenism and false religion were identified with African polities. Conversion and assimilation were the means to destroy “primitive” African religion and replace it with “true” religion.

In the process, a differentiation was also introduced within the religion and politics of African polities. The political aspect came to be personified by the chiefs. Referring to the LMS mission amongst the Thlaping, the Comaroffs note that “[i]n order to facilitate their work, the non-conformists attempted to drive a wedge between the realm of the spirit and the temporal affairs of government, both indigenous and imperial. The object was to lay the ground for a new moral economy based on the clear separation of church and state, of sacred authority and secular power - to establish, in short, a state of colonialism in anticipation of the colonial state.” (Comaroff and Comaroff 1991:11)

But as mentioned at the beginning of this section, this distinction between religion and politics was not part of any Southern African people’s *emic* categorisation. On the contrary a wide range of sources characterise the indivisibility of the economic, social, spiritual and cosmological aspects of these orders. And chieftainship was central in all these aspects. As Ritchken asserts, the pre-colonial order of what was to become the Northern Transvaal shared a common ontology in which the will of the ancestors represented “the social order in its purest form.” (Ritchken 1995:48) Authority was derived from proximity to the ancestral order through age and through linkage with

the most powerful lineage; that of the royal or chiefly lineage. And “the will of the ancestors, expressed through the chief, secured the reproduction of the chieftdom and the fertility of the natural world.” (Ritchken 1995:40) Mackenzie, writing about the Bechuana community in 1871 said, “in talking about the chief, Tswana accentuated his role in sustaining order – in its economic, spiritual, social and cosmological aspects, since these were indivisible.” (Quoted in Comaroff and Comaroff 1991:128) According to the Comaroffs, “the bogosi (chieftdom) was the hub of everyday life, the axis around which rotated the cycles of production and ritual performance that yielded human, material and spiritual value. Its suzerainty in turn was mandated by the royal dead, whose potency emanated from their communal grave in the cattle-byre alongside the royal court.” (1991:148)

In the Comaroffs’ account, the first part of the process of secularisation was the introduction of a distinction between the domain of the spirit and the “temporal” and material domain of power. “Marking off the religious domain from the political, therefore, was the first step in isolating the battleground on which Satan was to be defeated.” (1991:259) The missionaries thought that they claimed the spiritual realm for God, and left secular power for the chiefs. They contested areas they identified as of the spirit or religious or that they viewed as immoral; rain-making, circumcision, polygamous marriage, witchcraft, sacrifice and ancestors. Although their arguments were often met with ridicule, by their moral and political economies and their technologies, missionaries, traders and British military and magistrates “unleashed forces that would pick away at the seams of the indigenous politico-ritual order” (Comaroff and Comaroff 1991:257) unravelling the fabric of black sovereignty. Missionaries undermined the metaphysical sources of chiefly legitimacy at the same

time as settlers, military interventions and the appropriation of land undermined their physical and material bases of power.

This differentiation and separation certainly had effects, and was part of a systematic and pervasive destruction of African polities and their modes of economic and social reproduction. But the destruction of African polities was also incomplete, contested and imperfectly policed. For many reasons, the assimilationist ambition reached its limits in its internal contradictions as well as its powers of intervention.

When Britain annexed Natal from the Boers in 1848 it did not have the strength to impose British governance or law upon the new black “subjects” of the crown. With nothing more than a small posting of British soldiers and few resources, Britain sought to extract tax revenue from unwilling Zulu subjects under a relatively strong but recently defeated polity and chieftainship. Theophilus Shepstone, a fluent Zulu speaker and the son of missionaries, suggested that chiefs could be used to assist British rule over black subjects. (McClendon 2004) He advocated the retention of the political control of chiefs acting under the authority of black custom. He suggested a residential segregation of black and white to “preserve” chiefly authority. White administration could then insert itself above the chiefs as a form of “customary” authority; the Lieutenant Governor becoming the supreme or “paramount chief.” In this way, chiefs rather than whites could impose and collect taxes and police order. Shepstone’s suggestions were employed in what became known as the policy of indirect rule. Natal’s Ordinance 3 in 1849 gave the Lieutenant Governor the powers enjoyed by supreme or paramount chiefs. (Martens 2003) It gave white administrators sovereignty over black subjects within an imaginary and administrative system based

on custom. In 1848 “Royal Instructions” recognized customary laws and “the powers which ‘the laws, customs and usages of the inhabitants’ had vested in the chiefs.” (Martens 2003:3) This form of indirect rule eventually won over Natal colonists who had “staunchly opposed the tribal system” which they blamed for the chronic shortage of labour. But by the 1880s, colonists came to regard traditionalism as a bulwark of their racial domination.” (Welsh 1972:38)

Scholars writing about Natal Indirect Rule have identified the “strength of Nguni institutions, the unwillingness of Britain to spend large sums of money on African administrations, the pragmatic genius of Theophilus Shepstone and the practical necessity of cultivating indigenous allies to safeguard colonial security” as reasons for its institution. (Martens 2003:2) All these factors point to an inability by the colonial government to exert sovereignty across the territories and people it had conquered by force. Indirect rule is an index of the weakness and lack of legitimacy of the colonial powers.

The policy of indirect rule was extended across the British Empire. Its first destination was the Cape. The liberal Franchise has already been mentioned, but it was restricted to the Colony proper and did not cover what were called the Annexed Territories of today’s Eastern Cape. There, periods of decimating frontier warfare alternated with impositions of law and treaty to secure a “peace” and the possibility of British government. But attempts to impose British law and government on the Xhosa territories – a 1835 strategy sponsored by Governor d’Urban, and a subsequent 1855 plan devised by Rhodes and promoted by Sir George Grey - were unsuccessful. (Cape of Good Hope Colony 1883:17; Welsh 1972) They bred resistance and led to new

cycles of war. In the Cape, as in Natal, the colonial government was insufficiently strong to rule directly. Finally in 1883, the Cape made an official decision to employ Natal's indirect rule policy in its annexed territories. (Cape of Good Hope Colony 1883)

The policy of indirect rule involved administrative and legal interventions into customary relationships between people in these now subjugated and increasingly circumscribed polities. The most important intervention was the codification of these customs, making of them a written and fixed law rather than an oral tradition. Against the wishes of Shepstone, certain elements of custom were first codified by British administrators in Natal in 1878. (Ranger 1983:250; 1993:68) This intervention has parallels in other colonies where indirect rule was instituted. "Muslim Personal Law" was codified from Shari'a in Egypt and "Tribal law" was codified in India, for instance. In South Africa, this codification intervened into practices that had been associated with "primitive religion" and chiefly authority.

Many changes in form and content were introduced in this process. One is particularly relevant to this chapter. Many elements of African practice; now designated "customary" rather than "religious," were considered to be "repugnant" to human or universal values by British codifiers and their missionary interlocutors. They sought to use the process of codification to eliminate or transform these customs and also the social practices to which they refer. This involved a process of secularisation. Witchcraft, for example, was treated in this altered law and in ordinance as imaginary or illusory. The techniques of combating witchcraft rather than witchcraft itself became the object of disciplinary intervention. (Ashforth 2005; Geschiere 2006) Such

transformations have been well studied with respect to witchcraft, polygamy, communal and individual tenure, and women's legal standing. (See for example Bennett 2004:6-32; Hendricks and Ntsebeza 1999-107; Ranger 1983:212,231 and 236) Codification and indirect rule also affected the adjudication of custom. Once codified, "customary law" was implemented not only by chiefs, but also by white magistrates in court.

Many of these codifications and their repugnancy clauses affected the legitimating basis of chiefly authority. But they were implemented in haphazard and inconsistent ways. British, Union and apartheid magistrates regularly turned a blind eye to the ways in which customary law and authority were instituted and arbitrated by chiefs. These officials could not afford to completely undermine the chiefs who they needed to secure rule and order, and they often didn't have sufficient force, will, legitimacy or moral authority to act against the chiefs on these grounds of "repugnancy."

This has been a very brief account of the institution of a differentiation and rearrangement between what were identified as religious, cultural and political aspects of pre-colonial polities. It begs two comments. The first is that the "religious" element of things African that was partially separated from its political elements was never institutionalised as religion. No religious specialists or institutions or texts came to authorise the practices, beliefs and ontology identified as religious in this process. When it comes to a discussion of the relationships between state and religious institutions in South Africa, there is a significant silence because there have been no indigenous religious institutions. This is not to say that these practices, beliefs and ontology disappeared though. They have played an important part in various forms of

Christianity in Southern Africa, most strongly through the African Independent Churches but also in their influence on the mainline or English-speaking and Catholic Churches and later Black Theology. Relationships between these churches and the state are discussed below in section four.

The second comment relates to the endurance of this differentiation and partial secularisation. This brief account of the destruction and then transformative preservation of things African has covered the early colonial period and up to the mid to late 1800s. There will be a chance to investigate some aspects of both assimilating and preserving strategies in segregationist, apartheid “separate development” and ‘homeland’ policies below and in Chapters Four and Six. Later iterations have varied and intensified these strategies. Each has introduced new authorisations and techniques of custom and chieftainship under the signs of the old. Each retribalisation policy was a response to the intensification of racial, social and economic integration into the remainder of South Africa and the concomitant undermining of chiefly control and modes of customary relationship. But none of these iterations has to date questioned the differentiation between religion, politics and culture instituted by the missionaries and colonial administrators.

3. Political theologies and the metaphysics of race

It is impossible to write about the political history of South Africa without placing race at the centre of analysis. Attention to the making of race is absolutely necessary to an interpretation of the relations of religion, tradition and society to the state. The

various forms of white government in South Africa have placed racial rule and the political exclusion of black people at the centre of their political objectives. Their motivations may have been diverse; disdain and conceit for example, or the desire to maximise the extraction of land, cattle, labour, minerals, or fear. And their means and techniques may have been diverse; civilisation, assimilation, exclusion and naked violence and repression. But even in this variety, race rule was the unifying objective of South African government until 1994.

a. A brief history of racialised politics

In Chapter One I argued that formations of political secularism were instituted in moments of state formation in early modern Europe and in the revolutions in France, America and Russia. As I will show in this section and the next, the 1910 Union, the 1948 beginnings of apartheid and South Africa's declaration of independence in 1960 were all moments of articulation and consolidation of white power and rule. It was around these moments that novel political theologies and relationships between religion and the state were mobilised. A brief political history of the South African state and policy in these three periods will provide a context for a discussion of their racialised political theologies and nationalisms.

i. The Union

The territorial boundary and nation state that we now know as South Africa came into being with the formation of the Union in 1910. After the Boer or South African War (1899 to 1902) Britain re-annexed the two Boer polities, the South African Republic

(Transvaal) and the Orange Free State. For the first time all four territories, including the colonies of the Cape and Natal and their annexed territories, as well as the Transvaal and Orange Free State were united under the British Flag.

An all-white National Convention brought together the leaders of the four colonies. They met from October 1908 to May 1909 to settle the terms and constitution of a unity government. Their deliberations were put into law in the South Africa Act passed in the British Parliament in 1909. This Act legislated the South African Union which came into being in 1910. The Union had only partial independence since South Africa remained under the British Crown as a “self governing dominion” of the British Empire. It was a constitutional monarchy. The South Africa Act, with minor modifications in 1931, functioned as the Constitution of South Africa until it became a Republic in 1960. Under its terms, white adult males¹⁰ were granted franchise. In 1927 the franchise was extended to white women. The Cape Colony’s non-racial franchise was retained, although under conditions that made it increasingly difficult to maintain. It was abolished in 1935.

Most accounts give two reasons for the country’s unification. The first was the desire of British imperialists to gain control over South Africa’s substantial mineral wealth. Diamonds were discovered in Kimberly in 1867, and almost immediately the land from which they were mined was taken by force and deception from Langa libelele. (Magubane 1996) When gold was discovered on the Witwatersrand in 1884, then under the control of the Afrikaner President Paul Kruger, Imperial Britain once again went on the offensive, attempting to take control over the goldfields. Britain waged war against Hlubi in 1873, against Gcaleka and Pedi in 1877, against Ngqika, Thembu,

Pondo, and Griqua in 1878, and against the Zulu in 1870, Sotho in 1880, Ndebele in 1893 and against the Afrikaner republics in 1899. (1996:53) Its principle imperialist was Cecil John Rhodes who, by 1895, was “managing director of the Chartered Company and of the Northern Railways, Chairman of De Beers Consolidated Mines and the Consolidated Gold Fields of South Africa, and Prime Minister of the Cape Colony.” (Magubane 1996:227)

The second reason lies in what British and Boer leaders alike termed the “native problem.” The motto of the 1910 Union was *Unitate Vires*: “From Unity, Strength.” The Unity was white unity, and the strength was that over black Africans. The Union delivered on this motto. While retaining the Cape Colony’s non-racial franchise in letter, the Union legislation made what it termed “native affairs” a matter of national rather than British government. In so doing it cemented the moves towards indirect rule and strict racial segregation developed in the colony of Natal and the annexed territories of the Cape.

The National Convention negotiated a common policy from contesting visions of white rule over black people across the four colonies. While these visions differed, they nonetheless held in common an assumption of white racial and cultural superiority and the objective of accessing cheap and pliable black labour. In the Cape colony, liberal theories of race and governance embodied civilising and assimilating ambitions. The Natal policy of indirect rule has already been described. The two former Boer Republics brought a less liberal view of race relations to the unification process. The Transvaal Republic had made it clear that there was to be no equality in church or state between black and white. (Costa 2000:24) There was no recognition of

custom, customary law or the authority of chiefs. The Orange Free State position, on which there was less British influence, was explicitly theological. In it there was no desire to either civilise or incorporate black subjects, only to subjugate them. (Welsh 1972:36)

In preparing for the consolidation of the four colonies, Lord Milner appointed a South African Native Affairs Commission in 1903 to investigate the “native” or “national question.” Although many of the recommendations of its 1905 report were not implemented immediately, it is widely held that the findings of the commission were to shape Native Affairs policy after the Union. (Magubane 1996; Costa 2000) It suggested intensified means of proleterianisation including increased taxation and the reduction of black wages. It also advocated the creation of segregated reserves, political separation through the separation of voter’s rolls by race, and the introduction of communal rather than individual African representation. (Magubane 1996:248)

The new Union state set about implementing this segregationist policy. Amongst its most effective means was the infamous 1913 Land Act, which established black reserves in just 13 percent of South Africa’s landmass. In 1927 the Native Administration Act was passed towards a policy of “retribalisation” to preserve, as Hendricks and Ntsebeza put it, the “shattered fabric of the indigenous mode of living” (1999:103) in these much reduced territories. The policy of segregation differed from that of indirect rule not so much in its means, but in its ends. The “civilizing” project was largely dropped.

ii. Apartheid rising; 1948-1960

The Afrikaner National Party (NP) came to power in the 1948 white elections with a minority vote and against a weak opposition. Its electoral campaign was based on the proposal of apartheid or “separateness.” The National Party appealed to Afrikaner ethnic nationalism, set up against the common enemy of British imperialism and British treatment of Afrikaners in the Boer War. Its leader was DF Malan, a Dutch Reformed minister and fiery Afrikaner ideologue. But it did not have a strong start in government, nor did it have the support of the majority of white voters for almost two decades. (van der Westhuizen 2007) As a result it was cautious and pragmatic. (Posel 2011) As soon as Malan was elected, he reached out a conciliatory hand to English-speaking white voters. During this first phase of rule, the NP persuaded many English speaking white South Africans to join the ranks of its voters through an invocation of white superiority and *swart gevaar* (black danger).

Once in power, the National Party introduced a system of “institutionalised racism and racial social engineering” that intensified and built on earlier segregationist policies. (Posel 2011:1) It sought to preserve white racial political and economic supremacy in a context in which white people were a small national minority. The call for the imposition of strong racial separation was a response to the racial integration that resulted from the urbanisation in the 1930s and 40s driven by the world wars and drought. During this period “[m]any Afrikaners joined the ranks of the poor whites, some 30 per cent of which could not feed or house their children in 1932. Living in racially mixed, dilapidated urban dwellings and slums, these were the ‘Afrikaners’ identified by the NP and the Broederbond as most at risk of being ‘lost’ to

miscegenation....” (van der Westhuizen 2007:31) The National Party electoral campaign played on white Afrikaner fears about being swamped by or mixed with black people. The ideological apparatus of Apartheid constantly invoked black life as a threat, the *swart gevaar* of disease, violence and miscegenation. Afrikaner nationalists sought to increase the size of the state to impose order to deal with increased black urbanisation and its overcrowding and dissent. (Posel 2011:8)

Afrikaner fears of mixing were both social and economic. The economic fears concerned emerging competition between white and black workers in the urban areas of the Rand. Over the next twelve years, the NP constructed a class alliance of workers, farmers, civil servants and business people (Hyslop 1995:31) that delivered preferential benefits to white workers. “Wages of white workers rose by ten per cent in the first five years of NP rule, while those of black workers dropped by five per cent.” (van der Westhuizen 2007:33) The civil service became a vehicle for Afrikaner advancement.

The National Party set to work to try to rationalise, clarify and disambiguate race. In 1949 it introduced the Immorality Act making sex “between races” illegal. This was followed by the Prohibition of Mixed Marriages Act of 1950. In the same year, The Population Registration Act passed through parliament, legislating that each person be assigned a race under law. The Group Areas Act of the same year intensified segregation by allocating different urban as well as rural residential areas for different “race groups.”

National Party attempts to “impose order” on the majority of black people in the country had rural and urban strategies. For the purposes of this chapter, the rural are more important and they involved another iteration of indirect rule. Just three years after the NP came to power, parliament passed the 1951 Bantu Authorities Act (BBA) which sought once again to “retribalise” black people, a phrase that acknowledges the already changed ways of life for black people in both rural and urban areas. According to NP ideology, black political citizenship and representation ought to be located in “traditional African” ways of leadership. The Act introduced headmen who were made responsible for unpopular government policies, and held chiefs accountable for social control. (Hendricks and Ntsebeza 1999:105) It was used to sideline chiefs who were in opposition to the government. Their more compliant juniors were “promoted” to “traditional” leadership.

In the 1950s, anti-colonial sentiment and independence movements spread across Africa, and critiques of colonialism became widespread. South Africa’s Afrikaner Nationalist ideologues themselves sought independence from British imperial rule in this period. But simultaneously, Hendrik Verwoerd, then head of the Department of Native Affairs, sought to refashion the reserves as “self-governing territories.” (Posel 2011) The NP government took this international discourse of independence and twisted it towards the further entrenchment of white minority rule. The Bantu Self-Government Act of 1959 removed white representation of Africans in parliament, ending the last legacies of the Cape Franchise for Africans. Verwoerd attempted to extend “tribal” rule to the urban areas too. The government sought to assert “ethnic groupings” in townships linked to schools with single media of instruction (Posel 2011) although these were never particularly effective.

iii. Apartheid might

By 1960, the National Party had garnered a significant following from English-speaking whites. (van der Westhuizen 2007:23) Faced with threats of being cast out of the Commonwealth because of the apartheid policy, white South Africa elected to leave. In a referendum in October 1960, a majority of whites voted in favour of South Africa becoming a republic. The following year, parliament passed a new constitution that retained a very similar form of state and white political representation as the imperial one. This consolidation of white power was championed by Verwoerd who came to power in the 1960 elections, ushering in what Posel calls an aggressive and authoritarian phase of policy making. (2011:8)

The state renewed its attempts to exclude almost all black people from “white south Africa.” During the 1950s, it had accepted the de facto presence of a fairly large black urban population, and made provision for township housing. But the increasingly powerful post 1960 state sought physically to remove black people to “ethnic homelands.” Between 1960 and 1983, 3.5 million people were forcibly removed from their homes across the country as part of this policy. (van der Westhuizen 2007:101)

Nationalist ideologues framed black people as incommensurably different from whites, both inferior and “traditional.” In the midst of African nationalist uprisings demanding political equality, Hertzog’s utterances in 1965 indicate something of the tone of this government discourse. “As against the European” he said, “the native stands as an eight-year-old against a man of mature experience – a child in religion, a child in moral conviction, without art and without science; with the most primitive

needs and the most elementary knowledge to meet these needs.” (Quoted in Moodie 1975:261) Under this rhetoric and with the instruments of a strongly consolidated state, the NP worked towards the “self-government” and then the “independence” of segregated “homelands” or Bantustans. The NP tried to present these areas as the embodiment of black political aspiration and freedom. They spoke of this policy as “separate development,” as “democracy,” as “good neighbourliness” and as “peaceful co-existence.” In the 1970s, all black South Africans were ascribed a “homeland citizenship” and denied their South African citizenship. (van der Westhuizen 2007)

But by late in the 1960s, the Afrikaner nationalist alliance began to weaken. Some Afrikaners sought to liberalise racial government in favour of the economic need for skilled black labour and the development of black consumers. Others continued to argue for race separation and “white purity” against any economic rationale. This division between *verkrampes* (conservatives) and *verligtes* (the enlightened) was one of class. (van der Westhuizen 2007) The *verligtes* were related to Afrikaner capital, based in the Cape. The latter, on the other hand, were made up of the lower classes and in Northern provinces.

iv. Cracks in the apartheid edifice, 1976 to 1990

A black politics of political equality and African nationalism had been violently repressed by the apartheid state since the 1950s. But on June the 16th 1976, black schoolchildren in Soweto defied teachers, parents and police to refuse the introduction of Afrikaans as the medium of instruction at black schools. It started a wave of protests that the state was unable to repress completely in the next decade and a half.

The renewal of mass open opposition to the apartheid state during this period was also marked by the rise of the Black Consciousness (BC) movement. In 1977 its leader Steve Biko was tortured and murdered in police custody and all BC organisations banned.

Shaken by the Soweto uprisings, P W Botha came to power in 1978 on a wave of reformist thinking. Throughout his tenure as State president, he attempted to introduce changes that would keep the basic edifice of race rule in place, while apportioning some political and economic advantage to black people. Signalling the death of grand apartheid, he made his famous “adapt or die” speech in 1979, asking white South Africans to show “racial tolerance” and adaptability. Soon afterwards, he visited Soweto, becoming the first NP leader to do so. (van der Westhuizen 2007:110) Botha repealed a host of apartheid laws including the Immorality Act and the Public Amenities Act.(Lawrence 1994:5) He deracialised the armed forces by the end of the 1970s.

Botha’s most significant reform was the introduction of The Tricameral Parliament in 1983, which sought to co-opt “coloured” and “Indian” people by giving them representation in second class houses of parliament. But elections for these Tricameral houses inspired “only 13 and 18 percent voter turnout respectively.” (Beinart 2001:255) Instead, this proposal galvanised opposition to apartheid and the formation of the United Democratic Front (UDF), an alliance of progressive civic organisations and NGOs aligned to the ANC. While the ANC leadership remained in exile or in prison, the UDF became the local and popular vehicle for anti-apartheid protest.

While the government openly engaged in reforms to dismantle some aspects of apartheid, it also grew bloated securocrat institutions to fight a “total onslaught” campaign against ANC and UDF. In the early 1980s the security police Civil Cooperation Bureau (CCB) was created, and amongst its more than 200 projects, planted car bombs and assassinated ANC officials. It also funded and operated a series of proxy vigilante groups in opposition to the UDF. This hidden war proliferated in taxi violence, and Inkatha Freedom Party (IFP) resistance to youth joining UDF affiliated organisations in the midlands of Natal.

As part of Botha’s reforms many of the major “influx-control” laws that had controlled the movement and residence of black people were rescinded, and vast numbers moved from homelands and farms into the cities. Squatter settlements spread rapidly around the Rand and Transvaal, Alexander and Soweto. They became political flashpoints, and in them schools were boycotted and young “comrades” aimed to make the country ungovernable. They were met with military and security police violence. Cycles of funerals, rallies and violence were repeated in townships across the country. In the face of growing lawlessness, the first of the states of emergency was declared in 1985. In the same year the Congress of South African Trade Unions (COSATU) was formed and worker mobilisation increased. Strikes by the National Union of Mineworkers peaked in 1986 and 1987. The state was effectively excluded from townships between 1984 and 1986. During that time a series of alternative justice and policing mechanisms were put into place by the young UDF comrades; vigilante groups, self-defence units, anti-crime committees, and people’s courts. (Nina and Scharf 2001:7)

During the 1980s, white private gun ownership rocketed, and Afrikaner commandoes were reinvigorated. As policing loosened in the late 1980s and early 1990s, a crime wave swept through both black and white South Africa. (Beinart 2001:279) White fears escalated and morale declined as sports and economic sanctions forced awareness of the effects and conditions of apartheid upon them. The violence was accompanied by deepening economic woes. Declining gold prices in 1983 led to growing unemployment. Township riots caused capital flight, especially by firms from the USA. At the same time, the security state was becoming increasingly expensive. Beinart estimates that defence expenditure grew from 6 percent in 1960 to 15 per cent in 1970 and onward to between 18 and 20 percent over the 80s (2001:263). It is not clear to what degree economic sanctions put economic pressure on the state. Perhaps more significant was Chase Manhattan's action to downgrade South Africa's ratings in 1986. Others financiers followed suit, and the South African government found it increasingly difficult to acquire and service loans to fund its oppressive operations. As the currency fell and capital fled, the government declared bankruptcy, "imposing a unilateral moratorium on the repayment of foreign debt." (Waldmeir 1997:56) As a result, the "Rand collapsed to less than half its value to the dollar and pound sterling, inflation set in and foreign debt grew." (Beinart 2001:256)

b. Political theologies and the foundations of rule

These are just brief windows into the events of South African politics, highlighting movements of repression, law, violence and resistance. They illustrate the political centrality of race and the fragility, violence and changeability of assertions of white rule and supremacy. They also illustrate the extraordinary violence and intensity of

government interventions that sought to disambiguate race and maintain a racialised separation and white rule.

This section and the next will briefly analyse the place of religion and traditional authority in this history. This section deals with some aspects of political theology and nationalist formations. The next will attend to relationships between the white state and various religious institutions. It should be clear from this history that political theologies, civil religion and the mobilisation of religious and traditional authorities are not the only explanations for either the aims or the strategies of white rule. But their mobilisation was both conspicuous and vital. White rule cannot be explained by these elements alone. On the other hand, it cannot be understood without them.

Let me return to Chapter One's discussion of political foundations and their relationship to secularism. There I argued that pre-modern structures of legitimation, in Europe as elsewhere, gave authority to hierarchical rule. They located political rights in rulers who were in some manner differentiated from and elevated above their subjects. Rulers' right to rule was sanctified through a claim to transcendental legitimacy of some kind. In the European tradition this included notions of providence, of natural law, of the divine right of kings, and of the King as head of the church.

I argued that political secularism is founded, in contrast, on Enlightenment political concepts. These theorised and founded a separation of religion from political power. Political rights came to be located in "the people." Modern forms of politics derive their legitimacy from "self-government" and the will of the people often expressed in some form of social contract. I also argued that modern politics sanctifies the bond

between “the people” and the nation or territory of the polity, linking a political and a social community. Drawing on Romantic sentiment, nationalist movements did the work of sanctifying and enchanting this bond, sometimes with explicitly religious content and sometimes without. Nationalism mobilised positive affect to this end, and it also constituted and excluded some from that national political community, which often led to their being targeted with violence and exclusion.

How can South Africa’s modes of white rule be understood on these terms? I suggest that white governments used and embodied various modes of modern state-craft towards distinctly pre-modern political objectives. In their political concepts, political theology and nationalism, white governments insisted on the right of whites to rule over blacks. Pre-1994 South African polities were not secular because their various forms of white rule could not be based on modern political concepts of democracy, universal franchise, the representation of the will of the people or the distribution of political rights. White rule could not be based on a single moral community between rulers and ruled. With the very limited exception of some forms of missionary assimilation and the Cape franchise, none of South Africa’s historical forms of rule were interested in racial equality or in political rights for black people. The second condition of political secularism - secular political foundations - was incompatible with the ambitions and strategies of white rule.

Political theologies and civil religions in South Africa either asserted or contested a metaphysics of racial difference and white supremacy. It was both logically and politically necessary for white rule to develop justifications for the political right of white government to rule over black people. These became the target of theologies of

liberation that declared them heretical. There are three main examples of such political theologies in South Africa. British civilisational and apartheid Kuyperian Calvinist political theologies sanctified a difference between black and white, legitimated white superiority, and sought to provide a rationale for white rule. The third, liberation theology, contested the ontology of racial difference and white superiority and founded a theology of equality.

Some of the elements of British imperial justification have already been mentioned. Imperialism was relatively secularised in its political culture. It certainly drew on Christianity as a mark of superiority and as a British cultural possession and inheritance. But it was not necessarily or only articulated by religious specialists, and it didn't draw heavily on scriptural resources. And Christianity was only one element of the cultural possession that was held to grant superiority. Others included secularism itself, rationality, bureaucratic rule, models of law, and superior technology. This form of racism located difference in culture, making it at least theoretically possible to assimilate difference through enculturation. It was only when assimilationist policies had moulded colonial people into subjects who contested racial differentiation and inequality on Enlightenment terms that new forms of racism emerged that identified difference as more fixed, biological or inherent.

Afrikaner civil religion on the other hand was far more elaborate and more theological in its orientation. It is probably the most researched aspect of the place of religion in pre-1994 South Africa. It had a number of interlocking elements.

The first was a sacralisation of a bond between Afrikaners in opposition to British imperialism and black people. The second was a political theology of race that was closely tied to biological racism. This located difference in biological matter; essentials, forms, phenotypes, bodies, and the very being of people. (Costa 2000) It was a theory of innate difference. (Martens 2003; Costa 2000) This underpinned the idea that races are fixed, and that culture and race are historically and ontologically coterminous, and therefore there are no grounds for the civilization of the other. We can see this new form of racism in Jan Smuts' "Native Policy in Africa" speech given at Oxford in 1929. He argued that Africans are mentally and culturally different from Europeans. Europeans should not therefore engage in policy that would result in a de-Africanisation of Africans. (Welsh 1972) Under apartheid, biological racism was linked with a Kuyperian version of political theology. Dutch theologian Adrian Kuyper "argued that Calvinism had resolved the medieval dualism between the church and world by placing both equally under the sovereignty of God." (Moodie 1975:54) It was a particularly conservative strand of Christianity that resisted the transformations of the Enlightenment. This form of Calvinist Protestantism maintained Calvin's original position that very few souls would be saved, and Kuyper's version of it added a racial or ethnic dimension; limiting the potentially saved to a chosen racial few. This was certainly not any foundation for an assimilationist policy. He suggested that nations, rather than individuals, were the creation of God, making apartheid obedience to the will of god in its recognition of national or ethnic differences.

The third was a covenant that identified a manifest destiny in Afrikaner rule. (van der Westhuizen 2007) The 1838 victory of the Boers over the Zulu at the Battle of Blood

River and their “covenant” with God became the prime symbol of Afrikaner civil religion. (Moodie 1975) Afrikaners were, according to this covenant, the chosen people of God with a special and burdensome mission to rule over “the descendents of Ham.” (van der Westhuizen 2007) Take D F Malan’s words: “Our history is the greatest masterpiece of the centuries. We hold this nationhood as our due for it was given to us by the Architect of the universe.... Afrikanerdom is not the work of me but the creation of God.” (Quoted from Pienaar in Moodie 1975:2)

These elements of racialised political theology were incorporated into apartheid’s founding documents. The 1961 Constitution¹¹ began as follows:

In humble submission to Almighty God, Who controls the destinies of nations and the history of peoples;

*Who gathered our forebears together from many lands and gave them this
their own;*

Who has guided them from generation to generation;

Who has wondrously delivered them from the dangers that beset them;

We, who are in Parliament assembled, declare that whereas we

Are Conscious of our responsibility towards God and man.

Are convinced of the necessity to stand united

To safeguard the integrity and freedom of our country;

To secure the maintenance of law and order;

*To further the contentment and spiritual and material welfare of all in our
midst.*

The constitution also stated in section two that ‘*The people of the Republic of South Africa acknowledge the sovereignty and guidance of almighty God.*’ Like in the South Africa Act of 1909, the 1961 Constitution failed to give any consideration to the political rights or representation of black South Africans ‘*in our midst,*’ referring only to a patrimonial responsibility for black subjects.

The Tricameral Constitution in 1983 amended this theology somewhat. In bringing Indian and Coloured representatives into Parliament, the 1983 constitution sought to reflect some sort of religious or customary cohabitation. Its preamble reflects the utter ambivalence of this attempt. It¹² kept the same wording as the 1961 constitution, but also included the following:

*We declare that we are conscious of our responsibility towards God and man;
Are convinced of the necessity of standing united and of pursuing the following
national goals:*

*To uphold Christian values and civilized norms, with recognition and
protection of freedom of faith and worship;*

*To respect, to further and to protect the self-determination of population
groups and peoples; ...*

*Are desirous of giving the Republic of South Africa a Constitution which provides for
elected and responsible forms of government and which is best suited to the traditions,
history and circumstances of our land.*

In opposition to these racialised theologies, various strands of secular African nationalism asserted the equality of people across races. African nationalism was a

direct response to the Union and its political exclusion of black people. The South African Native National Conference (SANNC) was formed in 1912 to contest the Union. It was initially a middle class and elite organisation that had prominent membership of both rural chiefs and missionary educated intellectuals. (Lodge 1983) It sought initially to prevent what was to become the 1913 Land Act, then in Bill form, from being passed. At first dispatching requests and polite complaints, it quickly grew to support striking mine workers and anti-pass campaigns. From the 1920's the emergence of trade unions and worker movements, particularly the Industrial and Commercial Workers Union (ICU) and the Communist Party, somewhat radicalised the African congress movement. In 1923 it changed its name to the African National Congress (ANC).

In South Africa it was not the state but African nationalist movements that sponsored Enlightenment values and the political imaginary of freedom and self-government. In the 1940s and 1950s it was both radicalised and brutally repressed. The urban locations that the NP presented as a threat to white interests were increasingly the locus of a black politics of equality; both political and economic. The ANC and South African Communist Party (SACP) mobilised against passes and the migrant labour system. But the national party responded by smashing the unions and banning the ANC and the South African Communist Party. The Suppression of Communism Act was used against a wide range of political opponents. (van der Westhuizen 2007)

Not only did these organisations oppose government policy, but in the development of the Freedom Charter, finalised in 1955, they sought to articulate the rights and responsibilities of a politics and an economic distribution that was not based on a

principle of race. Quoting Stephen Clingman, “[i]f the intent of the apartheid government was to prove some misguided point about God-given hierarchies and distinctions, then the anti-apartheid movement would show through its most intimate gestures as much as its wider institutional structures that not only were racial cooperation and harmony possible, but that the only kind of superiority there could be was moral.” (Quoted in van der Westhuizen 2007:72) These organisations did not recognise a civilisational basis for black politics, but rather sought an end to segregation, paternalism, racial discrimination, demanding equal rights and equal citizenship. For the first time, white people joined anti-apartheid activism, particularly with the formation of the Congress of democrats in 1953; participants in the development of the freedom charter. At parliamentary level, the white opposition Progressive Party was formed in 1959.

As white South Africa entrenched itself in apartheid, and as the repression of black people increased, black politics was radicalised. In the late 1950s Robert Sobukwe left the ANC to found the Pan African Congress (PAC). In 1960 the PAC mobilised against passes, leading to widespread demonstrations. The police opened fire on demonstrators, killing 69 people in Sharpeville. Opposition politics became increasingly militant, and the ANC and the PAC both embarked on an armed struggle for liberation. The more radical leadership of the ANC was gutted by the 1963 arrest at Rivonia of many members of the ANC’s leadership including Mandela, Sisulu, Kathrada and Mbeki (Govan). The leadership of the ANC went into exile, and began a long diplomacy on behalf of political rights for black people.

It was in this period when the “liberation” parties were harassed and exiled, that church leaders took a greater leadership in the struggles against apartheid. Some mainline church leaders used their relative freedom of speech and organisation to contribute to anti-apartheid activities. Others became linked with ANC structures in exile and were able to act as liaison between these and people within the country who were banned or jailed. But there was also an important theological element to their actions. Drawing on the emergence of Catholic liberation theology, as well as the writings of German theologians and their reflection on the Nazi regime, a Protestant liberation theology developed. It was nurtured particularly in conversation with the Black Consciousness movement and the Protestant ecumenical Federal Theological Seminary. It contested racialised political theologies on biblical and theological terms. It also articulated a political theology of equality on the basis that everyone was made equally in God’s image. Archbishop Desmond Tutu was the most prominent of many liberation theologians that became increasingly active in the 1980s at the height of the states of emergency and the organisation of the United Democratic Front.

The visibility of this liberation theology was also an important counter to the apartheid ideology that linked the ANC, the South African Communist Party and the threat that together these would introduce a “heathen” government or one that would seek to repress religion.

This black politics of equality and political freedom, in its secular and political theology iterations, can also be contrasted with the political imaginary of tradition, customary authority and chieftainship. The apartheid state made considerable investments in policies that asserted a fundamental difference between black and

white culture and being. National Party ideology of “separate development” was about “reinvigorating, refashioning and rewarding ‘traditional’ African notions of authority and political culture...” (Posel 2011:25) A prime architect of this approach was W M Eiselen who in the 1920’s was an anthropological expert on ‘indigenous African religion,’ and under apartheid was Verwoerd’s right hand man in the ‘Bantu Affairs’ administration in the 1950s. (Chidester 1996) The ideological discourse around homelands and ethnic nationalism was threaded through with mention of divine right of traditional leaders, the authority of traditional leaders according to custom, and the legitimacy that derives from the historical legacy of their rule.

Govan Mbeki, one of the staunchest opponents of traditional leadership in the ANC, wrote “Verwoerd drew a picture of chieftainship restored to its ancient glory before the arrival of the white man, and assured putative chiefs that the government would empower them with the authority that was theirs by divine right to rule over their people. To show how serious the government was, it immediately appointed a large number of recognised chiefs, and raised their stipends to levels undreamt before.” (Quoted in Goodenough 2002:11) This discourse and the resources that the apartheid state brought to it provided an alternative political imaginary of autonomy, self-determination, freedom and also autochthony. It provided the imaginary for some traditional and then homeland leaders of a world without whites, and without the economic and social degradations they brought with them.

4. Church and state under white rule

Gill and Kasharvian have suggested that the most important determinants in a relationship between states and religious institutions is their relative powers in periods of state formation and consolidation, and the ideological ambition of modern states to appropriate or subdue the powers of religion. (Gill and Keshavarzian 1999) In the last chapter I outlined four formations of political secularism and the relationships between religious and government institutions they took to be the ideal

Each formation of political secularism involves a coherent normative account of what place religion “ought” to have in the nation-state, and a set of tools to argue for and discipline these relationships. But this aspect of political secularism was also impossible under South Africa’s Union and the Apartheid governments. Institutional relationships were not based on a normative account about religion *per se* or politics *per se*. They were always subject to the furtherance of white rule. They could not be stated in principle, because these relationships depended on the religious institutions relationship with racial ideology and practice. Relationships between government and religious institutions depended on the particular version of racialised ideology in operation, the power of the government, and the forms, ambitions and race theologies of the religious groups with which they interacted.

Missionaries

Before the Union there was no South African state or nation. There were localised and sub-national forms of rule. It is not strictly accurate to speak of the possibility of political secularism before the advent of either nation or state. But in the case of

colonialism, missionaries and administrators often shared objectives and presented two faces of European rule. They often shared the objective of civilisation and the inclusion of black subjects under British sovereignty and process of extraction. But in South Africa and Kenya, both of which had relatively large white settler populations, missionaries and colonial administrations were sometimes in conflict.

To give just one example, the missionary Van der Kemp became concerned about genocidal and exploitative settler treatment of the Khoikhoi. He headed up a missionary station in Bethelsdorp, where he sought to create a place in which Khoikhoi could be on equal footing with colonists. This was very much against the wishes of the Cape authorities. (Giliomee 1988) He put pressure on the colonial administration to punish the mistreatment of Khoikhoi by publicizing cases of abuse by farm owners in the British press. Under pressure from British humanists, the Cape government then established a Black Circuit court in 1812 to investigate these charges of cruelty. But there was a backlash from settlers. And a decision by Governor Maynier's to allow Khoikhoi to worship in churches shared by whites caused great dissatisfaction among the settlers. As a magistrate in the district of Uitenhage said at the time, "It is difficult and often impossible to get the colonists to understand that the Hottentots ought to be protected by the laws no less than themselves, and that the judge may make no distinction between them and the Hottentots. According to the unfortunate notion prevalent here, a heathen ... can in no wise be believed, and only by violent measures can he be brought to do good and shun evil." (In Moodie 1975:29) In this instance the colonial government acted in favour of the settlers rather than on the complaints of the missionaries on behalf of the Khoikhoi.

On the other hand, the British administration provided financial and other support to missionary efforts. Education and health services were provided by missions and later the mainline protestant churches that were their inheritors. From 1854, the Colonial state subsidised missionary institutions “that would undertake to train Bantu youth in industrial occupation and to fit them to act as interpreters, evangelists and school masters among their own people.” (Ndletyana 2008:3) By 1887 there were nearly 50,000 African children studying in church schools. Davies and Shepherd suggest that because “civilisation” had been the goal of black education until this point, governments granted religious bodies “considerable liberty in their control of the work.” (1954:xix)

The mostly close relationship between British colonial administration and Mission churches was transferred at the Union to what became the nationally organised mainline churches. South Africa under the Union government remained a part of Britain’s constitutional monarchy. The Church of England, and locally, the Church of the Province, had very close relationships with local English speaking government and British imperialism. Because the formal locus of South Africa’s sovereignty was the British parliament, it was not necessary to write this establishment into a Union constitution. And while some missionaries critiqued indirect rule as a postponement of civilisational policy, the English speaking church as a whole was supportive of white minority rule. (Cochrane 1987)

The English speaking churches

Mainline Protestant churches were founded at the time of the Union out of earlier missions. Like the Union government, these churches took control over their internal

affairs on a national level and gained a degree of autonomy from European offices. In line with segregation as a national policy, most initiated segregationist policies within their churches. Some sought to “Africanise Christianity” as they put, it by introducing a complete separation of African and European parishes and church hierarchies. The Dutch Reformed Church was segregated as early as the 1850s. In 1923, the Bantu Presbyterian church was established by the Presbyterian synod. Many other mainline churches were to follow. (Cochrane 1987) Only Anglicans and Roman Catholics refused this racial segregation. The first process of state formation did, in other words, subordinate the churches to national policy with respect to race.

The Union government continued to fund educational institutions run by churches. But almost as soon as the National Party came to power in 1948, it launched an apartheid assault on church schooling and the educated black elite they were producing. Such people were the very antithesis of the Apartheid political project. In 1949 the government appointed a commission under Eiselen to formulate education policy for Africans. (Moodie 1975) Its report based its recommendations on “the premise that educational practice had to deal with African children trained and conditioned in an African culture, speaking African languages and imbued with values, interest and behaviour patterns ‘learned at the knee of a Bantu mother’.” (Quoted in Welsh 1972:49) Such an education would not “alienate” pupils from “their culture” it claimed. To this end, the commission proposed what became the 1953 Bantu Education Act, which centralised all black African education under the Native Affairs department. (Moodie 1975)

The National party replaced Christian control of education with state controlled Christian national education that furthered apartheid racial theology. This is a good example of secularising in the context of a consolidating state. Many churches tried to retain ownership and control over black education and continued to provide schooling for as long as they could. But without government subsidies, one after the other, they closed or were turned over to government administration and the Bantu education curriculum. The introduction of Christian National education was also an anathema to other religious groups. Private and variously funded Jewish and Muslim schools were established in opposition to the Christian national education on offer at government schools.

For many reasons the English speaking churches, which had a majority black membership, were mobilised from the 1960s to the 1980s to oppose the practices and policies of apartheid. Until the early 1980s, religious groups enjoyed a form of indemnity from violence and political harassment from the apartheid state which, taking religion and religious authority seriously, was loathe to suppress it or subject it to the same violence it had other groups. But as black and white ministers began to contest the Christian foundations of Afrikaner nationalist ideology and power, the relationship became increasingly oppositional and, from the side of the state, repressive.

A new generation of black leaders aligned to the ANC and PAC were elected into positions of power in the English speaking or mainline churches from the early 1980s. The Methodist Conference, for example, was headed up by Stanley Mogoba and then Mvume Dandala. More famously, Desmond Tutu became the Anglican Archbishop.

In the mid 1980s, these church leaders become very visible in the activities of the anti-apartheid United Democratic Front. Churches themselves became sites of struggle, both theological and political. (Walshe 1997) And the state took its gloves off with respect to Christian ministers. From the mid 1980s onwards, many religious leaders were arrested and tortured for their political activities.

African Independent Churches (AIC)

An African separatist church movement developed between 1890 and 1910 in the context of the urbanisation brought about by the discovery of diamonds and gold. (Sundkler 1948) During this period, black preachers and catechists were drawn from the rural areas to work in the mines of the Witwatersrand. They were influenced by the charismatic African American Methodist Episcopal Church (AME). Like the AME, many international missions supported the indigenisation of clergy across the globe. But local missionaries sought to maintain paternalistic white or European control over religious activities. (Sundkler 1948)

In this context Mengena Mokone and other lay preachers founded the Ethiopian Church in Pretoria, the first Christian church independent of missionary or white control. It began a movement that grew rapidly. At first, the independent churches were politically active. And the British South African leadership that was looking for ways to unite the four colonies responded to their independence and political activism with violence and intense administrative intervention.

Leaders of the early independent church movement were involved in the Bambata rebellion of 1906 to 1908 in Natal. Missionaries, politicians and some black

Christians expressed concern about that they termed the growing “Ethiopian problem.” As Sundkler put it, “[i]t was then feared that the Ethiopian movement was an African political underground movement aiming and ousting the White man from South Africa, or, at least, that it might establish a Pan-African National Church which would cause harm by hampering the evangelisation of the Bantu peoples.” (1948:13) In 1903, J H Scott, a chief magistrate in the Cape Colony claimed that the Ethiopian movement was “ a political and social movement, not a religious movement at all.” (Sundkler 1948)

The Natal colony tried to repress independent churches in order to negate their possible political influence. Its Natal Native Affairs Commission of 1906-7 made the threat to the Ethiopian movement that opens this chapter. (Quoted in Sundkler 1948:69) The first form of punishment was the withdrawal of state support for ministers of religion, and a restriction on their ability to preach and mobilise in public. Natal passed regulations to the effect that “No Native Minister of a Church, independent and free from direct and effective European control, shall be registered as a Marriage officer. No official recognition in any form by grants-in-aid schools, or otherwise, shall be given to Native Churches independent of, and free from, European control or to any religious movement amongst Natives embodying race cleavage as a principle. ... That it be unlawful for any Native Minister or member of a religious movement and not under European control and not recognised, whether exempted or otherwise, to address meetings or assemblies of Natives.” (Quoted in full from Sundkler 1948:70)

Like many other aspects of policy that was consolidated at the time of the union, there were attempts to find a resolution between the ways in which independent churches had been treated across the four colonies. This was part of the mandate of the Native Affairs Commission. The Transvaal had already recognised its first Ethiopian church in 1893, but after the turn of the century, the Transvaal and Orange Free State largely concurred with Natal. In the Cape colony separatist churches were treated the same as mission churches in terms of law. The Native Affairs Commission leaned towards the Cape position. The commission did not want to be seen as repressing religious freedom, declaring that “any measure capable of being represented as religious persecution should be avoided.” The commission eventually made a recommendation to accord recognition of “such Native Churches as are possessed of sufficiently stable organisation to control their pastors and enforce discipline where necessary and to ensure the appointment to the ministry of reliable and worthy men only...” (Native Commission cited in Sundkler 1948:67) Over time, increasing numbers of Independent churches sought recognition which brought with it the right to become marriage officers, possible access to land for churches and schools, and access to a travel rebate for ministers on the South African railways.

The massacre at Bulhoek put an end to this liberal policy. In 1921 Enoch Mgijima led a group of some 3,000 Christians calling themselves the Israelites. As they had for a number of Easters, they formed a temporary village at Ntabelanga. That year, Mgijima prophesied that by staying in this place white people would be crushed by “the natives.” The Israelites stayed in pursuit of this prophecy, earning the ire of many in the surrounding area, black and white, for over-grazing and not paying hut taxes respectively. The situation escalated until 800 police surrounded the place and

attacked the sword and knobkerrie wielding Israelites. Nearly 180 Israelites died at the hands of the police, and many more were injured¹³.

In response to the massacre, the government initiated a Native Churches Commission which laid down some general rules for separatist churches. (Sundkler 1948) The commission included a member of the Dutch Reformed Church and a “native education expert.” It decided that “so long as the movement is not mischievous it should be tolerated and where it springs from a worthy motive and is working in harmony with the Government it should be encouraged.” (Quoted in Sundkler 1948:73) Some administrative regulation of these churches was built into the conditions for such toleration.

In their formative years, the independent churches were politically active in a range of ways. AIC leaders participated in the formation and early workings of the South African Native National Congress, the precursor to the ANC. But after the radicalisation of the ANC and the violence that befell the Bambata rebels and Mgijima’s Israelites, the independent churches became noticeably more quietist.

Many who write about these independent churches struggle with the ways in which they defy the categories of liberal political theory. Amongst contemporary scholars, Gunner, for example, writes of the Shembe church, the second biggest AIC, as “outside of, yet constantly overlapping with the overtly political discourse of the region.” (Gunner 2004) Peterson argues that to assess the political role of the AICs, means that it is necessary to “stretch ... the semantics of the political.” (Quoted in Gunner 2004:6) Like the earlier black millenarian prophets, they do not contest

political power in any conventional sense of politics. That, perhaps, is their greatest independence.

The disposition of these churches against engagement in the explicitly political domain, and, after these earlier contestations, to disavow politics as such, means that the AIC's became almost invisible to national political life. Their very independence removed them from contesting the ideological or institutional foundations of white power, even as these churches grew to include the biggest number of black South Africans.

Dutch Reformed church

The Dutch Reformed Church (in Afrikaans the *Nederduits Gereformeerde Kerk* (NGK)) was never officially established in law as the state church of the apartheid government. A differentiation between church and party was consistently maintained, even as a great number of people moved between these spheres. But while religion and politics were differentiated, there was very little separation between them. The Dutch Reformed Church and the Hervormde and Gereformeerde churches, were “civil society extension(s) of Afrikaner nationalism.” (van der Westhuizen 2007:50)

It has already been mentioned that during the first phase of apartheid government from 1948 to 1960, the National Party did not have an electoral majority. During this period the party drew heavily on the church to help secure the Afrikaner alliance. In this relationship, the NGK gained a great deal of power and influence, and secured a national institution of Calvinist social conservatism. This was legislated in publication control or censorship and statutes against entertainment or liquor trading on Sundays.

There was also a common law offence of blasphemy. (van der Vyver 1999:1)

Afrikaner churches were active in their support of “immorality” legislation, seeing itself as the moral guardians to poor white women in particular.

The first open contestation between the religious and nationalist elements of the NGK took place over what was called the Church clause. It marks the strengthening of the National Party and its increasing capacity to discipline the Afrikaner churches. Enacted in 1957, the Church clause sought to give the then Minister of Constitutional Co-operation and Development the power to prohibit black attendance at services and functions in areas other than those designated for black people under the Group Areas Act. There was a huge outcry by almost all of the English-speaking churches which saw this as an affront to mission and pastoral activities. Some prominent leaders in the NGK synod were also critical of the clause and spoke out against it. But they were convinced by Verwoerd to withdraw their opposition. In so doing, the NGK allowed the government to erode its evangelical mission. But given the need to continue to bring English-speaking voters into the nationalist fold, the NP could not afford to alienate these white voters. As a result, the Church clause was never implemented. (van der Vyver 1999:2)

The brutality of the 1960 Sharpeville massacre and the decision to become a Republic galvanised increasing opposition by the ‘English-speaking’ churches to the apartheid state. The majority of the members of these ex-mission churches, both mainline Protestant and Catholic, were black. In 1960, the World Council of Churches called a meeting about the “social and racial situation” in South Africa in response to what it called the “disturbances” of March 1960. It became known as the Cottesloe

Consultation. It was historic in bringing together black and white church leaders for the first time, even though there was no representation from independent churches. Still, all but two delegations were of mixed race, and about a quarter of the participants were black. Many of the discussions remained racially patronising, referring to “bantu members” of the consultation, for example, and affirming that “apartheid with consultation is not un-Christian¹⁴.”

But the consultation represents the beginnings of the ecumenical movement in South Africa, a coalition of Christian groups which, despite their theological differences, represented Christianity to the state in some way. At least initially, Afrikaans churches were invited to join this ecumenical movement. The official statement of Cottesloe took positions that were new in South African church state relations. The consultation came out against racial exclusion in church worship, was concerned with what it called “the revival of heathen customs” within Christianity, and could find no scriptural grounds for the prohibition of mixed marriages “even though they may be inadvisable.” It also called attention to the debilitating effects of migrant labour, supported the direct representation of coloured people in parliament, and urged the release of enquiries into police actions in Sharpeville and Langa.

The Afrikaans churches participated in Cottesloe. But in the end the Nederduits Hervormde Kerk noted that it could not subscribe to the Cottesloe declaration and wished to place on record “our gratefulness to the Government for all the positive steps it has taken to solve the [native] problem, and to promote the welfare of different groups.” Not surprisingly, they were represented by an all-white delegation. The Nederduits Gereformeerde Kerk on the other hand did support the resolutions.

But the NGK delegation considered them compatible with a policy of race differentiation which, they suggested, could be defended from a Christian point of view.

After Cottesloe, Verwoerd called the members of the NGK delegation to a meeting. As van der Westhuizen notes, The “DRC synod buckled under pressure from Verwoerd, aided by the Broederbond, and renounced their own representatives who had adopted the World Council of Churches’ Cottesloe Declaration in 1960.” (2007:51) But Cottesloe also marked the beginnings of anti-apartheid sentiment amongst a small band of Afrikaner theologians. In 1961 a group of Afrikaner theologians published ‘Delayed Action’ which refuted the biblical and moral bases for apartheid. (Moodie 1975:290) The beginnings, Moodie calls it, of a “comprehensive theological reconsideration.” But this reconsideration by Afrikaners of race political theology was harshly punished. In 1966, far-right wing politician Andries Treurnicht, who was still in the NP at the time, conspired to have Beyers Naudé excommunicated from the DRC. And prominent Afrikaner theologian A S Geyser was charged with heresy for his condemnation of the churches’ racial exclusion. (van der Westhuizen 2007:52)

The South African government’s treatment of all these churches - Afrikaans, mission, Mainline Protestant and African independent - can be explained in relation to their theologies and practices of race. Where churches supported white rule and black subordination, they were given institutional support by the state. They were rewarded with administrative recognition, state subsidies, access to participation in state-sponsored public institutions such as schools, and military chaplaincies, and access to Christian

public broadcasting. But where they questioned the theological legitimacy of apartheid or race rule, and where they provided institutional support or leadership to anti-apartheid activities, they were treated with increasing levels of violence. This was first evidenced in the appropriation of schooling from Christian bodies to the state, and the state's articulation of a "Christian national education" that was not under the control of religious authorities or theologians. Later, when mainline churches began actively to oppose apartheid and articulate liberation and black theology, the state responded with violence towards individual religious leaders, many of whom were active in the UDF and were arrested and tortured in the 1980s.

The mechanisms of statecraft with respect to political secularism – including co-option, appropriation, critique and violence – were all applied to churches from 1910 to 1994. But there could be no culture of political secularism, no normative or vernacularised account of what place religion "ought" to play in the state and the nation. This is because relationships between the state and religious institutions were subordinated to the politics of racial rule.

5. Moving towards negotiations

In 1982, amidst international pressure and a fear that Nelson Mandela would die in prison, he and his senior ANC comrades Sisulu, Kathrada, Mhlaba and Mhlangeni were transferred to Pollsmoor prison where their health could be monitored. (Sparks 1994:24) Anticipating movement, Mandela wrote to Minister Coetzee, Minister of

Justice, as he had to Hendrik Verwoerd in 1961. (Sparks 1994:25) But he got no response.

While Mandela was waiting, Pieter de Lange took over as chair of the Broederbond in 1983. He published a document titled *Basic Political Conditions for the Survival of the Afrikaner*, a manifesto for negotiation that nonetheless stopped short of one person one vote. (Waldmeir 1997) De Lange took the initiative to meet with Thabo Mbeki in New York in 1986, thereby coming under the influence of the ANC's "most polished diplomat." (Sparks 1994:72) By the middle of the 1980s, some Afrikaner intellectuals and National Party members were realising that apartheid was not, as we now say, sustainable. Even the synod of the Dutch Reformed Church under the leadership of Rev Heyns started distancing itself from apartheid in 1986. Increasing numbers of Afrikaner leaders, both progressive and conservative, travelled to Lusaka or London where they were charmed by urbane ANC exiles who undid their racial stereotypes. From 1987 to 1990, Professor Willie Esterhuyse from Stellenbosch University took prominent Afrikaner business and church leaders to meet with Mbeki in London. He was recruited to the task by the National Intelligence Services. His open spying set up a channel of communication between intelligence and the ANC in exile.

In 1985, Botha offered Mandela his release on condition that he gave up violence. It was an offer Mandela denounced roundly. Other overtures followed; such as an offer to release Mandela to the Transkei homeland where he could live under the rule of his nephew Paramount Chief Kaiser Matanzima. (Sparks 1994:51) This was also rejected. In a desperate attempt to expand the Tricameral system to Africans, Chris Heunis, then Constitutional Affairs minister, proposed in 1986 a "council of leaders" that

would include African representatives. The council was to be ruled by “consensus” which would ensure that white parties would have veto rights. The African representatives to whom the proposal referred were Buthelezi and other homeland leaders; people who were already working within the apartheid structures. The plan failed when Buthelezi refused to participate. Early talks with Mandela sought to co-opt him as a moderate leader within this framework, and therefore split the ANC between moderate and communist factions. (Sparks 1994:72) The attempt failed dismally.

While the security establishment and UDF comrades clashed, international pressure for reform mounted. In 1986 the ANC in exile secured a United Nations debate on apartheid, and as a result a Commonwealth Eminent Persons Group came to South Africa. They attempted to secure an agreement from Pretoria to negotiate with the ANC. On the very day they were due to meet the cabinet, the 19th of May 1986, Botha ordered raids against ANC bases in Zambia, Zimbabwe and Botswana, and instituted a renewed state of emergency. (Friedman 1993:5; Sparks 1994) They concluded that “while the Government claims to be ready to negotiate, it is in truth not yet prepared to negotiate fundamental change, nor to face the prospect of the end of white domination and white power in the foreseeable future.” (Quoted in Klug 2000:73)

In 1988 Mandela was moved to a warden’s house in Victor Verster prison near Paarl. (Sparks 1994:36) From there he developed a memorandum which he sent to Botha in March 1989, offering terms for negotiations. But Botha was not in a good position to receive him. That January he had suffered a stroke. They finally met that July in a disappointing and inconclusive meeting. The ANC in exile was making its own moves.

In August 1989, the ANC published the *Harare Declaration*, setting out five pre-conditions for negotiations. These included a lifting of the state of emergency, an end to restrictions on political activity, the unbanning of political organisations and release of political prisoners, and an end to political executions. On those terms the ANC said it would suspend the armed struggle “while the two sides agreed on constitutional principles”. (Sparks 1994:87)

The big breakthrough came when de Klerk took office. A cabinet conservative from a family of prominent Afrikaner Nationalists, he was to have been the hawk to replace Botha. (Sparks 1994:97) Yet he was also a pragmatic head of a government in deep trouble. On the second of February 1990, de Klerk made a dramatic speech unbanning the ANC, PAC and SACP and committing the National Party government to negotiations to end exclusive white rule. Taking the ANC by surprise, Mandela and many other senior ANC leaders were released from prison within days of the announcement. This started almost two years of open negotiations between the ANC and National Party about talks to reform South Africa’s politics. Neither side brought all their supporters with them. There was suspicion within ANC ranks that Mandela had been turned in prison. The PAC denounced the talks. Many white South Africans lost confidence in the leadership of the country, property prices fell and there was widespread emigration. PW Botha denounced talks, and there was a marked increase in right wing militancy. (Ebrahim 1998)

Halting attempts to start these talks were regularly interrupted by violence. The ANC called off negotiations when 16 activists were killed by police who opened fire on unarmed demonstrators for example. (Ebrahim 1998) But in May 1990, three days of

meetings between the ANC and NP led to the adoption of the *Groote Schuur Minutes*. With more than 400 journalists watching, the NP government agreed to lift the state of emergency, and the ANC agreed to “reconsider the armed struggle.” (Ebrahim 1998) There were discussions about the release of political prisoners and conditions for the return of nearly 40,000 exiles. (Waldmeir 1997:162) A few months down a rocky road, the two parties signed the secret *D F Malan Accord*, and later in August the *Pretoria Minute* in which the ANC renounced the use of violence as it suspended its armed struggle. (Spitz and Chaskalson 2000) In September 1991, a National Peace Accord was signed, laying the foundations for multiparty talks.

Negotiations took place principally because of a stalemate in power. (See Ebrahim 1998; Waldmeir 1997; and Friedman 1993 amongst others) The ANC realised that its armed wing couldn’t win a military war, and the costs for neighbouring states to host the ANC were increasingly high. (Friedman 1993:11) The Soviet Union was in crisis and putting pressure on the ANC to settle by negotiation. The military was unable to decisively quash township opposition. And the costs of trying were just too high. And so, negotiations began in earnest.

6. Conclusion

South Africa was not secular before 1994. Its various governments articulated a political theology and a civil religion to legitimate their white rule. They appropriated imaginaries of African independence, chieftainship, and a customary social order to exclude black people from national wealth and membership of the political

community. They appropriated church resources, drew on some churches for moral and theological legitimation, and unleashed violence upon some religious groups and leaders. Aspects of modern statecraft were turned towards the anti-democratic politics of white rule.

This is the morality tale of South African race rule. There has been no moral community between rulers and ruled, between the social and the political community. Religion and tradition have been deeply entangled in white rule. In this, aspects of modern statecraft usually associated with secularism were turned towards non-secular ends. Religion was also mobilised towards liberation and towards secular political values of equality. Religion and tradition have themselves become the grounds on which politics has been contested.

Chapter Three: Constituting Relations between Religions and the State

Strip South Africa of its multitude of religions and it is no longer South Africa.
Albie Sachs, 1990¹⁵

A very important argument for a bill of rights is that it is subscribed to by almost every religious persuasion or group represented in our country.
South African Law Commission, 1989¹⁶

1. Introduction

In Chapter One I suggested three conditions of political secularism. This chapter addresses the first; the condition of secular institutional relations. There are three requirements for institutional relationships between religion and politics to be secular. The first is a clear, well understood and administratively mobilised *differentiation* between the religious and the political. Religious and political organisations need to be distinguishable for secularism to be possible. The second is a *separation* of ‘church and state’ as it is referred to in Christian terms. More inclusively, this refers to a separation of religious and political institutions. Separation immediately implies their relationship too. In Chapter One I described four formations of political secularism; four very different relations between religion and politics. These were Establishment, American, Laïcité and Jacobin Communist forms. What distinguishes them is the mechanism - violent, agonistic or cooperative - by which religious groups are located in a position from which they do not contest public political power. However it is achieved, this exclusion from the contestation of political power is the third requirement of this condition. Political secularism does not, therefore, denote an

absence of religious institutions in public life. Instead, it is best understood as a form of *unequal relationship* between religion and politics in the public and the institutions of state.

In this chapter I will argue that this condition of secular institutional relations was conclusively met during the period of post-apartheid state formation, at least with respect to ‘world religions.’ Secular institutional relations were entrenched in South Africa’s post-apartheid constitution. I argue that religious institutions became subordinated to political authority during the negotiations through the co-optive mechanisms of human rights and constitutionalism. In post-apartheid South Africa, as in most constitutional democracies, it is the state that guarantees religious freedom and autonomy. The state, through law, grants rights to religious individuals and institutions, and it also enables and sets conditions for their exercise. It limits the right to religion, establishes a framework for its interpretation, and subordinates religious rights to other general legal and administrative principles.

As already argued in Chapter One, formations of political secularism are partly a reflection of the relative powers of religious groups and political institutions during periods of state formation; powers that can be numerical, institutional or based on the popularity of their political imaginaries. (Keddie 1997; Gill and Keshavarzian 1999; Gill 2008) The next part of this chapter therefore investigates the political parties that were involved in the negotiations, and their ideas and interests around religion. Following this, I examine the groups that sought to represent religion to the negotiating parties, examining their imaginaries for the future democracy. These political and religious groups participated in a fragile and contested negotiation, and

the formation of political secularism emerging from the negotiations is inextricably tied to its processes. The chapter therefore goes on to follow the debates about the place of religion during the negotiations, particularly the terms on which religion was included in the bill of rights in the interim and final constitutions. It provides an overview of the legal place of religious rights and institutions in the post-apartheid constitution. Sections of the final constitution that include reference to religion are included in Appendix Two for ease of reference.

2. Negotiating the transition

Political negotiations led South Africa out of apartheid and into a regime that, for the first time in national history, was not based on race. These negotiations took part in three phases. In the first, already covered briefly in Chapter Two, the ANC and National party engaged in “talks about talks” in which they felt their way towards a negotiated settlement of the increasingly intractable conflict. The second phase took place at Kempton Park. There the Congress for a Democratic South Africa (Codesa) and then the Multi Party Negotiation Process (MPNP) secured a framework for a settlement, the form of a future government and an Interim Constitution. The Kempton Park talks took place amidst explosive violence and insecurity. (Shaw 1994) The democratic elections of 1994 and the inauguration of Nelson Mandela as President ushered in the last phase of negotiations, one in which the final constitution was written by a democratic parliament acting as a Constitutional Assembly. Before attending to the ways in which religion was framed in the constitution, I will first outline the three phases of the negotiations.

a. Phase One: Talks about talks - Human Rights and Constitutionalism

During the first phase of negotiations, the National Party government and ANC leaders held tentative and then increasingly formal meetings from 1985 to 1991. These contacts and the agreements they reached prepared the way for negotiations. (Ebrahim 1998) It is significant that during this period and under pressure from the international community, both parties were persuaded to pursue negotiations through a framework of human rights and constitutionalism.

It is not that rights language was absent from African demands in earlier phases of South African politics. In 1941, the ANC drafted a document called ‘African Claims.’ It demanded full citizenship, access to land and an end to discriminatory legislation. (Ebrahim 1998) The 1955 Freedom Charter also framed some of its entitlements as rights. But the ANC’s main rhetoric until the late 1980s had been that of a “national democratic revolution” and “people’s power.” As Albie Sachs wrote in 1990, “We are not used to the idea of rights, certainly not of constitutional rights. Our debates are about power rather than rights.” (Sachs 1990:vii)

New political imaginaries of freedom and power took hold in the mid-1980s as the ANC’s internal workings became increasingly subject to international scrutiny. The mutiny at the Quatro Camp in Angola, and complaints about the brutality of ANC security personnel resulted in an ANC conference in Zambia in 1985. It called for a code of conduct, and a process to deal with those accused of spying or criminal activities. (Klug 2000) To this end, Zola Skweyiya, holder of a German law PhD, was

appointed to head a new law department within the ANC. (Klug 2000:78) When formal contacts with the apartheid government began in 1986, a Constitutional Committee was formed from that department. It included Jack Simons as its chair, as well as Skweyiya, Penuel Maduna, Teddy Pakane, Bridget Mabandla, Kader Asmal and Albie Sachs. (ibid 2000:78) Gloppen (1997) and Corder¹⁷ both point to Sachs, a lawyer, ANC National Executive Committee (NEC) member and later Constitutional Court Judge, as a central figure in persuading the ANC towards constitutionalism and human rights. (Gloppen 1997:200)

The Commonwealth Mission, the United Nations (UN) and international governments all put pressure on the ANC to begin to formulate a vision of future governance in South Africa and its position on negotiations. By October 1987 the ANC had produced a 'Statement on negotiations.' It outlined the ANC's preconditions for negotiation and accepted the necessity of a bill of rights. In 1988 it published its proposed constitutional principles. (Klug 2000:78) This was followed by a series of international law conferences at which the ANC interacted with South African lawyers including Pius Langa from the National Association of Democratic Lawyers (NADEL), and an Oxford conference where South African judges met the ANC in defiance of the apartheid Minister of Justice.

The fate of the Soviet Union was central to these shifts in the format of political claims, and also to the willingness of the South African government to negotiate. According to Hugh Corder, the way in which the ANC sought Western support for sanctions in the latter half of the 1980s was by showing that it wasn't a proxy for the Soviet Union. "How do you do that?" he asked; "... by saying that we'll have a

written constitution, including a bill of rights, and statement of rights, basic protective rights. And this is also a sop to the white minority.” By the early 1990s, the ANC leadership had dropped much of the socialist rhetoric popular amongst the unions and UDF affiliates, at least in the talks about talks. “The language of democracy, black advancement, and human rights was more strongly emphasised.” (Beinart 2001:274)

This shift to a human rights discourse must be seen against the background of the rise of constitutionalism as global political norm. (Ackerman 1997) South Africa’s transition took place amidst an avalanche of new constitutions. “Over fifty six percent of the 188 states of the United Nations organisation made major amendments to their constitutions in the decade between 1989 and 1999.” (Klug 2000:12) This wave of constitutionalism was marked by the introduction of bills of rights in each new democratic regime, and a great deal of faith in the rule of law. (2000:1)

The shift towards constitutionalism in South Africa was remarkably rapid. The ANC was not the only party that turned to constitutional rights as a platform for international credibility. The National Party was trying to find a way out of the mess it was in. In 1986, then Justice Minister Coetzee asked the South African Law Commission (SALC) headed by Stellenbosch Law Professor Pierre Olivier to “investigate and make recommendations regarding the definition and protection of group rights ... and the possible extension of the existing protection of individual rights.” (Quoted in Klug 2000:84) The NP hoped that it could translate apartheid into a more respectable language of group rights. The request to the SALC was a response to Western pressure on the National Party; and a strategy to avoid sanctions. But the Law Commission came to the then unexpected conclusion that it would be “juridically

unsound to adopt the standpoint that there are statutorily definable groups with statutorily definable 'rights' in this country." (South African Law Commission 1989)

At some point, Olivier was persuaded against the group rights perspective. He argued that you protect the group through the individual.

In its 1991 publication *Manifesto for the New South Africa* the National Party argued for the first time for a constitutionally guaranteed and justiciable bill of rights. By the end of that year, it was commonly agreed amongst all political parties that South Africa should have a bill of rights. For the next two years almost all the political parties and some legal NGOs developed draft versions of which three were seriously considered in the negotiations; those of the ANC, NP and Democratic Party. (Spitz and Chaskalson 2000:252) And while political organisations were preparing their drafts, NGOs, university policy research units and individuals gave thought to the content of these rights.

b. Phase two – Multi-party negotiations

The second phase was one of multi-party negotiations from December 1991 to the April 1994 democratic elections. This period was particularly fragile and took place amidst a rising tide of political violence. Negotiations to end white rule were fragile, contested, violent, and uncertain. Until the very cusp of the historic elections, there was little guarantee that invidious and widespread violence would not spiral beyond the control of all the negotiating parties. While political organisations played their hands in the generally polite Kempton Park negotiations, assassinations, revenge killings, secret police campaigns, illicit funding, and mass mobilisations were used to

strengthen their positions. Talks were held at gun point. But with many near misses, Codesa and then the Multiparty Negotiation Process agreed to a process of political transition and drew up an Interim Constitution. It also established a Transitional Executive Council (TEC) and an Independent Electoral Commission (IEC) to hold the first democratic elections. It set the framework for a Government of National Unity, and created the nine current provinces and three tiers of government.

i. Congress for a Democratic South Africa (Codesa)

Mandela and de Klerk publicly committed themselves to starting substantive negotiations in 1991. After many delays Codesa I finally took place on the 20th and 21st December of that year. Despite the agreements already reached, the main negotiating parties brought very different agendas to the negotiating table. (Du Plessis 1994) The ANC thought that Codesa should sit for a short time to discuss how a constituent assembly could be elected. It wanted only the most basic legal structures in place to open up democratic politics. A free political climate, the reincorporation of the TBVC¹⁸ states, an interim government and agreements on constitutional drafting mechanisms were its immediate objectives. They thought it would take 18 months at most before an election. (Friedman 1993:16) The National Party on the other hand, had in mind a time frame of 10 to 15 years in which a power-sharing government would rule. (Friedman 1993:26)

Codesa did not begin well. The first day was held in plenary and aside from many and rousing speeches, its centre piece was the signing of a declaration of intent. But Ciskei, the Inkatha Freedom Party and Bophuthatswana publicly refused to sign.¹⁹ Despite the fact that Dawie de Villiers of the National Party officially apologised for apartheid

during his opening speech, expressing his party's "deep regret," the day ended with a dramatic argument between Mandela and FW de Klerk. (Ebrahim 1998:104) When de Klerk raised the issue of the armed struggle, going against the agreements of the secret D F Malan Accord between the ANC and NP, Mandela responded with an assassination of de Klerk's character. As Waldmeir writes, "never had South Africa heard a black man speak to a white man that way..." (1997:191) Suspicion of the South African government was widespread. While the National Party had hoped to present itself as an enlightened interlocutor in front of the world's media, one after another, delegates of the Inyandza National Movement, Natal and Transvaal Indian Congresses, the South African Communist Party and the Transkei warned the National Party against the use of state security apparatus to undermine negotiations²⁰.

Nineteen parties were represented at Codesa. The ANC was there with its allies the Transvaal and Natal Indian Congress and the South African Communist Party. The National Party and the South African government each had a delegation. The IFP and the Democratic Party were the other major political parties. Homeland administrations from the 'self-governing territories' sent delegations from the political parties of the homeland leaders. As a result the motley crew of Dikwankwetla from QwaQwa, Inthando ye Sizwe from KwaNdebele, United People's Front of Lebowa, Ximoko Progressive Party of Gazankulu and the Inyandza National Movement of KwaNgwane participated. To these were added the administrations of the TBVC states. Of these, the Transkei and Venda were broadly allied to the ANC. The last three parties were from the Tricameral Parliament set up by the 1983 apartheid Constitution. They were the Labour Party from the House of Representatives, and the Solidarity Party and National People's Party from the House of Delegates.

Codesa was organised into a number of Working Groups designed to attend to different elements of the transition and make reports and recommendations to regular plenary. But even the most basic issues of decision-making were contested. Senior ANC and NP officials together introduced the notion of 'sufficient consensus' the night before negotiations began. As Friedman writes, "Publicly this rule was never explained in understandable terms, but no one was in doubt about its real meaning: 'sufficient consensus' was achieved whenever the ANC and the NP agreed." (1993:25)

By any substantive reckoning Codesa failed. Friedman notes that "At township meetings, a person who talked at length without apparent purpose was dubbed a 'Codesa'." (1993:29) Violence escalated. Because of public discontent and the need to show some progress, a second plenary was held before negotiators had reached some vital decisions. Codesa collapsed at this premature second plenary on the 15th of May 1992. It opened late and immediately adjourned for 5 hours in the hopes that a deadlock in the crucial working group 2 could be broken. At 4 pm when it finally convened, it descended into a verbal brawl in which all underlying mistrust was brought to the surface. (Ebrahim 1998) Attempts to continue the negotiations got tangled in allegation that the SA government had tapped ANC and SACP phones at Kempton Park. In the mean time, ANC supporters and its more radical leaders, frustrated by the lack of progress, turned to mass action to flex its muscle. At the end of May 1992, an ANC policy conference sanctioned a mass action campaign to begin on the 16th of June.

The very next day shack-dwellers in the ANC aligned informal settlement of Boipatong were attacked by “IFP-supporting hostel residents.” (Friedman 1993:145) Over a period of four hours, thirty eight people were hacked, stabbed or shot to death. (Sparks 1994:140) On the 22nd, the ANC formally suspended talks. Mandela publicly held de Klerk accountable for not preventing the violence. A war of memoranda began. At this point what became known as the channel was set up between ANC and NP in the persons of Cyril Ramaphosa and Roelf Meyer.

Three things brought this phase to a close. The Congress of South African Trade Unions (COSATU), at the height of their strength and effectively leading the ANC’s mass action campaign, began talks with the South African Employer’s Consultative Committee on Labour Affairs. The latter was a negotiating wing of big business. In Friedman’s words, it brought the two bodies “within a hair’s breadth of an embryonic social contract.” (Friedman 1993:148) In the second development, ANC action turned towards the homelands, and particularly the two most militant ANC regions of Border and the Midlands. ANC and SACP strategists were confident that they could form an alliance between Ciskei soldiers, public servants and comrades that would collapse the homeland administration. As part of their strategy, the ANC marched on the capital Bisho. Ronnie Kasrils led the marchers out of the designated area and the Ciskei defence force opened fire, resulting in the killing of 28 marchers. With the ANC troubled by what became known as the Bisho Massacre, the National Party was itself at pains to return to negotiations. International criticism of the NP after Boipatong, as well as revelations of secret funding for the IFP had done serious damage to its cherished international reputation. On the 15th of July, the United Nations Security Council invited all Codesa participants to a debate in New York

which adopted a resolution expressing concern at the breakdown of talks. The National Party, De Klerk and the NP were once again subject to international pressure.

On the 26th of September 1992, the ANC and SA government met face to face to sign what has come to be called the September Record of Understanding. It was the fruit of the behind the scenes negotiations between Ramaphosa and Meyer. As a result some 400 political prisoners were released, 24 hostels were fenced and patrolled by police, and a prohibition of carrying weapons in public was to be enforced within two weeks. Just a few days later, the SACP's Joe Slovo, a 'sheep in wolf's clothing' according to Sparks (1994:182) opened the way for concessions by outlining possible sunset clauses. They included entrenched power-sharing for a fixed period, guarantees on regional government, amnesty for security officers, and the honouring of contracts for civil servants. (Friedman 1993:163) Klug calls this sunset clause the "very epitome of an elite pact." (2000:104) By March 1993 the ANC and NP had reached agreement on the form of a Transitional Executive Authority, and a 5 year government of national unity under an interim constitution. The ANC and NP together "formulated a joint negotiating position to guide their participation as a block in a future multilateral forum." (Barnes and De Klerk 2002:3) The two parties launched their election campaigns from this point onwards. While plans were put into place to hold the next round of multiparty negotiations, Home Affairs was already working on identifying possible election sites. (Ebrahim 1998)

Agreements between the ANC and the NP infuriated the IFP, and at a Shaka Day rally, Buthelezi announced the first of many IFP withdrawals from the negotiations²¹. In bilateral talks between the IFP and the ANC and NP respectively, the IFP raised the

new demand that the ANC's armed wing *Mkhonto weSizwe* (MK) be disbanded. It also formed what must be one of the strangest alliances of the negotiations; the Concerned South Africans Group (COSAG). By October 1992, the IFP was in partnership with the Conservative Party, and the governments of Brigadier 'Oupa' Gqozo of the Ciskei and Lucas Mangope of Bophutatswana in a front for federalism. In December 1992, the IFP launched a 'federal' constitution for KwaZulu Natal. It was very close to a secessionist document. After some initial support, organised business in Natal warned that it had no chance of independent economic survival and withdrew its support. (Friedman 1993:170)

ii. *The Multi Party Negotiating Process (MPNP)*

It was on this shaky ground that talks resumed in April 1993 in the form of a multiparty negotiation process. They were nearly derailed immediately. On that April's Easter Saturday, the popular SACP and MK leader Chris Hani was assassinated by right wing immigrant Janus Waluz in collusion with a senior official of the Conservative Party. (Waldmeir 1997) Mandela appealed for calm. Within minutes of the murder, the ANC announced that it would not call off negotiations. The ANC and the NP wanted to push through the shock of this assassination, and in the next meeting of the MPNP Joe Slovo of Hani's South African Communist Party proposed the date of 27 April 1994 for the elections. It was drafted as a declaration of intent, and it promised that setting a date would "send a ray of hope and optimism throughout the country²²." The elections were to be a little over a year away. (Barnes and De Klerk 2002) The IFP was incensed at the move. It made an impassioned speech that violence should be stopped before negotiations could continue. The

Conservative Party walked out of the negotiations at the announcement of the election date, never to return.

Violence would continue to dog the negotiations; but this time it spurred the ANC and National Party to greater decisiveness and unity. In June the Afrikaner Weerstand Beweging (AWB²³) attacked the World Trade Centre. In July, APLA opened fire on more than 1000 worshippers at St James Church in Kenilworth, killing 12 and injuring 56 others. American student Amy Biehl was killed by PAC youth in Gugulethu. The South African government shot to death 5 children home from school in what was said to be a SADF attack on the PAC in Umtata. (Sparks 1994:193) Violence between ANC and IFP supporters in rural Kwa-Zulu escalated. But as violence between the ANC and NP petered out and their agreements strengthened, the centre of negotiations held.

Codesa had been organised through working groups in which large numbers of politicians gave verbal presentations and then engaged in debate. They often ended in deadlock. The planning committee of the MPNP introduced a new way of working. Aside from the 208 member negotiating council, it agreed to establish technical committees composed largely of lawyers to draft documents for political deliberation. (Spitz and Chaskalson 2000:65) Political parties were required to produce written submissions, and these were then taken by technical committees to draft compromise texts towards an interim constitution. The Consultative Business Movement, a Christian business association, provided administrative services under the leadership of Theuns Eloff. (Cassidy 1995) This ensured a much smoother and more bureaucratic operation.

Behind closed doors these technical committees drafted an interim constitution that was almost entirely congruent with the preceding agreements between the ANC and NP. The public was barely aware of the rights debate in Kempton Park, or its implications. (Atkinson 1994) Finalised late on the night of the 17th of November 1993, de Klerk and the National Party finally accepted the reality of majority rule when it gave up on veto powers in the Transitional Executive that was to rule until the 1994 elections. (Waldmeir 1997) The next morning the National Party Cabinet met at 7 am to discuss the deal. According to Waldmeir, Tertius Delport, the NP's chief negotiator, screamed at de Klerk for "giving South Africa away." But at midnight of the 18th, the Interim Constitution was passed at the World Trade Centre.

The finalisation of the Interim Constitution failed to put an end to the violence. Instead the bloodshed worsened in those territories and constituencies that were left out of the compromises of the MPNP. In March 1994, Lucas Mangope announced that he would not bring Bophuthatswana into the elections. Mangope was not a popular man; voter turnout for his 1985 election was a stunning 0.6 percent. (Sparks 1994:207) Civil servants and military staff immediately went on strike. Mangope appealed to his Volksvront COSAG allies for assistance, imploring Constand Viljoen to keep the AWB out of the fray. But the AWB's Terreblanche sent his men in anyway, and they shot at black passersby with abandon²⁴, causing the Bophuthatswana forces to mutiny. In an event televised live and repeatedly in South Africa, a Bophuthatswana police officer fatally shot two wounded and imploring AWB members, ending "heroic" visions of Afrikaner independence militancy. Mangope's equivalent in the Ciskei, Brigadier Gqozo, took this lesson to heart when a strike started ten days later. He

resigned and handed over his administration to the Transitional Executive Committee. Venda and the Transkei were aligned to the ANC, and put up no opposition to their reincorporation into South Africa. (Beinart 2001)

But that left KwaZulu. KwaZulu-Natal was the murder centre of South Africa. In that province alone, 10,651 people died violently in 1994 and 1995, bringing the toll to more than 14,000 people lost to political violence since the mid 1980s. (Gloppen 1997:12) In early 1994 a state of emergency was declared in Natal, and South African troops were sent in on the recommendation of the Independent Electoral Commission (IEC). It looked as though a military intervention would be needed to bring territorial unity to the country. It would no doubt have been a violent and costly intervention. But in a show of support by the national security establishment, the South African police broke the back of a series of military camps established by the IFP and the KZN police. Then, in defiance of the upcoming elections, the IFP led a march in Johannesburg city centre on the 28th of March. Thousands made their way towards the ANC's headquarters where ANC security killed 8 people, and police another 45. (Waldmeir 1997)

High profile international mediators were unsuccessful in persuading Buthelezi to join the elections, and only a last minute intervention by Washington Okumu changed his mind. (Waldmeir 1997) Bringing the IFP and white right wing groups into the formal political process required a number of concessions from the ANC and NP. (Elazar 1994) These included constitutional amendments "securing the powers of the provinces, the possibility of a *Volkstaat*, and a constitutional role for the Zulu monarch..." (Gloppen 1997:201) These deals brought retired General Constant

Viljoen's Freedom Front into electoral politics. (Klug 2000:107) In a dramatic and not at all inevitable finish to these negotiations, violence came to a near standstill on the famous April 27th elections of 1994.

c. Phase three: The Constitutional Assembly

The final phase of the transition took place in the Constitutional Assembly. The elections put the ANC into power in a coalition Government of National Unity (GNU). The Constitutional Assembly had 490 members with seats divided according to the proportional representation of the 1994 elections. The ANC with 62.6 percent of the votes garnered 312 seats. The National Party had a 20 percent voter share and 99 seats. The IFP's 10.5 percent gave them 48 seats. The remainder were made up by the Freedom Front (14), The Democratic Party (10), the Pan Africanist Congress (5) and the African Christian Democratic Party (ACDP). The last had 2 seats²⁵. Gone was the ragged crew of traditional leaders, homeland apparatchiks, and Tricameral representatives. This democratically elected body wrote the final constitution.

In terms of the Interim Constitution, the Constitutional Assembly had just 2 years to finalise the text of a new Constitution. To do this it formed a constitutional committee, a management committee and six theme committees made up of legal drafters. Again the IFP decided to withdraw early in the proceedings, despite its continued involvement in Parliament and the Cabinet of the Government of National Unity. (Gloppen 1997:207) Most issues were wrapped up quite quickly. The ANC made sure justiciable socio-economic rights were included in the bill of rights for the first time. Issues that deadlocked were not new: minority influence on the executive, the role of

the provinces and their national council, and the balance of power between parliament and the executive. The last bones of contention were the property clause, language and education, and rights of strike and lockout. (Gloppen 1997:208)

Unlike the multiparty talks, the Constitutional Assembly went out of its way to secure public participation. It set up a 'talk line', and received more than 2 million written submissions and petitions. *Constitutional Talk*, a magazine publicising deliberations at the CA, was widely distributed. Most impressive perhaps was the 4 million copies of the draft constitutional text in 11 official languages circulated to the public in late 1995 for final comment. Radio and television programmes supplemented community meetings, and public hearings and local briefings were held on more than a thousand occasions, and reached some 95,000 people. While public input made little impact on the text of the final constitution, the process of consultation gave the constitution a great deal of public legitimacy.

After a few last minute concessions, the new Constitutional text was passed by 85 percent of the Constitutional Assembly. (Ebrahim 1998) It was sent to the Constitutional Court for certification. Some relatively minor changes out of the way, the new constitution was certified on the 11th of October. President Nelson Mandela signed it into law on the 10th of December 1996 in Sharpsville. (Gloppen 1997:2)

3. Political perspectives on religion

Aside from occasional ceremonial appearances, religious bodies were not directly involved in the negotiations. Political parties and technical committee lawyers decided the legal fate of religion in a future South Africa. No religious groups contested this²⁶. In terms of the first condition of political secularism this clear differentiation and separation between religious and political bodies is important. And it was acknowledged by both religious and political institutions. Through the negotiations, religious groups ceded control to the political process, believing it would be in the best interest of religion in the future. It is therefore important to understand the aspirations and ideas about religion that the political parties brought to the table.

a. The African National Congress

Within the ANC, the most developed thinking about the place of religion was presented by Albie Sachs in his book *Protecting Human Rights in a New South Africa*. Published in 1990, it makes an overall argument for human rights and their progressive political possibilities. Its third chapter deals specifically with religion's place in a future democracy.

He acknowledged the importance of religion and "the spiritual life." Conscience, he added, is the most fundamental human right of all, one that is deeply personal, but that also has social, cultural and even national dimensions. Religious communities, he asserted, should have autonomy; and be "free to worship as they please..." (1990:44) We should be allowed "to organise our own religious communities, to consecrate our

own holy places, and to acknowledge our own holy texts, to appoint our own religious leaders and follow our own rituals and dietary practices.” (ibid) For the ANC there were certain areas, in other words, in which religions have legitimate authority. People’s other rights should not be affected by their religious commitments. The state, he then wrote, should be neither theocratic nor atheist, “but secular, tolerant and accepting of the deep importance [of] religion.” (1990:45)

To be secular, in Sachs’ formulation, “does not mean [to be] anti-religious, but rather that there is no official religion, no favouring of any particular denomination, and no persecution of or discrimination against non-believers.” (ibid) The difficulty, he suggested, was to find a coherent constitutional format for what he saw as an ideal relationship between religion and the state. He outlined five possible options. Theocracy was the first, where religious organisations hold public power, and religious law is the law of the state. The second was that of a “partly secular partly religious state” in which there is legal power-sharing. In reflecting on these options later, Rashid Omar referred to this option as a situation where “the religious interpretations and moral standpoints of one particular religious denomination dominate.” (2002) Sachs called the third option a secular state with “an active interaction between state and religious organisations” each with autonomy. The fourth was a secular state in which religious organisations have a tolerated private sphere of activity, but no collaboration with the state. The last was a secular state that “represses religious organisations.” (Sachs 1990:45-46) For Sachs, the third option, that of a secular state with an active interaction between state and religious organisations, was the way to go.

This articulation is by far the most coherent and sustained input about this condition of political secularism by a party to the negotiations. It was never presented as a submission. But members of the technical drafting team that dealt with religion were aware of its existence, and it informed the more piecemeal ANC inputs throughout the negotiations. The South African Communist Party supported the ANC in this stance, calling for religious, linguistic and cultural rights for all individuals²⁷. The SACP did not advocate for a Soviet-style anti-religious secularism, nor did it reference Marx's critique of religion.

This ANC position on religion and the secularity of a future state was generally consistent with its perspective and makeup. The leaders of the ANC, especially those who returned from exile, were cosmopolitan. They included Protestants, Catholics, Muslims, secular Jews and atheists whose religious positions did not undermine their political solidarity²⁸. Leaders from the UDF and Unions were more likely to be practicing Christians. But their Christianity was ecumenical, and increasingly inter-faith. The ANC's position was also a strategic response to National Party and Afrikaner fears about the future of Afrikanerdom. Strong support for the right to religion would go a long way to settling white Christian fears that the ANC's alliance with the SA Communist Party would result in a state that repressed religion. Promoting this fear had been an important component of the 1980's anti ANC *swart-gevaar* rhetoric. (Chidester 1992)

b. The National Party

In the previous chapter I discussed the relationship between the National Party and the Dutch Reformed Church under apartheid. The NP headed by de Klerk, even with its many Reform members, appears to have been less tied to the NGK as an institution. Nowhere in the negotiations did the NP advocate that Christianity be recognised as an official religion. As with many other issues, most notably race, the National Party was strangely silent on the principles it had asserted through apartheid.

The negotiating position of the National Party and representatives of the old South African government can be reconstructed from their internal documents and submissions. Having been persuaded to a human rights framework and a bill of rights, the NP actively supported the individual right to religion. In one submission, for example, they called for the right “of individuals to hold (and not to hold) any religious or secular convictions and the right to express, profess, practice and propagate them publicly and in association with others²⁹.” The objective of this right, they said, was to “prevent the state from interfering in personal beliefs of people and from favouring certain beliefs over others³⁰.”

The National Party made two other religion-related demands. The first concerned the relationship between religious groups and the state. The apartheid government supported the presence and practice of Calvinist Christianity in the state and state-sponsored public institutions such as schools and public broadcasting. Not only was Christian theology appropriated by the state, but the state also employed religious personnel in their religious capacity. The public broadcaster hosted and funded Christian programming. Police, military and prisons employed Christian chaplains on state

funds. Schools were run on the broad educational philosophy of Christian National Education, and they also had religious instruction during class.

The National Party envisaged a continuation of these arrangements, albeit on less exclusive terms. The NP quite explicitly sought to avoid an ‘absolute separation’ between the church and the state³¹. It criticised American style political secularism with its disestablishment or strict Jeffersonian wall of separation. Its 1995 submission to the CA included the following critique of this form of secularism: “... an absolute separation would prevent the state from any action whatsoever, including fulfilling its duty to create the opportunity and space for different religions to exist, practice and flourish.” This situation leads, they said, “to rather absurd results not always concomitant with public opinion.” In this they referred to what is known as the neutrality dilemma, where “the individual is protected against instruction favouring religious convictions, but not against instruction offending religious convictions³².” The National Party favoured German constitutional provisions instead. In German law, freedom of religion is coupled with a duty of the state “to promote religious observances in state institutions such as schools.” In order to prevent any imposition on the freedom of religion or non-religion, such observances are required to be voluntary and inclusive. Throughout the negotiations the National Party advocated this German formulation.

The second National Party claim about religion was part of a broader desire to retain some degree of white Afrikaner cultural independence and autonomy. The NP distinguished itself from Afrikaner groups to its right by participating in negotiations towards a unitary state, and therefore by seeking ‘cultural’ autonomy through the

recognition of group and collective rights to culture, language and religion in the bill of rights. Groups to the right, on the other hand, asserted that territorial and political sovereignty was the only possible guarantee of autonomy. Many National Party documents include proposals for the protection of the rights of “cultural, religious and linguistic communities³³” or “minority rights.” But this phrase never referred to the establishment, recognition or entitlement of Christian communities per se. Instead, the NP suggested that Christianity or a particular version of it, a language group, or set of cultural practices, could define a community in need of minority protection. This phrase ‘cultural, religious and linguistic communities’ was a proxy for race or ethnicity. The most comprehensive rendition of this perspective is to be found in a submission to the Constitutional Assembly at the beginning of its deliberations in 1995. In *Our Future Together*³⁴, the NP proposed the establishment of statutory cultural councils that could represent the religious, cultural or linguistic interests of minorities. Another iteration of this proposed minority protection was to be found in the National Party demand that single language, cultural or religious medium schools, public and private, should receive state support.

The ANC contested these minority protections vehemently³⁵. But the minority issue for the NP was not principally about religion. On the contrary, the two major negotiating parties were in substantive agreement about the right to religion, the separation of religious and political institutions, and the substantial role that religion should play in the state-sponsored public on an equitable and voluntary basis. And the Democratic Party agreed with their position³⁶.

c. Minority Parties

During the MPNP's drafting of the interim constitution the IFP, some other homeland leaders, and the Afrikaner right wing disagreed with the emerging political consensus. Some of their demands will be dealt with in greater detail in the next chapter. For the purposes of religion, it is only necessary to point out that the IFP sought a federal regime in which the standard protections for civil and political rights, including the right to religion, were entrenched. It repeatedly withdrew from negotiations so there is little documentation on their position on religion. Even if it had held a substantially different view on the matter, its absence might have left that view sidelined.

The Freedom Front, an Afrikaner party established just prior to the 1994 election and represented at the Constitutional Assembly, also proved to be within the consensus on matters of religion. Its submission on the right to religion reads as follows: "The nature of the duty imposed on the state is to give full reign to human conduct based on the diversity of religious convictions in South African society, thus fostering mutual tolerance between different religious groups."³⁷

There were, however, two political formations that contested the political common-sense about religion's place in a democratic South Africa. By its own account, the Conservative Party (CP) could not imagine the possibility of a racially or religiously integrated future South Africa, one in which 'differences' could be accommodated or transcended. It regularly invoked spectres of religious conflict in Northern Ireland, Yugoslavia and India. The latter, they incorrectly claimed, was a mass of "tensions between Buddhists and 'Moslems' (sic)³⁸."

The Conservative Party did not take well to the prospect of living in a religiously diverse and secular nation-state. In an invited submission at the beginning of the Constitutional Assembly's deliberations it wrote that "Boer Afrikaners are aggrieved at having to live in a heathen country and under a heathen government... The recognition of other 'religions' and the view that Christianity is simply another 'religion' mean [sic] that citizens are enjoined to think and live in accordance with a Christian, or faithless heathen viewpoint. For the faithful Boer Afrikaner there is only one living God, while the gods of the other religions are human idols or fanciful inventions which do not truly exist³⁹." The CP used a religious argument to support demands for territorial secession for what it called the Boer Afrikaner. "Boer Afrikaners" they wrote "are devout Christians and Churchgoers and would therefore prefer to live and work in their own republic under their own government." Their submission sought to distinguish these Boer Afrikaners from other Christians, they proceed as follows: "... our people are the only people on Earth that do not have a heathen past. Our unique people came into being and grew into nationhood in the light of the Protestant Christian Faith. This historical experience infused his (sic) tradition and culture and requires that he has a Christian state."

The Conservative Party withdrew from the MPNP. They did not contest the elections and were not, therefore, represented in the first democratic parliament. This submission to the Constitutional Assembly was the result of an invitation to take their view into account and bring them into the new dispensation. Their position on this and other matters, however, was so untenable in relation to the existing political consensus that it had little effect.

The second dissenting party was the African Christian Democratic Party (ACDP). Founded on the eve of the 1994 elections, the ACDP a political party with an explicitly religious agenda. I will show in Chapter Five that they contested the secular foundations of the new state at every opportunity. But even with a strong stance against the philosophical foundations of secularism, they nonetheless supported “a separation of religious and state institutions, and high levels of church autonomy⁴⁰.” With respect to institutional relations then, they did not criticise the political consensus or offer an alternative formulation. A second religious party stood for elections in 1994. The Africa Muslim Party headed by Gulam Sabdia suggested that “the prevailing political, economic and social systems should be replaced by alternative indigenous systems.” (Tayob forthcoming:1) They did not win enough votes to get a seat in parliament and influence the Constitutional Assembly.

Let me summarise the terms of this widespread political consensus on religion’s freedoms and relations with the state. First, religious diversity, within Christianity and between religions, was recognised. Second, the importance of religion to the vast majority of the country’s citizens, both black and white, was acknowledged. This was often referred to by the phrase “South Africa is a religious country.” The third is a consequence of this. Because the vast majority of South Africans are practicing religionists and religion shapes many areas of their life, religious freedom is important. The need for a right to religion implied a fourth part of the consensus; a position of state neutrality with respect to religious groups. The submission by the Conservative Party aside, no party, not even the ACDP, sought to establish Christianity or one of its denominations as a privileged or state religion. The fifth area of complete consensus, to which the ACDP concurred, was that there should be a separation of church and

state or religious and state institutions. Lastly, the parties concurred that there should be no strict wall of separation; no replication of this element of American secularism. This position was forwarded most strongly by the National Party, but it had the support of the other parties.

4. Mobilising religion to secure rights

In Chapter One I pointed to the influence of national religious demographics and institutions on the forms of secularism that emerge during processes of state formation. This influence has been usefully theorised by Keddie (1997) and Gill (2008). *Laïcité* and Jacobin formations of secularism, for example, were both founded in countries with a majority, dominant and institutionally powerful church⁴¹. Violence and repression against these religious groups and anti-authoritarian and anti-papist political ideologies together combined to strip these churches of their privileges, land and administrative and educational authority. (Blumenberg 1966) A similar dominance of Islam in Turkey helps to explain that country's adoption of *Laïcité* during its formation as a nation state after the collapse of the Ottoman Empire. (Ali 2002) In all three cases the emerging revolutionary state understood religion to be an institutional and ideological threat requiring discipline or destruction.

Countries with more accommodating formations of secularism are more likely where Protestantism dominates, or where there is significant religious diversity such that no one religion or denomination can monopolise⁴². Protestantism is fissiparous, invariably leading to many independent and voluntary denominations. They have been

less likely therefore to present a collective threat to the state. Protestantism also tends towards individual piety and a more easily privatised religiosity. (Sullivan 2005) In the USA in particular, religions other than Christianity have increasingly taken on the intuitional characteristics of Protestantism. (Masuzawa 2005) In cases such as these, the emerging state does not have to discipline religious groups. But it does need to prevent religious dissent and violence through some form of neutrality towards religious differences. It is therefore important to understand the religious demographics of the period in which the post-apartheid state took form.

a. “South Africa is a Religious Country”

The census is the most useful data on religious affiliation in South Africa. The 1996 census was the first time in which “everyone counted,” and it resulted in a reasonably accurate account of the demographics of black South Africans including those living in the growing informal settlements. A second post-apartheid census was conducted in 2001. It is possible to compare affiliation across these surveys, since, for the first time; the religion categories were similar in the census instruments⁴³. It would have been ideal to have census data from 10 years earlier to understand the religious trends over the period of transition, but no such inclusive national data exists. The next census will be taken in 2011.

Christianity is by far the largest religion in the country, claiming the adherence of around 74 percent of the country’s inhabitants. It includes a wide range of denominations that can be aggregated under mainline Protestant Christianity, Reformed Churches, Roman Catholicism, African Independent Churches and

Pentecostal-Charismatic Churches. Goodhew has suggested that mainline Protestantism experienced a serious decline between 1960 and 1990. (2000) But mainline membership remained more or less in equilibrium between 1996 and 2001; resulting in a slight decline in the population proportion. Methodists dropped from 6.9 to 6.7 percent of the total population; Anglicans from 3.9 to 3.8 percent; Lutherans from 2.6 to 2.5 percent and Presbyterians increased slightly from 1.8 to 1.9 percent. But Reformed churches were certainly in decline. The NGK had about 3.5 million adherents in 1996, or 8.6 percent of the population. Half a million were lost to other churches by 2001⁴⁴. Other Reformed Churches, which include both the mission black reformed churches as well as the Conservative breakaway Afrikaanse Protestante Kerk also lost membership, going from 400,000 members to just 225,000 five years later. The Roman Catholic Church, which also had approximately 3.5 million adherents in 1996, saw a slight decline in membership by number.

Much more dramatic changes are to be glimpsed in the numbers for African Independent Churches. Between Zion Christian Church (ZCC), Bandla Lama Nazaretha, and what are classified as Zionist and Ethiopian type churches, membership decreased from about 34 percent of the population in 1996 to just under 20 percent in 2001. This is a massive drop in numbers, and it will be necessary to wait for the next census to confirm the scale of this change. If the census data are to be believed, the AIC aggregation masks the fact that the ZCC grew its membership by around one million (to nearly 5 million) over the five year period, consolidating its dominance amongst AICs.

The other significant change to Christian demographics was the rapid rise of Pentecostal Charismatic religiosity. In 1996 the census category Pentecostal-Charismatic churches made up 5.4 percent of the population with 2.2 million adherents. This is probably already significantly higher than it would have been five years previously. By 2001 they had grown by 1.5 million adherents to make up 8.2 percent of the population. This growth does not adequately capture the increasing Pentecostalisation of Christianity in South Africa. The census figures reveal a fragmentation of Christian denominations as people moved away from big established churches into smaller apostolic and charismatic groups. If the census is accurate, the Apostolic Faith Mission Church, for example, which had a membership of 2.2 million in 1996 declined over these five years to just 250,000. A catch-all category of ‘other Apostolic’ on the other hand grew from 3.5 million in 1996 to 5.6 million in 2001. And the even less definite ‘other Christian churches’ category more than doubled from 1.3 million to nearly 3 million. Most of these smaller ‘other’ churches are likely to be Pentecostal. This probably points a net increase of around 4 million Pentecostals in just five years. Some of the detail of these changes can be mapped using the *South African Christian Handbook* published for the years 1986/7, 1996/7 and 1999/2000. In 1986/7 the editor notes a move towards charismatic churches “which are growing at a rate of a new church every 2.1 days.” (1986:vii) Ten years later she reports that the Baptist Union, for example, has “planted no less than 110 churches in the past five years.” (Froise 1996) She notes a major shift from large denominations to “small, mainly charismatic churches, many of which are autonomous...” This was accompanied by a rise in the number of international missions to South Africa, particularly from the USA, and an explosion of South African missions to other African countries.

The 1996 census figures include two other interesting categories. Nearly 11.5 percent of the population or 4.6 million people said that they had “no religion.” Another 9 percent or 3.75 million refused to answer the religion question. By the 2001 census, there were far fewer refusals, down to just 1.4 percent of the population. But the number of people who reported they had no religion increased to 6.7 million or 15 percent of the population.

Christianity is by far the largest religious affiliation in South Africa. People with ‘no religion’ are the second biggest demographic. The remaining South Africans are varied in their religious affiliation. Each of the other religions is relatively small. According to the 2001 census, Muslims made up just less than 1.5 percent of South Africans; about 650,000 people. There were 550,000 Hindus. There were a little more than 75,000 Jews, about 0.2 percent of the population. A catch-all category of “other faiths” which include “Buddhists, Taoists, Confucians, New Age, Jehova’s Witness and Baha’i” grew from nearly 200,000 in 1996 to nearly 300,000 by 2001. The 1996 census for the first time included “African Traditional Belief” as an option in the survey sheet. That year just 17,097 people identified with this category. In 2001 however, the number had increased to nearly 126,000. All the figures for the “minority religious” listed above should be treated with caution since sampling errors are likely to be greatest where the population proportion is so low.

Important as the demographics are, it is also necessary to understand the mobilisation of religious groups to represent their interests, needs and claims on state and society. And although religious institutions did not participate as negotiators, some certainly

made sure their views were represented. They lobbied and partnered political parties. They made collective and denominational submissions to the MPNP and the Constitutional Assembly. And they petitioned for changes to various constitutional formulations.

b. The World Conference on Religion and Peace (WCRP)

The greatest religious influence on the negotiations came from an interfaith group, the World Conference on Religion and Peace. The South African chapter of the WCRP was founded in 1984 by the ubiquitous Archbishop Desmond Tutu. WCRP affiliates included progressive and moderate members from across the major world religions. Hindu members included Arya Prathindi Sabha, the Ramakrishna Society, SA Hindu Dharma Studies, SA Hindu Maha Sabha, the SA Hindu Students Association, Veda Dharma Sabha and the SA Tamil Federation. The Baha'i were represented by their national body the National Spiritual Assembly of Baha'is. The Buddhist Dharma Centre, Pretoria Buddhist Group and Buddhist Institute of South Africa affiliated to WCRP. South African Judaism was represented by the Jewish Board of Deputies, Jews for Social Justice, S.A. Union for Progressive Judaism and the Union of Orthodox Synagogues. Muslim members included the Call of Islam, Central Islamic Trust, the Islamic Council of South Africa and the Muslim Judicial Council⁴⁵. Christian groups included the South African Council of Churches (SACC), the South African Catholic Bishops Conference (SACBC) and the Institute for Contextual Theology. There was even some representation by AICs through the Council of African Independent Churches as well as the Federal Council of Spiritual African Indigenous Churches⁴⁶. In its leadership structures and institutional membership,

smaller religious communities were significantly over-represented relative to their demographics.

Active since 1984, the WCRP's first national inter-faith meeting took place a year before the opening of Codesa. From the second to the fourth of December 1990, more than 350 delegates met in Johannesburg⁴⁷. It was opened by Ali Mazrui and attended by Albie Sachs. Sachs' five models of state relations to religion, described in the ANC section above, were considered by the collective assembly. (Omar 2002) A relatively high degree of consensus was reached at the gathering, and the WCRP executive proceeded to draft statements and hold single-faith gatherings to confirm their support for a joint declaration. When Codesa opened, the WCRP corresponded to alert it of its existence. It said that it was considering questions that would need to be addressed in the transition. These included whether South Africa should be a secular state, and what should be done about religious schools and state subsidy, religion and the public media, personal religious law and a possible missionary code of conduct⁴⁸. Nearly two years later, in November of 1992, another WCRP inter-faith conference was held to ratify a now finalised declaration. It was, according to Moosa "the most inclusive religious gathering of its kind in South Africa." (2000:160)

The WCRP declaration⁴⁹ sought to guide relations between religions and the state, and also between religious groups. Finalised during the MPNP talks, the Technical Committees of the MPNP and the Constitutional Assembly relied heavily on its view⁵⁰. The WCRP's Declaration was confident. Its covering letter promised "a statement from the side of organised religion" vis-à-vis relations with the future

democratic state⁵¹. The Constitutional Assembly received literally hundreds of copies, as well as endorsements from a wide range of religious groups.

The declaration set out the terms of a social pact between religious groups and the state-to-be. It made a series of demands of the state, and, in turn, offered support from the “religious community” in the process of reconstruction and development. It called on the state to recognise and affirm religious diversity and guarantee the autonomy of religious communities. To this end, it asserted that “people shall enjoy freedom of conscience,” and that “religious communities shall be equal before the law” and, by implication, that the state should not favour or identify with any one religious community. The declaration also contended that “people have the right to religious education,” or more specifically, that parents, guardians and religious communities are primarily responsible for the religious education of children. Schools’ local communities ought, according to the declaration, to be in a position to decide on matters of religious education; whether it should be single or inter-faith, theological or comparative. It declares that “people in state institutions shall enjoy religious rights” by which was meant the continued existence of chaplaincy services in state institutions.

The declaration also advocated state recognition of “systems of family and customary” law, particularly in relation to marriages and their dissolution, the accreditation of marriage officers, and civil registration. Religious holidays, it suggested, ought to be respected by “authorities” and employers, but it stopped short of anticipating national holidays based on religious holy days. The remainder of the declaration dealt with religious communities’ ownership of property, tax regimes and

exemptions, and access to municipal land for burials, cremations and religious buildings according to community needs. All these rights and privileges had been awarded preferentially to Christian groups under apartheid.

The WCRP Declaration also suggested a formulation for the right to religion in a new bill of rights: “1. All persons are entitled to (1) freedom of conscience, (2) profess, practice and propagate any religion or no religion, (3) to change their religious allegiance. 2. Every religious community and/or member thereof shall enjoy the right (1) to establish, maintain and manage religious institutions; (2) to have their particular system of family law recognised by the state, and (3) to criticise and challenge all social and political structures and policies in terms of the teachings of their religion.”

Religions for their part saw a role in the creation of a democratic country. The WCRP declared religions willing to be self-critical and eliminate discrimination on the basis of race and gender in their own ranks⁵². They asserted the “moral responsibility” of religious communities to the new society through the production of good citizens through education in moral values, service, and the direction of land resources to “the landless.” Dealing with the sometimes difficult question of inter-religious relations, the declaration asserted the right of all religions to propagate their teachings, but, it added, “with respect for people of other religious communities” and without taking unfair advantage of age, weakness or economic or other vulnerability.

There are a number of elements in this proposed compact that the political parties had not yet taken into consideration. The most important of these was the demand for recognition for religious personal law in general, and specifically for the recognition

of Muslim and Hindu marriages. Religious groups also brought to the fore the administrative and institutional powers that religious bodies need in order to function, the rights to propagate a message, ownership of places of worship, tax exemption, and access to public media.

The WCRP was influential in the negotiations for a number of reasons. It presented a broad front. Its easily usable consensus document was already translated into terms that could be drafted in law. It was presented in substantively secular language. Even more important was its close ties with the ANC. This is evident in its personnel. There was Tutu's leadership and evident friendship with Mandela. Frank Chikane, ANC member and later minister in the office of Mbeki's presidency was a WCRP Trustee. Initially directed by Rev. Dr Gerrie Lubbe, the job was taken over by Cedric Mayson in 1992. A much detained Methodist minister, he was later employed by the ANC at Luthuli House to found the ANC "religion desk." Executive committee members included Ebrahim Rasool and Edgar Pieterse, later ANC Premier of the Western Cape and his special advisor respectively. After Rasool was released from detention in 1990, he was jointly employed by the WCRP and the Call of Islam⁵³. Many others shared affiliation and membership. Sister Bernard Ncube for example was a Catholic nun who was detained for 18 months. She was employed by both the WCRP and the Institute for Contextual Theology upon her release. She later served as an ANC MP in the 1994 Parliament.

Close relationships between the ANC and the WCRP were forged throughout the late 1980s. In 1987 the WCRP hosted a consultation with the ANC in exile in Lusaka titled "Religion and the South African crisis." The WCRP team was headed by Tutu.

The ANC took the meeting seriously. Its delegation included no fewer than five members of its National Executive Committee. A pithy recounting of this meeting announces that “common understanding” was reached. Apartheid, they agreed, was a heresy and “a falsification of Christianity, a denial of true religion and of religious pluralism⁵⁴.” The WCRP and ANC agreed on the importance of inter-faith cooperation as a platform for critique of the apartheid state. “True religion” they said, would flourish where there is no established religion, and where every individual has religious freedom. In addition the meeting “recognised the centrality of the ANC to any solution in the South African conflict⁵⁵.” The WCRP was later party to the conference, chaired by Tutu, at which the 1989 Harare Declaration was adopted⁵⁶. Winnie Mandela and Adelaide Tambo addressed a WCRP meeting on National Women’s Day in 1990⁵⁷. According to Moosa, the religious sector was actively mobilised by the ANC and other “pro-democracy forces.” (2000: 163)

Two things stand out when one puts South Africa’s religious demographics and the influence of the WCRP together. The first is that the size of a denomination had very little to do with its political prominence. Through the personality and commitments of then Archbishop Tutu and the strong ecumenism of Anglicanism, that denomination has all but dominated the South African Council of Churches and the ecumenical and interfaith movements along with a handful of Methodists, Congregationalists and Catholics. This is despite Anglicans making up less than four percent of the total population. The second is the converse of this observation. The majority of people in South Africa are followers of Pentecostal Charismatic or African Independent churches. Neither was much involved in the WCRP declaration. Although two bodies representing AICs were members of the WCRP, neither represented the biggest AICs

such as the Zion Christian Church or the Shembe church Ibandla lamaNazaretha. A few individual Pentecostal liberationists did participate in the WCRP (Balcomb 2004) Chikane was most prominent amongst these. But on the whole, they were not part of the WCRP process, consensus or declaration. I will return to the areas and positions of influence of Pentecostal Charismatic Christianity in chapter five.

c. Religious rationales for secular institutional relations

Religious individuals and groups sought to influence the political process in a wide range of areas, and not only to secure religious rights. Ecumenical groups were involved in peace initiatives, large and small. The National Peace Accord and the Ecumenical Monitoring Programme, for example, were both interfaith initiatives that invited the involvement of other civil society bodies⁵⁸. Mvume Dandala was one of the few people for whom it was safe to enter both IFP hostel spaces and ANC townships across the Vaal. Michael Cassidy of African Enterprise hosted “transformative retreats” to bring white and black Christian politicians together. (Cassidy 1995) Many of these initiatives mobilised the Christianity that political opponents shared. This role for religion was to be continued in the theologies and practices of reconciliation in the Truth and Reconciliation Commission (TRC). The SACC and others also made inputs into a number of more general provisions in the draft constitution as it was being written⁵⁹. The SACC argued for socio-economic rights for example, as well as a Constitutional Court. For the purposes of this chapter, however, I am most interested in religious input on the location of religion within a rights framework.

Most of the workings of the Kempton Park negotiations were invisible to members of the general public, and there was little correspondence between the public and negotiators. The majority of submissions to the MPNP were requested by political parties or technical committees, or were offered via individual political parties. Most of the communication from religious groups to the MPNP in particular came through the WCRP. Exceptions to this rule include a host of submissions from *Ulama* groups; bodies of traditional Islamic legal authorities, many of whom advocated for the recognition of Shari'ah or Muslim Personal Law. Much of the remaining religious correspondence to the MPNP was from exceptionally angry Afrikaners. The Constitutional Assembly on the other hand was a more open book, and it actively sought to encourage the participation of the public. It received literally hundreds of thousands of submissions and petitions and also hosted a Religion Public Hearing on the 25th and 26th of May 1995⁶⁰. Although the public hearing had a slightly wider participation that included some Pentecostal groups and an African Traditional Religion (ATR) representative, it was still dominated by the WCRP. It was hosted by the Institute for Democratic Alternatives in South Africa (Idasa) on behalf of the CA. The welcome address specifically thanked Cedric Mayson, then director of the WCRP, for his efforts in bringing the hearing together.

Letters, submissions, petitions, and the verbatim transcription of the public hearing all suggest that most religious people actively supported the establishment of a religiously neutral state and a separation between religious and public institutions. A wide range of religious arguments were made for secularism, the separation of institutions, and the allocation of the state as guardian and guarantor of religious

freedom. They generally suggest that religious freedom and state neutrality towards religion provide the proper conditions for religious flourishing.

One of the most pained and hesitating renditions of this argument came from the Dutch Reformed Church at the CA public hearing. Professor de Villiers presented the position of the NGK. Most Christians, he said, want a Christian state. But this was simply not possible. “We live in a plural society,” he said, and a Christian state would garner “fierce opposition” from other religions as well as proponents of political liberalism. But beyond such pragmatism he also conceded that a Christian state is “ethically undesirable” too, because it is “unfair.” A specially recognised religion, he conceded, leads almost inevitably to intolerance and repression⁶¹. For religion to keep its integrity, it needed to be free from the state.

The strongest arguments for a secularism that could guarantee religious freedom and equality came from members of minority traditions that had experienced Christian privilege and dominance under apartheid. Widespread and open criticism of Christianity and its collusions with apartheid were voiced at the public hearing. This history of “Christianity used as a political weapon” as Swami Jivananda put it⁶², was an argument for the separation of state and religious institutions. Only separation could guarantee equality and non-discrimination. The Muslim Judicial Council called the bill of rights “a contract which we sign with non-Muslims⁶³.”

Representatives of the smaller religions presented a wide range of religious needs to the negotiations, including some that were not included in the WCRP delegation. The Institute of Islamic Shari’a Studies, perhaps in anticipation of conflicts over the veil,

were concerned that nobody should ban or punish Muslim dress in the workplace. Muslim prisoners ought to be able to worship on Fridays, access the Qur'an, and receive Halaal prison food⁶⁴. A similar request was made by Amichand Rajbansi who sought adequate nutrition for Hindu prisoners. Hindu leader Moushami Joshi raised the problem of Diwali's proximity to the Matric final exams⁶⁵. Both Hindu and Muslim participants sought the recognition of their marriages and their religious clergy as marriage officers. They also sought some sort of accommodation and recognition for their religious holy days. The Rastafarian Burning Spear movement and the Helenvale Dagga Forum pressed for the legalisation of Marijuana as a religious right. By the end of the negotiations 1040 petitions to this effect had been sent to the negotiators⁶⁶. The Christian Science Committee argued that healing prayer should be recognised as a medical practice, and sought exemption from regulations governing medical practice and nursing⁶⁷. One Hindu group sought recognition of healing modalities from African and Indian subcontinents, particularly Ayurvedic medicine and acupuncture⁶⁸. Rabbi Harris submitted his concern about hate speech and ways to prevent it⁶⁹.

Christian groups on the other hand were more likely to be concerned for their theological, ecclesiastical and institutional autonomy. By their reckoning, religious groups could only remain critical and uncorrupted by state power if they had autonomy. Many of the larger Evangelical-charismatic churches also supported the secularity of an institutionally non-partisan state. Their reasoning was generally more conspicuously theological. The Evangelical Fellowship "endorses" the separation of church and state because of the "distinct spheres of responsibility given by God. [T]he Church must submit to the state even as it is its conscience" they said⁷⁰. His People

wrote that “The church as an institution should remain structurally separate from the state....” But the state, they argued, should “recognise and submit to the rule of Almighty God⁷¹.”

But some Christians were unable to accord recognition and equality to other religious groups. Most of the submissions to this effect were angry and fearful about both Islam and Communism. The Baptist Union declared itself “disturbed by the attitude of Muslim community and the persecution of converts⁷².” The Christian Education Foundation supported religious freedom but not religious equality. In their view, religions were simply not equal⁷³. More unguarded statements appear in individual letters. A man from Somerset West had this to say: “It’s all very nice sounding to give room to others, the non-Christians, but Jesus commanded us to go into the whole world and make disciples of all people. He also said that the gates of Hell cannot stand against Him⁷⁴.” Another from Machadodorp⁷⁵ wrote “Many people will cry out that there must be freedom of religion.” But, he said, it is important not to recognise these other so-called religions... “It is not to persecute those who follow false gods but to lead them into the truth. The leaders must return to God and teach the people to follow.” Other submissions were concerned about differentiating between acceptable and unacceptable religions and practices. The Christian Voice, for example declared itself against Satanism, occultism, animism, witchcraft, spiritualism and similar practices. These should not be accepted as religion and therefore protected.

But these sorts of submissions were in a very small minority, and they were against the mood of the times and the ethos of the negotiations. Apart from the fact that they

were meticulously catalogued, filed and stored, submissions like these were generally ignored by the negotiators.

5. Negotiating the right to religion in a new South Africa

For the Kempton Park negotiators, caught as they were in the whirlwind of escalating violence and insecurity, religion was not of immediate political concern. It was already commonsense that South Africans should have the right to practice religion. Justice Corbett's opening speech at Codesa's specifically acknowledged the importance of the right to religion. The ANC submitted that general constitutional principles should include "universally accepted human rights, freedoms and civil liberties including the freedom of religion, speech, assembly" and similar⁷⁶. Codesa got no further than these basic statements.

a. The Multi Party Negotiating Process

The legal framing of religion in South Africa's post-apartheid law was done at the MPNP. In just nine months, a bevy of technical experts drafted an interim Constitution and South Africa's first ever bill of rights. The Technical Committee on Fundamental Rights during the Transition, known in its abbreviated form as TC4, was responsible for writing the bill of rights. It is here that religious rights are to be found.

The TC4 committee of the MPNP had five members. Lourens du Plessis and Hugh Corder were law professors. Zac Yacoob was an experienced advocate and UDF

activist. Gerrit Grové was a government employee; the deputy state law advisor. The last was the only woman, the only African and the only non-lawyer. Sbongile Nene was a sociologist with an interest in gender. For most of TC4's life, she was almost silent. Influenced by political party colleagues, international legal norms and personal ambitions and experience, the four lawyers developed a bill of rights with religion, culture and language provisions that were retained, almost word for word, into the final constitution.

All the technical committees at the MPNP worked in the same way. They first defined their areas of work and then received submissions from political parties on its various elements. Taking the wording of these submissions as a basis, they formulated draft legal provisions to go into the proposed interim constitution. These, with explanatory notes or memoranda, were then delivered as progress reports to the Negotiating Council. There, political parties debated the draft formulations. If there was "sufficient consensus," that would be the end of the matter. Once settled, it became almost impossible to reopen. If there was no agreement, further submissions would be made. In a few cases it was impossible to resolve decisions in this way, and bilateral negotiations took place in which political parties traded concessions. Alternatively, an ad-hoc committee comprised of senior political party representatives met with the technical committee to hammer things out.

I have already noted that the ANC and NP disagreed about the basic scope of a bill of rights during the transition. The ANC wanted a minimal document and the final bill of rights to be developed by a post-election democratic assembly. The NP wanted a substantive document that could shape the post-apartheid constitution and include

significant minority protections. In the end, the National Party won this key battle. As a result they had an enduring influence on the post-apartheid constitution. But whatever their disagreement about the extent of rights in the transition, all parties were agreed that religion formed part of a basic set of first generation rights that were, in the words of the technical committee “minimal or essential rights and freedoms⁷⁷.”

In early June 1993, the Negotiating Council received the following draft text for inclusion in the bill of rights: “Religion and belief: Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, provided that nothing shall preclude the practice of religion in State or State aided institutions on a free, voluntary and equitable basis⁷⁸.” The first part of the formulation is the positive assertion of the right to religion. The second derives from the NP position that South Africa should not replicate USA’s law. They did not want a disestablishment clause that would erect a strict wall of separation. The government submission, endorsed by the National Party, argued that the right to religion should not “preclude ministration to the forces, the public services and other state institutions, religious instruction or exercise in schools, and religious broadcasts by an entity instituted by or under any law⁷⁹.” The ANC did not make a specific submission on religion at this point. But the technical committee referred to the ANC’s 1990 *A Bill of Rights for a New South Africa*’ document⁸⁰. The TC4 lawyers took consideration of three elements from that formulation. The first was “freedom of worship and tolerance of all religions” and “no state or official religion shall be established.” Its second was “[t]he institutions of religion shall be separate from the state, but nothing in this constitution shall prevent them from co-operating with the state with a view to furthering the objectives of this constitution nor from bearing witness and commenting on the actions of the state.”

The last clause sought to ensure respect for places of worship and prevent racism that might bar anyone from entering such places⁸¹. Nothing in this formulation suggested a contradiction with this draft text.

The Negotiating Council agreed to the June formulation and TC4 proceeded to clean up the text as the bill of rights took shape. They separated the religion clause into two parts. It became clause 8, the first part of which grants that “every person shall have the right to freedom of conscience, religion, thought, belief and opinion.” The second part became extremely lawyerly. It reads: “Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by the appropriate authority for that purpose, provided that such observances are conducted on an equitable basis and attendance thereat is free and voluntary⁸².” Sachs responded to the 4th progress report in support of this formulation. He suggested that the second part was not strictly necessary because there was no disestablishment provision. But, he added, “the clause is balanced, ensures the state doesn’t favour one religion over another,” and it proved a “sense of security,” presumably to the NP’s constituency⁸³. This version of the bill of rights was included in the first complete draft of the interim constitution presented to the Negotiating Council on the 21st of July⁸⁴.

The ANC’s response to the complete draft constitution was explosive. In a “private and confidential” submission authored by SACP lawyer Halton Cheadle and in an attempt to delay the constitution’s release, the ANC slammed the size and complexity of the bill of rights⁸⁵. They proposed a radically altered formulation for the complete bill which is literally two paragraphs long. The first would guarantee that “all

fundamental civil liberties necessary for free political campaigning, debates, criticism and opposition shall be respected...” The second would include just a handful of special guarantees to ease fears in the transitional period. These could include a right to language and culture, and some education provisions.

Religion, complained the ANC submission, was one of the clauses that had become too complicated. They agreed that the first part of the religion right was essential for the transition. The second however “pre-empts the constitution making authority deciding whether or not there should be state sponsored religions or whether there should be an anti-establishment clause in the constitution.... The proviso should be eliminated...”⁸⁶” The Negotiating Council met on the 21st of July 1993 to go over the draft interim constitution. When they got to religion and belief, the ANC again proposed that the second half of the religion clause be dropped. No one agreed.

Two weeks later, the ANC suggested written amendments to the draft bill of rights. In this document it went further: “... it is our view that the freedom of conscience and religion is in no way inconsistent with school prayers. The USA constitution has a special formulation which forbids religious observances at state schools. It is not even necessary to raise the problem here; doing so introduces unnecessary prescriptiveness⁸⁷.” The ANC garnered the support of both the General Council of the Bar⁸⁸ and the Law Reform Project of Lawyers for Human Rights⁸⁹ (LHR) for their position. But on the same day as that written submission, the religious clause was once again brought before the Negotiating Council as part of a TC4 report. This time, the full two-clause version was approved and accepted as is. No comments were noted⁹⁰. The ANC backed down.

Despite its protestations, the ANC had no ideological problem with the content of the religion clause. But by August the ANC had lost the battle for a short transitional bill of rights. And without bilateral agreement between the ANC and the NP, it would have been impossible to get sufficient consensus on a shortened bill of rights. The NP had worked hard to ensure the bill of rights' elaboration. The ANC might have fought harder to scrap the bill of rights' greatly expanding clauses, but the negotiations were increasingly fragile as violence and insecurity escalated. It was simply not worth it for the ANC to threaten the negotiations over this.

As a result, the religion clause remained more or less as is. It moved from clause 8 to 14. "Academic freedom in institutions of higher learning" was added to the list of conscience, religion, thought, belief and opinion. The CA later removed it. The second clause, now 14(2), was made less lawyerly and cleaned up to read "religious observances may be conducted at State or State-aided institutions under rules established by an appropriate authority for that purpose, provided that such observances are conducted on an equitable basis and attendance at them is free and voluntary⁹¹." The wording of the second part of the religion clause introduced a new concept, possibly even a new institution, into the mix. Who was the "appropriate authority" for the purposes of establishing rules for religious observances at state and state-aided institutions? This question remained unanswered during the MPNP. In the mean time, the 7th of October meeting of the Negotiating Council confirmed this clause as agreed,⁹² and it appeared that their work was done on the right to religion.

But this was not to be. In the middle of that month, Muslim groups made a series of submissions to the Technical committee that opened up the issue of Muslim Personal Law and its recognition in the new constitution. (Tayob forthcoming) A TC4 report noted that “At a late stage of the negotiation process representatives of the Muslim community made submissions ... to the effect that the religious laws observed by certain communities ... should also be recognised constitutionally in explicit terms....⁹³” Weeks of intense consultation followed. There were two broad perspectives within the Muslim community on the matter. Some traditional *Ulama*⁹⁴ authorities, who initiated these representations, argued for the recognition of Islamic law (Shari’a) and particularly its family law elements. They also wanted the establishment of state funded or administered religious courts to apply this law. They made several arguments for this: recognition would provide redress for the second class status of Islam in South Africa. It would sanction the marriages, divorces, laws of succession and custody arrangements practiced by most Muslims. It would also legitimise the work of the *Ulama* by recognising them and giving them access to non-voluntary modes of redress for the contravention of their rulings through fines or imprisonment for example. In the view of these *Ulama*, Islamic law is divinely sanctioned, and should remain immune to the intervention of secular or civil law. And according to Moosa, they “postured themselves as the sole authorities on MPL to the exclusion of other sectors of the Muslim Community.” (2001:128)

A second Muslim perspective came from a broad alliance of progressive Muslims, which also included some *Ulama* authorities, particularly from the Muslim Judicial Council. Their suggestions were more in line with the WCRP position. Sheila Camerer, who represented the old South African government and was a member of

the TC4 ad-hoc committee, recalls an important submission by Moulana Ebrahim Moosa and endorsed by a number of Muslim groups.⁹⁵ According to her, this submission tipped the balance in the decisions of the Negotiating Council. Moosa's submission clearly summarises the issues from this more progressive perspective.

Moosa's submission acknowledged the widespread *de facto* practice of Muslim Personal Law in South Africa, informally administered by various Muslim jurists. "It is known" he wrote, "that most Muslims would prefer to follow the dictates of their religion in matters of personal law, rather than secular law." And given the fact that MPL did in fact guide many Muslims' family relations, its non-recognition was problematic. His main concern was that MPL was administered in ways that disadvantaged women. Practices that he listed as problematic on the grounds of their gender inequality include divorce by repudiation (*talaq*), and limited maintenance provisions.

The next part of the submission turned to the possibilities for the recognition of MPL. Unlike the *Ulama* submissions, progressive Muslims highlighted the diversity of schools of Islamic interpretation and Muslim cultural practice in South Africa. For this reason, it was impossible, they said, to simply recognise any one self-appointed authority on Islamic law. This was a matter that required wide debate across the Muslim community, and this debate should always include women⁹⁶. Moosa suggested that the outcome of these discussions should be the codification of Muslim Personal Law. Such codification, which was "imperative," he said would also provide the Muslim community with a chance to reform their practices and bring them into line with human rights norms, particularly around gender. A similar codification in

Tunisia, had been conducted in such a way as to entrench gender equality in ways that are true to Islam. “It is accepted that a human rights dispensation is in full accord with Islamic law⁹⁷.”

On the 12th of November 1993, the ANC proposed a third clause to the right to religion. In a half page submission, the ANC “requested consideration” of the inclusion of the following: “(i) members of religious faiths shall be free to regulate relationships within the family, on a voluntary basis, in accordance with the principles and laws of their faith, provided that they do not violate the rights of others; (ii) legislation may provide for the recognition of religious personal family law within the framework of the Chapter on Fundamental Rights and appropriate legislation by parliament. And; (iii) legislation shall provide for the equal status of marriages performed by recognised religious officers to be acknowledged⁹⁸.”

Some of the conservative *Ulama*’s demands had been removed from this formulation. The submission about courts was not taken seriously. The TC4 were of the opinion this last point was too specific for a transitional constitution. The issue of courts was also beyond their remit⁹⁹. The ANC request made it clear that the recognition of personal family law should take place “within the framework of the Chapter on Fundamental Rights.” It would, in other words, only recognise such law where it guaranteed gender equality. Even though the ANC proposed the addition, many within its ranks were concerned about it.

The Technical Committee worked furiously to produce an addendum to their Twelfth report on the 16th of November 1993, just two days before the Negotiating Council

was to vote on the interim constitution. It drafted a new section “family law under religion” to be included as 14(3) “in order to address the concern which has been raised about religious law.” It reads: “Nothing in this section shall preclude legislation recognising (a) a system of personal and family law under religion, and (b) the validity of marriages conducted under religious law subject to specified procedures¹⁰⁰.” Like 14(2) about religion and the state, this clause does not actually grant rights. It is an enabling provision, one that promises the possibility of a future parliament passing legislation. It also does not explicitly state that such legislation would need to be subject to the equality provisions of the bill of rights, an error that would be remedied in the final Constitution.

b. The Constitutional Assembly

There is almost no difference between the right to religion as it is formulated in the Interim (1993) and final (1996) versions of the constitution. When elected representatives met at the beginning of the CA, their first task was to review what was already in place in the interim constitution and to make recommendations for the new. But all the parties agreed that the right to religion was more or less as it should be. The National Party said it wanted no amendments to the religion section¹⁰¹. The ANC for its part reported that it “supports 14(1)” the general right to religion, and “has no objections to 14(2) and 14(3).” The latter two deal with religion in state and state-sponsored institutions and marriage according to religious law respectively¹⁰². The DP supported the section in full¹⁰³. The IFP, returning to the negotiation process for the first time since Codesa, at least for a short while, said that the “federal republic of South Africa ... would support and endorse any particular religious belief” and

“promote the conditions for the free and equal exercise of all religions / beliefs in the state.” It appeared that there was nothing to argue about with the right to religion in the final constitution.

But there were some issues of concern to the religious public and the WCRP. The first of these brings us back to the question of an appropriate authority to guide religious observance at state or state-aided institutions. The National Party wanted government institutions, or at least, institutions established by law, to be the appropriate authority. Judging from their comments on the matter, they were most concerned about religious observation in schools. The ANC never did make any formal submission on this matter.

The Constitutional Assembly provided the opportunity for religious groups to make “live input” to negotiators. The Public Hearing on religion held on the 26th of May 1995 was a chance for religious groups to elaborate on this aspect of religion-state interaction. The overwhelming consensus by religious groups, endorsed by WCRP representatives at the Public Hearing, was that religious bodies should retain autonomy over religious observances, even when they were in state institutions. Religious bodies envisaged an interlocutory interfaith body, controlled by religious groups, which could advise government on matters religious. UNISA’s Professor Kritzingar then in leadership in the WCRP, called for an “independent national advisory commission on Religious Affairs,” one “not funded by the state¹⁰⁴.” He thought the idea of an “appropriate authority” was vague and therefore dangerous. If such a body were state sponsored, he continued, it would either be used by confessional groups ... or by government seeking “divine legitimation¹⁰⁵.” It should

be specified or excised. Martin Prozeski, WCRP member and Religion professor at the then University of Natal was against a “ministry of religion” under state control¹⁰⁶. So too was African Enterprises, which argued against a “State Department of Religion¹⁰⁷.” The ACDP also rallied against the state as an appropriate authority because it was, it said, completely against “state regulation of religious affairs¹⁰⁸.”

But having made their views known, religious groups had no leverage over the decision on an appropriate authority when it was finally made. In April 1996, at the very end of negotiations, the ANC and NP met for a long weekend in Arniston on the coast of the Western Cape. There, in what came to be called the Waenhuiskraans negotiations, the last deadlocked issues were decided in bilateral conversation. The National Party wanted to make sure that in schools particularly, the appropriate authority would be understood as the governing body¹⁰⁹. On their insistence, the phrasing of the religion clause was altered to read “the appropriate public authorities.” This small inclusion of the word public secured the subordination of religious to non-religious authorities when it came to religion’s participation in state and state-aided spaces.

That was the first change in wording. The second sought to make it absolutely and unambiguously clear that all rights to religion and culture were subject to the equality provision of the bill of rights. To the religion clause, number 14 in the interim constitution and number 15 in the final, was added the following section; “15(3)(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.” Paragraph (a) is the enabling provision about religious personal law. Similarly the interim constitution right to “language and

culture” section 31 and 30 respectively, stated “every person shall have the right to use the language and to participate in the cultural life of his or her choice.” In the final constitution, this clause continued “but no one exercising these rights may do so in a manner inconsistent with any provision of the bill of rights.”

One last addition needs mention here. The National Party and Afrikaner political organisations to its right all wanted some sort of minority protection under the rubric of cultural and language rights. Although religion *per se* was not at issue in this political objective, it was usually listed as part of a triumvirate of culture, language and religion to define a minority. This minority protection or at least this double representation over and above the structures of electoral politics was at issue in the last minute Waenhuiskraans negotiations in April 1996. There the National Party finally succeeded in winning some version of collective rather than individual rights through two new provisions.

The first new provision was a right of “cultural, religious and linguistic communities” included in a new section 31 of the bill of rights. The clause was written to protect the rights of members of communities to “enjoy their culture, practice their religion and use their language.” It also gave scope for them to “form, join and maintain cultural, religious and linguistic associations” and civil society bodies. The language of this new right uses almost exactly the same wording as the International Covenant on Civil and Political Rights. (Henrard 2001) Despite the NP’s symbolic victory in this matter, section 31 does not really grant any entitlements in addition to those already in the religion and culture and language rights. And it too requires their exercise to be in

line with the remainder of the bill of rights, including the right to gender and race equality.

The second National Party victory was the institution of a new “chapter nine” commission. Known colloquially the Commission with a long name; its full title is the Commission for the Protection and Promotion of the Rights of Cultural, Religious and Linguistic Communities. The most important aspect of the commission for both the National Party and the Freedom Front was that it was given the powers to suggest the establishment of advisory cultural councils. The Commission has yet to make such a recommendation.

6. Conclusion

The outcome of the negotiations is that, in terms of normative institutional relations between religion and the state, South Africa is without a doubt secular. Religious institutions were easily differentiated from political ones. Both political and religious groups agreed that their institutions should be separated for their mutual and common good. They also concurred that separation should not be so strict as to preclude their cooperation or the presence of religious observance in state and state-aided institutions. Relations between religious and state institutions were then negotiated and fixed in constitutional law during the process of post-apartheid state-formation.

I have shown that there was a large area of overlapping consensus between and among public representatives of both religious and political groups with respect to this

condition of political secularism. Very different rationales informed this consensus. Some were explicitly religious, others political. All parties agreed that “South Africa is a religious country,” that “there is religious diversity” and that, unlike in the past, there must be a place for all religions in the new society. They also agreed that the area of operation of religious institutions should not be less than that of Calvinist Christianity under apartheid. Religious clergy and observance should still be present in schools, prisons, hospital chaplaincies and in public broadcasting. But the terms of their presence were altered to include a wide range of religions, and by consensus, institutional Christianity lost its monopoly on the state and state-aided institutions.

The WCRP had all its major demands met. Other parts of their proposals were not included only because they were covered by other rights, particularly of association and free speech. Their interventions about who an appropriate authority should be were not successful. But within a year of the signing of the Constitution, the ANC initiated a National Religious Leaders Forum. The ANC had all its religion demands met. Earlier submissions that sought to prevent the barring of people from entering religious buildings on the basis of race were similarly covered by both the equality provision and freedom of association. The National Party also got their way in all things religious, including, in the end, some recognition of minority rights even if they are extremely thin.

What then of the last aspect of secular institutional relations; that religion’s place is subordinated to politics? In this too, South Africa is secular. The political process of the negotiations both gave a place to religion, and also, put religion in its place. It gave religion its place through the equal recognition of religions, and the “right to

religion for individuals” as well as non discrimination on the grounds of religion. It put religion in its place in a number of ways. First, the political process defined and framed religion’s rights, albeit with religious input. Second, religious rights are subordinated to equality in law. Where a practice authorised by a sacred text or religious authority discriminates unfairly on the basis of gender, race or sexuality for example, the equality provision will prevail. Third, the political negotiators decided that the appropriate authority governing religious observance in the state or state-aided institutions should be public; it should be part of the state.

South Africa’s formation of political secularism is well within a liberal democratic norm. But it has characteristics that set it apart from all the ideal type formations outlined in Chapter One. Unlike the Jacobin or Laïcité formations, there was no repression or founding violence against religious institutions during the process of state formation¹¹⁰. Unlike the Establishment formation of political secularism, all religions and individuals in their religious capacity are recognised as equal before the law in the South African constitution. There is no state religion or officially recognised or favoured religious denomination.

South African institutional relations subordinate institutions of religious authority to political authority in the state and state-sponsored public. But it is a very mild form of subordination. And it was based on the consensus that this arrangement is also in the best interests of religion. In this respect South Africa’s secularism has much more in common with the American formation. Like the American model, South Africa’s political secularism is more co-optive than antagonistic. It is based on the assumption, widely held by both religious and political actors during the negotiations, that religion

is a positive social influence. But unlike in the American model, the constitutional negotiators were very clear not to introduce a strict wall of separation between religious institutions and the state and state-sponsored publics. There is no disestablishment clause. Even more unique in its formulation, and acknowledging the diversity of religious authority and scope in the social life of its citizens, the right to religion specifically enables the recognition of marriages concluded under religious personal or family law. The relative ease with which religious rights and institutional relations were negotiated into the constitution is in stark contrast to the heated arguments about the theological and philosophical foundations of the new regime. This will be the subject of Chapter Five.

Chapter Four: The Re-establishment of Traditional Authority

The King does not meet the criteria...But, in general one would be inclined to say that if any organisation has the capacity to render nugatory any decisions taken at Codesa with which they may disagree, it would be advisable to have them present...
NJJ Olivier, 18 March 1992¹¹¹

They [the ANC] want to take power away from traditional leaders. It's natural for political parties not to want any institutional structure to have power that it wants for itself,[power] that it could use.
Patekile Holomisa, October 1996¹¹²

1. Introduction

Chapter one sketched a history of the emergence of political secularism in Western Europe. I argued that resources for early and modern state formation were both institutional and ideological; a greatly expanding state apparatus, the exclusion of religion as such from that apparatus, and the development of new forms of secular political rationality. Religion for its part gained its freedom from the state; freedom, that is, to pursue the Kingdom of Heaven. The state and political secularism co-emerged as religion was subordinated to the politics of the nation state through exclusion and privatisation.

But as Europe secularised, it colonised¹¹³. Chapter Two pointed to some of the contradictions and dependencies between secular state formation in the metropole and the forms of rule and administration in the colonies, particularly in what was to become South Africa. Colonialism was an extractive relation ambiguously tied to a “civilising mission.” (Mbembe 2001; Young 2004) It certainly needed administration,

but colonial administrations were racist, incomplete and violent. They were not sufficiently powerful to constitute ideal modern Weberian states; to claim the monopoly of the legitimate use of physical force within a given territory. (Weber 2004) In the eyes of those they ruled colonial authorities did not effectively legitimate their use of violence. Nor did they entirely monopolise it. They did not always extend meaningful sovereignty across either territory or population. And in Fields' useful phrase, colonial government did not establish a "moral community between rulers and ruled." (1982:573) British policies of indirect rule formalised this in parallel processes of administration that more or less effectively subordinated pre-colonial modes of rule, thereby establishing them under new conditions. (Ranger 1983; Fields 1982; Asad 1999; Beinart 2001; Bennett 2004; Benyon 1980)

But South Africa did develop a state in the twentieth century. In fact, as Posel puts it, "Apartheid was born ... of the appropriation of globally current enthusiasms for a big interventionist state yoked ... to an ideologically distinctive version of racial order and nationalist advance." (Posel 2011) Posel defines the state as "an institutional matrix that posits and performs an ideological and operational unity, in historically varying ways and with varying degrees of efficacy." (Posel 2011:2) As I showed in Chapter Two, the ideological and operational unity of the apartheid state was perverse; it was a unity of white racial and political supremacy that excluded the black majority from national political life. Apartheid rulers, like their colonial and imperial predecessors, required the active involvement of both religious and traditional authorities in their ideology and their statecraft. And at the height of grand apartheid, indirect rule was developed further as the 'national' state spawned a series of pseudo states for its excluded majority in Bantustans or homelands.

The negotiations of the 1990s promised a long-delayed liberation for black South Africans and, indeed, for all South Africans. At least for the liberation movement, the writing of a new constitution was an opportunity to finally establish the grounds for an inclusive “moral community between rulers and ruled.” Why then did the negotiations recognise the institution of chieftainship within its vision of a post-apartheid society and an otherwise liberal constitution? Why, in other words, was this element of indirect rule maintained over the threshold of apartheid? And what does this mean in terms of South Africa’s claimed post-apartheid secularism?

In this chapter I will argue that forms of territorial and political sovereignty established by the apartheid state to uphold its white unity haunted the negotiations. And they survive in traces into the final constitution and the modes of government after the official end of apartheid. For my purposes, the most important of these is the recognition of traditional leadership in terms of customary law and in the employ of the state.

The situation of the homelands is critical to an explanation of the recognition of traditional leadership. It was in the homelands that chieftainship was manipulated and retained. And it was in the homelands that a political imaginary of customary leadership was kept alive by subjects and chiefs as much as by apartheid administrators. This chapter begins with a sketch of the situation of the homelands at the brink of negotiations and the choices made by traditional leaders in positions of homeland authority to secure their place in a future dispensation. It then turns to the ambivalence and strategic weakness of the ANC in relation to the political imaginary

of traditional leadership and the chiefs in power in the homelands respectively. This discussion leads into a narrative of contestations over the recognition of chieftainship in the negotiation process. First I reconstruct the events at Codesa through which traditional leaders came to be recognised as full participants in the political negotiations. I then describe the claims that traditional leaders made in Multi Party Negotiation Process (MPNP); claims to the recognition of areas of sovereignty for “traditional or customary communities;” to the recognition of the institution of traditional leadership; to cultural rights; and to the recognition of customary law and traditional courts. Not all of these claims were successful. But many left their mark on the final constitution and the post-apartheid dispensation. From there I turn to failed attempts by the ANC to reduce the entitlements of traditional leaders in the final constitution after the 1994 democratic elections. An appendix at the end of this thesis includes sections of the final 1996 constitution¹¹⁴ that refer to, entitle, or have an effect on traditional leadership and customary law. The conclusion to this chapter provides a brief overview of the legal framing of the place of traditional leadership and customary law in the final constitution. It considers these entitlements in light of the institutional relations condition of political secularism.

2. The Violence of the Homelands

Oomen estimates that by 1990, around 44 percent of the population - nearly 17 million people - lived in areas designated as homelands. They comprised a meagre 14 percent of South Africa’s land territory. (2005) The homelands were an apartheid intensification of earlier colonial and union segregationist policies. From the early

of nineteen areas, some of them a hundred miles apart. KwaZulu had twenty-nine major and forty-one minor fragments. (Muriaas 2002:24) Despite this geographic spread and the fact that they were economically unviable, these territories were granted “self-governing” status by South Africa from 1963. (Muriaas 2002:24) In 1970 the Bantu Homeland Citizenship Act passed by the South African parliament granted black South Africans an “additional citizenship” in a “designated homeland” on the basis of “language, culture or race.” (Klaaren 2000:5)

From 1973, the homelands were increasingly subject to a politics of ethnic nationalism, and were run by ethnic based legislative authorities. According to apartheid’s separate development ideology, each homeland was a nation state for a tribe or ethnicity. The reality never matched this ideology, but from the late 1970s and in the context of African independence movements, some of these “self-governing” territories took the “independence” offered by the apartheid state. The leadership of four homelands elected to accept independence; the Transkei in 1976, Bophuthatswana in 1977, Venda in 1979 and the Ciskei in 1981. These four were collectively known as the TBVC states. They were never recognised internationally, but, somewhat farcically, relations between the South African state and the TBVC homelands fell under the government’s Foreign Affairs department. (van der Westhuizen 2007:40) With independence, homeland citizens of the TBVC states, including those that didn’t actually live in the homelands, lost their South African citizenship and nationality.

Chieftainship was a cornerstone of rule in both kinds of homelands; self-governing territories and the TBVC states. (Ritchken 1995) As Oomen put it, “Traditional

leaders formed the majority in all the ‘national parliaments’ and sat in the gargantuan buildings that – like national flags, stamps and other emblems – served to legitimise the existence of polities that only the South African state would recognise.” (2005:41) Approximately 800 traditional leaders were remunerated by the South African government, either directly or through the TBVC states. They were given financial, legal, military and administrative support.

It is in the context of the homelands that the story of chieftainship and its claims on a post-apartheid future need to be written. And the 1980s was a decisive decade in the fortunes of traditional leadership. Many events undermined homeland leadership and unsettled the social and economic relations of homeland subjects in that decade. Some of these have already been mentioned in Chapter Two. They include a sharp rise in unemployment, an influx of migrant workers into the homelands, a drought from 1983 that undermined what little remained of agricultural subsistence production, increased pressure for land, and the dropping of Influx Control. Even more significant was the wave of youth mobilisation after the 1976 Soweto uprising and the establishment of the United Democratic Front 1983, both of which returned ANC aligned politics into townships and then rural areas after a long abeyance.

Homeland leaders, many of whom were themselves chiefs or claimed some position within traditional structures, responded in a variety of ways to these pressures. (Marks 1986) A brief examination of some of the local politics within homelands provides a background to the discussions and contestations over traditional leadership in the political negotiations. I have chosen to look at events in Bushbuckridge in the Northern Transvaal, Transkei and KwaZulu since they reveal a number of the

strategies used by traditional authorities to secure their power in the national political negotiations of the 1990s. The two homelands in Bushbuckridge and KwaZulu were “self-governing” territories and Transkei was one of the “independent” TBVC states.

i. Bushbuckridge

In Bushbuckridge in 1972, two “self-governing” homelands, Lebowa and Gazankulu, were established for erstwhile Shangaan and Sotho polities. Both Ritchken (1995) and Delius (1996) have written close histories of social and political turmoil in the area in the 1980s, which included an anti-witchcraft movement and violent contestations over the status of chieftainship and the moral and social order of homeland communities.

The populations of Gazankulu and Lebowa trebled in the twenty years after their establishment. By the 1980s they were, in effect, no longer agricultural areas. (Ritchken 1995:148) But an agrarian economy and a stable hierarchical social order that included ancestors formed the basis for idealised chiefly authority over gendered and material relations in the rural areas. By the 1980s chiefs could not rule in ways set down in customary law. Many of the economic and social relations that would have made sense of that law no longer existed. The many and varied bases of chiefs’ authority shifted with circumstances, and over time came to include an ability to extract local resources, control over the allocation of increasingly small plots of land, jurisdiction over chiefly courts, the existence of clientalist relations with homeland government officials and police, official recognition by the Native Affairs Department and therefore state salaries and the accompanying accoutrements of power. All of these bases of power and legitimacy were fragile and increasingly contested. Delius reports that there were growing complaints in the 1980s about chiefly extraction of

taxes and fines, the abuse of community funds, particularly money for the building of schools, the cost of the annual “traditional levy” and chiefly demands for financial support for their cars, bride-wealth and houses, portions of beer and labour on chiefs’ land. (1996:146) All of these demands were made of increasingly impoverished subjects.

Economic pressures also severed the connections between youth and patrimonial chieftainship in a number of ways. Initiation schools, for example, became increasingly commodified over the decades preceding the 1980s, and they no longer initiated their students into a specific chiefdom. The families of initiates rather than chiefs bore the costs of initiation. (Ritchken 1995:342) This broke the relationship between youth and chiefly leadership and undermined traditional structures of discipline. Added to this was the growing numbers of young unemployed men and returning migrants, including initiated men unable to raise sufficient bride wealth (*bogadi*) to get married and start their own families. Delius reported increased crime, violence, drug use and drunkenness from the late 1970s. (Delius 1996)

Chiefs, drawing on apartheid and homeland ideology, mobilised ethnicity as a way of reclaiming and consolidating power. As Vail has argued, “within a state that divides subordinate groups along ethnic lines, a rural petit bourgeoisie manipulated ethnic sentiments into ethnic nationalist programmes to achieve their own ends.” (Vail 1991) This was certainly the case in Bushbuckridge. In 1984 the Chief Minister of Gazankulu formed a ‘cultural’ organisation modelled on Inkatha that bound chiefs and other members of the bureaucracy and local elite under a single umbrella. The

mobilisation of ethnic nationalism was sufficiently effective to result in conflicts on the border between Gazankulu and Lebowa during that year.

But this kind of ethnic mobilisation was not able to prevent a wave of youth mobilisation allied to the liberation movement. Bushbuckridge, like many other rural areas, became home to youth from urban township schools who had been radicalised through the 1976 Soweto uprising. Many were sent to homeland schools in the hopes that they could continue their schooling despite the pervasive urban school boycotts. (Delius 1996:162) This infusion of politicised youth changed the politics of rural schooling. The Congress of South African Students (COSAS) became a force in homeland schools, as did the UDF when it was launched in 1983. (Delius 1996) The ANC, encouraging this politicisation, declared 1985 the Year of the Youth and said that they were the vanguard of the struggle for national liberation.

In Bushbuckridge, politically active school goers were joined by young unemployed men, and their interventions soon extended beyond the school gates. The Shatale Youth Congress, for example, was founded in the mid 80s. They declared that their first objective was to “draw up a good guidance for a future community system in a democratic South Africa” and to maintain law and order. (Quoted in Ritchken 1995:309) Their first campaign was to institute proper accounting for community funds overseen by chiefs, a demand supported by parents. In response, some chiefs called for assistance from the army and police, and together they acted with violence against the Youth Congress. Quite rapidly, skirmishes between youth groups and the homeland police escalated. Schools were closed, a consumer boycott of white and

“collaborator” shops began, and a cycle of violence gained momentum as the youth declared war on the Lebowa government. (Delius 1996:187)

What sets the developments in the Northern Transvaal apart from those in other homelands was its anti-witchcraft movement. Scholars argue that violence against accused witches were closely related to chiefs’ loss of control over the sanctioning of social relations in the area. From the introduction of the administrative structures of Traditional Authorities in the 1960s, magistrates had more consistently prevented witchcraft accusations from coming before chiefs’ courts, effectively driving witchcraft underground. As Delius explains it, “The confidence of communities in the capacity of a system of chieftainship, which had been co-opted and partly discredited, to fulfil its duty in organising their defences against supernatural hazards had ... been further undermined.” (1996:164) Ritchken describes a situation in which witchcraft accusations were never resolved, but instead left to simmer as rumour and conflict. (1995:335) When the youth sought to restore communities from the degradations of homeland rule and impoverishment, they turned against accused witches as embodiments of social distress and suffering. Over the months of April and May 1986, 150 people were identified as witches by youth groups in Lebowa, and most of them were burnt alive. The average age of the killers was nineteen.

It was only when a coalition of chiefs, shop-owners and school principles - the Sofasonke Civil Union - called on the intervention of the Lebowa military that these killings came to an end. Hundreds of youth were arrested, a permanent police presence introduced in the area, and schools were re-opened. Some chiefs that had fled during the witch hunts returned to the area under army protection. (Delius

1996:205) Sofasonke acted violently against youth leaders, burning houses and beating prominent members of the youth congress. It took an intervention by the South African Council of Churches' Frank Chikane to pressure Ramodike, then Chief Minister of Lebowa, to disarm Sofasonke and so to de-escalate the inter-generational conflict and community violence. (Ritchken 1995)

Youth politics of the 1980s introduced the possibility of the removal not only of individual chiefs, but of the institution of chieftainship itself. This was a radical change in South African rural politics. Earlier uprisings, such as that of Sekhukhuneland in 1958, had sought to defend the idea of chieftainship from apartheid's pressures, temptations and manipulations of specific chiefs. But in the 1980s, it was suggested that the institution of traditional leadership itself come to an end, to be replaced by democratic forms of local government. (Delius 1996:189) The youth mobilised to replace chiefly structures of authority and invert the age hierarchies of social control. They also sought to replace chieftainship as a form of local government. They introduced "people's courts" in opposition to chiefly courts, and sought to introduce democratic structures in all areas of social control including in schools as well as institutions for dealing with accusations of witchcraft.

It is important to understand the relationship between these youth organisations and the structures of the national liberation movements to which they looked. Youth mobilisation was not in fact accompanied by official organising by the ANC which was only unbanned in 1990. Even the United Democratic Front did not have much presence in most homeland areas. The rural youth movements of the 1980s were not, on the whole, subject to the discipline of the ANC or its allies. And the UDF

distanced itself from the killing spree of the young comrades in Lebowa. (Ntsebeza 2006)

The irony of local relations between the self-governing homelands and the ANC was that in Bushbuckridge and elsewhere, it was the chiefs and other homeland elites that were able to make public alliances with the ANC after its unbanning. And they did so largely through the Congress of Traditional Leaders in Southern Africa (Contralesa), an organisation that will be discussed in more detail below. Both popular and pariah chiefs in Lebowa and Gazankulu rushed to join Contralesa in the late 1980s. Chiefs that had supported armed action against the comrades “now proclaimed themselves as supporters of the ANC and denounced attempts by the youth and migrants to raise issues of corruption and maladministration in the villages as ‘uncomradely behaviour’, appealing to the ANC leadership for support.” (Delius 1996:207) Even Ramodike, Chief Minister of Lebowa, joined the ANC in 1990. Despite his promises to deliver homeland votes to the ANC, he prevented the formation of civic organisations and the establishment of ANC branches in areas under his control.

ii. The Transkei

Like the other homelands territories the Transkei was established in the late 1950s. Under the leadership of Chief Kaiser Matanzima from the early 60s onwards, it became the first homeland to argue for and accept independence in 1976. This timing is important since it marks a distinction between the liberation politics of the student uprisings in Soweto and the state-authorised independence of the homeland. The Transkei was to be a Xhosa polity, but Xhosa speakers were spread across the Transkei and its southern neighbour the Ciskei which took its ‘independence’ in 1981

against the wishes of Transkeian rulers. Kaiser Matanzima ruled the Transkei until a *coup d'état* by ANC aligned Major General Bantu Holomisa toppled him in 1987.

Matanzima's rule illustrates three characteristics of homeland government; political repression, the manipulation and betrayal of customary claims to chieftainship, and elite clientalist corruption. The homelands were in many respects a taste of the post-colony within an apartheid framework. The ANC and PAC were banned from 1963 for example, and Proclamation 400 gave Matanzima the powers of a permanent state of emergency. This allowed him to exclude, arrest or deport all opposition in preparation for the "elections" for independence in 1976, an election in which he won all but 4 seats, giving the Transkei government a veneer of democratic respectability. (Streek and Wicksteed 1981:13)

Like its self-governing predecessor, the "independent" Transkeian parliament had a majority of chiefs and a minority of elected officials, many of whom were also chiefs. And the authority of chieftainship was protected by Transkei law. And yet in all the homelands, the Chief Ministers' official powers included "The division of existing black tribes, the amalgamation of black tribes, the constitution of new black tribes, and the recognition, appointment, conditions of service, discipline, retrenchment, deposition, dismissal and pensioning of paramount chiefs, chiefs and headmen." (Ritchken 1995:155) Chieftainship was therefore an important currency of homeland legitimacy, and the civil arm of homeland administration had tremendous powers over the appointment and treatment of local chiefs. In the process, hereditary or customary assertions of chieftainship were alternately undermined or supported by bureaucratic-political controls.

Kaiser Matanzima's own chiefly standing was seriously inflated by administrative fiat. He was the son of a minor chief of the amaHala tribe in Emigrant Thembuland. After studying law and politics and completing his articles, Matanzima took up his chieftainship. Two years later he was appointed to the pre-homeland Bunga or black council by the South African authorities who recognised his ambition. With their support Matanzima secured recognition for increasingly powerful "traditional" positions against the opposition of his more senior family members the Thembu Paramount Sabata Dalindyebo and Nelson Mandela. (Streek and Wicksteed 1981:112) First he was appointed as a regional chief. In 1966, he was made paramount, putting him on a par with Dalindyebo despite there being no precedent for such an elevation in customary law. From there he was appointed Chief Minister and, upon independence, State President of the Transkei. He employed his brother George, struck off the attorneys roll in 1963 for misappropriating funds and making false statements under oath, as Prime Minister.

The Transkeian constitution gave Matanzima the tools to harass and demote Sabata Dalindyebo. In 1976, the year of the Soweto uprising, Sabata's allowance was withdrawn on an administrative pretence after he argued against independence. Soon afterwards he was offered the position of State President in what Streek and Wicksteed called "an effort to neutralise his power by placing him in an apolitical office that was easy to monitor." (1981:322) Sabata refused, and from then on was subject to administrative and political harassment. In 1978 the Great Place of the paramountcy was raided by military police. In 1979 he was charged on a number of counts and, despite massive popular support, convicted for the treasonable offence of

speaking against the independence of the Transkei. He was stripped of his parliamentary seat and his chieftainship. In 1980 he went into exile.

Kaiser Matanzima had almost complete control over the reins of the Transkeian government until he was deposed by force. Most local chiefs realised their dependence on him and fell into line. The civil service was massively inflated by clientalist appointments, and by 1978, some 64 000 people were employed by the Transkeian state. As Streek and Wicksteed note, this was twice as many civil servants as in Botswana at the same time (1981:28) This growth in the size of the Transkeian state, evident in both military and civil service expenditure, was funded by the South African fiscus, which contributed nearly R1 billion in the first four years of its supposed independence.

Matanzima continued to harass opposition after independence. In 1979 he banned 34 organisations, including the Methodist church of which he was a lay preacher. He literally nationalised the Methodist church and established the United Methodist Church of Southern Africa. It immediately appropriated Methodist church property in the territory, and deported non-consenting ministers. (Streek and Wicksteed 1981) He also expelled the Federal Theological Seminary from the Transkei when it engaged in Black Consciousness mobilisation.

Massive South African investment in homeland military power in the 1980s backfired when Bantu Holomisa, a general in the Transkei military, staged his *coup d'état* in 1987. Bantu Holomisa was a member of the Transkeian elite and the son of a minor chief but not himself eligible for chieftainship. After ousting Matanzima, Holomisa

continued to rule the territory until 1994 when it was reincorporated into South Africa. He was aligned with the ANC in exile, and allowed it to establish bases from which it organised operations into South African territory. Despite this change of political leadership and orientation, widespread clientalism and corruption, poor service delivery, poverty and overcrowding continued more or less unabated in the Transkei.

The exiled ANC's engagement in homeland politics in the 1980s bore another fruit in the Transkei in the person of Patekile Holomisa. Heir to the amaHegebe chieftainship, and eventually married to the daughter of Kaiser Matanzima, he studied law and politics at the Universities of Transkei and Natal. By the time he graduated in 1985 he had been radicalised by his involvement in student politics. Upon the completion of his studies he was called home to assume his chieftainship. Given his political perspective, he was unsure about what to do and went to visit the ANC in exile to ask for advice¹¹⁷. The ANC counselled him to take up his chieftainship and participate as an inside agent in the Transkei legislature. He did this while setting up a law practice in the capital Mthatha. Like many other liberation-oriented chiefs he joined Contralesa soon after its establishment in 1987. By 1989 he took over the leadership of Contralesa and has remained at its helm ever since. A relatively senior member of the ANC, he became a leading figure in negotiating a future for traditional leadership in the negotiations.

iii. KwaZulu, Mangosuthu Buthelezi and Inkatha

Like Matanzima, The Chief Minister of KwaZulu was an ambitious and relatively junior member of the royal household, in his case the Zulu one. But Buthelezi was also, at least in his earlier career, both charismatic and publicly aligned with the ANC.

He joined the ANC youth league in 1975 and, with ANC President Oliver Tambo's blessing, launched a 'cultural movement' called Inkatha. It was to be the ANC's Trojan horse; a vehicle to mobilise support for the ANC within the KwaZulu homeland. In many respects, Buthelezi got his early legitimacy from this association with the liberation movement. But, as Richkin suggests, he became increasingly dependent on patronage and coercion within the homeland structures, and needed to maintain that system in order to retain his power base.

While Matanzima was working to undermine Sabata Dalindyebo's chieftainship, Buthelezi was trying to rein in a figure with much greater historical stature; the Zulu king Goodwill Zwelethini. In 1979, the Zulu King formed an organisation to rival Inkatha, calling it Inala. Buthelezi, with the powers of parliament behind him, castigated the king publicly in the National Assembly and threatened to cut off his stipend. He also threatened to amend the homeland and Inkatha constitutions to prevent the king from taking part in politics. (Sparks 1994:122) Unlike Sabata Dalindyebo, the Zulu king was more malleable. From this time onwards, Buthelezi, the King's nephew, referred to himself as the traditional Prime Minister to the King. Drawing on an enduring trope around traditional authority, Buthelezi said that the King was "above politics," and therefore had to be represented by his prime minister, effectively depriving the King of the claim to represent himself or the interests of the Zulu nation.

Buthelezi proved to be exceptionally skilled in his use of Zulu ethnic nationalism and the mobilisation of the imaginary of Zulu monarchy from Shaka to the present. And although King Zwelethini had far wider allegiance than Buthelezi, the latter saw that

he “was produced, dressed in leopard skins ... to demand the restoration of the Zulu kingdom.” (Waldmeir 1997:243) Assertions of ethnic nationalism were rooted in an idealised Chief Shaka and a pre-colonial polity that never was as belittled or reduced as its southern and eastern neighbours. But this ethnic nationalism would have been impotent without Inkatha’s control over the resources of army, police, South African government funding and clientalist relationships across the homeland.

While the ANC disapproved of this ethnic nationalism, Buthelezi remained aligned with the ANC and its vision of national liberation in many respects. From the 1970s the National Party repeatedly tried to get Buthelezi to accept independence for KwaZulu. He refused every time. In the mid 1980s they approached him to be a black representative on the interracial council they sought to establish as an extension of the Tricameral system. Buthelezi refused again. (Friedman 1993:12) And the National Party was unable to either break ties with or coerce this important ally in their homeland policy.

In other homelands the mobilisation of youth comrades and the involvement of the UDF led to what could be called local skirmishes and intergenerational conflict. In KwaZulu, the result was explosive and exceptionally violent. Buthelezi sought support and thanks from the ANC for his resistance to some aspects of homeland policy. Instead, he encountered increasing criticism from the UDF “comrades” for the ways in which Inkatha colluded with the South African state and argued against sanctions. The enmity between the two grew rapidly. Soon after its formation, the UDF began actively mobilising in the Natal midlands, hoping to “neutralise” Buthelezi.

Clashes between UDF aligned “comrades” and Inkatha claimed 3,000 lives even before Mandela was released from prison. (Waldmeir 1997) And the violence escalated after the ANC was unbanned. (Gloppen 1997) This conflict, like that in Bushbuckridge, was not only about political affiliation. It was also about age, social mobility, rural-urban divides and patriarchal authority. (Adam and Moodley 1993) In response to the growing politicisation of youth and their escape from rural bonds of traditional affiliation, Inkatha went on a recruitment drive that forced “virtually every teacher, nurse, policeman and public servant in KwaZulu to join the movement or withhold employment if they did not.” (Waldmeir 1997:174) Buthelezi used his access to the machinery of the homeland state.

Unlike other homeland leaders, Buthelezi had ambitions not only for continued power in what was to become KwaZulu-Natal. He also had national political ambitions. And over the next two decades, these two ambitions required slightly contradictory claims; one on the basis of Zulu nationalism, and the other, on the basis of a secular black moderate free-market agenda.

On the 4th of July 1990, five months after the ANC was unbanned, Buthelezi re-launched Inkatha as the Inkatha Freedom Party (IFP). It was a political party which would seek, he said, to establish a nation-wide support base. It was the vehicle for intervention outside of the homelands and to oppose the ANC. Just eight days later, violence erupted on the Witwatersrand, and more than thirty people were killed in the Sebokeng township. (Sparks 1994:138) By September that year, a cycle of random attacks on commuter trains was established, accompanied by rumours of police and

security force complicity. Violence in the Natal-midlands and the Witwatersrand was to continue throughout the negotiations, until the very brink of the 1994 elections and thereafter. Various attempts by the ANC to “cut Buthelezi down to size” and do away with the KwaZulu administration continued to anger the IFP even after the 1994 elections. And while much of this violence was orchestrated by political principles, political motives were deeply entangled in localised revenge killings and warlordism.

The South African government provided covert support, arms and funding in what became a war between Inkatha and the ANC. The South African security establishment founded the Civil Cooperation Bureau (CCB) in the early 1980s. Amongst its more than 200 projects, it planted car bombs and assassinated ANC officials, and funded and armed urban vigilante groups. It gave the same support to Inkatha in opposition to the comrades. Vlakplaas Security Police head Eugene De Kock collected weapons from the old South African Defence Force (SADF) Koevoet unit in Angola, treated them with acid to remove identifying markers, and distributed them in black bags through Transvaal Inkatha leaders Themba Khoza and Victor Ndlovu. (Sparks 1994:175) In 1986, military intelligence trained Inkatha members in Angola. On their return they were integrated into the KwaZulu police, where they aided violent attacks and quashed investigations. (Sparks 1994) Allegations of a “third force” from within the police, military establishment, IFP, and homeland police were substantiated by Inkathagate revelations in August 1991 of police support for IFP violence and government funding for IFP activities. This was substantiated in both TRC and Goldstone Commission Reports. (Adam and Moodley 1993)

ANC responsibility for the violence has received little attention. There is a great deal of evidence, for example, that Harry Gwala used hit squads in the midlands region he commanded for the ANC. (Sparks 1994) His membership of the SACP was suspended as a result, but only in 1994 when his work was complete. At the opening of the MPNP the IFP claimed that of “312 IFP branch chairmen in the Natal Midlands in 1987, only two were still alive in 1991.”¹¹⁸

iv. The ANC, the homelands, and the Chiefs

These three brief forays into homeland politics sketch a complex and ambivalent picture of the ANC and liberation politics in relation to both homeland leadership and chiefs. This ambivalence was to mark the entire negotiation process as well as its aftermath. The ambivalence was both strategic and ideological.

The ANC began as the South African Native National Congress (SANNC) in 1912 in Bloemfontein. Its founders were members of the black elite. It counted Christian products of mission education, leaders of African Independent Churches as well as rural chiefs amongst its members. For the first few decades of its existence, the ANC had an upper house of chiefs and a lower house of commoners. And links between the ANC and chiefly rural elite continued until the ANC and SACP were banned and driven underground in the early 1950s.

The ANC response to the establishment of the homelands went no further than public condemnation and an exile campaign of mobilisation to prevent their international recognition. In this they were very successful. But the ANC had little direct presence in the homelands from the 1950s until well into the 1980s. The issue of the Bantustans

and the ANC's weak presence in them was put on the table at the ANC's 1985 Consultative Conference in Zambia. With some form of political change increasingly likely, and with the mobilisation of the young comrades and UDF, the ANC decided to pay more attention to building up its structures and alliances and to supporting opposition parties to fight homeland rule.

That same year, Simon Skosana sought "independence" for the homeland of KwaNdebele. According to Beinart there was "clear evidence of security police involvement" as Skosana attacked communities resisting incorporation. (2001:266) A group of KwaNdebele traditional leaders came together to oppose this bid for independence. In 1987 they formed the Congress of Traditional Leaders in Southern Africa (Contralesa). Harassed by the security police, the chiefs sought protection from the UDF. The UDF gave Contralesa support and a national platform. And as already mentioned, a wide range of traditional leaders with varying degrees of local power and legitimacy joined Contralesa in the late 1980s. Hendricks and Ntsebeza report that by 1989, it could claim the support of eighty percent of chiefs in Transkei and fifty percent in KZN. (1999)

Traditional leaders were, in other words, one route through which the ANC could gain a foothold in the rural areas. This was a strategic alliance. But it also took place against the background of an ongoing debate within the ANC about the status of the institution of traditional leadership itself.

Some within the ANC took a secular Enlightenment stance that the institution of traditional leadership was anachronistic as well as contrary to principles of equality

and democratic accountability. Perhaps the most well-known advocate of the demise of chieftainship was Govan Mbeki, the father of the man who would become South Africa's second democratic president. Mbeki famously wrote: "If Africans have had Chiefs, it was because all human societies have had them at one stage or another. But when a people have developed to a stage which discards chieftainship, when their social development contradicts the need for such an institution, then to force it on them is not liberation but enslavement." (Quoted in Ntsebeza 2006:259) The influence of Marxist thinking on this argument is apparent, and South African Communist Party members within the ANC were more likely to be critical of the institution.

Many within the UDF leadership also followed this view. Peter Mokaba, for example, grew up under traditional authority in Lebowa. He was very clear about the future of chiefs under the ANC: "we intend removing the tribal chiefs as soon as possible" he said. "We have called on them to resign. Our ultimate intention is to allow the people to govern themselves." (Van Kessel in Ntsebeza 2006)

The official ANC policy until the late 1980s was against the institution of chieftainship. The ANC declared in its 1988 draft constitutional principles that traditional leadership was anachronistic to its modernist vision and that the institution of traditional leadership should be abolished with the advent of democracy. (Muriaas 2002:9) The ANC policy also stated that "because of its relationship with the apartheid regime, there would be no place for chieftaincy in a democratic South Africa." (Williams 2009:194)

Despite this official position, the ANC and its allies became deeply invested in chiefly politics. Peter Mokaba was instrumental in the setting up of Contralesa, against his position on chiefs. There were many reasons for the disjuncture between policy and practice in this respect, some of which have already been mentioned.

The situation in Lebowa was just one example of how the ANC was perceived to be allied to militant youth. The ANC was aware that the activities of such youth groups had alienated tribal hierarchies, adults living in the homelands and the business elite. (Muriaas 2002:91) The ANC needed the support of these people too, and the chiefs were a route to that support. But as Hendricks writes, “the youth and civic movements found the rapprochement between the liberation movement and their former enemies particularly repulsive.” (1999:107) Where local activists viewed chiefs as the puppets of apartheid, the returning exiles were “more concerned with pursuing a more broad based liberation movement.” (Hendricks and Ntsebeza 1999:107) As such, Ntsebeza suggests that the ANC’s weakness was the main reason for its wooing of traditional leaders, and what he calls its “desperate and naïve collaboration.” (Ntsebeza 2006)

The official tone of ANC relationships with chiefs began to change around 1988. A Contralesa delegation went to Lusaka that year. Afterwards, Jacob Zuma wrote an article in ANC’s *Urambulo* magazine criticising Govan Mbeki’s position. Zuma proposed “the continuation of the institution of chieftainship, *but under our control*.” (Ntsebeza 2006:264 italics added) The ANC gave Contralesa its formal blessing in 1988, and “welcomed the chiefs back to the people.” Where they had rendered chiefs as collaborators in the past, they now started appearing in ANC rhetoric as patriotic victims of apartheid. (Muriaas 2002:89)

The ANC was particularly worried about the mobilisation of Zulu ethnic nationalism in KwaZulu, a stance in opposition to the African nationalism of the ANC. In the late 1980s, the still-jailed Natal leadership of the ANC met to discuss Inkatha's portrayal of the ANC as "anti-Zulu, Indian-controlled and Xhosa-led¹¹⁹." The ANC, like many potential rulers before it, found itself entangled in the language of chieftainship and ethnicity in the process. It settled on a strategy to counter this representation by giving prominence to Zulu members of the ANC, including Chief Albert Luthuli. Mandela's stance on traditional leadership was decisive in a change of strategy. On his release from prison he went out of his way to mobilise Zulu speakers, and in doing this, drew on the same symbolic resources used by Buthelezi. In 1990, for example, he was a prominent presence at a Sonke Festival to mark the 165th anniversary of the death of Shaka. There hundreds of *amabutho* or warriors participated wearing traditional dress, and the people's poet Mzwakhe Mbuli "stirred up the crowd" with tales of Zulu military success. (Klopper 1996:54) The ANC also began to contest the allegiance of the Zulu King, Goodwill Zwelethini. (Klopper 1996)

To summarise; traditional leaders found themselves in a precarious position in the 1980s. The economic and social bases of homeland rule according to the political imaginary of chieftainship were deeply undermined. Individual chiefs were accused of collaboration and were brought to account by youth leaders and those allied with the liberation parties. More importantly, many youth leaders and elements of the UDF sought to put an end to traditional leadership *per se*. Student and militant youth bodies gained some influence in the homelands from the early to middle 1980s, but it was not until the ANC was officially unbanned that it attempted to set up structures in the

rural areas. Then “[e]fforts were made to allay the anxieties of local businessmen and leading figures in the ANC appeared to embrace precisely the chiefs and homeland leaders whom the youths and some migrants regarded as principle foes.” (Delius 1996:207) By the early 1990s the chiefs and homeland governments had, on the whole, held onto a fragile rope of control over the rural areas. And “Bantustan leaders, for their part, realised that they needed to fortify their power bases or risk being sidelined.” (Ritchken 1995:413)

As the negotiations dawned, homeland leaders followed one of two strategies to try to maintain some of their considerable local and regional power. In the first, homeland leaders tried to retain the leadership of sovereign or semi-sovereign territories. The homelands of KwaZulu, Bophuthatswana and the Ciskei under Buthelezi, Mangope and Gqozo took this route. (Elazar 1994) The KwaZulu government sought a system in which what was to become KwaZulu-Natal would be a constitutional monarchy, and a strong regional power with a considerable degree of autonomy. Bophuthatswana’s Mangope went even further, saying “would like to continue as we are; an autonomous and independent country, preferably with extended borders and continued friendly and cordial relations with our neighbours¹²⁰.” The Ciskei presented a vision of a “federation of states” in which the “diversity of cultures and regional interests could be reflected¹²¹.” These three joined forces with right-wing Afrikaners, particularly the Conservative Party and the Afrikaner Weerstand Beweging¹²² (AWB), which sought territorial sovereignty for a Volkstaat or Afrikaner homeland. This alliance was formalised as COSAG; the Concerned South Africans Group.

In contrast, traditional leaders who were members of or affiliated to the ANC actively sought to have the homelands reincorporated into a unified South Africa. Amongst these were the leaders of the Transkei and Venda from the TBVC states, and traditional and homeland leaders from many of the self-governing territories. (Friedman 1993) Proponents of this second strategy were willing to concede territorial sovereignty, but many nonetheless sought to retain personal and political power as well as the position of the imaginary and institution of traditional leadership itself. How they did so is the subject of much of the rest of this chapter.

3. Negotiating the Place of Traditional Authority

In late November 1991, the Codesa preparatory meetings came to an agreement on who, in principle, could participate in negotiations. It was a deeply political question and one that was answered in trade-offs. A multi-party Codesa steering committee agreed by compromise that political parties, political organisations, the South African government and TBVC administrations could take part.

The place of homeland leaders was particularly contested in this decision. The National Party argued that the TBVC states were independent and not part of South Africa. They wanted to exclude them from the negotiations. (Muriaas 2002: 84) This would have resulted in a much greater likelihood of the National Party retaining power in what remained of South Africa. They bolstered this argument on the basis of 1986 legislation that restored the South African citizenship of homeland nationals living permanently in South Africa; making a distinction between homeland residents

and those to whom homeland citizenship had been ascribed previously¹²³. (Klaaren 2000:9) But the ANC insisted that all homeland citizens be part of the negotiations too. As a compromise, the governments of the TBVC states were included on the grounds that they would have to negotiate their return to a unified South Africa. Since the remaining “self-governing” homelands were under the sovereignty of the South African government, they did not require representation. But, to balance things out, leaders of the ruling political parties in those “self-governing territories” were invited to participate.

A similar balancing act took place for other parties. On the NP side, political parties from the Indian and Coloured houses of the Tricameral parliament were included. In balance, the ANC aligned Transvaal and Natal Indian Congresses were allowed. Both had refused to participate in Tricameral politics. Other political parties were included; the DP, then opposition in parliament, as well as the SACP and the IFP, both of which claimed national reach¹²⁴. The PAC withdrew from the first planning meeting and did not return until the Constitutional Assembly. The Conservative Party (CP), Herstigte Nasionale Party (HNP), Afrikaner Weerstandsbeweging (AWB) and the Azanian People’s Organisation (Azapo) were also invited. They all declined to participate in negotiations they believed had no standing¹²⁵.

Implicit in these decisions was some notion of what constituted a political entity. They were parties, administrations or groups that already had political control over the administration of a territory, or wanted to contest future elections and therefore participate in national government. Aside from these obviously political entities, other important interests were welcomed to Codesa’s plenary sessions as dignitaries or

observers from ‘interest groups.’ They were not, in other words, allowed to participate as negotiators. These included the Congress of South African Trade Unions (COSATU)¹²⁶, international and civil society organisations and religious groups. Traditional leaders as such, were understood by all participants except the IFP as an interest group, and some were invited to attend Codesa events as observers. In addition, many individual traditional leaders were present within delegations from the TVBC “states” or homeland parties.

Despite this early consensus on who could participate as a political entity, traditional leaders came to assert their right to participate as political negotiators as such. As a result they contributed to the framing of the new South African constitution. They were able to secure the recognition of traditional leadership in the constitution. The first question this raises is how hereditary traditional leaders were able to gain recognition as political entities and therefore legitimate participants in the negotiation processes leading to democracy.

a. A Place in the Negotiations?

From the first Codesa planning meeting in November 1991, Buthelezi as leader of the IFP requested that the Zulu King participate with a full delegation. The KwaZulu (KZ) government, also under the leadership of Buthelezi, also petitioned for representation. Since KwaZulu was not ‘independent,’ Buthelezi having refused independence, the self-governing government was not eligible for participation on the terms decided at the planning meeting. Since neither the King nor the KZ government met the criteria for participation, the IFP was asked to make a formal submission on the matter¹²⁷. At

the planning meeting just two days before Codesa began, the IFP repeated what was fast becoming a demand, particularly about the King's participation. The minutes note that the ANC suggested an alternative that was rejected by the IFP. And since no agreement was reached, it was decided to take it up again after Codesa I. As a result of this "slight" to "the Zulu people", as the IFP termed it, Buthelezi boycotted Codesa I, sending Frank Mdlalose to represent his party. In his opening speech Mdlalose complained that "the rejection of His Majesty the King of the Zulus by Codesa was indeed so very painful.... The Zulu Nation is excluded." And Buthelezi as "traditional Prime Minister to His Majesty" had no choice but to stand by him in his exclusion¹²⁸.

Buthelezi, pulling the strings of the king, the IFP and the KZ government, was a dangerous man to leave out of the negotiations. Given the spiralling violence across the Rand townships and Natal midlands, it became clear that the issue of the king's participation had the potential to seriously derail negotiations. And so on the second of February 1992, the Management Committee established a sub-committee to look into the matter. The terms of reference for the sub-committee were to "investigate and make recommendations" on the "participation of the Zulu king and other traditional leaders." The inclusion of 'other' traditional leaders was the result of an ANC intervention. The subcommittee was mandated to "ask experts and scholars to present on the matter," and to give attention to "pre-colonial states and governmental structures as well as historical, cultural and ethnic considerations and comparable institutions in Africa and elsewhere¹²⁹."

The sub-committee had four members. It was chaired by the Reverend T J Mohapi from QwaQwa's Dikwankwetla Party. Frank Mdlalose of the IFP was its second

member. N J Mahlangu was a representative of Intando Yesizwe Party from KwaNdebele. His namesake M J Mahlangu was the fourth, a delegate of the United People's Front from Lebowa. Homeland entities were to decide the future participation of traditional leaders. MJ Mahlangu, the committee member most sympathetic to the ANC, was not available for the first meeting. The rest of the committee invited IFP affiliate N M Melakane to participate in his stead.

On the fifth of February 1992 the subcommittee met for the first time, and sought, in just one meeting, to resolve the question once and for all. Its report outlined the procedure: the meeting discussed the principle of participation at Codesa and the application of the Zulu King and traditional leaders, taking note of "certain submissions ¹³⁰." Having discussed the matter, it came up with a simple recommendation: "Recognising that participation in Codesa is primarily the prerogative of political parties, administrations and organisations, but in view of the important role played by hereditary leaders in the country's past and present day, it is recommended to the management committee that ... hereditary leaders be allowed to participate fully in Codesa."

It was not a very strong motivation. Traditional leaders' "important role" hardly made that role political in nature. Business leaders, teachers, unionists, and church ministers arguably also play an important role, but that does not make them political representatives. Nonetheless, the sub-committee suggested full participation. On their recommendation, the Zulu King ought to have a full delegation, and so too should other traditional leaders. According to the subcommittee report, a senior hereditary leader should lead a full delegation from each self-governing and TBVC homeland

state. The makeup of these delegations, it suggested, should be determined by homeland administrations, once again putting the fate of traditional leaders in the hands of homeland leaders. The subcommittee recommended that traditional leaders should become part of the management committee and join the working groups as delegates with advisors. This would have doubled the size of Codesa. Showing its political colours, the subcommittee recommended that Contralesa not be represented as such. Instead, members of Contralesa could be included in regional delegations at the discretion of homeland administrations. They concluded that through this report it had “fulfilled its task.”¹³¹ All that remained was to process further applications in the same manner, that is, to accept a delegation from each region as a full participant.

The Subcommittee submitted its report to the Management Committee on the 10th of February. But it was far from happy with it¹³². It was clearly just a restatement of the IFP position that now also conceded participation to other traditional leaders. The management committee overruled the report and promptly redrafted the terms of reference for the sub-committee. Colin Elgin of the DA, Pravin Gordhan of the Transvaal-Natal Indian Congress, the Government’s G Viljoen and Z Titus, Transkei representative and chair of the Planning Committee, were asked to redraft the terms of reference over lunch. The new terms acknowledged that “it is accepted that all the people of South Africa ought to be accorded the right to contribute to the negotiating process of Codesa on a meaningful basis” and also that “Codesa is made up of political parties, political organisations and administrations.” A contingent of high powered delegates, mostly allied to the ANC, was added to the original four member sub-committee by the management committee. They included the SACP’s Joe Slovo, Colin Elgin of the liberal Democratic Party, TT Matanzima from the Transkei and the

ANC's Jacob Zuma. The new terms of reference committed this resuscitated sub-committee to report on the following: "2.1.1 Whether (a) the King of the Zulus, and (b) other traditional leaders should be given the opportunity of participating in the negotiating process of Codesa, and 2.1.2 if so, the appropriate form of such participation, including any other options within which they might be accorded an opportunity to participate on a meaningful basis¹³³." This committee was clearly looking to provide a ceremonial role for the Zulu King and other traditional leaders at Codesa, one that did not grant full political rights of deliberation and decision.

The first meeting of the newly enlarged Sub-Committee on the Participation of the Zulu King and Other Traditional Leaders on the 24th of February decided to slow the process down considerably. It invited submissions from the heads of all delegations, and also invited experts to make submissions. No longer would traditional and homeland leaders have the final word on the matter. Mostly black and a few white academics from law, history and anthropology were invited to address the committee on the background, legitimacy and future of the institution of traditional leadership. In addition both Gerrit Viljoen of the South African Government and Nelson Mandela were to be asked to give evidence. Mandela never did appear before the committee¹³⁴. The meeting also agreed to invite six traditional leaders from each region as well as a six member delegation from Contralesa to present their cases on the 18th and 19 of March 1992 in a closed hearing.

The submissions, expert reports and verbatim transcriptions of these two days constitute a fascinating archive. Above all they reveal a concerted effort by Zuma and Slovo to undermine IFP demands and to reformulate the possible recognition of

traditional leadership within a ceremonial register. Mahlangu who was to chair the hearings reported himself ill. Jacob Zuma took over that role, which gave him a great deal of leeway in its proceedings¹³⁵. As each delegation arrived, the terms of the committee were read out to them. They then had twenty minutes to make their presentations. In the discussion that followed, the Zuma-Slovo team presented the same three questions to all the delegations; experts, Contralesa and traditional leaders in homeland delegations.

The first question was whether traditional leaders are equal in status. Is the Zulu king the same as other traditional leaders or is there a national hierarchy of chiefs? This produced a fascinating oral history of chieftainship by many of the delegations, one that recounted colonial and apartheid interventions into the structures of traditional authority. For most who engaged in this discussion, the words were problematic. King, Paramount Chief, chief and headman were all colonial designations, sitting in awkward relation to vernacular terms¹³⁶. It also produced competition between the delegations, which was perhaps its objective. One after another the traditional leaders said that it probably did not make sense for senior traditional leaders to participate on political terms in the negotiations. But, they stressed, if the Zulu king were to be granted this role then they would insist on participating on the same terms. The experts on the other hand stressed the unique de facto power of the Zulu kingdom in comparison with other traditional formations.

For his second question, Zuma assumed the position of traditional insider seeking to protect the institution of traditional leadership from the denigrations of politics. Were traditional leaders not “above politics” he asked? This question was a direct jibe at

Buthelezi in his relationship to the Zulu king. The king had been left out of the earlier KwaZulu indaba because, as Buthelezi said at the time, the king should be above politics¹³⁷. There are different times in the struggle, Zuma continued;¹³⁸ a time when traditional leaders played their part, and then a time when modern political movement came about. “Now, should traditional leaders be engaged in this modern politics, particularly with commoners, or should they be able to keep distant – to keep their dignity away from the hurly burly of political negotiation?” The experts, in general did not agree with Zuma¹³⁹. But most traditional leaders did¹⁴⁰. They thought that chiefs should be “beyond reproach” and exercise a “divine responsibility of nation-building.” To do this they needed to be “mediators and not politicians¹⁴¹.” This was the logic for the view amongst most traditional leaders that they should not be full participants at Codesa¹⁴². Instead they could be advisors, or dignitaries and observers. It was only if the Zulu king was to participate that the rest would have to. Contralesa offered its own solution to this problem. It could represent the kings at Codesa “without having to have their Kings or Paramount Chiefs coming by themselves¹⁴³.”

If Zuma was playing good cop in this interrogation, Slovo the Marxist was doing the opposite. He spoke as an outsider to the traditional world in which Zuma was comfortable. He asked the third question, one that is absolutely central to modern political principles. Who, he asked, do you represent? And what, he asked, do you represent? The most common answer he received was that traditional leaders represent those who were not politically aligned; the old, the rural, the ignorant, the “silent rural majority” as the chiefs put it; those who turned to them rather than the political parties¹⁴⁴. There was an implicit threat to the political parties in many of their answers. We represent people who do not follow your politics. And, they implied, we

are in a position to block your campaigning in the areas over which we have control. In the first signs of tension between the ANC aligned traditional leaders and the ANC principles within the negotiations, the Transkei delegation made it clear that it was they rather than the ANC who were appropriate representatives of rural people. After pointing out that ‘national liberation movements’ have acknowledged that “there is a place for traditional leaders in this country...” they warned that “we have 90 percent following in rural areas. Political parties in rural areas have insignificant following, they shouldn’t deceive themselves.”

So much for whom, but “what do you represent”, they were asked. In one instance, Zuma asked chief Sefora of Contralesa this question. Like many other chiefs, he didn’t know how to answer this eminently political question. He said: “...federalism, confederalism, unitarianism – these are political concepts and have nothing to do with me as a traditional leader.” Eglin pushed further “But most decisions at Codesa are political?” Sefora’s colleague chief Rathogwa stepped in to help. “We would reach consensus, he said, rather than clash over political decisions¹⁴⁵.” Many of the chiefs asserted that they represented the institution of traditional authority itself, and the “issues of chieftainship”¹⁴⁶ rather than some territory or constituency.

Slovo suggested that their position was analogous to the participation of women. To the Transkei delegation he said “We have had the same problem with women who constitute 52 per cent of our population, who are very poorly represented at Codesa. ... And women, like your subjects, are people with many political allegiances.” And so we have to ask the same question to Transkei traditional leaders – which policy do you represent? Nonkonyana was not happy with the comparison.

“We are not like women or Cosatu”, he said, “because we were rulers before the colonists¹⁴⁷.”

It is clear that this line of questioning, like the one about being “above politics” sought to differentiate traditional and political roles. If it had been successful, this differentiation could have founded a separation between traditional and political authorities that would grant the former ceremonial roles that were not in competition with political parties or government.

On the whole, the traditional leaders did not answer these questions particularly convincingly. In fact, in many cases they failed to answer them at all. It was certainly not on the basis of persuasion that traditional leaders were to win their representation. And along the way, the hearings revealed the low levels of local power and legitimacy of many of the traditional leaders who presented. Many delegations bemoaned their loss of power, and spoke about people in rural areas who no longer acknowledged their authority or respected their role¹⁴⁸. This was sometimes coupled with the desire that participation in Codesa would lead to the redress and rebuilding of the institution, a way of claiming dignity back from the manipulations of the white rule and the disrespect of the youth.

The IFP did not make a submission to the sub-committee hearings. Instead, after all the delegations had presented, Mdlalose made some ‘remarks’ which should not, he suggested, lead to questions. He recounted repeated National Party assurances to Buthelezi that the Zulu king as well as the KwaZulu government would be able to

attend the negotiations. This was his understanding until the start of the Codesa preparatory meetings. They had been betrayed by the National Party.

The new sub-committee made some in-principle decisions on the 30th of March 1992. The first was that Codesa should be as inclusive as possible, and that the principle of participation “has widespread support.” A second was that the same principle should be applied equally to the Zulu King and other traditional leaders, thus resolving to the advantage of the ANC the question of the equality of traditional leaders, no matter what their historical trajectory. The meeting noted that the nature and form of participation was still under discussion¹⁴⁹. Still keeping things moving as slowly as possible, they gave themselves a month to report back to the Management Committee.

Conflicts over the relationships between the ANC, traditional leaders and homeland governments were by no means restricted to the issue of the Zulu king and the IFP. They also flared up in relation to the two other homelands that sought to avoid re-incorporation in a unified South Africa. The ANC and Contralesa accused both Bophuthatswana and the Ciskei of manipulating or excluding legitimate traditional leaders from these discussions about participation and fronting others who did not have popular support. When approached to constitute a delegation of traditional leaders, Bophuthatswana’s president Lucas Mangope sent a personal submission. Rather contentiously, the subcommittee agreed to accept it as “a reply from a traditional leader as President L M Mangope is himself a traditional leader¹⁵⁰.” But at the end of February, Codesa had received a letter from Samuel Morwagabusi II Mankuroane, who addressed himself as the ‘deposed Paramount Chief of the Batlhaping-Taung’, deposed, that is, by Lucas Mangope. He launched a scathing

attack on Mangope's failure to sign the declaration of intent, and his "suicidal" attempt to retain independence. He demanded that if traditional leaders were to be represented at Codesa, he should be the legitimate representative¹⁵¹.

There was a more dangerous tussle between the ANC and the Ciskei over paramount chief Sandile. In February 1992 the Ciskei delegation presented documents produced by the ANC's border region to Codesa's management committee. They laid a complaint that the ANC was trying to undermine the sovereignty and integrity of the Ciskei. And they were absolutely correct. The documents outlined the ANC branch strategy to "weaken [Brigadier] Gqozo's position at Codesa, isolate him politically ... bring about an interim administration in Ciskei, and consequently weaken South Africa's position at Codesa¹⁵²."

When the time came for the March sub-committee hearing about the participation of traditional leaders at Codesa, the Ciskei sent a delegation that excluded the paramount chief, king Sandile. The Ciskei also argued that the king was "above politics." But on the 18th of March the sub-committee read a letter of complaint sent by Sandile himself who arrived at Kempton Park to present his case. The sub-committee decided that Codesa was not mandated to solve this problem and that the best they could do was listen to and remunerate both Ciskei delegations. The official Ciskei delegation sought the full participation of traditional leaders at Codesa. Chief Sandile on the other hand, wanted kings to be able to observe proceedings only. He said that the committee should "regard the traditional leaders of South Africa as part of the broad liberatory and reform movements¹⁵³."

The ANC's involvement in affairs of traditional authority within the Ciskei continued after the hearing. On the 6th of April the ANC held what it called a People's Assembly in King Williams Town which, in a moot Codesa, passed a series of laws. One read as follows: "Law on harassment of traditional leaders: The People's Assembly, Noting the current harassment of traditional leaders in the Ciskei, and in particular the disgraceful treatment handed out to the paramount chief by the Ciskei Administration, And believing that the status of legitimate chiefs should not be undermined by the petty politics of an illegitimate Bantustan Administration, Therefore resolves to Censure the Ciskei Administration, And further resolves to reaffirm the status of the paramount chief and accord him all due respects as a traditional leader of the people¹⁵⁴ ..."

To return to the sub-committee meeting; on the 30th of March when the in-principle decisions were made, the IFP vented its frustrations in a submission to the Management Committee. Its submission was titled *The Removal of Some Major Obstacles to the Achievement of a Climate Conducive to Peaceful Negotiations*. Scattered with threats, the document refers to the "strong feelings" of Zulu people that they were being marginalised in the negotiations. As the document put it: "Why exclude the Zulu qua Zulu? ... Let His Majesty the King of the Zulus and the KwaZulu government take their seats at Codesa... If the demands for participation are not met without further ado ...the unfathomable repercussions is (sic) not only abhorrent but frightening."

Against the background of the bloodshed in Natal and the East Rand the IFP threat worked. It appears that the management committee meeting of the 27th of April was

the scene of trade-offs. Mdlalose announced that the IFP agreed to withdraw the application of the KZ government¹⁵⁵ to participate in the negotiations. On the same day the sub-committee finally made recommendations to the Management Committee. “Traditional leaders should have participation at Codesa, which should take the form of one delegation from each of the four provinces, consisting of 12 delegates and 5 advisors” each¹⁵⁶. But this may have been a pyrrhic victory for the IFP. The recommendations were not complete. They had yet to determine how the delegations were to be comprised, and Joe Slovo, attempting to buy time, wanted it recorded that no agreement could be reached before outstanding submissions had been reviewed. But this question was never answered as Codesa came to a fractious end at its second plenary in May 1992.

Codesa was in ruins. The ANC turned to mass action and attempted to undermine the COSAG aligned homeland leaders. Two of this period’s most bloody confrontations have already been mentioned. IFP aligned hostel dwellers massacred township residents in Boipathong, and the ANC led a march it hoped would lead to revolution in the Ciskei. Instead, the Ciskei security forces opened fire on ANC marchers. The ANC and the National Party were at loggerheads as the ANC accused the NP of backing IFP violence and refusing to allow policing mechanisms to intervene. They were proved correct when evidence of government funding to the IFP became public. Never before had the situation seemed so bleak, and so likely to degenerate into open civil war.

This period also marks a change in the ANC’s official position on traditional leadership. At the end of May 1992 the ANC held its first National Conference on

South African soil since it's unbanning. At this conference the decision to turn to mass action was made. The conference also published a record of its decisions titled *ANC Policy Guidelines for a Democratic South Africa*¹⁵⁷. Under pressure from Mandela and Contralesa members within the ANC, this document concedes that “the institution of chieftainship has played an important role in the history of our country and chiefs will continue to have an important role to play.” This is the first official recognition of the future of the institution of traditional leadership by the ANC. It notes that the powers of the chiefs will be subject to the constitution. But it does provide for “an appropriate structure consisting of traditional leaders to be created by law, in order to advise parliament – on matters relevant to customary law and other matters relating to the powers and functions of chiefs.” It also promised that changes to the functions of chiefs would only take place after consultation with them. When actual functions of traditional leadership were mentioned however, they are delegated, advisory and ceremonial. Later the same document lists traditional leaders amongst members of civil society along with civic associations, trade unions, religious groups and women's groups. To the traditional leaders of Codesa, the ANC made it clear that “the price of this accommodation was that chieftaincy had to be ‘transformed’ so as to make it consistent with the new democratic political order.”(Williams 2009:191)

b. Chiefs’ participation in the Multi Party Negotiation Process

As an olive branch to the IFP and in line with new ANC policy, four full provincial delegations of traditional leaders were invited to participate in the MPNP when negotiations resumed. The earlier ANC strategy to recognise traditional leaders “ceremonially” and “above politics” had failed.

i. The Ironies of Participation

The composition of the delegations was problematic from the start. Each of the four provinces included a mix of “independent” and self-governing homelands; some for and some against re-incorporation; some allied to the IFP and others to the ANC. The Cape delegation included the Transkei and Ciskei. Traditional leaders from Bophuthatswana and Venda were to share a delegation, but the former refused to send delegates¹⁵⁸. Two “delegation leaders” from the Free State province showed up at the first meeting of the Negotiating Council¹⁵⁹. Transvaal complained that there were more than six homelands in the area, and five representatives couldn’t cover them¹⁶⁰. Conralesa which was furious at the ANC’s failure to champion its position, continued to demand independent representation¹⁶¹. It wasn’t clear whether the Natal delegation represented traditional leaders, or “His Majesty’s KwaZulu government.” The KZ government had not been invited to participate at the MPNP, but it insisted that it was present in the place of the traditional leader delegation¹⁶². Bantu Holomisa then wrote to complain that if the KwaZulu administration was to be represented, then so too should all the other self-governing territories¹⁶³. It looked as though the whole question was going to be opened up again.

But when the 1994 election date was announced on the 15th of June 1993, COSAG staged a symbolic walk-out. Unable to reverse the decision¹⁶⁴ the IFP, the KZ government and the Conservative Party withdrew from negotiations. The Natal delegation left and Conralesa aligned chiefs gained the upper hand within the remaining delegations. Before long the traditional leaders from the Cape, Transvaal

and the Orange Free State were working together for the extended recognition of traditional leadership and customary law as such.

This is the irony of the negotiations around the place of traditional authority. The IFP put the issue on the table through its demands for the representation of the Zulu king. Its power, popularity and the violence of its secessionist demands provided momentum for issues of tradition in the negotiations. But with the IFP's withdrawal from the MPNP negotiations, it was the ANC allied traditional leaders, brought into place to counteract the strength of the IFP, who actually articulated the needs of the institution of traditional leadership. They made two demands. The first was a right to customary law under the control of traditional leaders, immune from the equality clause. The second was for the inclusion of traditional leadership in the structures and institutions of the state. In both cases they had the support of the National Party and the delegation of the government of South Africa. Traditional leaders sought a permanent place in the future South African state. And despite their political alliance with the ANC, traditional leaders made demands that the ANC was unwilling to concede. And so they drew closer to the IFP.

ii. Traditional communities, customary law and gender

On the 21st of July 1993, the Negotiating Council debated the first full draft of the bill of rights. Chief Mwelo Nonkonyana from the Cape delegation asked why it included no mention of indigenous law¹⁶⁵. The ANC immediately pointed out that this was only a transitional Bill, and that his concerns were covered under the rights to language and culture. The chair ruled an end to the debate. But it was re-opened almost immediately when a Technical Committee member took the Council through

the proposed equality clause. Nonkonyana then raised a problem with equality, particularly as it related to gender¹⁶⁶. “As you know” he said, “we Traditional Leaders we have about five wives or ten or whatever.¹⁶⁷” But women under customary law have different status depending on their order of marriage. They are “equal as women, however in terms of our culture, they are not [equal].” He wanted this arrangement “catered for.” “We don’t want a situation”, he said, “where we can be challenged even by everybody and then the institution [of traditional leadership] will be gone, all our culture would be gone...”

The meeting erupted in complaint. But from that point on, Nonkonyana commented on most clauses. Under “detention” he pointed out that “traditional communities” don’t detain people; and suggested that there should be provision for customary courts. Under “property” he raised the issue of communal land ownership and tenure. At the suggestion of the chair, the Cape Traditional Leaders went away and made a formal submission on all these matters¹⁶⁸. Their submission contained a general argument for the validity of indigenous law and the systems and precedent “retained in the memories of traditional leaders and their councillors, their sons and their grandsons.” It conceded the need for political rights for women, and also that customary law would need to be codified again. But they were adamantly against gender equality in the social life of “their communities.”

When the next report came before the Negotiating Council on the 30th of July, Nonkonyana noted that their submission had not been taken into account. He immediately made it clear that, in the view of traditional leaders, the equality principle should not apply to customary law. The meeting was extremely fractious.

Nonkonyana pointed out the contradiction between a right that recognises culture, and a set of legal principles that would subordinate that culture to equality and other measures. As Nonkonyana said on behalf of the traditional leaders; “Chairperson, I think it insults our understanding.” We are objecting, he said, “that only one set of fundamental human rights shall be applicable to all, even ourselves.”

Clearly there was a growing issue. (du Plessis 1994) In response the Planning Committee set up an ad-hoc committee for TC4 to help deal with some of its difficult debates, including this one and the question of property rights. Where technical committees were comprised of lawyers and other experts, ad-hoc committees were made up of political negotiators in senior enough positions to trade concessions on behalf of their parties. This ad-hoc committee was convened by Shiela Camerer on behalf of the South African government, and included SACP lawyer Halton Cheadle, Tony Leon of the Democratic Party and Penuel Maduna for the ANC. (Spitz and Chaskalson 2000:257) On the second of August, the Negotiating Council agreed that the ad-hoc committee be expanded to include a traditional leader. Chief Gwadiso, also from the Cape delegation, was allocated that role by traditional leaders at MPNP¹⁶⁹.

At the same Negotiating Council meeting the Cape Traditional Leaders, with the support of the government,¹⁷⁰ suggested a new clause for the bill of rights. It read: “Every traditional community shall have the right to exist as such and to maintain and develop its distinct cultural characteristic and identify and define its culture as a right. Every traditional community shall have the right to have its rules and customs accepted as binding by such communities. Membership of Traditional Communities

shall be based on voluntary association provided that the authority of the Traditional Leader there, its own tradition and culture, is not undermined¹⁷¹.”

The generally modernist and liberal technical committee was alarmed by this addition, but they were not strong enough to stop it in its tracks. The Planning Committee agreed to call in a series of experts who were asked how the equality clause would impact on customary law. But the expert reports were widely divergent, and when the ad-hoc and TC met together at the end of August, it seemed impossible to draft a compromise. The discussion was going nowhere until the fifth and until then quiet member of TC4, Sibongile Nene, intervened. Pointing out that this was a political rather than a legal question, she noted that rural constituencies and particularly women living under traditional authority had yet to be consulted. If traditional leadership really was as democratic as the chiefs were claiming, they should consult with their constituencies, including women. She was critical of the proposal to apply customary law on a voluntary basis or through freedom of association. Women who chose not to comply with customary law were likely to be discriminated against by their families she said, and it is these women that a bill of rights ought to protect. Given that widespread independent consultation with women in rural communities was unlikely to happen to anybody’s satisfaction in the following few months, she proposed a “sunset clause” for customary law.

The ad-hoc committee thought this might provide a way out of the impasse. Customary law was important, they noted, and fundamental human rights would have an effect on it. It was therefore necessary to create opportunities for consultation on this matter. To allow this to happen, the constitution would be written to provide a

limited or conditional exemption to the equality clause. The suggested period was two years from the signing of the final constitution¹⁷². They proposed a series of conditions for the exemption: If there was an inconsistency, equality would prevail in law. If a rule was in place, it would stay in place until replaced by new legislation. Wherever possible, room would be made for “free choice” in the application of customary law. And when the time of exemption was over, the equality provision would apply in full. The technical committee wrote up the agreed principles as a formulation on customary law for discussion at a joint meeting on the 8th of September. The minutes note that “The Ad-hoc Committee recorded that their initial impression of this formulation was favourable.” Chief Gwadiso stated that this formulation was also acceptable in principle, but that he wanted an opportunity to consult....¹⁷³

News of the clause quickly spread beyond the confines of the MPNP and led to the first significant civil society mobilisation around a right in the draft constitution. Women’s groups were extremely critical of the proposal, and many women delegates, particularly from the ANC and its allies, began to mobilise civil society against this clause. Literally hundreds of letters began pouring in to the MPNP, and women’s organisations lobbied political parties.

Clearly the other traditional leaders were also not happy with the proposal. When Gwadiso came back from his consultations on the 14th of September 1993, he objected to the wording of the entire clause, but particularly the voluntary provision¹⁷⁴. If people didn’t like a chief’s authority, he said, they would have to go and live somewhere else. But the ad-hoc committee argued him down, and an amended

proposal was drafted and included in the 10th report of TC4 on the 5th of October. For the first time, Customary Law was included as a right in the bill of rights. In a Negotiating Council debate two days later, the technical committee noted that this was a compromise that had been agreed, it said, by the ad-hoc committee. Usually when something was agreed by an ad-hoc committee, it had sufficient weight to pass through the Negotiating Council unchallenged.

But when this clause came up for ratification at the Council, chief Gwadiso stood up and, apologising for his last minute intervention, handed out a new proposal from traditional leaders. Chief Netshumbupfe, legal advisor to the Transvaal delegation of traditional leaders, then stood up to present the proposal. Its contents went much further than the sunset clause. He wanted nothing short of full legal pluralism; two ways of life and laws, territorially separated, and where neither civil law nor the constitution would have the right to intervene in customary law. The customary law clause, he said should be linked to the right to 'Language and Culture' rather than 'Freedom of Association'. In this way, submission to customary law would be involuntary and entirely under the control of chiefs.

When they next met, the ad-hoc committee "expressed [their] displeasure" at Gwadiso's behaviour¹⁷⁵. But again they negotiated a compromise with him. But Gwadiso was unavailable for the subsequent ad-hoc committee on the 2nd of November. There, in his absence, all the members of the ad-hoc committee except Camerer agreed that this clause did not belong in a bill of rights, and that if it needed to exist, it should go somewhere else in the constitution. If dropped, a simple addition could be made to the "access to justice" right. It would state that, within the

provisions of the bill of rights, parties to a dispute could “agree to the application of a system of customary law.” This phrase would make sure customary law was only applied on a voluntary basis, and under the authority of the civil courts and not traditional leaders.

Gwadiso returned to the 8th of November meeting where he and Camerer both objected to the suggested deletion of the clause. The other parties to the ad-hoc committee noted “that they were under extreme pressure from women’s groups regarding the whole issue of customary law¹⁷⁶” and agreed to refer the matter to the Negotiating Council for a decision. The minutes of the Negotiating Council meeting on the 16th of November 1993, just one day before the Interim Constitution was finalised, records the following: “Discussion and debate proceeded around whether Clause 32 [Customary Law] should be included in the bill of rights.... The proposal was put to the meeting after which the chairperson ... ruled that there was neither consensus nor sufficient consensus and therefore the proposal stood down¹⁷⁷.” The chiefs overplayed their hand. Having demanded more and more from the clause, they eventually failed to secure a right to customary law under their control.

iii. Traditional Leadership in the Constitutional Principles

Early in the negotiations the ANC and NP reached a bilateral decision that during a period of interim arrangements, the parties would negotiate principles on the basis of which a final constitution could be drafted. Codesa went some way towards developing these principles but no firm decisions were made there. The 26th of September 1991 Record of Understanding laid the ground for the resumption of multiparty talks, and it also included a commitment to “principles of an interim

government and an interim constitution”, as well as to drafting a constitution “based on principles agreed in prior multi-party negotiations.” (Barnes and De Klerk 2002:2) The IFP also endorsed the use of constitutional principles, and tried to use them to secure federal principles and interpretations.¹⁷⁸

The MPNP was therefore responsible for drafting both an interim constitution and the constitutional principles in terms of which the final constitution was to be written. The constitutional committee of the MPNP acknowledged their political importance. They were to be used to “give direction and security to all relevant interests,¹⁷⁹” particularly “with regard to future opportunities for political participation and other basic concerns¹⁸⁰...” The MPNP spent three months listing, drafting and refining proposed principles and taking them to the Negotiating Council for decision. On the second of July 1993¹⁸¹, the Negotiating Council adopted the constitutional principles.

As of April 1994, the Interim Constitution entrenched 34 principles. The first ten provided for democratic constitutional government, regular elections, universal suffrage, a common voters role and proportional representation. They guaranteed basic human rights and equality before the law, and a constitutional basis for affirmative action. Constitutional Principles XI onwards are what Gloppen calls “concessions to consociationalism.” (1997) They promised the participation of minority political parties in the state, special majorities for constitutional amendments, protections for the diversity of language and culture, collective rights of self-determination, and the recognition of traditional leadership and indigenous and common law. They also guaranteed strong provincial or regional structures and powers with a degree of autonomy and local democratic election processes. (1997:202)

Throughout the remainder of the negotiations, parties formulated their claims in the language of these non-negotiable principles, restricting or expanding their interpretation towards their interests.

For the purposes of this chapter it is worth examining the two Constitutional Principles that deal specifically with traditional leadership and customary law. The first MPNP version of the principles included one which “recognised traditional leaders ... in an appropriate manner in the Constitution” and made provision for the application of indigenous law “to the extent it is compatible with the provisions of the fundamental rights contained in the constitution¹⁸².” The IFP was still at the negotiations at the time and supported this provision. It met resistance from the ANC and its allies though, and it was only by “sufficient consensus” that the Planning Committee was asked to look at its implementation¹⁸³. An alternative wording was also suggested: “The traditional leaders will be directly represented in the constitution-making body and at all levels of government.” This was not accepted.

The Technical Committee on Constitutional Issues produced a *Supplementary Report* dealing with customary law, its history, rationale and the effects that economic and political change have had on it. Where such law is recognised in international law, it noted, it is usually made consistent with fundamental human rights. “Where a society is in fact culturally plural as in South Africa” the report continued, “the recognition of indigenous law gives effect to the accepted constitutional principle acknowledging cultural diversity¹⁸⁴.” The technical committee envisaged a situation in which a hybrid of customary and civil law could be developed, mostly at regional level. They suggested a new formulation for the Constitutional Principle: “The status of

traditional leaders shall be recognised in the constitution. The constitution shall provide for the recognition of indigenous law and its application by the courts. Indigenous law shall be applied subject to the provisions of the fundamental rights contained in the constitution” and perhaps also “to legislation dealing specifically therewith.” This report elicited a lengthy debate on the 18th of June¹⁸⁵. The same arguments were made a week later, also without resolution.

In the mean time, the draft 16th principle read “At each level of government there shall be democratic representation.” To take the traditional leader clause into account, a suggestion was made that to this should be added “with appropriate provisions for Traditional Leaders at each level where applicable¹⁸⁶.” These two matters were resolved in tense bilaterals “over lunch” of the day before the CPs were finalised¹⁸⁷. Two clauses were agreed to: “2.12 The institution, status and role of Traditional Leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts subject to the provisions of the fundamental rights contained in the constitution and to legislation dealing specifically therewith.” Constitutional principle 2.17 reads: “At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of principle 2.12¹⁸⁸” These two principles then became entrenched.

iv. A Place for chiefs in the post-apartheid state?

With its work on the constitutional principles complete, the Technical Committee on Constitutional Issues was responsible for drafting the sections on Parliament, the Provinces¹⁸⁹ and Local Government. Its initial report was debated on the 28th July

1993. There, in their first coordinated action after the departure of their COSAG members, the traditional leaders noted that there was no provision for traditional leaders in the national legislature, constitution-making body or provincial or local government levels of the state in the report.

The Technical Committee was requested to “consider and address this sensitive issue¹⁹⁰.” In the next report, there was still no provision for traditional leaders. The reason, they said, was that the constitutional principles “require legislative structures at all levels to be democratic.” Where the non-derogation was provided for, they suggested, this was only relevant to the role of traditional leaders in local government, a section not yet completed by the Technical Committee¹⁹¹.

But the traditional leaders did not take the non-derogation to apply only to local government, and it was not stated in that way in the text of the principle. On the 13th of August, the MPNP received a substantial 23 page submission titled a *Joint Position Paper Concerning [the] Role of Traditional Leaders*¹⁹². It was signed by all three traditional leader delegations at the negotiations; Cape, OFS and Transvaal. Their submission argued that traditional leadership is itself a democratic institution; that each level of government should have democratic representation; and that provision has been made for traditional leadership. Therefore it said, “provision should be made for effective participation of traditional leaders in every level of government.”

The *Joint Position Paper* outlined their concrete proposals: They should participate in the Transitional Executive Council (TEC), which, like traditional leadership is “above party politics.” There, a special sub-council should be established to protect their

interests in the transition. It should provide for chiefs' "conditions of service" and monitor measures, legislative or executive, which "may affect traditional leader's powers during the transition" and, amongst other things, "ensure that traditional leaders are not under the control of existing administrations." An "effective role" for traditional leaders should be provided for in the interim constitution they said. Locally, their role should be to "regulate and control relationships and social behaviour within a traditional community" rather than provide services. They suggested the continuity and establishment of further Traditional Authorities, those apartheid territorial and administrative structures for chiefly rule created in terms of the 1951 Bantu Authorities Act. They should be composed of traditional leaders as well as "democratically elected traditional councils" to administer the affairs of people. A long list of tasks was proposed for these Traditional Authorities including land administration, the administration of justice, local policing, health services, and soil conservation. Traditional leaders that head up Traditional Authorities should then be represented in district councils which should be responsible for the provision of services. There should also be a King's Council, and the king should "be entitled, in due fulfilment of his functions, to the loyalty, respect, support and obedience of every resident of the area for which he has jurisdiction." He should maintain law and order in the area and have powers of arrest, search and seizure, secure the safety of travellers, deal with "any pretend witchcraft or divination," prevent the gathering of men in times of lawlessness, and detain and impound livestock. Regionally, Traditional Authorities should have the responsibility of nation-building and have significant legislative powers. Strictly speaking, a new South Africa should be "a united kingdom" and traditional leaders of the country should "oversee the fairly new process of the adoption of democracy." For this, a national house of traditional leaders

should be established. These demands outlined a continuation and extension of chiefly power on the basis of the consolidation of apartheid structures of rule.

After the IFP left the negotiations, the remaining traditional leaders made a point of the damage they could do if their demands were not met, and also implied for the first time that they had the IFP's support. In fact many of the demands listed in the *Joint Position Paper* were inspired by earlier IFP demands. The document was littered with threats: they could mobilise traditional communities against political parties, they could refuse to allow political parties to canvass in their areas, and they could disrupt local government events and services.

The traditional leaders took these proposals to a meeting with the Planning Committee on the 5th of October 1993. But the Committee's members were evidently unfamiliar with the workings of rural governance, and could not clearly understand what the traditional leaders were demanding, particularly with respect to Traditional Authorities. They convened an ad-hoc committee which included Stella Sigcau, Colin Eglin, Netshimbumpfe and Nonkonyana under the chair of Z Titus, chair of the Planning Committee. Titus worked hard between the 5th and 20th of October to take the proposals and break them down into what was constitutionally relevant and not, and to clarify which demands were for the retention of current roles of traditional leadership and which would involve their extension.

In the meantime, the competencies of national and regional government came before the council. Spitz and Chaskalson argue that, after the customary law clause was dropped from the bill of rights, indigenous and customary law were added to the areas

of provincial competence. It was, they suggest, “a deliberate decision by the ANC to induce Inkatha to enter elections”. (2000:159)

The following week, Titus reported on “informal discussions” between himself, Sigcau, Nonkonyana and Netshimbupfe that produced a discussion document. In it, all the demands about non-statutory bodies such as *imbizo*’s and King’s Councils were dropped. Traditional Authorities already existed in law, and as Titus said, “there is no threat at this stage that bodies similar to these may be disbanded¹⁹³.” And it was too early to discuss District Councils¹⁹⁴. That left the issues of national and regional representation. The latter was particularly difficult: should bodies of traditional leaders have veto rights over legislation and be part of the legislation making process? Alternatively, should they have the lesser advisory function that could also delay legislation that pertained to issues of traditional authority? After more informal meetings, a deal was brokered between the four, resulting in a final report on the 20th of October. It suggested that from that point on, traditional councils should be democratically elected, a major concession to the ANC; that traditional leaders be represented at district councils; that regional houses have full legislative powers on matters pertaining to traditional leadership, Traditional Authorities, and customary law, and that the national house should have the same general powers¹⁹⁵. The next day, the group clarified that if regional and national houses were unacceptable, traditional leaders should occupy 40 percent of seats of regional legislatures and an additional 30 percent of senate or parliamentary seats¹⁹⁶.

It looked as though traditional leaders might become part of all governance structures; a massive extension of their powers. The first debate of this in the Negotiating

Council was inconclusive¹⁹⁷. But the following one was positively fractious. The minutes of the meeting of the 2nd of November note that “notwithstanding the apparent agreement,” traditional leaders were still in disagreement about the regional and national powers they proposed, and so too were the parties. It was agreed that further bilateral meetings were necessary. On that 8th of November meeting the Council made it very clear that Traditional Authorities should not constitute or be construed to mean local government. The national and regional houses remained contested too¹⁹⁸. The council was given until the 11th of November to come up with a solution.

After a rush of bilaterals facilitated by Titus, the Negotiating Council passed Resolution 34 on the 11th of November.¹⁹⁹ Under its terms all matters relating to customary law would be dealt with by statute. Traditional Authorities would continue to exist and exercise their functions “in terms of indigenous law.” There would be elected local government with political responsibility for service provision, and hereditary leaders in the area would be ex-officio members of local government. The chair of the local government would be elected from the local government council. A regional house of traditional leaders could be established in those provinces with existing chiefs, to which all legislation pertaining to traditional leaders and indigenous law must be referred for consideration and comment. But its highest power would only be to delay legislation for 30 days. A national Council of Traditional Leaders of not more than 20 people could be established from representatives of regional houses. Again relevant legislation should be passed to them for comment, but they too could not delay legislation through the national assembly. It would be an advisory body, from which “The State President may seek ... advice on matters of National Interest.”

A week later when the interim constitution was finalised, a new Traditional Authorities chapter was included to reflect the resolution. It is included in full in Appendix Two.

The interim constitution may have been finalised at that point, but despite the many concessions to provincial government and traditional leadership in its text, the main parties to violence remained outside the negotiating process and in opposition to the elections. The leaders of Bophuthatswana and the Ciskei prepared to defend their independence with the help of the white right. The tale of their eventual capitulation was told in the last chapter. KZN remained a stumbling block to territorial unification.

The ANC and National Party made a series of pre-emptive concessions to the IFP's demands to draw Buthelezi as well as parties of the secessionist white right into the elections and move the country away from civil war. They voluntarily strengthened the federal sections of the interim constitution as an incentive for the IFP and the white right to participate in the elections. They introduced a double ballot, provinces were assigned areas of exclusive power, and a new clause was written to allow for a statutory vehicle for the possible establishment of a Volkstaat. They also wrote a new constitutional principle guaranteeing "self-determination" by a cultural community. (Elazar 1994) Together these brought the Freedom Front into the elections and split the Conservative Party.

The ANC and NP also jointly sponsored a new piece of legislation that marked the National Party stepping down from its earlier alliance with the IFP and other homelands. The 1993 Restoration and Extension of South African Citizenship Act²⁰⁰

restored South African citizenship to those who had been denied it by the granting of homeland independence. It also gave citizenship to children born of parents who had only ever had homeland citizenship. (Klaaren 2000:11) This piece of legislation removed some of the spoiling power of homeland leaders, since their citizens could vote independently of their wishes. It also provided an administrative structure for TBVC residents to participate in the April 1994 elections. But this legislative change did not prevent the IFP from hampering the work of the Independent Electoral Commission in homeland territory.

The ANC also approached the Zulu king with an agreement that promised significant concessions directly to the king rather than through the IFP. These included allowing the Royal House to appoint its own advisors and install all chiefs in KwaZulu Natal. (Klopper 1996:55) Such an agreement would have seriously undermined Buthelezi's control over symbols of royalty as well as the clientalist relationships he had established with chiefs in the homeland. The threat of this agreement most likely played a big part in Buthelezi's decision to enter the elections.

In a dramatic last minute agreement with Buthelezi a Memorandum of Agreement was signed by Buthelezi, Mandela and de Klerk on the 19th of April 1994. It included the following: "The undersigned parties agree to recognise and protect the institution, status and role of the constitutional position of the King of the Zulus and the Kingdom of KwaZulu, which institutions shall be provided for in the Provincial Constitution of KwaZulu/Natal immediately after the holding of the said elections...." And "Any outstanding issues in respect of the King of the Zulus and the 1993 Constitution as

amended will be addressed by way of international mediation which will commence as soon as possible after the said elections²⁰¹.”

A week later on the 27th of April 1994 South Africa held its first democratic national elections. They were peaceful, and covered the whole population and territory of the country including all the former homelands. They also included parties from across the political spectrum, an extraordinary feat of political leadership and conciliation considering the previous year’s violence.

c. Limiting the place of traditional leaders under democracy?

Only political parties that were elected in April 1994 were represented in the Constitutional Assembly. Gone were the delegations of chiefs. The ANC dominated the Constitutional Assembly with its nearly sixty-three percent majority. The NP had twenty percent and the IFP just ten per cent. Nelson Mandela was inaugurated as South Africa’s first black President and he appointed de Klerk and Buthelezi as deputy presidents in his Government of National Unity. In the newly established province of KwaZulu-Natal, the ANC was unable to secure a majority and install Jacob Zuma as its Premier as it had hoped. Instead, the IFP got a little over 50 per cent of the provincial votes, while the ANC garnered 32 per cent. (Muriaas 2002:93)

With a significant majority at the Constitutional Assembly, one might expect that the ANC might have tried to reduce the place and entitlements of traditional leaders. They did, but their attempts were not terribly successful. Peace between the ANC and the IFP was short lived. The promised international mediation didn’t materialise because

the ANC kept stalling. The KwaZulu-Natal government rushed to write a provincial constitution, hoping that it would supersede the national one. But the text was “unceremoniously thrown out” by the Constitutional Court²⁰². (Spitz and Chaskalson 2000:162) The court’s main reason was that the draft provincial constitution allowed for “traditional authorities in some places to substitute for democratically elected local governments.” (Goodenough 2002:29) In frustration the IFP withdrew from negotiations once again, even as it continued to govern KwaZulu-Natal and participate in Parliament. Buthelezi retained his deputy-presidency.

The ANC could not risk threatening the return of secessionist politics. There was another factor at play too. The first local government elections were due to take place in 1995. The ANC was absolutely clear that it wanted local government to be elected. Its *Building a United Nation* document includes the following: “The ANC insists that local government should be democratically constituted and function in accordance with democratic principles. Traditional leaders may and should participate in local government, subject to the principle of democratic and accountable local government²⁰³.” Despite the ANC’s political dominance and the fact that for the first time it had executive control over the instruments of the state, traditional leaders were in a position to postpone those elections at local level. They held the elections to ransom, and local government elections were postponed three times. Traditional leaders were concerned that proposed municipal boundaries would cut across the demarcation of Traditional Authorities, which, the chiefs argued, would cause them to “lose control over various functions which they had traditionally performed.” (Muriaas 2002:121)

A press release from Contralesa in March 1995 makes their threats explicit. The “current process of registering voters is only possible if clarity is reached on the role and function in local government.” Signed by Patekile Holomisa, it goes further: “the constitution must acknowledge and protect the status of Traditional Authorities as fully fledged local government in rural areas” headed by chiefs. Furthermore, “Provision should ... be made for traditional leaders to become more involved in the current negotiations, the development of a new constitution, participating in the formulation of policy options, especially regarding the social and economic restructuring of South Africa, and the implementation of RDP and other policy measures²⁰⁴.” The memorandum made their fears equally clear: “Theoretically speaking, it is possible in our areas that any political party including those that are opposed in principle to our institution and those who took our land may win the elections and introduce policies designed to destroy our institution²⁰⁵.”

The ANC won this battle in so far as there is no mention of traditional leaders in the Local Government chapter of the final constitution. But by the time the local government elections finally took place nearly two years later, traditional leaders had secured a more beneficial place for their institution in local government. The ANC also tried but failed to take the administration of traditional leadership away from the provinces, particularly KwaZulu-Natal. In 1995, the Payment of Traditional Leaders Bill was brought before Parliament. It “sought to abolish provincial control over payment” and nationalise it. (Goodenough 2002:19) The Bill was contested in the courts by Buthelezi. In 1996 the Constitutional Court ruled that KZN was in its rights to pass legislation to the effect that the province would have the sole power to pay traditional leaders²⁰⁶.

The ANC's last attempts to reduce provincial control of traditional leadership under the Constitution came to nothing when the Constitutional Court refused to certify the draft final text on a number of grounds, amongst which was the diminution of regional powers in comparison with the Constitutional Principles. The draft final constitution had included "the ability of the National Assembly to override provincial legislation" which was, the Constitutional Court ruled, "at the expense of Provincial Powers." Weaker provincial powers with respect to police, local government and traditional leaders meant that the draft final Constitution did not meet Constitutional Principles 17 and 18(2)²⁰⁷.

In the end, Contralesa filed "objections to certification of [the] constitutional text"²⁰⁸ despite pressure from its ANC leadership. Patekile Holomisa was brought in front of an ANC disciplinary hearing for "bringing the ANC into disrepute" for his Contralesa activities. Bantu Holomisa was later expelled from the ANC in 1996 after testifying before the Truth and Reconciliation Commission. He was a Deputy Minister in Mandela's cabinet, member of the ANC's National Executive Committee (NEC) and 14th on the electoral lists. After his departure he formed the United Democratic Movement (UDM) in 1997, in part on a platform of mobilising chiefs and rural constituencies. Although he did not become a national player, the UDM secured nearly 13 percent of votes in the Eastern Cape in the 1999 elections. (Muriaas 2002) And despite last minute attempts to get the IFP back into the Constitutional Assembly the IFP refused to endorse the final Constitution.

d. Ambiguous constitutional entitlements

The final 1996 constitution attempts to frame the place of traditional leadership and customary law into post-apartheid South Africa. Appendix Two includes the relevant sections of the constitution in full. The next chapter will engage with some of the consequences of its provisions. For now the task is simply to describe them and point out some of their ambiguities, elisions and incompleteness.

Sections affecting traditional leadership and customary law are scattered across the constitution. The most important are contained in chapter twelve, which deals with the recognition and role of traditional leaders. Section 211(1), provides that the “institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.” Section 211(2) states that “a traditional authority that observes a system of customary law may function subject to any applicable legislation and customs....” Section 211(3) states that “The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law...”

Clearly it is the constitution itself that provides the legal foundation for the legitimacy of traditional leadership after apartheid. But paradoxically, the constitutional text asserts that the institution, status and role of traditional leadership are recognised according to customary law. Nowhere are the contours or limits of that recognition specified. The section on the role of traditional leaders is similarly unspecified and open-ended. The first provision, 212(1), states that “National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting

local communities.” This is an enabling provision, and does not by itself confer any entitlement. It is followed by a further enabling section providing for future legislation. Section 212(2) provides that “To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law” new legislation may be developed. This new provincial and national legislation may, it says, provide for the establishment of provincial houses of traditional leaders (section 212(2)(a)) and a national council of traditional leaders (section 212(2)(b)).

Other sections of the constitution build on or supplement this main chapter, and deal with traditional courts, the relationship between traditional leaders and territorial and local administration, and customary law and rights. But the agreements of chapter twelve are not integrated with the remainder of the constitution’s entitlements. Chapter eight deals with courts and the administration of justice, but it makes no direct reference to tribal, customary or chiefs’ courts. It merely mentions in section 166(e) “any other court established or recognised in terms of an Act of Parliament...” The constitution does not, in other words, explicitly recognise traditional courts as such. Nonetheless at the end of the constitutional text, Schedule Six provides for transitional arrangements. Its section 16 provides that “Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold such office....” The constitution, in other words, leaves unresolved the future place and nature of customary courts. It makes room for their continuation, but without constitutional or legislative support.

A similar disjuncture is to be found in sections that affect traditional leaders' roles within local governance and administrative structures. They are found in three areas of the constitution. As already mentioned, chapter twelve recognises existing Traditional Authorities subject to both legislation and custom, and provides that future national legislation may provide for a role for them as institutions at a local level. But this is their only specific mention in the constitution, which leaves this entitlement without provincial or local legislative support. Chapter Six concerns itself with Provinces and their competencies. Provincial legislatures are conferred with the power to pass legislation as set out in various schedules. Schedule Four deals with areas of concurrent national and provincial legislative competence, and these include "cultural matters," as well as "indigenous law and customary law subject to Chapter 12" and "traditional leadership subject to Chapter 12 of the Constitution." Schedule Five deals with areas of exclusive provincial legislative competence, which includes "provincial cultural matters." In addition, there is a provision in section 143 for provinces to write constitutions which "must not be inconsistent with" the national constitution. The section also provides that provincial constitutions may provide for 143(1)(b) "the institution, role, authority and status of a traditional monarch, where applicable." The Provinces chapter does not, in other words, grant or confer any specific powers to traditional leaders, it does not specify anything about provincial roles and governance except to say that legislation may be developed. The section on the recognition of a traditional monarch is clearly a reference to KwaZulu-Natal, but one that does not specify any powers or roles for such a monarch. As already mentioned, KZN did produce such a constitution, but it was thrown out by the Constitutional Court for, amongst other things, inflating the role of traditional leaders.

The local government chapter is even more telling. Neither traditional leaders nor Traditional Authorities are mentioned at all. And notwithstanding the 17th Constitutional Principle, the main object of local government is given in section 152(1)(a) as “to provide democratic and accountable government for local communities.” Traditional Authorities, the territorial and administrative vehicle of apartheid rule by chiefs, are not recognised in the structures of local government. This too contradicts their potential recognition in chapter twelve, and certainly limits the scope of any future legislation authorised by that chapter. The democratic object of local government and the non recognition of Traditional Authorities were contested by traditional leaders in the run up to the first local government elections, which were due to have taken place in 1995. The compromise that allowed for the holding of those elections, the consolidation of municipal and Traditional Authority boundaries, was reflected in legislation rather than the constitution.

The last area is that of the relationship between human rights and customary law. Customary law is not a right. As already mentioned, customary law is recognised in chapter twelve in that courts “must apply customary law when applicable.” This means that chiefs are not in control of the articulation or development of customary law. It is subject to the development of legislation and jurisprudence. Nor do they have any monopoly on its application. Nor is the application of customary law limited spatially to Traditional Authorities or other territorial communities that might elect to practice it. Unlike the framework for customary law in the past, this articulation does however promise that the powers of the state could be used to implement decisions taken on the basis of customary law. Importantly, customary law, like religious law

and common law, was made subject to the bill of rights which includes, of course, the equality provision.

Where customary law and the bill of rights overlap most concretely is in the right to religion. The right includes an enabling provision, section 15(3)(a) which “does not prevent legislation” that would recognise “marriages concluded under any tradition, or a system of religious, personal or family law,” nor does it prevent the legislation of “systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.” Any such marriage or family law provisions must also be consistent with other elements of the constitution. This provision opens the possibility for the state’s recognition of customary marriages for the first time.

The constitution recognises both traditional leaders and customary law as part of the post-apartheid state. But the terms of that recognition are unclear, and much has been left unspecified. The open ended and general character of these provisions bear the marks of a difficult political compromise and deep ambiguity.

4. Conclusion

This chapter has sought to explain the complex processes, both within and outside the negotiations, by which traditional leadership and customary law were re-asserted into the operation of the post-apartheid dispensation, state and law. I argued that the situation in the homelands on the cusp of the negotiations, the ANC’s weak presence

in these areas as well as its ambiguity about traditional leadership were decisive. In the 1980s, homelands provided a framework for the continuation of both the administrative function and political imaginary of traditional leadership. These were disciplined, encouraged and financed by the apartheid state. They were also deeply contested and undermined by economic and social changes, as well as the introduction of radical politics after 1976. There can be no doubt that the institution of traditional leadership was stripped of much of its local legitimacy and efficacy in the 1980s, a situation conceded by many of the traditional leaders at the negotiations. Its weakness and lack of legitimacy is also reflected in the turn to violence and the manipulation of the political resources of the homelands to bolster support, particularly for the IFP.

The negotiations themselves provided a national platform for the reassertion of the institution of traditional leadership as such. While the IFP and the KwaZulu government, Bophuthatswana and the Ciskei fought reincorporation, the extent of the violence and the ambition of Buthelezi's political scope meant that their claims were both undermined and overpowered within the negotiations. But they could not be ignored. ANC aligned chiefs were able to use this space to make claims on behalf of the institution of traditional leadership *per se*, and the security of traditional leaders in the employ of the state.

The ANC, for its part, formed strategic alliances with chiefs in the 1980s in opposition to a more ideological condemnation of the institution. But some senior ANC politicians, particularly Nelson Mandela and Jacob Zuma, judged that they could engage in the language of chieftainship and cultural authenticity and in that way both co-opt and subdue traditional leaders. Through a variety of twists of fate, they

found that traditional leaders worked to great effect within both the ANC and the negotiations to demand a place in a future South Africa.

What remains to be addressed is what the recognition of traditional leadership and customary law mean in terms of political secularism? An answer to this requires a return to some of the central theoretical and historical considerations of the thesis.

Political secularism is a name for the exclusion of religion from political power. It is a name for the constitution of political communities in which religion does not formally define citizenship or its entitlements. In Chapter One I outlined four historical formations of political secularism that emerged in Europe and the Americas in the early modern and modern periods. Formed in relation to Christianity, they were then exported across the globe as philosophical, legal and political norms. In all four formations, religion's powers have been contested and contained by states. The first formation designates the Jacobinism of Marxist and Maoist states. The unique Jacobin ambition is to destroy religion as an institution, a social power and a form of consciousness. This revolutionary ideological position found expression in movements and then states that sought to dominate or destroy a dominant, coherent, and politically ambitious religious community and institution. *Laïcité*, Establishment secularism, and American First Amendment Secularism are characterised by widespread and systematic legal and administrative intervention into the public and institutional aspects of religion rather than their outright destruction. *Laïcité* is characterised by an aggressive exclusion of and control over religious institutions and a strong secular political ideology and culture. It was formed in Revolutionary France and exported to Turkey, both of which had powerful national religious institutions in the form of Roman Catholicism and Islam respectively. American-style secularism

was formed in a situation of powerful religious institutions and individual religiosity, denominational pluralism and competition, and de-territorialised and voluntary forms of religious association. Its mechanisms include the strong assertion of religious rights tied with a strict formal exclusion of religion from the institutions of the state. Establishment secularism sought to undermine religion by co-opting it ceremonially and economically. It is now characterised by weak denominational pluralism as well as relatively weak affiliation and religiosity.

Despite the often inflated claims of the modern secularisation theorists, mechanisms for the exclusion of religion from political power were always incomplete and contested. But they did have powerful effects, coherence and systematicity.

This schematic proceeds as if religion was an unproblematic term; as if religion pre-existed secularism and was simply empirically available to be destroyed, excluded, subordinated or co-opted in these formations. Of course it is not that simple. Even in terms of the Atlantic world, increasing attention is being paid to the secular constitution of religion in the process of institutional differentiation and separation.

This issue is considerably more complex outside of the context of Christianity and the religions of the book. It is considerably more complex both conceptually and practically. In this thesis, I have sought to extend aspects of an analysis of political secularism some way beyond the religions of the book and towards formations of the religious that are not codified and sacralised in writing. Let me recap the argument so far.

Drawing on the work of both Chidester (1996) and Jean and John Comaroff (1991), I argued that early mercantile colonists made a distinction between religion and “heathenism,” asserting that the Africans they encountered were somehow incompletely human, a state marked most strongly by their “lack” of religion. As conquest and settlement gained momentum, colonists and those in the metropole, working through the intellectual prism of social-Darwinism, made a new distinction between world religion and “primitive” religion. Colonial “civilising” and missionary ambitions attempted to destroy this “primitive” religion in a number of ways. Among these were conversion to Christianity, assimilation to European mores, and an attack on what were understood to be African religious practices. Polygamous marriage, witchcraft, relations with ancestral spirits, rain making and first fruits ceremonies, divinatory healing modalities and initiation all came under ideological attack. They may not have had much success had it not been for the damage done to the social and economic relations that supported such practices and communities – of conquest, the appropriation of land and livestock, the imposition of taxes and a monetary economy and law.

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In doing this, missionary and “civilising” interventions also attempted to institute political secularism. As the Comaroffs so clearly argue with respect to the Thlaping, they sought to institute a *differentiation* between the religious and the political in African polities. In attacking the so called primitive or communal religion of African polities, they also sought to sever the religious or metaphysical legitimation of the chiefs at the same time as they were undermined in their control of land and cattle, the introduction of semi-sovereign Christian settlements, and radically transforming gender relations and sources of status. The codification of customary law and the

imposition of “universal human values” through the repugnancy clause and anti-witchcraft ordinances were all part of the arsenal of this only partially successful secularisation.

The extractive ambition of colonialism, and the great imperial greed for diamonds and gold, undermined its “civilising” assimilationist ambition. From the late 1800s warfare against African sovereignties and territories escalated. (Magubane 1996) In the first decade of the 1900s, racial segregationist policies were introduced along with Shepstone’s policy of indirect rule. The remaining chiefs and the idea of chiefly power were bolstered again for administrative purposes, which, as Fields has argued, brought colonial administrators into the business of witchcraft, invented traditions and customary law. Segregationist policies were intensified under apartheid, culminating in the madness of ‘self-governance’ and ‘independence’ across scattered fragments of depleted land and subjects. The Kuyperian political theology of apartheid added spiritualised notions of cultural essence and ethnic nationalism to the mix of the tools and legitimacies of traditional leadership in its policies of re-tribalisation. So where does that leave traditional leaders, the institution of chieftainship and customary law? It leaves them in the homelands. It leaves them with a concatenation of logics of authority and social order, none of which are ever strong enough to establish a hegemony.

The imaginary of the institution of traditional leadership sits in an ambiguous relation to the terms of modern differentiation between religion and politics, civil society and the state, and religion and culture. It sits in ambiguous relation to the institutional differentiations of economics, society, politics, law and the administration of justice

of which political secularism is a part. I am not suggesting that religion and tradition are the same thing. As concepts, practices and institutions, chieftainship and religious authority they have different referents, genealogies and histories.

But there are three similarities between the public or institutional forms of world religion and that of traditional authority that are important for an analysis of political secularism in South Africa. And they are closely tied. The first is that, like religious institutions, the institution of traditional leadership is both a potential obstacle and a potential resource for state formation and consolidation. The second is that traditional authorities, like religious authorities, seek to regulate the conditions of intimacy and social, sexual and cultural reproduction. Practically this is reflected in various comparable codifications of contract, custom and prescription around marriage, succession and inheritance in Shari'ah and Muslim Personal Law and customary law for example. The third similarity, which will be discussed again in the next chapter, is that both religion and tradition draw on transcendental legitimacies, whether God, Allah or the ancestors.

I will turn to the question of legitimacy, secular foundations and political power in the next chapter. Customary and religious regulation of the conditions of intimacy will be dealt with in the analysis in Chapter Six. What remains is the question of the threat or usefulness of traditional and religious institutions in state formation and consolidation. In Chapter One I suggested that a state of political secularism denotes an institutional configuration and normative relationship between religious and state institutions that preclude or prevent religious authorities from assuming political power. I also suggested that political secularism is impossible unless religion as such is

differentiated from politics. I argued that with respect to world religion, this “institutional” condition of political secularism was met in this process of post-apartheid state formation in a way that bore some resemblance to the American formation of political secularism.

The same analysis can be applied to traditional leadership and its passage through the negotiation process. As I showed in this chapter, traditional leaders were not differentiated from a conception of the political at the start of the negotiations. A combination of the war between the ANC and the IFP, the ANC’s strategy to counter the manipulation of the Zulu monarchy, the need to secure territorial unity, and the failure to corral traditional leaders into observer or ceremonial status meant that traditional leadership was not differentiated from politics. By the time this differentiation was made in the Constitutional Assembly, where only elected political parties were represented, the traditional leaders had already secured many of their claims for the institution. Let me turn then to the mechanisms by which traditional leaders might have been put in a position from which they could not contest political power, but were not. An attempt on the life of the institution of traditional leadership came in the form of distinctly Jacobin mobilisation by youth in the homelands of the 1980s. Practical and ideological work was done to eradicate chieftainship. But in this, the young comrades were simply not strong enough to match the resources of the homeland chiefs. The second strategy was that of co-option and subordination. Against the wishes of the young comrades, the ANC formed its “broad church” alliance with traditional leaders, some with and some without local legitimacy. They thought they could use this alliance to access homeland populations and secure territorial reincorporation. In return they sought to “democratise” chieftainship, and

maintain only its ceremonial and de-politicised and non-administrative roles. This is what many of their allied traditional leaders argued at the beginning of the negotiations. But once they had secured direct representation, and riding on the IFPs power, traditional leaders made claims that the ANC did not support and were unable to control. And so, neither destroyed nor autonomised nor co-opted, traditional leaders were able secure their employment in the state, concessions about local administration and rule, and the inclusion of customary law into national law.

Chapter Five: Secular Foundations and the Rites of State

And there is a special debt to the religious leaders who have sought with such richness and dignity to infuse a spiritual dimension into an occasion of momentous political and secular significance.

Justice Corbett, opening address to Codesa I Plenary²⁰⁹

Thus we are in danger of throwing out the baby of Judeo-Christian values and ethics with the bathwater of apartheid.

Michael Cassidy²¹⁰

1. Introduction

Chapters Three and Four were concerned with the first condition of political secularism, that of relations between religious and traditional institutions and the state. This chapter turns to the second condition of secular political foundations. I ask on what basis the post-apartheid dispensation was founded.

The first chapter gave a very brief introduction to the development of secular political philosophy. It is a tradition of thought that founds a principle of political power independent of the authority of God or the church. Hobbes initiated this tradition when, in a time of civil war, he theorised human co-existence on the basis of a “state of nature;” of violence rather than divine providence or natural order. (Geuss 2008:22) From Hobbes’ *Leviathan* onwards, Western political thought has posited a social contract as a basis for political power in opposition to a state of war or violence. (Baudrillard 1983:16)

Social contract theories were augmented by notions of democracy and representation of the will of the people as the basis for political legitimacy, later mediated through the party and deliberative consensus in the public sphere. (Mouffe 2000, 2005; Lefort 1988) Connoting modes of government as well as imaginaries of freedom, constitutions, the rule of law, democracy, and representative government are the stuff of modern political discourse.

Enlightenment political philosophy established secular foundations for power, legitimacy, justice and imaginaries of freedom. Political secularism, in terms of its legal and conceptual foundations, is dependent on the formal exclusion of God, religious clergy and theological terms in the structures of law and the legitimacy and accountability of the state.

Notwithstanding the widespread and explicit exclusion of religion from the domain of modern politics, other more ambiguous operations were at work in the historical development of secular political thought. While Enlightenment thinkers critiqued both dogmatic religious authority and the metaphysics of the transcendent authorisation of power they were themselves deeply influenced by the structures of Christian thought. It is in this sense that Carl Schmitt could claim that all modern political concepts were nothing but secularised theological concepts. (1985:36) And since the turn of the century, a significant movement of continental philosophy has engaged with continuities between Christian and secular political thought. (See for example Agamben 2005; De Vries and Sullivan 2006; Derrida 2002; Habermas 2002; Lefort 2006; Vattimo 2005; Gauchet 1997)

There is a second tie between political theology and secular political philosophy, one that is more pertinent for this chapter. Here I agree with Lefort (2006) and Gauchet (1997) that while religion has been excluded from modern politics in its formal foundations and its institutional relations, new objects have been made sacred in the process of secularisation. (Blumenberg 1966) The starkest example is the French Revolution's declaration that the right to property was sacred. (Asad 2003:26-32; Arendt 1958) The people, the nation, and the land have all been sacralised in the creation and establishment of nation-states. And nationalism is deeply informed by Romantic critiques of the Enlightenment.

This chapter will examine these foundational aspects of political secularism in South Africa's negotiations; its political ideals and its legitimating nationalism and sacralisation. The chapter outlines the exclusion of religious and traditional concepts and legitimacies from the foundational principles of post-apartheid law. It then briefly outlines the content of the constitutional assertion of universal principles taken exclusively from the tradition of Enlightenment political thought.

This formulation of political legitimacy was secured against an important attempt to found the new constitution on non-secular terms. During the negotiations, some Christian groups mobilised to have God recognised as sovereign authority over the polity, a demand that presupposed God's willed intervention in history and a human obligation to act in ways that could guarantee God's blessing. This was coupled with a widespread belief that an acknowledgement of God in the preamble to the constitution would lead to the assertion of "Biblical principles" in social morality and public life. Linked with this was the demand that Biblical principles or at least "public morality"

should be included in the constitution's interpretation clause, providing a Christian or at least moral majoritarian interpretation of rights that would preclude the legalisation of termination of pregnancy, gay rights, and the availability of pornography for example. They were not successful in instituting explicitly transcendental authorisation or legitimacy for the constitution and the new South Africa it sought to establish. The preamble, founding provisions and grounds for interpretation of the constitution and arbitration of dispute, are all extremely secular, referring to "values of an open and democratic society," and to the "supremacy of the constitution," and human dignity as its ultimate political and ethical values.

Throughout the thesis I have examined aspects of "things African" in relation to political secularism and South Africa's transition. In this chapter, I address attempts to found sub-national zones of sovereignty and exception on political concepts derived from the imaginary of chieftainship and ethnic nationalism. I argue that neither the IFP and its allies nor the ANC aligned traditional leaders could insert political concepts and ideals of chieftainship into the national or universal foundational values of the constitution despite their institutional recognition.

The last part of the chapter indicates some of the ways in which the law, the nation and the people were sacralised in the process of state formation. To do this it examines elements of the political culture that emerged in the transition, and the ways in which the "new South Africa" was represented to the public. To this end, I address both the public staging of the new nation and some of the contents of its national political discourse. I also examine the role of Christianity in the Truth and Reconciliation Commission (TRC) process.

I conclude that South Africa's transition formulated strongly secular political concepts in its foundation. The form of nationalism that emerged during the transition was also strongly secular. There were however some elements of civil religion involved here too; explicitly religious contents introduced through the TRC.

2. Christian foundations?

Before turning to the negotiations, it is worth recalling that the foundational principles of apartheid were explicitly religious in at least two senses. The first was a political theology of race that precluded the possibility of representation as a basis of political power and legitimacy except where this representation was limited to whites. Political power therefore needed a constitutive outside or a transcendental authorisation. The political theology of apartheid acknowledged a God that differentiated between the country's inhabitants. The preamble of the 1961 constitution quite literally asserts that God gave South Africa to whites. White responsibility to God was, it said, to stand united to safeguard "the integrity of the country," secure "law and order" and "further the contentment and spiritual and material welfare of all in our midst"²¹¹. The 1983 constitution had an absurd preamble, one that tried again to recognise a partisan God's support for white rule. But with the establishment of the Coloured and Indian houses of parliament and therefore Hindu and Muslim "representatives," the Tricameral constitution also sought to acknowledge some equivalence of other religions under the authorisation of the Christian God. It is an utterly incoherent statement. (van der Vyver 1999) It speaks of "our" responsibility towards God and man, and the necessity

of pursuing national goals of upholding “Christian values and civilised norms” with “recognition and protection of freedom of faith and worship” and the “self-determination of peoples²¹².”

The second foundation was a Calvinist socio-sexual morality which, like everything else under apartheid, was shot through with race. Closely tied with social panic about the purity of Afrikaner women, apartheid policy was extremely concerned about sexual morality and miscegenation. (van der Westhuizen 2007) In its racial incarnation, it led to the Prohibition of Mixed Marriages Act²¹³ and the Immorality Act²¹⁴, both of which sought to preclude intimacy, love and the creation of families across racial lines. But it also drew on Christianity as a source and standard of social ethics. It was a narrow Calvinist social-sexual morality that the Kairos document called a “Church Theology.” (1986) Calvinist social mores were legislated in a wide range of areas. They included publication control or censorship against sexually explicit materials, policies against abortion, sodomy, liquor trading and entertainment on Sundays, and a common law crime of blasphemy.

While the Christian basis of racialised political exclusion was deeply objectionable and was regularly called into question, the Christian social morality of apartheid was more widely shared, at least as an ideal, between black and white. This was the case even as the migrant labour system and widespread forced removals of the 1960s to 1980s did incalculable damage to social relations of marriage and family.

No Christian group actively sought to retain the racial political theology of apartheid in the constitutional negotiations²¹⁵. There was, however, a concerted attempt to retain

and entrench the second part of apartheid's theology. Many Pentecostal-Charismatic Christians sought to draw a distinction between the two. As Michael Cassidy framed it in 1995: "Many are embracing the view that to liberalise on race issues, as was so right and necessary, requires us also to abandon family values and liberalise on every issue relating to sexual behaviour, pornography, abortion on demand, Sunday Observance, gambling, prostitution, and what is appropriate in the media and entertainment. Thus we are in danger of throwing out the baby of Judeo-Christian values and ethics with the bathwater of apartheid." (Cassidy 1995:220)

In Chapter Three I outlined the role of the World Council on Religion and Peace (WCRP). In that chapter I paid little attention to the competing Pentecostal collective that mobilised in relation to the transition. Unlike the WCRP it was exclusively Christian and avowedly opposed to interfaith cooperation. It included many but not all of the major Pentecostal churches. Despite mainline Christian polemics against Pentecostals, the latter are neither monolithic nor unified. Roger Balcomb has written very usefully on the variety of responses by Evangelicals to the democratisation of South Africa. He distinguishes between positions he labels conservative, pragmatist, protagonist of the third way, the "alternative community" and liberationist. (Balcomb 2004, 2008) These distinctions are important to their claims and strategies during the transition.

Take for example Bishop Frank Retief and the members of St James church in Kenilworth. They are conservative Pentecostals, formed by English-speaking whites who broke away from the Anglican Church in the 1970s in opposition to the leadership of then Archbishop Tutu. In July 1993 the St James Church was attacked

by the armed wing of the Pan African Congress (PAC). Condemnation of what became known as the St James Massacre generally failed to mention the churches' support for white supremacy²¹⁶. Ray McCauley and the Rhema church on the other hand were the most prominent amongst Balcomb's category of pragmatists. They construed themselves as "apolitical" until mobilised in the late 1980s in terms of racial reconciliation and social services. From then onwards, Rhema moved closer to the SACC where it eventually assumed observer status. Michael Cassidy of African Enterprise is a proponent of what Balcomb termed "the third way," one opposed to both apartheid state violence and violent attempts to overthrow it. Trained by the US Tele-evangelist Billy Graham, Cassidy emphasised personal reconciliation across political and racial boundaries. He was particularly involved in attempts to reconcile the warring parties in KZN in the 1980s by invoking a common Christian belief. The liberationists were Pentecostals whose political but not theological position quite closely matched that of the Christian Institute and the South African Council of Churches. The best known liberationist was the Reverend Frank Chikane from the Apostolic Faith Mission Church. Chikane and Cyril Ramaphosa were Christian youth leaders in the Students' Christian Council.

The year 1990 was a turning point for many evangelical Churches. Ray McCauley took leadership in organising what came to be called the Rustenburg Conference. There, a variety of church leaders, both mainline and Pentecostal, rejected apartheid as a sin and "confessed their guilt in relation to it." (Balcomb 2004:15) In 1992 and 1993, Michael Cassidy called together a consultation of Christian leaders, most of them Pentecostal-Charismatic, and deliberated on the future of religion in South Africa. This consultation produced a document of "affirmations and declarations" to

rival the WCRP declaration. It was to form the basis of demands in the writing of the final constitution. McCauley then became part of the steering committee of the National Peace Accord in 1992, along with Heyns and Chikane.

There is a charismatic Christian story of the constitutional negotiation. Although not generally part of the national public discourse, it created an important and enduring evangelical public in the late 1980s and 1990s. Cassidy in his book *A Witness for Ever* describes an “explosion” of prayer between 1991 and 1994, a period which, I suggested in Chapter Three, saw significant growth in Pentecostal-charismatic church membership. Across the country Pentecostal activity centred on praying for a safe political transition and towards racial reconciliation, some of which was taking place within the churches themselves. Cassidy’s African Enterprise acquired the use of a luxury game farm to which mid-ranking members of political parties were invited to Christian retreats. In the “African bush” and in a “Christian brotherhood” their racial prejudices could be overcome and they could find one another through their personal stories. (Cassidy 1995) The importance of this kind of racial reconciliation should not be underestimated, particularly for its role in demilitarising some Afrikaner conservatives. (Hyslop 1995) For some white politicians, Cassidy’s weekends away provided their first personal encounter with black Christians from liberation organisations. These encounters, said Cassidy, allowed them to break through the stereotypes of the ANC and SACP as communist atheists.

In the Pentecostal public, the most significant moment of political transition took place on the eve of the 1994 elections when Washington Okumu succeeded in brokering a deal between the IFP, ANC and NP that led the IFP into the elections.

Okumu, an evangelical Christian, shuttled between political leaders to develop a possible compromise. He arranged a meeting with Buthelezi, whom he knew personally, to present his proposal. Despite rushing through Johannesburg traffic to get to Lanseria airport to meet Buthelezi's charter plane, he arrived just after it took off. With only Buthelezi on board, the pilot soon noticed something wrong with his instruments. His compass malfunctioned and he had to return to Lanseria. Cassidy reports that when Buthelezi stepped off the plane he said to Okumu, "You know, my brother, God has brought me back." When the pilot, also a "Bible-believing Christian" checked the dials back on the ground there appeared to be no problem. It was, according to this Pentecostal story, the moment in which God's hand reached out and changed the course of history. Against a background of fervent prayer Okumu presented his plan and Buthelezi took the chance to find a way out of deadlock.

Whether or not one believes that God miraculously intervened through the mechanics of Buthelezi's plane, one cannot doubt that during this period many evangelical Christians were motivated to prayer and to the mobilisation of social and political networks through a version of Christian faith that made that faith consequential to the future of South Africa.

A broad collaboration of Pentecostal-Charismatic Christians made three main demands on the writing of the constitution, although they varied greatly in the form of their interventions. Their first demand was to see an acknowledgement of the sovereignty of God, preferably a recognisably triune Christian God²¹⁷, in the preamble. For many, the inclusion of a phrase recognising the sovereignty of God over human affairs would secure God's blessing for the country, and, as far as possible, assure

further intervention towards reconciliation and peace. Second, they wanted the new Bill of Rights to be interpreted in terms of what they understood to be Christian sexual and social morality. Once sexual orientation had been included in the equality clause in the Interim Constitution, the third demand was that it be removed and that gay people and homosexuality not be protected against discrimination through the constitution.

The preamble was left quite late in the MPNP negotiations in 1993. The Technical Committee on Constitutional Issues, drawing largely on ANC and DP submissions, produced a first draft preamble that made no reference at all to God. Upon hearing about this Cassidy secured a meeting with Mandela who asked him to contact Albie Sachs who, as we have already seen, was active in his liaison with the religious community. With Ron Steele from the Rhema Church and UNISA theologian Gerald Pillay, Cassidy asked that a reference to God be included in the preamble and also a prayer, perhaps *Nkosi Sikelel' iAfrika*, at its end. Sachs was amenable to the proposal, and promised to take it to the leadership of the ANC. By the 12th of November 1993, Sachs had seen to it that, with the support of the National Party, “in humble submission to Almighty God” was added. This is how the Interim Constitution’s preamble was passed into law.

It was on the basis of this achievement, a massive charismatic revival, and God’s intervention in South Africa’s history on the eve of the 1994 elections, that Pentecostal-Charismatic Christians faced the post-apartheid future and the finalisation of the Constitution by the democratic assembly. But they were deeply troubled by the avalanche of sex and sex talk in a South Africa newly liberated from Calvinist

constraint. The deregulation of publications control in 1993 allowed for a massive influx of sexually explicit and pornographic material. To this was added the increased visibility of the gay rights movement, and the possibility that termination of pregnancy on demand would be legalised. It is in this context that the other demands were made in the Constitutional Assembly; for the introduction of Biblical principles in the interpretation of human rights, and for the exclusion of sexual orientation as grounds for non-discrimination in the equality clause.

The Constitutional Assembly saw a confused, drawn out, ill-tempered altercation on the foundations for the new South Africa. The principle advocate for a theological foundation was the African Christian Democratic Party (ACDP). Formed by conservative Pentecostals just before the 1994 elections and closely allied with St James' church, the ACDP won two seats that were taken up by Reverend Kenneth Meshoe and Louis Green.

The Constitutional Assembly's Theme Committee One (TC1) had the title of Character of the Democratic State. Its mandate was to engage with political abstractions such as democracy, equality, the supremacy of the constitution, name and symbols, official languages and the separation of powers. Most of these were already covered by the Constitutional Principles and were drafted into law by other committees. It is a testament to the vagueness of its mandate that none of the bigger parties delegated its top negotiators to this committee. While the committee was dominated by the ANC, its core group comprised only two people from the ANC and one from the PAC. The remaining five were from the NP, DP, FF, IFP and ACDP respectively²¹⁸.

The question of secularism was not even on the agenda of the Constitutional Assembly. But TC1's Technical Committee, tasked with compiling a work programme in February 1995, included a seemingly innocuous item, a "non-contentious" point, that "[t]here shall be a separation between State and Religion²¹⁹." In response Meshoe suggested that it should read "separation between state and religious institutions." This refers to the first condition of political secularism, that of secular institutional relations. As mentioned in Chapter Three, all major religious groups agreed to an institutional separation, including the Pentecostal churches. But this debate in TC1 brought the second condition into contention, that of secular foundations. In reply to Meshoe, the ANC's Kekana asserted that religion as such, and not just its institutions, should be separate from the state. He said "we are not talking about an institution versus another institution. We are talking about an institution (the state) and a particular concept called religion." But Meshoe held that such a foundational separation is impossible, both in politics and in people. "Man (sic)" he said "is a religious being whether you believe in God or believe that man is the supreme, but everybody is religious ..." There is no getting away from religion. Since this meeting was merely engaged in a sorting exercise to agree to the work programme, everyone was keen to move on. But a rather scrappy conversation bounced back and forth between Meshoe, members of the technical committee and the ANC. At one point Blade Nzimande asked the ACDP if it was petitioning for a Christian state. Meshoe said that it was not. But he was not very articulate about what they did want. In a desire to end the conversation, Nzimande suggested "the best way to deal with this is to go and scrap that sentence and ... put a sentence like SA will be a secular state under contentious issues..."²²⁰,

Unfortunately, the meeting agreed to this resolution²²¹. The Technical Committee's next report on the 28th of February 1995 elaborated the now contentious point that "South Africa shall be a secular state." It stated that "there is no disagreement between the parties on the fact that the constitution should provide for a separation of religion (often expressed as "church") and state." But, it said, it was not clear what this means in practice. It sought to outline some of the possible practical consequences: "Should there be references to deities in the constitution?" it asked. "Would religious office bearers be barred from holding offices of state?" "Should the state allow religious observances in its institutions?"²²² Much of this was already settled in the right to religion clause. The report's rather speculative thinking was to become a source of great distress to some Christians.

The report soon spilled out of the Constitutional Assembly. Meshoe and perhaps some from the National Party and Freedom Front circulated it to Christian groups who were quickly convinced that Christianity and the freedom of religion were under threat. They thought that their worst fears about a Soviet-style repression of religion were about to be realised, and they started to mobilise. A month later, Harvey Ebrahim, the manager of the Constitutional Assembly, tabled a Christian leaflet with the Management Committee and reported "a flood of submissions" against South Africa becoming a secular state. An organisation called Christian Voice was also planning a march to Parliament on the 30th of May to hand over a memorandum he said²²³.

The leaflet reads as follows: "The ANC has proposed that South Africa become a secular state, and that state and religion should be separated." What this means is that

“anyone who is a Christian leader would not be able to hold any public office in any state institution; No Christian services could be held at any state land or building (including schools, hospitals etc); No Christian prayers would be allowed in any state institution or ones funded fully or partially by the state.” A handwritten sentence had been added. It reads: “Christian churches will be compelled to perform the marriage ceremony of lesbians and homosexuals.” The ACDP, the pamphlet claimed, was the only party to speak out against this “travesty.” Calling themselves the Constitutional Awareness Campaign Coordinators two white women from Durban called on all Christians to write to Mr Cyril Ramaphosa in person to protest this ANC submission, and if not, they warned “the very words God Almighty will be removed from the new constitution²²⁴.” A Christian Voice Open letter to Christians followed. The country, it said, was being flooded with filth – pornography, homosexuality, abortion, Satanism, and the interfaith movement – profane activities taking cover under a regime of human rights. In bold letters it demanded that Christians take a stand.²²⁵

As Ebrahim reported, these pamphlets inspired a flood of submissions. His People Christian Ministries, Reform International Churches Association of South Africa, the Baptist Union of South Africa, Christian Digest, United Christian Action, International Fellowship of Christian Churches, and the African Enterprise Consultation on Human Rights and Religious Freedom all made submissions. These were all white led and mostly white membership Pentecostal-charismatic groupings. And individuals wrote by the thousands. At first, these letters were from English and Afrikaans speaking whites. But as the petitions, pamphlets and sermons spread, black South Africans from Thohoyandou, Guyani, Mabopane, Hillbrow, Orlando, and

Joubert Park were moved to write in support of the “Trinity: Father, Son and Holy Spirit” and against a secular state.

The ANC was angry. On the 25th of May Pravin Gordhan demanded an apology from the ACDP for “distorting the CA process” and making “malicious allegations against the ANC.” The next day Ramaphosa petitioned the Constitutional Committee²²⁶. The ACDP had smeared the Constitutional Assembly and the ANC, he said, and had “whipped up the feelings of a large section of the Christian community.” He demanded that the ACDP apologise, refrain from emotive campaigns, and that it be disciplined. On the 26th of May 1995, the Constitutional Assembly issued a press statement, signed by Ramaphosa, on *The Relationship between State and Religion*. It noted the concerns of the Christian community and pointed to the interim constitution’s Constitutional Principles that recognised religious freedom as a fundamental right. It “stated unequivocally that at no stage in any debate of any structure of the Constitutional Assembly” has the pamphlet’s interpretation of secularism been suggested by any party or person²²⁷. There was nothing to prevent Christian ministers from holding government jobs or prayers being held in schools. Despite this reassurance, somewhere in the region of 20 000 people marched to Parliament four days later to hand over a petition on the issue of the secular state. Ramaphosa was there to receive it, bible in hand, on national television.

The problem of the secular state continued to rattle around the halls of parliament as the ACDP raised the issue of sexual orientation and the interpretation of rights at every opportunity. Chris Nissen, ANC minister in the new office of the Reconstruction and Development Programme (RDP) wrote to the chair of TC1 and

Ramaphosa. He suggested that the Western Cape Provincial Council of Churches (WCPCC) and the Ecumenical Foundation of South Africa (EFSA) address TC1 to help them to think through “the current debate on religiosity in our new South African society²²⁸.” “These two organisations” he said, “have a history of struggle for political and religious freedom and I value their opinion highly.” Nissan was himself a Minister of the Uniting Presbyterian Church and member of the executive of the WCPCC and SACC. On the 1st of August 1995 a racially mixed delegation from the WCPCC came to the committee chambers²²⁹. They made an oral submission, followed by a debate that covered biblical principles, gay and lesbian rights, references to race in the constitution and “the possible mechanisms the state should use to uplift the poor.” The discussion ended with talk of “assisting politicians in reassuring those Christians amongst whom there was uncertainty regarding the new constitution²³⁰.”

A week later the theme committee received a request from United Christian Action that they too address the theme committee²³¹. In a spirit of fairness the request was granted, and on the 14th of August, Reverend Peter Hammond and Mr Van Wyk made an oral submission to TC1. Notwithstanding the presence of non-Christians in the committee, Hammond opened by saying “We greet each of you in the precious name of the Lord and Saviour Jesus Christ.” He proceeded to outline the demands of what he called “the more than 75 percent Christian majority.” Speaking particularly, he said, for the “Bible believing Protestant or evangelical community,” he demanded a “Christian constitutional republic.” If Muslims could have Islamic states, he said, then South African Christians could have a Christian state. He claimed that the Christian faith “has made more positive changes on earth than any other force or movement in

the history of the world.” Christianity gave us hospitals (that’s why they are marked with a cross), literacy (most languages were put into writing by Christian missionaries), the elevation of women, and the concept of charity. “A Godless state” he said, would be “a hopeless state²³².”

Hammond was an un-strategic choice to present to a majority ANC committee of mixed faith. He was a gun lobbyist known to have assisted RENAMO in Mozambique, and he had been arrested for gun-running, treason and insurrection in Sudan. Frontline Fellowship claims that Hammond has travelled “hundreds of thousands of miles by motorbike to deliver Bibles to persecuted Christians” in Africa and Eastern Europe²³³ as part of their “evangelising in war zones.” His legal troubles suggest that he delivered weapons there too. He later authored the anti-gay book *Pink Agenda: The Ruin of the Family*.

Even the Pentecostal Christians on the committee felt the need to distance themselves from Hammond. Carl Niehaus, later employed by both the Rhema church and the ANC, said “we must accept that the particular presentation of Christianity that Reverend Hammond and Mr van Wyk represents here is not representative of all Christians in South Africa...”²³⁴ Kekana laid into the aggrandising history of the church presented by Hammond; countering with its contribution to colonialism. Sister Ncube, a Catholic nun and ANC Member of Parliament was angered by Hammond’s patronising tone. “It looks” she said “like you are talking to some pagan government that does not know much about what God is all about²³⁵.” Mr Booie continued in the same vein. The march, he suggested, was all based on rumour and suspicion that the

ANC is communist and that there are no Christians in government. “But there is no truth in this no truth at all that we are not Christians.”

Hammond’s intervention put the nail in the coffin of ACDP’s attempts to have the sovereignty of God retained in the preamble and to have a Biblical basis for interpretation written into the bill of rights. But there were other reasons too. The ACDP failed to win support within the Constitutional Assembly or from powerful civil society groupings. The ACDP entered the political process very late in the transition, and acted against the social compact of negotiators who had been locked in both friendship and enmity over the previous five years.

Christians who wrote to the CA on these matters regularly claimed to be representing the approximately seventy-five percent of South Africans who are Christian. And their correspondence with the Constitutional Assembly was significant. By the time the public debate died down at the end of 1995, nearly 39,000 people had petitioned parliament against a secular state and against “secular humanism.” Added to this were 16,400 petitions against sexual orientation, 10,250 against abortion and euthanasia and for capital punishment, nearly 18,000 for reference to a triune God in the preamble²³⁶. In addition about a third of the 11,000 written submissions to the Constitutional Assembly covered these issues.

But this visibility and demands for “democratic representation” for “the religious majority” were belied by the divisions between Christians on these matters, divisions that were seen in the competing representations to TC1 above. The powerful WCRP lobby did not support the ACDP or its demands. For one thing, their multi-faith

constituency would not endorse calls for the recognition of an explicitly Christian God. Nor did they think that a reference to God in the preamble would automatically secure the kinds of interpretation that some claimed. Perhaps most importantly, criticism of “Church theology” and its apolitical moralising stance remained active. Where the WCRP did mention morality, it identified the major moral issues of the country as racism, unemployment and violence. Tutu also gave very prominent support for the retention of sexual orientation. “I would strongly urge you to include the sexual orientation clause in the final constitution” he wrote in a much publicised submission on the 2nd of June 1995²³⁷.

The submissions and their claims to represent seventy five percent of South Africa’s population were also made in the context of a massive ANC electoral victory in 1994. It was clear that these narrow representations of “moral values” did not determine voting behaviour at the time, even as the ANC stood for a range of non-traditional and counter-majoritarian values such as gender-quality, support for sexual orientation provisions, abortion and the end to capital punishment.” (Pillay, Roberts, and Rule 2006)

The ACDP also failed to garner unequivocal support from other Pentecostals, and some of the big churches were extremely critical of its strategies if not its demands. Ray McCauley was a “vociferous” opponent of the ACDP, and Chikane criticised the ACDP for lacking “political acumen” and being “embarrassing” particularly in “its narrow concerns with the ‘sins of sex’.” (Balcomb 2004:30) While the ACDP sometimes had in-principle support from the National Party, the NP was on the whole

unwilling to be seen to be standing with them. In the end the African Christian Democratic Party, like the IFP, voted against the adoption of the final constitution.

Before turning to the contents of the preamble and interpretation and equality clauses of the final constitution, I want to address the issue of whether traditional African concepts of political legitimacy or political foundation were included in the constitution for the new dispensation and why.

3. Traditional Foundations?

Ethnic nationalism was a central part of the apartheid ideology of “separate development” and its institutional realisation in the homelands. It was a strategy to divide black South Africans and undermine any basis for solidarity. State-sponsored ethnographic folk-studies (*volkekunde*) were part of the state’s substantial investment in the reification of ethnicity, as were single language newspapers, forced removals which attempted to separate settlements according to ethnic ascription, and local language community radio. (Vail 1991; Chidester 1996) The South African government and some homeland leaders made every imaginable effort to ensure that the imagined community was not one of African nationalism or pan-Africanism or even national non-racialism, but one of tribe or ethnicity under the “immemorial rule” of traditional leaders and customary law. Tribal or ethnic nationalism was an important technique of homeland power, along with South Africa’s finance of institutions of state, legislation, taxes, influx control and all the other mechanics of apartheid power. (Marks 1986; Delius 1996; Ritchken 1995)

The last chapter argued that there were two positions through which homeland politics and traditional leadership entered the negotiations. One was led by the Inkatha Freedom Party (IFP), and joined by Bophuthatswana and the Ciskei. The other was led by Conrales and joined by traditional leaders allied to the ANC and from TBVC and self-governing homelands.

The Zulu nationalism sponsored by the IFP had all the classic elements of nationalism. (Anderson 1991) It valorised Shaka as the founder of the nation, and asserted a correspondence between Zulu speakers, Zulu ethnicity and a Zulu polity under traditional rule. It posited continual lines of hereditary chieftainship, a heroic struggle against British and apartheid rule, a history of martyrs, sacred places of victorious battles, sacred times of historical victory, rituals of collective action, mythologies of power, and markers of cultural identity. Together they constituted a cultural and political imaginary of heroic and timeless Zulu ethnicity.

The IFP sought to institute something along the lines of establishment secularism in KwaZulu-Natal (KZN). Buthelezi wanted the institution of the Zulu monarchy to be recognised as such; legitimated in terms of divine and ancestral rule. This would be the public regime of provincial or federal legitimacy. Like establishment secularisms in the post-revolutionary period, the symbolic and ceremonial recognition of monarchy would not be a reflection of the monarch's political powers. It would be a way to expand the bases of legitimacy for other political actors. In this Buthelezi exemplified the multiplication of legitimacies involved in this procedure. He was, for example, head of the IFP, Chief Minister of KwaZulu-Natal and therefore head of its

government and head of the KZN military. He also claimed the position of “traditional Prime Minister to His Majesty the King of the Zulus²³⁸.”

KwaZulu-Natal is also home, to use their apartheid designations, to fairly large white and Indian minority populations. For this Buthelezi also suggested an establishment solution. Non-Zulu citizens of the federal state would be able to exercise political and other rights independent of their ethnicity. The IFP did not succeed in winning secession from the rest of South Africa or a strong version of federalism. But the Zulu King was recognised as a monarch in the agreement that brought the IFP into the 1994 elections. But this strategy proved to be a double edged sword. The IFP sought to extend its political role from that of homeland leadership to national party. But its agenda was so closely tied to Zulu nationalism that its national scope was severely restricted.

The second position through which tradition and chieftainship was presented to the negotiations was that of Contralesa. In opposition to the IFP, traditional leaders aligned with the ANC scrupulously avoided use of ethnic signifiers in the negotiations. As Holomisa said on behalf of Contralesa at Codesa, Contralesa formed against tribalism. “We formed Contralesa in order to forge unity among ourselves and to combat tribalism by inculcating in both ourselves and our people the feeling that we are all South Africans who have common goals, aims and destiny. We are fully aware that the apartheid system has exploited our tribal and language differences to the extent that our people are made to believe that the African section of the South African community were (sic) constituted of ten different nations²³⁹....”

Contralesa-aligned traditional leaders drew on two regimes of legitimation, and in both they sometimes found common ground with IFP-aligned chiefs. The first was an appropriation of Enlightenment values to traditional or customary rule. It was often asserted that chieftainship is a democratic institution²⁴⁰. This was developed in some instances in terms of theories of development and the devolution of government to bring it “closer to the people.” The second regime of legitimation was the positing of a non-ethnic pan-black cultural world that was corrupted or dissipated in urban areas, but still survived more or less intact in rural areas. It was an argument, in other words, that drew on the idea of chieftainship as protector of the social good and social fabric. It was a discourse that was particularly set in opposition to the activities of the ANC aligned comrades of the 1980s. Take for example the statement by Brigadier Oupa Gqozo at the opening of Codesa. He claimed that 42 percent of the population are black youth without proper education who have been indoctrinated with ideas of disobedience. For this reason, he argued, “[m]ajority rule is a simplistic solution... there can be no liberation when discipline, respect for moral and traditional values is lacking²⁴¹.”

Traditional leaders argued that there were areas in South Africa in which modern political processes were marginal at best. In such areas, they claimed, “African values” and modes of rule and life ought to be recognised and practiced by traditional leaders and what they called traditional communities. To support these claims, traditional leaders called upon both divine²⁴² and historical authorisation for the institution of traditional leadership in terms of God’s assertion of their rule²⁴³, the ancestral lineage of tribes, the custodianship of custom and land, and hereditary blood-lineage according to custom.

On the whole, traditional leaders who participated in the negotiations did not claim that such values or legitimacies should have universal or even national scope. In fact, it was exactly as a territorial entity that these foundations were asserted. Chief Nonkonyana, for example, in a debate during the MPNP objected that “only one set of fundamental human rights” should be applicable to everyone, including traditional leaders. “It means in our understanding” he said “that the rights of people in Ulundi; the rights of the people in the Eastern Cape, the rights of the people in the Chris Hani Squatter Camp....” should be protected if they were universal in the sense that they exist in all these areas. But, he continued, “if that right exists only in Ulundi and [is] not existing in the squatter camps then it is not universal....”²⁴⁴ And it should gain special and specific recognition.

A memorandum submitted by *Amakhosi* of the Kingdom of KwaZulu-Natal in May 1995 made a similar point, this time in criticism of what they called “the ANC’s hostility to the notion of “social and cultural pluralism.” They critiqued the interim constitution on the grounds that it revealed “little understanding of African societies and of the importance of traditional communities as a different and specific model of societal organisation²⁴⁵...” They did not seek the integration, representation, or presence of elements of black South African and social life in the national dispensation. They too sought an enclave of rule by traditional leadership and customary law.

Contralesa addressed the issue of interpretation. Referring to principles of democracy, non-racialism, non-sexism and representative government, Contralesa suggested that

these principles “cannot be practiced as if in a vacuum; they should be applied in the context of the realities on the ground, and, most importantly, they should be interpreted from an African rather than a European point of view²⁴⁶.” This appears to be a more widespread claim. But it was immediately asserted that in South Africa where “the natives are in the majority” true liberation should be embodied in a constitution that would result in the “restoration of all that was unjustly usurped from the indigenous people of our land.” Contralesa increasingly sought a restoration of enclaves of an idealised pre-colonial past untouched by modern economic or political processes.

The dominance of traditional leaders in representing “things African” to the negotiations all but silenced other possible ways of addressing these issues. And, as women’s organisations repeatedly pointed out, there was little input from anyone other than traditional leaders; little comment from rural communities, traditional healers, African Independent Churches or any other possible locus of articulation around these issues. A Constitutional Assembly summary of submissions for the period to February 1996, for example, reported that of 250,000 submissions only 42 addressed the issue of traditional leadership. Outside of the debates over traditional leadership, there were only a handful of inputs about other aspects of things African.

A few, such as Ma Tsepo, were concerned about witchcraft which should be addressed, she said, by Africans through discussions amongst Africans²⁴⁷. And abortion, she said, was a difficult thing for both Christians and “Africans, considering our custom of Botho-Ubuntu.” Nonetheless, she continued, it should be made available. A man from Venda stated that the constitution should address cultural

issues including witchcraft which needed to be dealt with by law. Traditional healers should also be recognised he said²⁴⁸, a claim also made by the Traditional Healers Association. Richard Nyanga wrote to the Constitutional Assembly in March 1995 to argue for the recognition of polygamy on grounds of culture as well as biology. Black men are promiscuous, he said. By instituting polygamy such men will be protected from HIV, and women from single parenthood and illegality. But, he conceded, wives should be given a say in whether their husbands should be able to marry again.

It is an extraordinarily thin representation of social and cultural matters in South Africa. And, as it was reported to the CA, these issues were impossible to frame in constitutional terms. The terms of the constitution were already figured in relation to individual rights and a certain cognate liberal conception of personhood. On the whole, the monopoly by traditional leaders of things African in the negotiations meant that the many other possible elements of cultural and social life were simply not reflected in the debates about a post-apartheid South Africa or in the final constitution except via the recognition of traditional leadership and customary law, the content of which was never really debated.

The exception is the scattering of universal claims made under the name of African culture through the concept of ubuntu. Johann Broodryk from the uBuntu School of Philosophy wrote to suggest that “uBuntusim can become what liberalism became for America,” a philosophy that encompassed values such as “sharing, love, collectiveness, empathy and understanding²⁴⁹.” But this is literally one of a handful of mentions of ubuntu across the archives of the negotiations.

For a short period at least, the post-amble to the interim constitution brought the concept of *ubuntu* directly into South Africa's post-apartheid legal regime. On the night of the 17th of November 1993, just twenty-four hours before the final voting on the interim constitution, Cyril Ramaphosa and Roelf Meyer together presented an extraordinary post-amble with the title of *National Unity and Reconciliation*. It is included in full as Appendix One. The text of the preamble was never discussed in the MPNP. Unlike all the other provisions of the interim constitution, it did not go through the process of technical committees and drafts debated in the negotiating council. It was presented as a complete document and was sanctioned by the full negotiating council of the MPNP at its first discussion.

The post-amble was later incorporated into the Promotion of National Unity and Reconciliation Act²⁵⁰ otherwise known as the TRC Act. The Constitutional Assembly decided not to include a post-amble in the final constitution. And reference to the TRC Act was excluded from the final constitution in terms of the ruling of the Constitutional Court in certifying the text²⁵¹. *Ubuntu* is not, therefore, included as an explicit value or political principle in the constitution. It has, however, become part of South African jurisprudence through its sojourn in the interim constitution²⁵².

4. Secular foundations: political and legal concepts

Pentecostal-Charismatic attempts to secure non-secular foundations were unsuccessful. Chiefly assertions were not recognised as universal, but, as I showed in Chapter Four, were incorporated as the basis of legitimation for the institution of traditional

authority as such. The concept of *ubuntu* moved out of the constitutional dispensation and into the Truth and Reconciliation Commission process. It did not remain as a stated legal value in the constitution. No non-secular assertions were included in the universal foundations of the new constitution.

How then can the secularity of South Africa's post-apartheid foundations be characterised positively? One way is from the constitutional text itself and its stated political concepts. These are to be found in its preamble, founding provisions and its framework for interpretation. In these, the South African constitution is saturated by Enlightenment political values.

The preamble of the final constitution, included in full in Appendix Two, begins by identifying the political community for the constitution: "We, the people of South Africa." It is "us" "the people" that authorise the constitution, and for the first time in South Africa's history it is not a racialised political community. Immediately afterwards, the preamble turns to four actions that we undertake; actions that "recognise," "honour," "respect" and "believe." We recognise past injustice; honour those who have suffered for justice and freedom; respect those who have built and developed the country; and believe "that South Africa belongs to all who live in it, united in our diversity."

The preamble goes on to assert the work that the constitution, this "supreme law of the Republic," has been written to do. It is a matter of high aspiration. The constitution was adopted, it says, to "heal the divisions of the past" and to establish a new society, one based on "democratic values, social justice and fundamental human

rights.” And this new democratic society, it says, will be based on the foundations provided by the constitution. In this democracy with its open society, government will be “based on the will of the people” and every citizen will be “equally protected by law.” This preamble promises not only that the constitution will guarantee political freedom. It also seeks to “improve the quality of life for all citizens and free the potential of each person.” The last work of the constitution is to help build “a united and democratic South Africa” which can take its place “as a sovereign state in a family of nations.” The preamble ends with “May God protect our people” and then “God Bless South Africa” in English and the other official languages, beginning with *Nkosi Sikelel’ iAfrika*.

Placed immediately after the preamble, the first chapter of the constitution is titled Founding Provisions. This brief chapter proclaims the official languages, national flag, national anthem, citizenship, supremacy of the constitution. It opens with a general statement that asserts that the Republic of South Africa is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. “Non-racialism and non-sexism” are given as foundational values, as are the supremacy of the constitution and the rule of law. This is followed by a list of political rights written as values: “universal adult suffrage, a national common voters’ roll, regular elections and a multi-party system of democratic government” to ensure, it says, “accountability, responsiveness and openness.”

Interpretation takes us straight to the heart of the declared values of a constitutional dispensation. Human rights themselves constitute a kind of value. But once

established, how are we to interpret their meaning, scope, and the grounds on which they can be justifiably limited? Take, for example, the right to life. On its own it is completely un-contentious. But should euthanasia be allowed, abortion, capital punishment? The grounds for interpretation are themselves written into law in the interpretation clause of the bill of rights. The wording of the clause was developed early in the negotiations and remained quite consistent throughout. It was taken largely from the Canadian constitution. Petitions by the ACDP and the NP for the addition of Biblical principles and public morals respectively, failed. The final constitution states that when a court, tribunal or forum interprets the bill of rights it must “promote the values that underlie an open and democratic society based on human dignity, equality and freedom.” It also “must” and “may” consider international and foreign law respectively. The interpretation clause ends with the statement that “every court, tribunal or forum must promote the spirit, purport and objects of the bill of rights.”

There is a great deal that can be said about these foundational principles. In the context of a discussion on secularism, two things stand out from the text of the constitution. First, its political foundations are not religious. They derive from the tradition of Enlightenment political thought and exclude any explicit reference to God as authority or to scriptures as a basis for legislation or arbitration. Second, neither the constitution nor the South African state is identified as secular within the text. Nowhere does the constitution declare that South Africa is a secular state, nowhere does it name secularism as a value in itself. The Constitutional Assembly’s experience warned of the dense multi-valence and ambiguity of the term and the ways in which it

could be used to mobilise some Christians against an otherwise widely supported dispensation.

5. Sacred constitution, sacred nation

Accepting that the conceptual and legal foundations of South Africa's constitution are secular, it is necessary to turn to the ways in which the law, the nation and the people were sacralised in the process of South Africa's state formation. What was the political culture of the negotiations relative to religion and tradition? And how was this "new South Africa" represented to the public and the international community during this period. What, in other words, constituted the nationalism, and the public performative and symbolic legitimacy of the new dispensation?

In Chapter One I outlined a second principle of foundation in modern states, one that links population and territory together and identifies, reifies and performs something of their spirit and their bond. This is nationalism. This foundation draws on Romantic sentiment and forms, themselves often enlivening otherwise absent or relegated religious and cultural tropes. As Anderson and others have pointed out, the relationship between religion and nationalism is complex, ambiguous and historically variable. (1991)

a. The legitimacy of law

In South Africa's case, the emerging nationalism of the transition linked not only population and territory together, but also the law. The constitution itself – its existence, its contents, its promise, the process of its development and the international esteem in which it was held – were an important part of the nationalism of this period of state formation. For a time at least, the text represented the achievement of the new dispensation. The legitimacy of the constitution was largely dependent on the public's perception of and participation in the processes of its development. Although Codesa and the MPNP were held behind closed doors, the Constitutional Assembly had a significant Public Participation Programme which, in Salazar's words "harnessed the resources of the electronic media not only to source information from the public, but also to publicly reveal their own deliberations and resolutions". (2002:54) By the time the final draft constitution was released in May 1996, two years after the first democratic elections, two million submissions had been received, with views from 120,000 individuals, 500 organisations and nearly 1,300 public meetings, workshops and hearings. Nearly seventy three percent of the adult population reported having been reached by one or more media or outreach programme. (Salazar 2002:64)

Within the negotiations, the sanctification of the new constitution and its anticipated rule was achieved through theological as well as Roman Dutch legal terms even though this system of law was thrown out in the process. This is most clear in relation to the Constitutional Principles, the thirty-four statements settled by the MPNP which bound many of the terms of the final constitution. From Codesa's first attempts to

draft constitutional principles, they were spoken about as being “enshrined in and not contradicted by any other provisions of a new constitution²⁵³.” A Schedule of Constitutional Principles was first included in the first draft of the interim constitution of the 21st of July 1993 and then adopted by the Negotiating Council. As soon as they were adopted, the language used to refer to them changed, both textually and legally. The constitutional principles, up to now written in small letters became capitalised as Constitutional Principles. The numbers 1 to 34 became Roman Numerals; I to XXXIV.

When the Constitutional Principles were first challenged, the Technical Committee suggested that they constituted a solemn pact and the foundation of a social contract. They wrote: “The reason why Constitutional Principles and the key aspects of the constitution making process should not be amended by legislation during the transition is that these provisions are contained in a solemn pact agreed upon by the parties of the MPNP, and constitute the basis of the future constitutional state and constitution making process. Constitutionally, once the MPNP is dissolved, there will be no other body which can change this solemn pact, which must remain binding until the new constitution has been adopted in accordance with its requirements²⁵⁴.” There is an obviously theological language in this elevation of the frame for the political negotiations. As the OED puts it, something solemn is “[a]ssociated or connected with religious rites or observances; performed with due ceremony and reverence; having a religious character; sacred²⁵⁵.”

The Constitutional Principles set out to bind the terms of the final constitution, and they did just that. Public and parliamentary hearings were told repeatedly that the Constitutional Principles were “not up for debate²⁵⁶.” Reports from all Theme

Committees were standardised and structured according to the principles. Each committee had to outline the principles that applied to them, the areas of commonality between parties, and contentious issues. The contentions were then often resolved in light of an interpretation of the principles²⁵⁷.

As I mentioned in the last chapter, the IFP took the Constitutional Assembly to court to challenge sufficient consensus as a basis for decision making, and in complaint about the failure of the ANC to engage in international mediation. In this context the Constitutional Principles were referred to not only as a solemn pact, but as sacrosanct. The CA's Law Advisors Grové and Ndziba opined that from April 27 1994 "these Principles became *sacro sanct* and neither Parliament nor the Constitutional Assembly has the power to change them. No negotiation between the parties, whether by way of international mediation or otherwise can have any effect on the mandate of the Constitutional Assembly as now fixed by the Constitutional Principles."²⁵⁸ To be sacrosanct means to be "secured by a religious sanction from violation, infringement or encroachment" or "inviolable" and "sacred"²⁵⁹.

In this way the underpinnings of the law were themselves declared sacred. And in the text of the final constitution we find something of this in the interpretation clause too. As already noted, it ends with the statement that "every court, tribunal or forum must promote the spirit, purport and objects of the bill of rights." The bill of rights has a letter, but also a spirit. So too in many respects, does the august body that interprets the spirit; the Constitutional Court.

b. Mandela mania and the transitional events

But it is not only the text that authorised the new dispensation and the political transition. The process of negotiations and the miracle of the political transition were themselves secular authorisations for the new dispensations.

There were a series of milestones in this. The white referendum in 1992, the unbanning of the ANC and other political parties, the steady stream of returning exiles, the opening of Codesa and the removal of some of the racist laws. These all represented glimmers of a new South Africa. But it was not until the extraordinary first democratic election in 1994 that the new South Africa could appear embodied in a non-racial political community. The now iconic images of miles of queues on voting day confirmed this community.

The elections led to the inauguration of Nelson Mandela as the country's first black president. A great deal of the symbolism and ritual of the occasion would have needed no religious presence to provide its elevation and its sense of the miraculous. Mandela was inaugurated at the Union Buildings in Pretoria, until then a bastion of white supremacist rule. The military, symbol of apartheid's oppression, expressed their allegiance to the new president in a moving fly-past. Mandela was flanked by his two deputies in a government of national unity, a symbol that nobody would be excluded from the united new South Africa, not even those who had sought to exclude themselves. They were surrounded by heads of state and the world's media who witnessed and acknowledged this transition and welcomed the country into the "family of nations." It was perceived to be a miraculous moment, one that was almost

too good to be true. And it was shared by millions at the Union Buildings and watching on TV who experienced the promise and achievement and excitement that the moment marked.

The following year South Africa hosted the Rugby World Cup. It marked the end of sporting sanctions, and the return of South Africa to the international community. South Africa not only hosted the event, but also won the 1995 World Cup in an extraordinary final match in what was the heartland of white rugby support. Nelson Mandela was there, wearing a Springbok rugby jersey, and cheering on the still mostly white national Rugby team.

While the formal entitlements and racial equalities of the new constitution went some way towards creating a common political community, that community could only be represented to itself and realised in these moment of heightened performance and affect and through the politics of hope. And Nelson Mandela, known affectionately and intimately, as Madiba, was the centre of a constellation of such affect and performance.

Much of the creation of a moral community between rulers and ruled was achieved by Mandela through his statesmanship and the ways in which he sought to include as wide a range of political actors as possible in the membership of the emerging nation. There were some, of course, who resisted his advances. But many were won over by what came to be called Madiba-magic. It was a very effective strategy. Mandela engaged in a wide range of languages and cultural tropes. The last chapter referenced his participation in ANC rallies that performed Zulu ethnicity, a strategy in which

Jacob Zuma played a leading role. (Klopper 1996) Just as striking was Mandela's much publicised tea with the aged Betsy Verwoerd, widow of the architect of apartheid.

c. The ceremonial presence of religion

Many such examples could be given, and they point to the fact that the nationalist foundations of legitimacy of the new South Africa did not make religious presence or content central. But religious leaders and discourses did participate in many events of this early nationalism. In many instances, figures of religious and traditional authority were willing participants in the religious sanctioning of moments of political significance.

At the end of 1990 a planning group met to prepare for the first multi-party talks at Codesa. They had to decide who would chair Codesa. Who would have the dignity, skill, gravitas and neutrality to hold such an event together? At first, religious leaders were proposed and Methodist Bishop Stanley Mogoba and the NGK's Reverend Heyns were nominated for the task. But there were complaints about the choice, particularly from the PAC, and a concern that non-Christian religious groups would be excluded from the process. The planning committee decided to ask two Judges to chair instead; marking a transition that was henceforth to take place under the sign of the law. They were Chief Justice Corbett and Justice Mohammed, South Africa's first black Supreme Court judge.

But religious leaders were still felt to be necessary to the occasion. All of Codesa's plenary sessions were opened and closed by a multitude of prayers and blessings. The first day, for example, saw Professor Heyns, Rabbi Cyril Harris, Sheikh Nazim Mohammed, Reverend Stanley Mogoba and Pundit Vedelanker all blessing the gathering²⁶⁰. Justice Corbett's thanks to them is given as an opening quote to this chapter. He commended them for "with richness and dignity" infusing a "spiritual dimension to an occasion of momentous political and secular significance."

At Mandela's inauguration a wide range of religious and traditional leaders and traditional healers contributed to the symbolic condensation and heightening of the occasion. They blessed Mandela and his presidency. Tutu's prayer at the inauguration spoke of the arrival of the fullness of time. Religious leaders witnessed his inauguration, and as Madumo told Adam Ashforth, "hundreds of traditional healers massed at the Union Buildings to bless the new regime" and they "danced and burnt all the herbs for all South Africans – for Blacks, Whites, Indians and all." (2000:103)

Another example of such a political rite of passage can be taken from late in the constitution writing process. The Constitutional Assembly came to the end of its work in May 1996 when it produced a draft constitutional text to be sent to the Constitutional Court for certification. A ceremony was held at Parliament to mark the event. As hundreds of guests stood at the entrance to Parliament, an *imbongi*, a praise singer, led Mandela and the others into the national assembly. The guests included all kinds of people considered important to reflect the achievement of national unity and a final constitution. There were church leaders, imams and religious leaders from all

the other faiths. There were NGOs, and business people, the unions, representatives of civil servants. There were traditional leaders and traditional healers.

Nationalist public displays of the apartheid government always included a very visible presence of Dutch Reformed Church ministers. The public presence of religion in the transition was, by contrast, always inclusive of a wide range of religious leaders. The administrators of the negotiations, Parliament and the office of the Presidency all ensured that Muslims, Jews, Christians, Hindus and, more recently, Buddhists and Baha'i were included in ceremonial functions. This ceremonial inclusion is not representative of the dominance of Christianity amongst the population. It cannot be doubted that during the transition the political community came to include, in Charles Taylor's terms, "believers and unbelievers alike," and Christians, Muslims, Hindus and Jews, both legally and socially. (2007) The right to religion was granted to all, and in law, religious affiliation has no impact on the status of citizenship. As I have shown, both rhetorically and in the ways in which the transition was staged to the public, people of all faiths and none were equally part of, and welcome in, the new South Africa. The ANC itself represented a cosmopolitan religious and secular pluralism, and its leaders went out of their way to affirm the membership of religious minorities in the national community.

d. The TRC and Christianity as a resource for nation-building

The transition from apartheid to the new dispensation altered the basis of rule in South Africa. By eradicating the racial basis of citizenship and membership of the political community the process of transition sought to constitute a new and for the first time

truly national political community. Some of the formal elements of this nation-building were addressed in the previous two chapters; the achievement of territorial unity, a unitary state, and the equality of all citizens in the eyes of the law for example. But this says little of the relation between the social and political communities of South Africa and the possibility of the rhetorical and performative constitution of a nation “united in its diversity.”

After the rending of the “Medieval cloak of religion”, nationalism became the most important modern means by which people were brought into an imagined community. In nationalist movements and events, rhetoric, symbolism and public rituals involve people in a “common enterprise, calling their attention to their relatedness and joint interests in a compelling way.” (Edelman 1967:16) The development of a South African national public over the course of the transition and the efforts of the new political leadership to consolidate a nation also drew on the resources of Christianity as the pervasive and majority religion in the country. Nowhere was this more apparent than in the processes of reconciliation and transformation.

Salazar has argued that while South Africa’s “new democracy is undoubtedly secular,” its “deliberative world view” was shaped “in close alliance with a set of religious arguments regarding the nation.” (Salazar 2002:16) It is what he calls a “rhetorical conjunction of sacred and secular.” He argues that the terms of liberation theology popularised by Archbishop Tutu and widely used in his oratory were secularised both in popular discourse and by Nelson Mandela.

The idea of “reconciliation” is a Pauline idea, for example, which Tutu used to rebut the racial divisions of apartheid. It stood against the silencing, banning and arrests of many activists. Liberation theologians called for the “subjugated to express their experience of oppression” as a foundation for transformation.” (Doxtader 2009:74) The term “transformation” was itself introduced to the South African lexicon from the concept of *metanoia*, the New Testament Greek word for repentance, which Protestant theologians like Karl Barth interpreted as transformation of heart, mind and action. It was taken up by liberation theologians in the 1980s. Another central concept was that of the liberatory present or *kairos*. According to Albert Nolan, a South African Roman Catholic priest, “The fundamental insight of prophetic theology is the recognition that an *eschaton* or day of reckoning and liberation is near. It is this that turns the present moment into a *kairos*.” (Quoted in Doxtader 2009:65) A group of black theologians under the leadership of Frank Chikane met in Soweto in 1985 to pose a challenge to the churches in their response to apartheid. The Kairos Document they produced was a call to action to the churches, and provided a language of reconciliation with justice. (Kairos Theologians 1986) The idea of South Africa as a “rainbow people” came from Tutu’s term “the rainbow people of God,” drawing inspiration from both Genesis and Ezekiel. In both Biblical sources the rainbow marks God’s epiphany and the restoration of the devastated community and its re-founding after a period of evil and suffering. (Salazar 2002:11) Tutu also Christianised the idea of *ubuntu* into a form of generalised but African human compassion which could be contrasted with the divisiveness of apartheid. (Marx 2002:53)

These discourses remained theological until the late 1980s when they were drawn upon in political rhetoric outside of the churches. (Doxtader 2009:18) Kader Asmal

publicly opened the question of amnesty and reconciliation in 1992. (Verdoolaege 2006) He set out the challenges of moving from a violent, unjust and divisive apartheid past to a just future; problems that required some sort of reckoning and reconciliation through what he called “a revival of moral conscience.” (Asmal 1992) He argued that this would only be possible through debate, confronting the roots of violence, reconciliation on new terms, confession, justice, the avoidance of revenge, and catharsis.

During the MPNP, some politicians in the National Party began to seek a blanket amnesty for themselves and their apartheid securocrats. Some in the ANC and all of the PAC on the other hand wanted criminal trials for perpetrators of apartheid. “The amnesty-for-truth exchange of the TRC was the deal that brought a breakthrough” almost at the end of the MPNP (Verdoolaege 2006:28) It was a political compromise.

The interim constitution’s preamble refers to the constitution as a bridge between an unjust past and a future free from injustice. But to span the gulf between past and future requires, it says, a reconciliation of the people and a reconstruction of society. The wording of the post-amble, included in full in Appendix One, was itself designed to be inclusive and to help constitute South Africans, whatever their political past, as members of a single community. (Chipkin 2007) To do this, the post-amble avoided asserting a moral dichotomy between apartheid and the struggle. The past, for example, was said to have generated “gross violations of human rights” and “transgression of humanitarian principles in violent conflict” and a legacy of “hatred, fear, guilt and revenge.” It sought to deal with the past in such a way as it could be both acknowledged and transcended. It did this through a series of dichotomies. The

past could now be addressed, it said, on the basis of understanding but not revenge; reparation but not retaliation; *ubuntu* but not victimisation. This was to be achieved via a conditional amnesty for acts, omissions and offences associated with political objectives. The post-amble required the post-election democratic Parliament to pass an act to provide a mechanism for this reconciliation and reconstruction.

After the 1994 elections, Parliament debated what became the Promotion of National Unity and Reconciliation Act²⁶¹ otherwise known as the TRC Act. Churches were very involved in these debates. (Meiring 2000) The beginning of the TRC and the completion of the drafting of the final constitution overlap closely. On the 16th of April 1996 the first dramatic public hearings of the Human Rights Violations Committee were heard. A month later, the draft text of the final constitution was voted on by Parliament and sent to the Constitutional Court for ratification.

In terms of the Act, it was Mandela's responsibility to appoint TRC commissioners. He selected Archbishop Tutu as its chair. And of the 12 commissioners, four were *baruti* or Christian ministers. Local churches, particularly those affiliated with the SACC, were involved in the TRC in many ways. They provided venues, and volunteers who helped to disseminate information about the hearings, and who also acted as "facilitators and spiritual guides" to victims and perpetrators. (Meiring 2000:125) Meiring also writes of a "TRC liturgy" which was taken from a Service of Dedication and Blessing of Commissioners of the Truth and Reconciliation Commission in St George's Cathedral in Cape Town in February 1996. It included hymns, multi-faith prayers, the lighting of candles and the presentation of olive branches. "These elements were repeated at most hearings in many parts of the

country.” (2000:126) Hymns and prayers were used to open and close hearings, but also in response to moments of intense emotion and crisis. This began when Nomonde Calata, testifying at the first victims’ hearing in East London, was overcome with grief in the telling of her husband’s murder. After her crying subsided, Tutu started singing the Xhosa hymn *Senzeni na* (What have we done). Everyone in the hall joined in the singing. (Meiring 2000:126)

But this Christian dominance was not uncontested, including within the TRC. Commissioner Piet Meiring has written about some of the tensions between those within the commission who wanted a more secular framing and Tutu and others who sponsored and enacted a religious rendition of reconciliation. The first Johannesburg public hearings of the TRC were held at the Central Methodist Church from the 26th of April to the 3rd of May 1996. The head of the Johannesburg TRC office, Commissioner Fazel Randera, was concerned that the earlier East London hearings had been “too religious.” He sought a more juridical style hearing. Randera suggested that the commission follow the example of parliament that had decided to have a “moment of silence” at the beginning of each event; a time for prayer or meditation if people wanted to use it. Tutu agreed to this, and although he appeared at this hearing and all the others in his archbishop’s vestments with clerical collar and crucifix, he started the proceedings with a moment of silence. But when the first testimony was to get underway, Tutu stopped the proceedings and said “No! This is not the way to do it.” Then, as Meiring recounts, “the Archbishop placed the hearing of the day in the Lord’s hands, asking that Jesus Christ, who himself is the Truth, guide us in our quest for truth, that the Holy Spirit of God grant us the wisdom and grace we need.”

(2000:124) Where the negotiations had taken place under the sign of the law, the TRC took place under the sign of religion.

The TRC received 31,000 submissions, and 7,000 requests for amnesty. In the end it granted amnesty to 150 people. (Salazar 2002) There were victims' hearings, and commissions for amnesty and reparation. There were also a series of "institutional hearings" that sought to address what the TRC report calls the "backdrop" or context for "gross human rights violations." There were institutional hearings about Business and Labour, the Faith community, the Legal community, the Health Sector, the Media and Prisons. In addition the commissioners initiated a series of what they called special hearings on Compulsory Military Service, Children and Youth and Women²⁶². By far the most attention has focussed on the dramatic victims' hearings which were televised live in South Africa, and condensed into shorter programmes and broadcast nightly during prime time.

There have been many critiques of the TRC process as a whole, as well as religion's place in it. It is certainly beyond the scope of this chapter to address these in detail. But some comments contribute to an understanding of the TRC in relation to secularism. Certainly there can be no doubt that Christian elements thoroughly permeated the models of the TRC and its notion of reconciliation. The model for reconciliation was thoroughly Christian. In this model, it was the duty of perpetrators to make a full disclosure of their activities, confess them, and repent their actions. Victims on the other hand were given a chance to voice their experiences and the impact of those experiences on themselves and their families. They could have their suffering witnessed. Through this catharsis, they were to gain some peace through

hearing the truth about what happened to their loved ones, and a chance to confront their persecutors. The idealised objective of their interaction was forgiveness. Between confession and forgiveness, reconciliation was to be found. Every step of this process was informed by Christian practice and theology and the doctrine that forgiveness is a Christian calling. (Meiring 2000:127) Moosa calls the workings of this model a performance; where “the actors have already configured the purpose of the play and there is a hope that other participants and viewers will also understand its message.” (Moosa 2000:114) Many Christian commentators on the TRC have argued that “it is easier for Christians to face the truth and accept the TRC than for non-believers.” (Verdoolaege 2006) Others argued that Christians would find it easier than non-Christians to reconcile with former enemies.

Many criticisms stem from this model, not least because of the public pressure on victims to forgive, and the question of the sincerity of the confessions of perpetrators. (Christianse 2003) Derrida for example criticised this way of instrumentalising forgiveness. Many have also questioned the relationship between individuals reconciling in tense and televised public hearings and a broader social and political process of reconciliation. (Van der Walt 2007)

While nobody doubts that there were some powerful individual reconciliations, this clearly did not translate into the “broader event of national or social reconciliation on which the peace and stability of a future South Africa would come to turn.” (Van der Walt 2007:12) More than this, the model of individual reconciliation when applied to a national society can become what van der Walt calls an “offensive clerical moralism.” By his reckoning this has allowed white South Africans to withdraw from

their responsibilities and secure in their systematic privilege. “Clerical moralism” leads to flippant and too easy reconciliation, a false unity under the sign of the rainbow nation.

Marx argues that the TRC paid far too much attention to the perpetrator rather than the victim. He also argues that the TRC failed to engage with apartheid in a systematic manner, dealing instead with “individual evil” in perpetrators. In this, it “spared the white population from having to confront the system it had supported.” (Marx 2002:51) Instead, black South Africans were valorised as people with a capacity to forgive, an exemplary spirit of forgiveness, of *ubuntu*. (Marx 2002) In a similar vein Chipkin argues that the TRC failed to produce a South African subject, it produced instead an exemplary humanity that was the basis for a dangerous exceptionalism. (Chipkin 2007:178)

Tutu’s chairing and theological framing of the Truth and Reconciliation Commission are ambiguous in respect of secularisation. Some have argued that the TRC is an affront to secularism, or its betrayal. Marx for example, writes that in the TRC “the secular order is rejected ... and delegitimized through theocratic notions and concepts. The struggle for the end of apartheid becomes a divine mission in order to restore the order of the world.” (Marx 2002:58) But the TRC was not a religious event. It was a case of religious theology and personnel being brought into a nationalist or nation-building project that was quasi-judicial and state sponsored. In doing this, it attempted to instrumentalise religious conceptions of forgiveness and reconciliation to constitute a national community that could include perpetrators and victims alike. Its goals were politicised in other words. But towards these political ends it drew on a

popular and widely shared set of conceptions about social relations, evil, forgiveness and the possibility of a shared community. It also drew on the pastoral care of Tutu and other commissioners. TRC discourse combined Christian and human rights elements and the commissioners included non-Christians and people who had notions of a juridical rather than religious format for reconciliation.

The work of the Truth and Reconciliation Commission came to an end when Tutu handed the final report to Mandela in October 1998. A few of its processes are still ongoing; reparations and the charging of people who were not awarded amnesty. Many of these cases are still being investigated and have yet to be prosecuted. While the TRC is over, the broader question of racial and economic reconciliation and the possibility of justice in South Africa remains an open one. Will the constitution be the foundation, as it promises, of a future reconciled and more egalitarian society?

6. Conclusion

South Africa's constitutional and legal foundations are without a doubt secular. They were asserted in principle and against an attempt to recognise the sovereignty of God over the law and the national community and to institute Biblical or Christian values and interpretations of that law. The transition founded a new political community that was, for the first time, not a legislatively racialised political community. And many of the events and symbols of the nation-building that accompanied the transition did not require the presence of religion. They celebrated the new constitution, the 1994

elections, the inauguration of Mandela, Madiba's personification of inclusive reconciliation, and the 1995 Rugby World cup.

But the rhetorical and performative creation of a national–community also required some sort of re-visiting of the past. And it is in relationship to this most painful and antagonistic past, that Christianity as the majority religion and as a common language of reconciliation was brought into use in the political process. In the event of the TRC and in nation-building discourse, Christian notions of reconciliation, liberation, and forgiveness were mobilised. Tutu was central to this appropriation of religion to nationalism. And his role in this was as much theological as pastoral.

Unlike the Jacobin or Laicite versions of political secularism, South Africa's transition did not develop a public critique of religion in general. On the contrary, the religiosity of the nation and its citizens came to be understood as an important resource for the social fabric and the tools with which that social fabric could be restored after the violence of colonialism and apartheid. In this it bears a striking resemblance to the American first amendment formation of political secularism.

Chapter six: Towards Secular Constitutionalism in Post-apartheid South Africa?

Having resisted the bullets and bombs of lead, we now face the bullets and bombs of sugar, and slowly we succumb to their sweetness. ... If all power corrupts, the people's power corrupts in a popular way. A lucre continua! ... Now we must display resoluteness in resisting the idea of the inevitability of corruption and the certainty of authoritarianism.
Albie Sachs²⁶³

When I was growing up an ungqingili (a gay) would not have stood in front of me. I would knock him out.
Jacob Zuma²⁶⁴

1. Introduction

The last three chapters have looked at the negotiations that led South Africa from apartheid into a new dispensation. In this process of state formation, the place of religion and tradition were formulated anew. In this chapter, I turn to the period since the negotiations and the third condition of political secularism. Here I examine how religion and tradition have fared in the consolidation of the new dispensation and the post-apartheid state. I ask what happened to relationships between religion, tradition and the ANC government when the constitution came into effect.

This chapter deals with the third condition of political secularism posited in this thesis; that of political secularism in late modernity. For South Africa's transition took place well into the rising tide of globalisation, neoliberalism, new forms of religion and the global mobilisation of cultural and ethnic identities. Many have commented on the fact that the South African constitution is a robustly modernist law formulated at a time when many of the forms of rationality, state and economy that underpin

modernism are under strain. (see for example Comaroff and Comaroff 1999; Klug 2000, 2010; Garuba and Raditlhalo 2008; Jacklin and Vale 2009; Robins 2008)

This condition opens up a host of questions about the post-apartheid period and the place of religion, tradition and custom in it. How, for example, have institutional relations between religious groups and the government been negotiated? How has the right to religion been interpreted? Have its enabling provisions been legislated? What role has religious language and performance played in nationalism, nation-building and reconciliation? Has the ambivalent and contested place of traditional leadership and customary law been resolved? Has the institution of traditional leadership been consolidated, transformed or limited by the democratic state? How has customary law been enacted in practice by traditional leaders and in legislation? What are the consequences of the contrasting location of religion and tradition relative to the state? These are political and legal questions. They are also closely related to changes in social practice, forms of subjectivity, religious forms, the public sphere, ethnic mobilisation, and the economy.

There are certainly more questions than can be answered in this chapter. And there are a wide range of possible methods or approaches to answering them. As a result some caveats are necessary. Sixteen years is not a very long time for state formation. New processes are constantly emerging, and the building of a state, society and political culture is a continuous process in the making. There is no privileged place in the present from which to assess the legacies of the transition, even as there may be emerging trends and evident moments of consolidation and crisis. Many of the elements on which a more thorough assessment of post apartheid secularism or its

lack would depend have yet to be studied. This thesis has paid a great deal of attention to national-level processes, and official or formal relations between politics, law and religious and traditional bodies. And some conclusions can be reached in these areas. But the test of the endurance of secular constitutionalism also lies in the many and diverse local sites on which state and religious and traditional institutions and claims engage. And there is as yet very little research on the practical ways in which religious and traditional institutions are engaged in education, local government, and social services; all of which have an important bearing on this question. There is a great deal of work yet to be done in this area.

In this chapter I will limit myself to just two areas of post-apartheid politics as a way of taking some of these questions forward. The first relates to legislative developments that have sought to reconcile potentially contending constitutional rights and interpretations. For this I have chosen to examine the development of legislation around marriage; religious, traditional and civil. This is because marriage is an extremely rich ground on which to compare relations between religious groups and the state. It also illuminates some of the differences between secularised relations with religious groups and the non-secularised inclusion of traditional authorities. The second area is that of the relationships between the ANC government and religious and traditional interlocutors. The ANC has sought to consolidate power and its control over the instruments of state during a period of difficult social and economic conditions in post-apartheid South Africa. In this chapter I sketch some of the dynamics between the ANC, religion and tradition and the contradictions these dynamics both embody and attempt to manage. In order to set the scene for this

investigation, the chapter begins with an overview of some major social, economic and political trends and events in the post-apartheid years.

These two areas together cover some important elements of the unfolding and consolidation of the institutional and foundational conditions of secularism set out at the beginning of this thesis. They also focus on the different ways in which religion and tradition have been dealt with by South African statecraft. As I showed in previous chapters, South Africa's constitutional dispensation is without a doubt secular in relation to world religions. In contrast, official elements of African customary worlds represented by traditional leaders and customary law were included in the mechanisms of the state and its law. This continued the strategies of colonial and apartheid governance. In this chapter I conclude that on the whole, post apartheid South Africa is secular in relation to world religions. Secular institutional relationships have been established, and secular political foundations and nationalism have been created. There is no evidence of a form of political religion that would attempt to contest the leadership of the state or its institutions. But this chapter also outlines the increasing pressure on the secularity of the relationship between the ANC and religious groups in the context of a weak articulation of secularism as an explicit political ideology. This pressure is also closely related to the ambiguities of a countermajoritarian constitution in areas of social and sexual morality. There has been a rise of "public religion" in South Africa since 1994; a religious presence that appears to be growing in strength, numbers and avenues of access to government. Driven by increasingly transnational Pentecostal charismatic mobilisation around "Biblical" and "family" values, it is also fuelled by social crisis and repeated moral

panic over events that reveal the extraordinary social suffering in South Africa. This is a context for an increasingly strong assertion of a conservative social agenda.

In contrast, the negotiations attempts to both recognise and curtail traditional leadership have largely failed and have introduced significant legal and governance ambivalence. This constitutional ambivalence has been deepened by a weak and under-resourced elected local government. This has been unable to wrest local administration from traditional leaders. Repeated attempts to legislate a reduction in the roles of local chiefs have failed, until more recently they have simply been acknowledged. But this inclusion in the state has also required a complete legislative subordination to the equality provisions of the constitution. In this, idealised patriarchal and customary worlds that also articulate a socially conservative agenda are increasingly put in opposition to a strong constitutional assertion of gender equality.

2. The post-apartheid context

The political settlement brought hope for the future and an end to many forms of suffering and humiliation. But it did not bring social or economic relief to the majority of previously disenfranchised South Africans - far from it. In 1995, 37.9 percent of black Africans were poor by the measure that they each had R174 or less per month on which to live. By 2000 that headcount poverty figure had increased to 45.9 percent²⁶⁵. The poverty figures for white South Africans went from 0.2 to 0.6 percent across the same period, which gives some indication of racial disparity in the country.

There is no commonly agreed poverty line in South Africa, which makes comparison difficult. But all measures show that between 1995 and 2000 poor households sunk deeper into poverty and the gap between rich and poor widened. (Human Sciences Research Council 2004) Between 1994 and 1998, the number of households that reported that their children were always, often or occasionally hungry increased. Between 30 and 40 percent of South Africa's children sometimes went to bed hungry in these years. (Altman, Hart, and Jacobs 2009:12)

This poverty is directly linked with the trends in unemployment. The official unemployment rate went from an already worrying 19 percent in 1995²⁶⁶ to 25.4 percent in 2000. By 2003 it had reached a high of 28.2 percent. Improvements, to 22.7 percent in 2007 for example, have been reversed by the recent financial crisis²⁶⁷. The official unemployment rate as of the third quarter of 2010 stood at 25.3 percent²⁶⁸.

But even these figures underestimate South Africa's unemployment crisis. Significant proportions of those who are counted as employed have piece work, informal employment and other insecure forms of income generation at very low wages. In addition a more useful "expanded" definition of unemployment includes those who haven't made an effort to find work or start a business in the past month. In other words, it takes into account those who have given up looking for work. By this measure, unemployment stood at 29 percent in 1995 and went as high as 41.8 percent in 2003. Statistics South Africa stopped releasing the data on expanded unemployment in 2005.

It was not only unemployment that ran rampant on the threshold of a promised freedom. “In 1990, the estimated prevalence of HIV infection was less than 1 percent; by 1998, it had reached 22.8 percent - and as much as 32.5 percent in some parts of KwaZulu-Natal.” (Posel 2008:21) Somewhere in the region of five and a half million South Africans are infected with the virus; the largest national infection in the world. (Dorrington et al. 2004) The rapid grasp of the HIV epidemic on South Africa was truly a bitter poison for the new democracy and for the promises of the new society to which the negotiators had looked forward. And the epidemic took hold in part because of a terrible government response. Mbeki’s AIDS denialism confused many, corrupted public debate, and held up the roll-out of life-saving medication. Only in the last five years has anything like an adequate response taken place. Literally hundreds of thousands of lives were lost in the process, and the epidemic was allowed to take hold of society.

The ANC’s macroeconomic approach upon taking over government was substantively redistributive, an approach captured in the terms of the Reconstruction and Development Programme (RDP). In 1998 a more neoliberal policy replaced it. Called Growth, Employment and Redistribution (GEAR), its prime target was to reduce national debt and improve macro-economic conditions. Despite South Africa’s disastrous unemployment conditions, by early 2000, apartheid’s internal debts were all but paid off by the ANC led government and the recovery of revenue from tax was much improved. This provided finance for a programme of expanded spending, particularly on social grants.

Although the amounts of money involved per person are low, the impact of grants on children and household subsistence has been marked. As of October 2010, there were nearly 14.5 million people receiving social grants each month. Just short of 10 million received Child Support Grants to the value of R240 per child per month. Most of the remainder received Old Age Pensions and Disability Grants, both of which pay out R1,010 per person per month²⁶⁹. The period from 2002 onwards saw a significant decline in hunger, and by 2007 one in ten families reported a lack of food as opposed to the 30 to 40 percent the previous decade. The massive state investment in social grants is most likely the cause for an improvement in this situation. (Altman, Hart, and Jacobs 2009:14)

Services of water and electricity also expanded. In 1993 just short of 60 percent of households had piped water to their stands, for example. By 2005 this had improved by 10 percent,²⁷⁰ even with a rapid increase in the number of households and speedy urbanisation. There was a steady rise in the esteem in which public institutions were held over this period. Roberts et al report that trust in the institutions of state went from around 50 percent in 1999 to aggregate trust rising above 60 percent in 2004. (Roberts, wa Kivilu, and Davids 2010:5)

But service delivery has been uneven, often of poor quality and the source of innumerable local corruptions and conflicts. Housing has been amongst the most difficult areas of delivery. In 1993, 68.3 percent of households were living in formal dwellings. There was only a marginal increase to 69.8 percent²⁷¹ twelve years later. Very many of the more than a million houses built during this period were far from places of employment, poorly serviced, and of exceptionally bad quality. The massive

investments in formalising township settlements often did little more than create spatial poverty traps. And by 2004, only 38 percent were satisfied with the performance of their local government or municipality...” (Roberts, wa Kivilu, and Davids 2010:6)

The government has had great difficulty in transforming the civil service and at the same time massively expanding public services with some kind of parity between previously black and white areas across the country. And this was attempted during a period of deepening poverty and the low recovery of municipal taxes, reduced government spending within the GEAR policy, a loss of skills with emigration, and waves of rapid policy and institutional change. Social services, municipal services and education have all had regular crises and low levels of success. Ironically, the state institutions of socio-economic rights and transformation have been the vectors for inequality and poverty in post-apartheid South Africa. In contrast, the middle classes have increasingly acquired their services in these areas privately – buying their schooling, hospital care, security and insurance and social services.

While the late 1990s and early 2000s was a time of optimism buoyed by the politics of hope, the mood was changing by 2004 and 2005. There was a growing impatience with the pace and quality of service delivery in the context of increasing disparities in wealth and opportunity, as well as corruption and enrichment within the ANC and the black elite. There was "a worrisome reversal in trust in virtually all major public institutions, particularly in local government and Parliament, but also in the other two tiers of government" in 2005. (Roberts, wa Kivilu, and Davids 2010:5)

There were literally hundreds of protests over local service delivery and the non-provision of housing, roads, toilets and public amenities in the run up to the 2006 local government elections. The ANC responded with allegations of a third force rather than acknowledging the poor quality of many of its local councillors and the systematic problems of delivery in these areas.

South Africa was also rocked by a series of high profile and destabilising corruption scandals in this period. Tony Yengeni, the ANC's Chief Whip in Parliament was found guilty of fraud. Misappropriation scandals such as Travelgate and Oilgate hit the press. It became clear that ANC parliamentarians were siphoning money from their travel accounts for personal expenses. After a long and messy disciplinary process, most were seen to get away with corruption. The Oilgate scandal revealed that the ANC received significant financial contributions from national oil trading. (Roberts, wa Kivilu, and Davids 2010) The credibility of national crime statistics was questioned and it became apparent that local police stations were under pressure to underreport major and violent crimes. Even more undermining was the continued revelations of the personal enrichment of senior members of the ANC in the arms deal concluded soon after the transition. The repeatedly foiled attempts at investigating the arms deal put enormous pressure on the separation of powers and the independent investigative organs of the state. Most recently, the head of both the South African police and Interpol, Jackie Selebi, has been found guilty of fraud and money laundering. South Africa's politics had been increasingly marked by conspicuous consumption by the black elite and clientalist relations between the ANC and the business elite; practices which have come to be known as tenderpreneurship.

The changing relationship between the citizenry and the ANC is somewhat evident in South Africa's electoral politics. Four democratic national elections have been held to date; in 1994, 1999, 2004 and 2009. In 1994 the ANC won 62.6 percent of the votes. In 1999 it garnered 66.4 percent; and in 2004, a massive 69.7 percent. These 10 years of growth in the ANC's national electoral support were matched by a general decline in political opposition from the parties against which it was pitted in the negotiations. National Party²⁷² support went from 20.4 percent in 1994, to 6.9 percent in 1999, and just 1.7 percent in 2005 before it merged with the ANC. It no longer exists. The IFP's support dropped from 10.5 percent in 1994, to 8.6 percent in 1999, 7 percent in 2004 and just 4.5 percent in 2009. Most importantly, the IFP lost its control over KwaZulu-Natal in 2004. Other parties such as the PAC, Freedom Front, and ACDP have had marginal support; none of them garnered much more than 2 percent in any election. The United Democratic Front (UDF) was formed in 1997, and it appointed Chief Gwadiiso as its Eastern Cape leader. (Hendricks and Ntsebeza 1999:118) In 1999 it received 3.4 percent of the vote. It has not secured these levels since; winning just 2.3 and 0.8 percent in 2004 and 2009 respectively. The only party to buck this trend has been the DA. The Democratic Party of the negotiations became the Democratic Alliance (DA), and its support has grown steadily ever since. It garnered 1.7 percent of the national vote in 1994 which increased to 9.6 percent in 1999 and a significant 12.4 percent in 2004. It also took political control of the Western Cape Province.

The period between the 2004 and 2009 elections was politically turbulent. In October 2004, Schabir Shaik was charged with fraud and corruption for his part in tendering in the arms deal and in his relationship with Jacob Zuma who was then Deputy President of both the ANC and the country. In a much publicised case, Shaik was found guilty

in May 2005 of having a “generally corrupt relationship” with Jacob Zuma, to whom he was a financial advisor. Ostensibly on the basis of this, Jacob Zuma was “relieved of his duties” in the government by President Mbeki in mid 2005. These duties included the deputy presidency, head of the National AIDS Council and the Moral Regeneration Movement. His dismissal fostered division within the ANC and a backlash against Mbeki.

While the National Prosecuting Authority prevaricated over whether to charge Zuma with fraud and corruption, a charge of rape was brought against him in December 2005. The trial was held in the Johannesburg High Court, where there was visible support for Zuma in the crowds outside the courtroom as well as a presence of activists in support of the plaintiff. A rape conviction would have made Zuma ineligible to stand for president. On the 8th of May 2006 he was found not guilty²⁷³. But during the course of the trial it became clear that he had sex with a much younger woman who was openly HIV positive, and without a condom. The woman who laid the charge left the country and has since received asylum in the Netherlands.

Zuma’s acquittal on the rape charge opened the way for his continued rise within the ANC. In December 2007, he was elected president of the ANC at its 52nd National Conference in Polokwane. He replaced the increasingly unpopular Thabo Mbeki as leader of the party. A few months later, Mbeki was called upon to step down as President, which he did. Kgalema Motlante became care-taker president until the 2009 elections.

The corruption allegations against Zuma remained an obstacle to his becoming President of the country. The tussle between those who would charge Zuma and those who sought to keep the case out of court put pressure on all the independent organs of state – the courts, investigation unit, national prosecuting authority, and intelligence agencies.

Zuma's troubles included not only a potential corruption charge, but also his domestic life. At the time of writing, Zuma is married to three wives and negotiating *lobola* for another two. Although there seemed little public condemnation of his polygamy, the press identified that Zuma had somewhere between 19 and 22 children. The question of his sexual and financial continence became a matter of political electioneering.

It was not only in the corridors of state that uncertainty reigned. In 2008, the national electricity supplier (Eskom) became unable to meet demand. Months of widespread power-outages were instituted, frightening both big business and the middle classes. Eskom's lack of future planning and key technical skills became apparent. And in May 2008, increasingly negative sentiment against migrant black Africans erupted into a series of xenophobic attacks. They began in Alexandra township in Johannesburg and spread to urban centres in the Western Cape and KwaZulu-Natal. Sixty two people were left dead in these attacks, hundreds were arrested, and thousands African migrants either left the country or were put into refugee camps.

After the ANC's Polokwane Conference, two senior leaders, Terror Lekota and Mbhazima Shilowa, broke away from the ANC. They formed a party called the Congress of the People (COPE). They were both Mbeki supporters. Despite having

little time to prepare for the elections, it was soon clear that they were mobilising significant support in some black townships and rural areas. The Democratic Alliance was also looking increasingly strong and garnering support from black voters.

In the end, a final decision against charging Jacob Zuma with corruption was made just weeks before the 2009 elections. He was free to stand as president. The process revealed considerable political interference with organs of the state from both Zuma and Mbeki factions of the ANC. The ANC won the 2009 elections. But for the first time since the transition to democracy, its following dropped. The ANC received 65.9 percent of the votes in the 2009 elections, less than they had ten years earlier. Support for the DA jumped to 16.7 percent in 2009. And the new party COPE received 7.4 percent of the votes. These results are the first signs of the de-racialisation of electoral support.

The political crisis of 2009 has passed. Jacob Zuma is president, and COPE has more or less fallen apart. The many successes of South Africa's hosting of the 2010 Soccer World Cup have given a window once again onto a politics of hope in the country. But many of the underlying issues that gave rise to this crisis; of unemployment, HIV, crime, racism, sexual violence, xenophobia, corruption, tenderpreneurship and still growing inequality, have not gone away.

The remainder of the chapter examines the legal and other relationships between institutions of state, ANC government, religion and traditional leadership during this period. This is the political terrain on which the questions of the possibility of secular rule need to be asked in post-apartheid South Africa.

3. Marriage Acts

Chapter Three explained how the right to Freedom of Religion, Belief and Opinion came to include an enabling provision around marriage and family law. The bill of rights states that “15(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.” After a section dealing with state institutions, it goes on to add that “15(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 or family law under any tradition, or adhered to by persons professing a particular religion.” Such legislation, it added, “must be consistent with this section and the other provisions of the Constitution²⁷⁴.”

Marriage is an area of potential competition between the state and other institutions and values that seek to determine and regulate the terms of sexual intimacy and social reproduction. The family has become a major site of modern state intervention and also of public religious re-assertion. These questions came to the fore very quickly in South Africa after the passage of the new constitution. The state - attempting to institute the constitution’s dual imperative of recognising religious and traditional systems of family law and marriage on the one hand and equality on the basis of gender and sexuality on the other – found itself in competition with religious and traditional leaders and institutions who were not necessarily interested in the pursuit of gender equality as a principle objective.

It is important not to automatically conflate religious leadership and socially conservative perspectives, particularly in South Africa. Some influential progressive

Christians and Muslims have looked to the constitution as an opportunity for the transformation of religion in terms of gender and racial equality. Farid Esack and Ebrahim Moosa have already been mentioned in these terms, and Archbishop Emeritus Tutu has actively supported gay rights in national legislation as well as within the Anglican Church. But they are in a minority. And women are largely absent from leadership roles in religious institutions. Nor is the ANC without its own contradictions in these matters. By no means all ANC members support equality on the basis of gender or sexuality in their political actions or their personal opinions, families and sexual relationships. In addition to state, religious and traditional institutions, the women's lobby continued to mobilise for gender equality on the basis of the constitution.

For feminist writers, the issue of Muslim and customary marriages posed twin challenges at the dawn of democracy. On the one hand, because of non-recognition in law, women married under these regimes had no protection from the state and no guarantee of their rights in terms of these regimes. It was up to local traditional leaders or *ulama*, for example, to rule on men's obligations to wives and ex wives in terms of maintenance, divorce and custody. These only have social sanctions, and often in deeply patriarchal settings. The state did not, in other words, provide its means of enforcement such as orders, fines, or imprisonment for the breach of marriage contracts made under customary or Muslim law. For this reason, it was imperative that such marriages be recognised. On the other hand, the content of these marriage contracts discriminated against women and were, at least potentially, in contradiction to the equality principles of the constitution. To recognise them therefore required that they be changed and brought in line with these provisions. And

this became the object of the development of new marriage legislation. I will briefly describe the process of producing each piece of marriage legislation, and an outline of their contents as the basis for a discussion.

Customary Marriage

The new government got to work on customary marriages soon after it took power. In 1997, the South African Law Commission (SALC) proposed legislation to recognise customary marriages. They suggested that some rules should apply to all marriages; the consent of both parties, a minimal legal age for such consent, and a legal equivalence between the parties to a marriage and some of the terms of divorce. They also argued that “in certain areas, spouses should be free to follow their cultural preferences as guaranteed in sections 30 and 31 of the 1996 constitution;” the rights to language and culture and of cultural, religious and linguistic communities respectively. (Henrard 2002:214) The SALC therefore proposed legislation that would recognise both polygamous and monogamous customary marriages, but altered the terms of the marriage contract in such a way that would strengthen women’s entitlements.

The proposals were widely debated in bill form. They went to the newly established National and Provincial Houses of Traditional Leaders who were, on the whole, extremely critical of them. The Commission on Gender Equality (CGE) also organised a consultation process with rural women. The question of polygamy was constantly raised at these forums. Reports in the black press tended to present the proposal as the “redemption of black culture” after it was distorted under colonialism and apartheid. (Yarbrough 2005:12) White reportage, on the other hand, saw customary law only as an apartheid exploitation of black culture.

After a period of consultation the then Department of Justice and Constitutional Development pushed the Bill through Parliament, and the Recognition of Customary Marriages Act²⁷⁵ (RCMA) was passed in 1998. The Act recognised all customary marriages in existence at the time that it was passed, both monogamous and polygamous. It also recognised future polygamous marriages.

The question of how to deal with polygamy is writ large in the Act. As Cheryl Gillwald, then Deputy Minister said at its launch: “[t]he main reasons ... for not imposing a ban on polygamy are that such a ban would be almost impossible to enforce and that the popularity of the practice seems to be waning²⁷⁶.” Despite this Budlender et al calculate “the relatively high percentage of 7.2 percent of married women reporting that their husbands are party to polygamous unions.” (2004:12)

Equality in the RCMA does not mean that male and female partners have the same rights. Role differentiation was maintained in the law and women were not granted the right to have more than one husband for example. Substantial rather than formal equality was recognised in accommodating the structures of customary marriage. To this extent, customary marriages under the RCMA continue earlier practices and codification. But the Act also changed the substance of customary marriage by incorporating many elements of civil law. (Himonga 2005) In particular, new marriages conducted under the RCMA are automatically made in community of property, asserting women’s rights to an equal share of the marital estate. And in the case of a man wanting to take a second or further wife, he has to make an application to the courts to show that he will be able to support this new spouse. One aspect of

such an application is the consent of the first wife to his taking another partner. *Lobola*, although widely practiced, is not a necessary condition for a customary marriage under the RCMA.

There appears to be a widespread failure to implement the terms of this law in the sanctioning of customary marriages. The actual workings of changes to customary marriage are extremely difficult to ascertain. Statistics South Africa has compiled some basic data on the registration of Customary Marriage from 2003 to 2008. Between 14 000 and 18 000 customary marriages were registered each year in this period. But this is a poor indication of the number of customary marriages, since less than 10 percent were registered in the year in which they took place. This is partly because customary marriages that were entered into before the act may now be registered. Some of these marriages may be 20 years old, it is impossible to tell. The low rate of registration is contrary to the Act that requires that the spouses of a customary marriage have a duty to register the marriage within 12 months of its taking place²⁷⁷. The statistical report also does not have access to the marital status of the parties at the time of marriage and therefore cannot report how many of these marriages are polygamous. (Statistics South Africa 2009:2) It does not appear likely, however, that the passage of this act has altered much in the way in which people get married, except that it legalises polygamy in some cases.

Civil Marriages

The South African Law Commission then set about reviewing all marriage legislation in 1999. Under apartheid, the Marriage Act only made provision for Christian and Jewish marriage officers. (Budlender, Chobokoane, and Simelane 2004:3) The review

led to revisions to the Marriage Act²⁷⁸ that now allows for the registration of Hindu, Muslim and other marriage officers. In this sense, civil marriages were made more inclusive and religiously neutral, and marriages under civil contract can take place in a variety of locations and not only churches and Jewish temples. While some Muslims, Hindus and others marry under the Marriage Act, there remains a strong social sanction in some quarters against Muslim couples using this civil law to arrange their marriage contracts.

According to 2008 data, 51.4 percent of civil marriages were conducted by a magistrate or someone in the Department of Home Affairs. This gives no indication of whether religious or traditional ceremonies were also held. In contrast 34.2 percent of ceremonies were conducted by religious officiants. The status of the marriage officer in the remaining 14.4 percent of marriages was unrecorded. (Statistics South Africa 2009:2) It is impossible to tell how many of the religious marriages were Christian, Jewish, Muslim, Hindu or from another tradition.

Muslim Marriages

Despite the specific inclusion of the enabling clause in the right to religion, Muslim marriages are still not recognised in South Africa. The history of the attempt to have elements of Muslim law recognised predates the constitutional negotiations. Apartheid State President John Vorster was petitioned to introduce Muslim Personal Law (MPL) in 1975, but he did not respond. In 1987, the South African Law Commission under apartheid invited comments on matters of Muslim Personal Law as

a result of a private member's bill introduced into the Tricameral House of Delegates. These initiatives were spurned within the Muslim community, which suspected that this offer of recognition was made merely to legitimate the Tricameral Parliament. (Moosa 2001:126)

The enabling clause in the 1993 interim constitution set a new process in motion. The ANC requested the establishment of a Muslim Personal Law Board under the auspices of the SALC in 1994. (Moosa 2001:129) Its task was to seek a way of legislating for Muslim Personal Law, including marriage law. It looked at the possibility of new legislation which would, in effect, have codified aspects of MPL. The board was marred by friction from the start, and it disbanded when conservative *ulama* withdrew after tensions with progressive Muslims and women represented on it. (Amien 2006) The conservative *ulama* wished to petition the Constitutional Assembly to "exempt Muslim family law legislation from the human rights provisions of the new constitution." (Moosa 2001:129) This was the same stance taken by traditional leaders with respect to customary law in the negotiation; a stance that was not successful.

The issue fell into abeyance until the Law Commission established a project committee at the beginning of 1999 to investigate the legislative options for Muslim marriages. This reduced the terms of reference in comparison with the earlier board that sought to address a full recognition of Muslim Personal Law. (Tayob 2005:22) In July 2000, the committee circulated an issue paper, and after making amendments, a Discussion Paper was published in December 2001²⁷⁹. It garnered widespread interest amongst Muslims, and no fewer than 84 written submissions were received by the cut off date and another 29 thereafter from a wide range of "Muslim religious

organisations, gender and cultural groups as well as individuals.²⁸⁰ The final report was published in 2003, containing draft legislation to be taken forward by the Department of Justice.

Despite producing a potential legal resolution between Shari'a and gender equality, the committee was unable to frame a social or religious resolution. As Tayob puts it, "The majority of Muslims believe that a compromise with the constitution was inherently impossible." (Tayob 2008:585) Irrevocable disagreements emerged between Muslim clergy on the one hand and human rights and women's rights groups who were allied to a small minority of progressive Muslim clergy and academics on the other. The *ulama* have refused to give consent to a codification that would provide for equal or nearly equal benefits to male and female partners in a marriage contract on the grounds that it is in opposition to the dictates of the Qur'an. A long list of provisions under Islamic law would, according to feminist legal scholars such as Amien, Sloth-Nielsen and O'Sullivan, simply never pass the requirement of equality on the grounds of gender. (Amien 2006; Sloth-Nielsen and van Heerden 2003; O'Sullivan and Murray 2005) Neither side were entirely satisfied with the outcome. The Department of Justice decided not to table the Bill in Parliament as a result of this impasse. This issue remains unresolved.

While legislative development has stalled, a number of court cases have paved the way towards recognition of marriages conducted under Muslim Law by enforcing obligations under the law through the civil courts. In *Ryland v Edros*²⁸¹ the Cape High Court enforced a contractual relationship established under MPL. In the case of *Amod v Multilateral Motor Vehicle Accident Fund*²⁸² a woman married under Islamic law

successfully claimed damages for compensation after the death of her spouse. This too resulted in a civil court supporting a Muslim marriage contract. (Henrard 2002) Neither case addressed the broader recognition of Muslim marriages. But these and other cases will put pressure on the courts to address the issue of Muslim marriages *per se* and force a new legislative development. At the time of writing a new Muslim Marriages Draft Bill produced by the South African Law Commission has been circulated for public comment²⁸³.

Same-sex marriages

Same sex marriage received official support at the ANC's 1997 policy conference. The South African Law Commission, when it reviewed marriage legislation in 1999, also recommended that same-sex marriage be recognised. But the ANC ignored this aspect of the report. In the mean time, gay rights groups took a range of discriminatory measures to court. These included the decriminalisation of sodomy, pension benefits, and joint adoption. The Department of Home Affairs, then under the political headship of the IFP's Buthelezi, contested and appealed every one of these court decisions. Home Affairs lost every appeal on the grounds of non-discrimination on the basis of sexual orientation in the equality clause.

In 2002, a case took up the question of the recognition of gay marriage. *Minister of Home Affairs v Fourie* worked its way from the High Court, to the Supreme Court of Appeal and eventually to the Constitutional Court in 2005²⁸⁴. The Constitutional Court acknowledged that there was discrimination against same sex couples in marriage legislation and ruled that this was unconstitutional. It did not however rule that the marriage act should be amended to allow for same-sex marriage.

Acknowledging the problem of popular support for such issues, it passed it back to the legislature. The judgement gave Parliament one year to pass new legislation so that same sex couples “would be able to enjoy the same rights and benefits as married heterosexuals.” (Cock 2007:9) If they failed to do this the court ruled that the Marriage Act automatically be amended to include a gender neutral “spouse” where it currently states husband and wife. The ANC was put in a corner.

The Court’s ruling caused huge controversy. The ANC proceeded to produce a draft Civil Unions Bill and parliament opened it up for public comment. Vociferous public and parliamentary debate took place and no fewer than 5,822 petitions as well as a “considerable amount (sic) of submissions” were received on the draft bill²⁸⁵. The lines were drawn between gay rights activists and church and traditional leaders’ groups. As Robins puts it, “While political, religious and traditional leaders vigorously attacked the Bill at these hearings, citing homosexuality as ‘unAfrican’, ‘immoral’ and ‘sinful’, gay activists from numerous organisations in turn registered their anger at what they perceived to constitute homophobia, hate speech and the violation of their constitutional rights as citizens.” (2008:186)

Christian civil society response was divided. A formation that called itself The Marriage Alliance included Doctors for Life and a range of evangelical Churches, found the proposed legislation completely contrary to their faith and their readings of the bible. Many of their arguments came directly from US advocacy material against gay marriage. The right to sexual orientation was pitted against the right to religion in this position. The mainstream ecumenical response, as represented by the South African Council of Churches on the other hand, acknowledged a human rights

framework and the secularity of the state, and rendered the decision to the state. But they too expressed a concern that religious marriage officers would be forced to solemnise gay marriages in opposition to the doctrines of their faith, their ecclesiastical autonomy, and individual conscience.

In a dramatic last minute argument in Parliament, ANC MPs were instructed to vote for the Civil Unions Bill in an impassioned speech by Terror Lekota²⁸⁶. This was in line with the ANC NEC statement of October 2006: “Our approach as the ANC is informed by respect for human rights and opposition to any form of discrimination. In its discussion the NEC noted that some matters of this kind can occasion discomfort amongst members of our movement and the rest of society. However we agreed that in the final analysis, respect for human rights entails recognising diversity and also ensuring that we always take into account the sensitivities of our society²⁸⁷.” Despite this formal rhetoric, Jacob Zuma is reported to have said that gay marriages are “a disgrace to the nation and to God.” (Robins 2008:186) He later apologised. The ANC members voted and the Civil Unions Act²⁸⁸ was passed in 2006 just before the deadline given by the Constitutional Court came to an end.

As the then minister of Home Affairs Nosiviwe Mapisa-Nqakula wrote in a statement widely placed in the media, “The right of ministers of religion to conduct a marriage contrary to the dogma of his or her religion remains. The Civil Union [Act] allows a marriage officer to object to solemnising civil unions on grounds of conscience²⁸⁹.” The Act allows for religious organisations to apply corporately for one of their members or ministers to be able to solemnise marriages under this legislation. This effectively gives religious institutions authority over all their members with respect to

solemnising marriage between same sex partners. As is the case with Termination of Pregnancy Act²⁹⁰ civil servants' freedom of conscience, religion and belief was also upheld. Marriage officers employed by the state to conduct civil marriages are also not compelled to solemnise civil unions if it is against their conscience, religion and belief.

Discussion

There is a productive comparison to be made across these forms of marriage contract and the legal, political and popular deliberations around their recognition. One comparison reveals the consequences of differences in institutional position and legal entitlement between religious and traditional bodies. Comparing Muslim and Customary marriage reveals some of the consequences of secular versus non secular in institutional relationships with the state and in law.

Many of the issues that drafters faced in reconciling religious and traditional marriages and substantive gender equality are shared between customary and Muslim Personal Law. They include polygamy, grounds for divorce, rules of automatic succession, custody, inheritance, the division of marital estates at divorce, consent, age of consent and women's legal standing in marriage contracts. And the legislation drafted for customary and Muslim marriages treat these issues in similar ways with a core civil law component that prioritises equality, and another that makes provision for gender differentiation according to religion and tradition. There are other similarities too. Women married under both customary and Muslim rites were prejudiced by the non recognition of those marriage contracts. Men claiming authority over their traditions – *ulama* and traditional leaders respectively - contested the

authority of the state to transform their traditions. And in both cases, an alliance of progressive religionists and traditionalists contested their patriarchal authority in the name of the transformation of the tradition and gender equality. Both law making processes began in the early years of democracy and therefore under similar national political conditions.

How then to explain the very different outcomes? Customary marriages are recognised under the RCMA. Muslim marriages are still operating largely outside of the ambit of state law. The difference is a direct result of the secular and non secular relations between the state and religious and traditional bodies respectively. The institution of traditional leadership and customary law are part of the state and its law. As such they are uniquely subject to legislative development, and therefore, to the equality provisions. They do not have autonomy from the state. The state is within its rights and under obligation to intervene in the institution and the law in ways consistent with the constitution. Customary law was codified by Colonial administrators, legislated for by apartheid administrators, and now again, has been codified in legislation in the RCMA. There is the right to custom, but it is subordinated to other aspects of the constitution.

What then of Muslim personal law, as well as the expressed Christian interests in the issues of gay marriage? The ideas of religious autonomy, conscience and a separation of powers and domains have been central to the development of secularism. These ideas were defended by both the ANC and religious groups in the negotiations. The constitutional right to religion includes the right to the integrity of conscience. Religious organisations as institutions of civil society have the right to autonomous

ecclesiastical and theological control over their internal rules and regulations. And religious groups sought separation from the state so that their ecclesiastical and theological control could remain autonomous.

When it came to developing customary marriage legislation, the law makers followed due process, took comments into account, framed a compromise, and then acted against the wishes of the vast majority of traditional leaders in passing the RCMA. When it came to developing Muslim marriage legislation, they began the same way. They formed a consultative body that included a variety of opinions amongst Muslims, followed due process, took comments into account and then framed a compromise. They did not, however, act against the wishes of those Muslims, probably the majority, who were opposed to the compromise. Instead they acknowledged the autonomy of the “Muslim community” in deciding on this matter. They gave cognisance to the idea of the sacred authority of the Qur’an and were unwilling to codify elements of scripture in opposition to its claimed authoritative interpretation. But it was only by withdrawing from the legislative process that they could do this.

As long as a social practice or institution does not seek the authorisation of the state; so long as nobody takes this practice to court; and as long as an organisation can claim to be a religion with a domain of autonomy through conscience or sacred authority, the state has not legislated religious practices to bring them in line with equality provisions. But the moment a practice or institution falls under the rubric of legislation, equality becomes an issue. The ordination of women in the church, for example, is a matter of ecclesiastical and theological autonomy. Unless someone takes it to court, and perhaps even then, the state is unlikely to intervene. On the contrary,

access of women to chieftainship, for example, has been both proactively legislated and contested in court.

These examples of marriage legislation also point to the different avenues open for the legislation of majoritarian and countermajoritarian demands. Unpopular demands for equality that are in opposition to public opinion have been taken to the courts. This is most clear in the advancement of the equal rights of gay and lesbian people who won their demands through the courts. And it put enormous pressure on the ANC at a time when it sought to defend itself against claims of immorality and corruption. It is clear that the executive branch of the ANC had to override the “popular” will represented in the views of members of parliament, in order to support the Civil Union Act. The question of Muslim Marriages on the other hand, which affects a small minority, some 1.5 percent of the population, has been dealt with in specially established forums. The state has not yet been willing to intervene to force a resolution in favour of one or another position in this forum.

4. Religion and the ANC government

There has been little evidence of a secular turn since 1996 in terms of religious affiliation or adherence. If anything, religiosity has increased. The most recent HSRC social attitudes survey reports that 80 percent of South Africans identify themselves as Christian. (Roberts, wa Kivilu, and Davids 2010) A little over half the population attends religious services at least once a week, and another twenty five percent at least once a month. Even given the likelihood that this is over-reported, these are very

strong indicators of religious attachment. According to the HSRC “three-quarters of the adult population express a resolute faith in the existence of God and claim that ‘Jesus is the solution to all the world’s problems.’” Nine out of ten said that they believed in “the power of prayer,” and three quarters that they pray at least once a day. And “[w]hile trust in many public institutions began to wane in 2005there remained an overwhelming and steadfast confidence in churches and religious organisations.” (In Roberts, wa Kivilu, and Davids 2010:11) The institutional assertion of political secularism in South Africa’s state formation did not, in other words, result in a reduction in reported religiosity. In this South Africa’s secularism is similar to that of North America rather than the more aggressive Jacobin or Laïcité formations. But the institutional place of religion relative to the state did change significantly after 1994.

Chapter Three addressed the close and cooperative relationship between the interfaith movement (WCRP), mainline Protestants (SACC) and the ANC during the negotiations. This continued when the ANC established a Commission for Religious Affairs in 1995. According to its literature it has a “spiritual function which includes a chaplaincy”, a political function that “relates spiritual and theological insights to current issues” and a religious function to promote understanding and cooperation with religious bodies²⁹¹. Its first head was previous WCRP secretary general Cedric Mayson.

The SACC offered its support of the new government in many ways. Its 1995 conference captured its relationship to the new state as one of critical solidarity; a partner in the South African nation building project. This solidarity was best

expressed in the leadership that members of the SACC provided to the Truth and Reconciliation Commission (TRC).

But the interfaith movement and the South African Council of Churches weakened considerably after the transition. Many religious leaders withdrew from the public sphere. (Omar 2002) Others, including senior church leaders, joined the government. Aside from Mayson, the Reverend Frank Chikane, one time secretary general of the SACC, joined the presidency. Father Smangaliso Mkhathshwa was appointed Mayor of Tshwane (Pretoria). Mkhathshwa had been a member of the Catholic Bishops Conference. Financial support that churches had received on behalf of the struggle began to be channelled directly to the ANC and government programmes, leaving the ecumenical movements with far fewer resources. (Bompani 2006:1140)

The place where the mainline churches and progressive religionists were most visible was the Truth and Reconciliation Commission. A great deal has been written about the TRC's theology of reconciliation. (See, for example Verdoolaege 2006; Villa-Vicencio and Verwoerd 2000) As discussed in the last chapter, Tutu's role as chair of the commission has been highlighted in the framing of its approach to transitional justice and reconciliatory nation-building; an approach that combined a language of rights, African humanism and Christianity. (Moosa 2000) The Anglican Communion was called in for intercession. And Tutu is well known for statements grounding reconciliation in a Christian theology that recognised that despite their awful deeds, perpetrators like victims were children of God.

For all its importance and the voluminous commentary it has garnered, the TRC is only one element of a more complex story of the public role of religion after apartheid. And even while the TRC was taking place, the ecumenical churches became more distanced from and more critical of other elements of emerging government policy. When the GEAR macroeconomic policy was introduced in 1998 without consultation within the ruling alliance or the ANC's civil society supporters, many mainline church leaders felt that they had been betrayed²⁹². The SACC responded by establishing more formal channels for communication with the government around public policy, not only in direct conversation with the ANC but in the spaces of parliament. The SACC created a Public Policy Liaison office, later called the Parliamentary Office. The following year the Catholic Bishops Conference decided to set up its own institution after it became clear that the churches had contending positions on abortion²⁹³.

In 1997 Nelson Mandela intervened to bring the churches back into a closer relationship with the ANC. He convened an interfaith National Religious Leaders Forum (NRLF) to draw religious communities into a common project of nation building, referring to this as "a partnership to bring about transformation." The discourse of the NRLF acknowledged the separation of religion and state, but not a distance between political and spiritual integrity. A working group met monthly and produced an *Ubuntu Pledge* and a *Code of Conduct for Persons in Positions of Responsibility* in 1998. The NRLF helped to conceptualise and launch a Morals Summit in October that year. The following year they drafted a *Code of Electoral Conduct* in preparation for the April 1999 national elections. It appeared that the close relationships between the ANC, the SACC and the ecumenical movements, now

embodied in the National Religious Leaders Forum, were to be sustained. But as the ANC consolidated its power, this relationship became increasingly antagonistic.

The Secretary General of the SACC at the turn of the century was Dr. Molefe Tsele. His opening speech at the 2001 SACC conference offers some insight into the churches' increasing discomfort with its role in providing moral authority to the ANC. Tsele said at this conference: "We must run away from an incestuous co-habitation with government... To be in alliance with a persecuted political movement is one thing, but to become an ally in government is another..." He criticised the ANC for seeking to "instrumentalise the Church." He denounced a government which, he said, "consorts with their new-found comrades in the World Bank and IMF." He said: "we should refuse to be turned into praise singers of the state." and "it is clear that what South Africa needs at this juncture is not a weak or domesticated SACC, but an SACC that has a clear vision of its role as an agent of transformation²⁹⁴." The rest of his speech raised concerns about GEAR, arms deal corruption and access to HIV/AIDS medication to prevent mother to child transmission.

Thabo Mbeki and others in the ANC responded angrily. As the newspapers reported it at the time, "President Thabo Mbeki ... joined the chorus of African National Congress criticism of church leaders." Mbeki suggested that the churches had "abandoned the common struggle against the legacy of apartheid²⁹⁵." The ANC in KZN called Tsele's speech "satanic and evil." They said that the church was nothing but a sales agent for the pharmaceutical industry. And it was not only Tsele that felt the ire of the ANC. Archbishop Njongonkulu Ndungane, Tutu's Anglican

replacement, was reviled for his outspoken criticism on HIV, the economy and arms deal.

In 2001 the disquiet with the situation of “critical solidarity” was such that the Triennial National conference, the highest policy body of the organisation, resolved to “adopt an attitude of critical engagement in its dealings with the state and other organs of civil society.” Gone was the concept of solidarity. Tutu, now finished with the work of the TRC, became a critical voice against the government again. In 2002 he received an honorary degree from University of Pretoria and used his speech to take on government on AIDS policy, its stance on Zimbabwe, and the arms deal²⁹⁶.

In November 2004, Tutu was invited to give the annual Nelson Mandela Lecture. He used it as an opportunity to raise concerns about the leadership and direction of the ANC. He was scathing about Mbeki’s denialist position on HIV/AIDS and on the fact that many within the ANC seemed unwilling or unable to speak out against him. Tutu said: An unthinking, uncritical, kowtowing party line toeing is fatal to a vibrant democracy. I am concerned to see how many have so easily been seemingly cowed and apparently intimidated to comply.” (Quoted in Bompani 2006:1142)

The President responded in a personal attack on Tutu in the online publication ANC Today; a vilification that was widely reported in the press. The chair of the Parliamentary Portfolio Committee on Sport, ANC MP Butana Komphela, called Tutu’s views on transformation “treasonous²⁹⁷.” The SACC tried to calm the debate somewhat, calling for a “culture of open debate without personality characterisation²⁹⁸” and the use of “temperate language.” But clearly elements within

the ANC thought they could no longer afford to allow the SACC or Tutu to be the voice of South Africa's moral and political conscience.

While Tutu remained critical, Mbeki's team mounted a dual strategy of undermining and co-opting the SACC. These interventions succeeded in taking some of the edge off their antagonistic relationship. Mbeki formed an inner circle religious working group. Gumede contends it had the purpose of "drawing critical clerics away from rebellious ANC allies and closer to the Mbeki camp." (2005) Mbeki also opened the 2004 SACC conference. There he took a swipe at a critical voice of the SACC, saying that it should "not be content merely to criticize or approve what others are striving to achieve²⁹⁹." Referring to the ANC's landslide 2004 election victory, Mbeki called the millions of SACC members "the same millions who, only two and a half months ago, voted us into government." He continued to say that the SACC ought to "identify itself with the national agenda I have sought to explain..."³⁰⁰

The 2004 Conference of the South African Council of Churches took this criticism to heart. It returned to the nature of this relationship with the state. This time it framed its relationship in much less political terms and in the technical language of development. The new relationship was to be characterised by what it termed church-state development cooperation. The 2004 conference mandated its NEC to "research and define models of cooperation between Churches and Governments" and to "negotiate a new partnership for community development." The conference resolutions go on to declare that "such a model of cooperation shall seek in combining the resources of the Government with the networks and capacities of the Churches, to establish equity, good governance and the realisation of the Millennium Development

Goals (MDGs) in order to benefit the poorest and alleviate poverty.” (South African Council of Churches, 2004)

But as the ANC entered a period of crisis after 2006, particularly regarding its own integrity, it increased the visibility and intensity of its relationships with religious bodies once more. While it may have contained the critical voice of the SACC, the ANC could not rely on these churches to provide open support for new policies. This was particularly true for the ANC faction emerging under the leadership of Jacob Zuma. In 2006, for example, Tutu publicly urged Zuma to drop out of the ANC's presidential succession race.

A new religious interlocutor stepped in to fill the role; Ray McCauley, head of the Rhema Church, and apart of an emerging Christian alliance made up largely of other Pentecostal Charismatic Churches. And Jacob Zuma, in his campaign to become president, called upon a new language and logic of relations with religious groups. (West 2010) Despite the patent ironies of Zuma's sponsorship of a language of conservative sexual morality amidst a rape charge, polygamy and affairs, this populist rhetoric came to feature the period from 2007 to 2009.

Chapter Five outlined the beginnings of this alliance during the negotiations when it challenged changes to publication control that liberalised the media and allowed for pornography and other sexually explicit content. A network of similarly minded Pentecostal charismatic churches responded to the rise of the gay rights movement in South Africa, and the Christian right along with the National Party contested the inclusion of the right to protection against discrimination on the grounds of sexual

orientation. The next target of the alliance was the death penalty, but it lost this campaign when the Constitutional Court interpreted the right to life in a way that precluded the death penalty. Mobilisation was stepped up in the debates around what was to become the Termination of Pregnancy Act. Again their campaign to prevent or limit access to abortions was unsuccessful. The alliance then took up the issue of corporal punishment in schools and at home as a case. It lost that case, and corporal punishment was outlawed in educational and other youth institutions. In 2006, its biggest and most supported campaign was against gay marriage and for a host of traditional family agendas. In large measure they failed in this mobilisation against same sex marriage. But each campaign was better mobilised and better resourced.

The Rhema church was an important presence in the National Religious Leaders' Forum. By 2005, many mainline Protestant and progressive Muslim religious leaders were busy elsewhere, and the institution had become both weaker and more socially conservative. (Omar 2002) Ray McCauley assumed an increasingly important place on the Forum, and two of his closest Rhema colleagues, Dr Carl Niehaus and Rev Ron Steele, sat on its working committee. They were increasingly frustrated by their inability to use the NRLF to persuade the ANC towards socially conservative and moral majoritarian policies.

McCauley and other social conservatives aligned themselves with the growing Zuma faction from 2007 onwards. It was a marriage of convenience. In 2008 McCauley and Zuma announced the creation of a new body to be called the National Interfaith Leadership Council (NILC). Although the NRLF continued to exist, it was more or less bypassed once Zuma was elected ANC president at Polokwane. Carl Niehaus was

appointed to the ANC as head of its communications division from the Rhema church, an appointment that was later relinquished when a trail of fraud and indebtedness was exposed by the press. NILC threw its weight behind Zuma's campaign for the national presidency. Composed of 20 religious leaders, it included four ANC Members of Parliament at its establishment including then Western Cape Premier Ebrahim Rasool and ANC's Chief Whip Mathole Motshekga. NILC is one of the vehicles for an increasingly close relationship between the ANC and the Rhema church. Rhema's 30th anniversary celebrations were attended by Zuma's wife MaNtuli as well as the Minister of Social Development Edna Molewa. And NILC uses ANC parliamentary facilities to communicate with the media.

The Rhema church gave Zuma an exclusive platform during the ANC election campaign. Zuma attended a mega church service in Rustenberg in March 2009 where he was given a chance to speak from the pulpit. Standing with bowed head, McCauley and his attending ministers prayed for and blessed Zuma. About 50 members of the congregation walked out in protest³⁰¹. Vusi Mona was the Rhema spokesperson at the time, and defended their actions. Shortly afterwards Mona was appointed onto Zuma's presidential communications team³⁰², following in Carl Niehaus' footsteps.

Zuma did not only turn to the Rhema church for legitimacy and moral standing in his political battles. He made public appearances at many Pentecostal and Zionist churches in his campaign. In February 2007 for example, Bishop Steven Zondo's Rivers of Living Waters Ministry held a prayer meeting for Zuma in Evaton. There Zuma said that the ANC really needed the church and its prayers "in this period." Then, with Gospel music star Solly Moholo, Zuma sang *Mshini Wam*³⁰³, and four

bishops put their hands on Zuma and prayed for him. He then put on the red coat worn by male members of the church. This was followed by a “business lunch” that raised money for the church as well as the Friends of Jacob Zuma Trust, a group established to raise funds to meet the costs of Zuma’s legal battles.

Bishop Ben Mthethwa declared Zuma an “honorary pastor” of a Charismatic independent church at Ntuzuma north of Durban in May 2007. In his talk at the event, Zuma is reported to have urged churches to work closely with government “in order to transform society³⁰⁴.” Speaking of his ordination Zuma said “[t]his is a symbol that has been decided on by the church, that we should work together... This is, in a sense, to arm me in my work as one of the leaders, that we could jointly lead the people together³⁰⁵.” The Full Gospel Church later distanced itself from the ordination, saying that another church had used its venue, and it had not ordained him³⁰⁶.

Zuma’s campaign was marked by more than just these visible sanctions by church leaders. He also drew on a popular Christian lexicon. At a rally in Khayelitsha outside Cape Town in May 2008, he said “Even God expects us to rule this country because we are the only organisation which was blessed by pastors when it was formed. It is even blessed in heaven. That is why we will rule until Jesus comes back³⁰⁷.” In June 2009 Zuma said “The ANC will rule until the Son of Man comes.” When the current SACC secretary general secretary Eddie Makue criticised this statement, the Friends of Jacob Zuma Trust responded that the SACC was trying to “privatise Jesus and turn Christianity into a cult³⁰⁸.”

It was not only Zuma that claimed divine sanction for himself and the party. The Free State's ANC Premier Ace Magashule suggested that Zuma was like Jesus; that he was bring "crucified like Christ" that he was persecuted yet magnanimous. Yvonne Phosa, an ANC leader in Mpumalanga, used similar sentiments in a rally at Elukatweni the week before the 2009 elections. She said the ANC "had the wisdom of Christ and the stick of Moses³⁰⁹." This after local priests had prayed for an ANC electoral victory. She said "As we emerge from the Easter, we are sprinkling the blood of Jesus Christ into the body and soul of the ANC.... If you go with Jesus Christ, nothing is impossible...Now, He is with the ANC³¹⁰." On the 4th of April 2009, the day Zuma heard that the corruption charges against him were to be dropped, he visited the Shembe church in KwaZulu-Natal. There he wore the white robes of purity of that congregation. A caption for a front page image of this visit on the Sunday Times of the 5th of April read "white as snow³¹¹."

And it wasn't just the ANC that sought to garner support through its proximity to the church. COPE, the breakaway political party, appointed Methodist minister Mvume Dandala as its parliamentary head. Dandala immediately resigned all his positions in the church. As Phillip Dexter, COPE's head of communications, suggested to the media, "He [has] committed himself to defend the secular nature of our democracy³¹²." But the link between Dandala's religious leadership and his political promise was central to the strategy of COPE. Dexter called Dandala a man of "unassailable integrity," who would take a strong stance on "clean governance³¹³." The ANC denounced what it saw as COPE's strategy to woo the religious vote. Zuma said COPE was like Jesus' donkey, and the ANC, by inference, was like Jesus. (West 2010:8)

There can be no doubt that Christianity was politicised in the run up to the 2009 election. Before the 2009 elections, Zuma appeared to promise some space for demands to amend the constitution to allow for the death penalty, corporal punishment, and an end to abortion and gay marriage. Zuma, although being very careful not to be seen to support these demands directly, suggested that the time had come for “open debate” on these matters. In September 2009, six months after the elections, McCauley announced that the Rhema church wanted to revisit laws legalising abortion and same-sex marriage³¹⁴. But at that point Zuma made it clear that the constitution cannot be changed on these matters and the debate was thereby curtailed. Since the election this kind of alliance between the ANC and the churches is no longer being given such prominence. But it may well be a sign of things to come as the ANC continues to try to hold on to and consolidate its powers in a situation where its delivery and integrity are under question.

While the ecumenical WCRP and the mainline Protestant SACC won out over a version of moralising Pentecostalism in the Constitutional negotiations, it was Pentecostal Christians whose views are more representative of national mores around social and sexual morality. Stacey and Meadow refer to a 1995 survey that showed that 44 percent were against gay rights in the constitution and 68 percent opposed gay people being allowed to adopt children. (Stacey and Meadow 2007:21) A Human Science Research Council (HSRC) survey conducted in 2003 revealed that 75 percent were in favour of capital punishment, 74 percent thought abortion wrong and 78 percent thought that gay sex was always wrong. (Pillay, Roberts, and Rule 2006:36) The constitution is countermajoritarian.

During the period of the transition “moral values” or at least those that deal with sexual and familial morality did not affect voting behaviour. (Pillay, Roberts, and Rule 2006:268) The ANC garnered substantial support despite its strong countermajoritarian stance on issues of abortion, pornography, and the protection of rights of sexual orientation. In contrast, parties like the ACDP that did mobilise on this basis received very little support. But with the muting of the voice of “prophetic” Christianity in the post-apartheid period, new charismatic Christian leaders, most notably Ray McCauley, have mobilised around populist social issues that have the potential to politicise the gap between policy and the views and experiences of many South Africans. Their mobilisation is all the stronger because it has a great deal of affinity to cultural claims to tradition articulated by traditional leaders. It is only in this context and in the midst of now acknowledged problems of corruption and tenderpreneurship within the ruling party that we can understand the increasing attention within the ANC to discourses of morality.

5. Custom, tradition and the ANC

Chapter Four addressed the ambivalent and deeply contested place of traditional leadership and customary law in the negotiations and the constitution it produced. Traditional leaders were recognised “in terms of customary law” but the institutions of that recognition were not customary. It enabled the recognition of traditional leaders in terms of apartheid era Traditional Authorities, possible roles in local government, and national and provincial houses of traditional leaders. Customary law

was also recognised subject to the equality clause and other provisions. It was to be applied in traditional courts that were maintained as part of the country's transitional arrangements. But customary law can also be applied in all of South Africa's other courts, and it can be developed and amended by legislation.

Through the recognition of traditional leadership and customary law, an official version of a customary world became embedded in the state and its instruments. This is exactly the opposite of a secularising process which seeks to exclude religious institutions from participation in the state and privatising and autonomising their operation. It is in opposition to modern secular exclusions of religious or canonical law from civil law. Instead, it continues forms of colonial government into the late modern period.

In Chapter Five I argued that the IFP, the Ciskei and the Bophuthatswana governments used arguments of ethnic or cultural nationalism to mobilise support for strong regional political powers. Discourses and performances of tradition, culture and the Zulu monarchy were employed towards this end. But this kind of ethnic nationalism could not easily translate into national political programmes or become part of a nationalist legitimisation for rule, despite the IFP's attempts. Traditional leaders who were aligned to the ANC had to disavow any such ethnic nationalism. Contralesa's mission statement and its negotiating positions all distanced itself from what it called "tribalism." That was the price of inclusion within the "broad church" of the ANC. At the national level, the articulation of pro-ANC traditional leaders had to become aligned with the African nationalism of the ANC and its task of nation building and reconciliation.

The constitution articulates contrasting frameworks for religion and tradition. Put simply, traditional leaders were institutionally included in the state, but their grounds for legitimacy were rhetorically and performatively excluded. Religion was institutionally excluded from the state. But religion was rhetorically and performatively included in the project of nation-building, particularly through a political theology of reconciliation. Religion's place was clearly articulated, even as the repercussions of that framing had yet to be developed. The legal articulation of custom, customary law and traditional authority on the other hand was ambiguous, confused and unfinished.

In the negotiations the ANC sought simultaneously to include, discipline and transform the institution of traditional leadership. For their part, traditional leaders sought to secure their place locally, within the ANC, and in terms of national legislation. The tension between these two interests continued after 1996, unresolved by the constitutional framework. Neither the interim nor the final constitution repealed apartheid or homeland legislation on chieftainship or its local roles. As a result, from 1994 until 2003 tribal and regional authorities continued to exist largely as they had under apartheid but without coherent legislative authority. (Williams 2009:195) Writing about Shekhukhuneland in 2000, Oomen could say that "almost all the institutional arrangements that singled out the former homelands as separate spheres of rule, largely under chiefly jurisdiction, were still in place." (Oomen 2005:38)

And the state's financial support to traditional leaders increased dramatically. "It was estimated in 1999 that ... paying the salaries of traditional leaders (excluding the headmen and representatives of the national and provincial houses) cost the South African government R577 million a year, of which R18 million went to the Zulu King alone." (Oomen 2005:56) As of April 2007, Kings and Paramount Chiefs were paid an annual salary of R545,066 and the approximately 800 chiefs received R130,830 each per annum. In addition, chairs and deputy chairs of the national and provincial houses of traditional leaders were paid salaries on par with senior administrative positions within the state; between R350,000 and R430,000 a year³¹⁵.

Despite this institutional support to traditional leadership, the ANC also sought to install democratic local government and delimit the roles and functions of traditional leaders. The vehicle for this was democratic local government through municipalities. Rural municipalities were established after 1996 and many of their salaried elected councillors came from the South African National Civics Organisation (SANCO); a body deeply opposed to the institution of traditional leadership. (Ntsebeza 2006:275) They were mandated to perform functions that traditional leaders had held until then, including liaison with local and national government, the organisation of state led development and the allocation of land. Between 1995 and 2000 these municipalities were consolidated into bigger administrative units. In this process the boundaries of traditional authorities were swallowed up in municipal structures. (Ntsebeza 2006:280) In 1997 the Eastern Cape legislature tried to divest traditional authorities of development functions and give them to elected councillors³¹⁶. Derek Hanekom, the first ANC minister of Land Affairs, proposed the Land Rights Bill to take the control of land allocation and tenure from chiefs.

On the whole, these measures failed to displace or reduce the practical powers and functions of traditional leaders. Attempts to establish rural municipalities soon ran into trouble. Local councillors in rural areas performed extremely poorly. Ntsebeza argues that rural dwellers “generally lost confidence in rural councillors and local government between 1994 and 2000.” (2006:278) Legislation and policy on the roles and functions of traditional leaders and elected officials were often contradictory, vague and unclear. (Goodenough 2002:29) In this context, elected officials were not able to appropriate the tasks of local government from traditional leaders. And, as Hendricks and Ntsebeza put it, the longer this tension existed, the more it was exploited by traditional leaders. (Hendricks and Ntsebeza 1999:123) Hanekom was reviled by Contralesa, and his proposed Land Rights Bill was withdrawn. In 1999 he was replaced by Thoko Didiza, whom Oomen calls “an Africanist minister.” (Oomen 2005:75) She shelved the Bill and announced that “the African structures of governance should be respected....”

Tension came to the fore in the preparations for the 2000 local government elections, just as it had before the 1995 elections. A new Municipal Systems Act was passed in 2000³¹⁷ in preparation for the elections. In this Act, traditional leaders were allocated no local government administrative functions. They were only given ex-officio representation on Municipal Councils. And the nature and extent of this representation became highly politicised. The first draft of the Act provided for a maximum of 10 percent representation of traditional leaders on municipal councils. This would mean that in some areas, not all traditional leaders would be represented. Contralesa mobilised traditional leaders to boycott the local government elections. Mandela

stepped in to press for resolution, and the traditional leaders agreed to let the local government elections go ahead only after a meeting with Thabo Mbeki in which he promised post-election reforms. Contralesa unsuccessfully pushed to have municipalities abolished in ex-homeland areas in favour of Traditional Authorities as the providers of local government. (Ntsebeza 2006:282) The elections were postponed to the end of 2000 to allow time for a resolution of the impasse. To settle it, amendments allowed 20 percent representation on local councils; a significant concession.

After the elections the ANC released a statement of intent promising that the “government would amend the constitution so that the powers of local government and traditional leaders were more clearly defined; but [it] never sought the passage of the amendment.” (Williams 2009:197) It did however amend the Municipal Structures Act a second time to include new roles for traditional leaders, some of which related to local government like the delegation of municipal functions, collecting and spending traditional taxes and convening meetings of community members. An early draft of these amendments also included a long list of religious or ceremonial functions for traditional leaders. Amongst these were the facilitation of “the gathering of fire-wood”, “to coordinate first fruit ceremonies”, “to co-ordinate rain making ceremonies” and “to attend to matters related to witchcraft and divination.” (Muriaas 2002) The traditional leaders called these “an insult to their intelligence, decorum and good faith.” (Oomen 2005:67) These “exotic” functions were removed by the time the amendment came before Parliament.

The traditional leaders gained the upper hand in this exchange and in the context of the weakness of local government administration. Official discourse and policy processes began to acknowledge their de facto local government powers. The 2002 draft *White paper on the Traditional Leadership Governance and Framework Act* acknowledged the institution and its “potential to transform and contribute enormously towards the restoration of the moral fibre of our society, and in the reconstruction and development of the country...” (Williams 2009:193) The language of moral regeneration and social fabric came to be shared between religious and traditional leaders’ discourse.

Two major pieces of legislation then consolidated the powers of traditional leaders in terms of their previous apartheid roles. The first was the Traditional Leadership and Governance Framework Act³¹⁸ of 2003. The objects of the act highlight the task of transforming the chieftaincy towards a more democratic institution, and it required that at least one third of the members of the traditional council were women. But it also “formally links chieftaincy with local government institutions and its development goals” in a way that was rejected by the ANC until that point. (Williams 2009:191) Patekile Holomisa claimed that after this act came into effect, “we should be able to proudly proclaim the country as a republic of the United Kingdoms of South Africa.” (Quoted in Williams 2009:191)

The following year the Communal Land Rights Act³¹⁹ (CLARA) was passed. As scholars have noted, CLARA, despite seeking to “provide legal security of tenure,” restores all the powers of traditional leaders granted under the 1951 Bantu Authorities Act and would give traditional councils power to take over the administration of land

currently managed under a number of regimes. CLARA gives traditional councils the power to administer and allocate all land in rural areas by automatically acting as land administration committees. It was the first time that traditional leaders and Contralesa wholeheartedly endorsed a bill dealing with rural administration. (Ntsebeza 2006:288) Four communities who manage their land under indigenous law but not under the authority of traditional councils challenged CLARA in the High Court in 2006 on both procedural and substantive grounds. The court ruled sections of CLARA unconstitutional and therefore passed the case to the Constitutional Court. While the Constitutional Court was investigating the matter, the Minister filed an affidavit to say that CLARA needed to be reviewed and would either be repealed *in toto* or drastically amended. In a judgement by Justice Ngcobo and with the concurrence of the entire court, CLARA was ruled “invalid in its entirety” on procedural grounds³²⁰.

In 2008, while CLARA was under dispute, a Traditional Courts Bill was tabled in parliament by the Justice Department. Traditional courts still function under a combination of the Union’s 1927 Bantu or Black Administration Act and the transitional provisions sixteen years after the end of apartheid. But in attempting to legislate for traditional courts anew, the bill would effectively entrench the apartheid jurisdictions of traditional authorities. Contralesa’s Nonkonyana, spokesperson for the Cape Delegation of Traditional Leaders during the negotiations, was also the sponsor and architect of the Bill. It would give traditional leaders the power to “sentence offenders to forced labour and strip people of their customary entitlements to land, water and community membership. It [would] also give the findings of traditional courts the same weight as those of magistrate’s courts³²¹.” In a heated debate in Parliament, women’s and rural advocates pointed out that the Bill had been work-

shopped by traditional leaders but not with rural communities. Cosatu, the Legal Recourses Centre (LRC), the Commission for Gender Equality (CGE) and a range of others contested the bill on the grounds that it would give sweeping and unaccountable powers to traditional leaders over rural South Africans. Estimates of how many people live under traditional leaders in rural areas range between 14 and 22 million. Given these debates the Portfolio Committee on Justice was unable to recommend the Bill before its parliamentary deadline, and so the 1927 Act remains on the books.

The dangers of unaccountable judicial powers were highlighted when Thembu King Buyelekhaye Dalindyebo, better known as Zwelibanzi, was found guilty of arson, kidnapping, defeating the ends of justice, assault with the intent to do grievous bodily harm and culpable homicide. He was sentenced to 15 years in the Mthatha High Court. Most of these charges arose out of his court rulings. The King imposed punishments including fines of R1200, six cows, being stripped naked and beaten with a *sjambok* (by the king) and a similar beating by community members that resulted in a boy's death³²².

Williams describes attempts to resolve the roles of traditional leadership under democracy as “an ongoing struggle, taking place over a variety of different policy issues, between chieftaincy and the state over the nature of chieftaincy's authority. With each successive policy, traditional leaders have resisted attempts to limit their authority, and instead sought to further entrench themselves into a post-apartheid order.” (2009:195) Attempts to legislate local government and traditional courts have

struggled with the tensions between the *de facto* powers of traditional leaders and constitutional imperatives towards democratic government.

Recognition within the institutions and mechanisms of the state has provided traditional leaders with jobs, budgets, cars, administrative roles, renewed powers and sometimes legitimacy. This is in contrast to religious institutions that are excluded from exactly these kinds of benefits. But the cost of the inclusion within the state is the legal subordination to other values of the constitution such as democracy and gender equality.

Customary law, which relates to a wide range of cultural practices and not only the legitimacy of traditional leaders, has become entangled between an articulation of a patriarchal social structure and gender equality. And in this entanglement, there has also been a battle for control between state lawyers and legal NGOs, traditional leaders, gender activists, and individuals and communities who organise themselves according to a dynamic “living customary law” and that more conservative and official versions generally idealised and advocated by traditional leaders.

The recognition of customary marriages has already been mentioned in this regard. The area of succession has been similarly fraught and contested. There are increasing numbers of women traditional leaders. In 2002 Goodenough could report that at least 11 women chiefs were recognised by the then Department of Traditional Affairs in KZN. (2002:132) These appointments were made by royal houses, independent of any legislative change. But formal representations by Traditional leaders, Contralesa included, are implacably against changes to the law of succession that would legislate

this. (Tebbe 2008) But they have been overruled repeatedly. A recent court case held up the rights of a woman to succeed to the chieftainship when it was contested on the grounds that it infringed customary law. Known as the *Shilubana* case, the Constitutional Court ruled that women could be appointed traditional leaders in their own right and not only as regents³²³. In 2004 the rule of male primogeniture, for traditional leaders and for black succession more generally was struck down by the Constitutional Court in the Bhe case³²⁴. It ruled that this “fundamental element of African customary law infringed unconstitutionally on the rights of women.” (Stacey and Meadow 2007:12)

There has also been a backlash against this kind of gendered transformation of the institution of traditional leadership and women’s entitlements more generally. Take the situation of the recognition of customary marriage as an example. Although the law stipulates new powers for women in customary marriages, it appears that the law has been largely ignored or bypassed in this respect. And the institutions against which gender-equality rulings have been made are themselves interested in upholding and defending an idealised set of gender relations that are much more widely congruent with public opinion.

The early phases of post-apartheid rule pushed to use law to transform both practice and public opinion. But as the institutions of state have been unable to enforce the kinds of relations idealised in law, a socially conservative discourse of moral regeneration has become prominent within some religious and traditional groups. And the ANC, contrary to many of its principled stances in the negotiations, has allied

itself with this increasingly visible conservatism as a defence against criticisms of the morality – sexual and financial – of its leaders.

Two examples should suffice. The first is the use of customary tropes by ANC leaders within party politics and in their engagements with the public. As Oomen points out, many African leaders have been able to “derive additional legitimacy from their association with ‘that other traditional, moral and political order’ which would enable them to get ‘around their own administrative weakness’ and the physical and emotional distance from their populations.” (Oomen 2005:12) In contrast to Mbeki’s extremely distanced articulation of the African subject and its renaissance, Zuma’s appeal is his ability to be “one of the people.” He has managed to string together a range of claims of the underdog; a “chain of equivalences” between being black, Zulu, and victimised. (Laclau 2005)

Zuma mobilised a version of rural Zulu masculinity in his defence in the rape trial, where he performed as “a tribal elder-cum-liberation struggle icon” as Robins puts it. (2008:189) Zuma claimed that “in Zulu culture” leaving a woman in a state of arousal was the worst thing a man could do. He argued that it would have been disrespectful not to sleep with her. Addressing the judge as *nkosi yenkantolo* (chief of the court), he referred to the woman’s private parts as “her father’s *kraal*.” Yes, he said, he had entered the *kraal* without a coat – a condom. His supporters printed thousands of t-shirts with “100% Zulu boy” on it. He promised he would pay *lobola* if the girl told her aunts to accept his marriage proposal. “What united Zuma’s diverse constituency was the linking of African populism with ‘traditional’ masculinity and conservative sexual politics.” (Robins 2008:190)

But this kind of representation can cut both ways. Although there appears to be little public condemnation of Zuma's polygamy, when he strayed from customary understandings of polygamy public opinion turned sharply against him. In 2010, it became public that Zuma had fathered a child with Sonono Khoza, daughter of soccer boss Irvin Khosa. At first Zuma brushed off the growing public comment, but when it became clear that criticism was mounting he apologised. Newspapers reported deep disquiet within the ANC over Zuma's philandering and anger that he had forced the ANC to "defend the indefensible." As one ANC National Executive Committee member is reported to have said "We first thought it was a private matter. But we were surprised that the outcry did not come from white people or foreign media, but from our African constituency. They must vote for us to stay in power and we must listen to them³²⁵."

6. Conclusion

Has South Africa been able to assert political secularism in this period of late modernity? Has the democratic government succeeded in doing what no earlier government in South Africa has even attempted; to rule in terms of the political rights of its citizens, an equal law, a common political community across race and religion, and a moral community between rulers and the ruled? Has it been able to subordinate religion and tradition to the politics of the nation state on those terms?

In Chapter One I outlined the third condition of political secularism, that of secular governance in late modernity. There I identified a range of pressures that other states have faced in instituting or maintaining secular governance. Among these are new forms of religious and ethnic mobilisation that do not recognise all the forms of separation between institutions and ideals of religion and state, or between public and private. Religious groups and the issues over which they mobilise are increasingly global, as are forms of constitutionalism and human rights discourse. (Klug 2000) And these new movements and formations are taking place within states with weakened capacities to provide service and protection to their citizens, to assert a national economy, and to intervene in it for the economic benefit of its citizens.

All of these elements are present in post-apartheid South Africa. There are many forms of new religious transnationalism. I have mentioned global Pentecostal charismatic Christianity and an increasingly dense linkage between Christian activists in the USA and South Africa over “family values” and moral majoritarianism. But this is only one route. Another is to be found in the links between South Africa and the rest of Africa in the movement of Christian and Muslim pastors, and in South African evangelical missions to Africa. There are renewed forms of ethnicity and ethnic mobilisation. In South Africa, there has been a great deal of change in this area, as well as significant continuity. The change is that the state sponsored ethnic nationalism of apartheid and the homelands came to an end, along with a reduction in the public presence of Afrikaner ethnic nationalism. But there are new forms of ethnic mobilisation. Robins (2008) and the Comaroffs (2008) have focussed on ethnic corporate ethnicities for example. A range of cultural practices have also been reinvigorated after the end of apartheid, including virginity testing, first fruits

ceremonies, circumcision and reed dances. Subdued or repressed under apartheid and its debilitating cultural racism, they have found new publics and in some instances, state funding through budgets of traditional leaders and government departments. Some of these are intertwined with assertions of ethnicity in complex ways. Mobilised by a combination of concern over HIV and women's sexuality, the Zulu king has introduced new discourses of Zulu authenticity and survival for example.

As I outlined at the beginning of this chapter, the institutions of the state have proved to be far weaker and less malleable than the negotiators presumed. The ability of the state to assert control over a national economy, to stimulate economic growth that provides jobs, and to provide services in health, education, social welfare and security – all of these have been institutionally challenging. It has proved near impossible for the ANC to deliver, through these rational-bureaucratic state vehicles, the promised freedom of the politics of hope; “A better life for all” as its slogan goes. At the time of the writing of the constitution, it was not yet clear that the ANC's political opposition would be so weak or fragmented, or that the ANC would increasingly claim the monopoly of those state organs for whose establishment and independence they had stood in the negotiations. It was not clear that the HIV/AIDS pandemic would have such a devastating impact on what has increasingly come to be called the social fabric. Nor was the increasing globalisation of capital and therefore its capriciousness evident at that time. That South Africa's unemployment rates would deepen repeatedly over the next decades could not have been predicted. It was not clear that the institutions of local and provincial government that had been so thoroughly contested between the IFP, NP and ANC in the negotiations would be so weak and under-capacitated. It was not yet clear, in other words, that the gap between policy and practice, and policy and

life as it is lived by most South Africans, would be so wide and so entrenched. As the Comaroffs have framed it: “South Africa, to put it bluntly, is trying to construct a modernist nation-state under postmodern conditions, a historical endeavour fraught with contradictions.” (1999:284) All of these elements, modernist law and social transformation, and postmodern social conditions, ethnic mobilisation and religious revival, are present in South Africa. It is not an either or. And the complexities of instituting political secularism in a late modern state can be seen in relation to both religion and tradition.

The state under ANC government has consolidated with respect to religion. There is no evidence of the emergence of a “political religion” in South Africa, a religious movement that would seek to wrest government power away from the ANC or the parliamentary process. But there is certainly evidence of a “public religion” that seeks to contest the terms of social life and alter the ways in which political powers interpret the constitution.

The democratic government succeeded in an early cooption of public religious presence through the TRC, the occupation of visible roles in government by struggle church leaders. In addition, the ANC government founded what it called a moral regeneration movement that sought to appropriate moral authority of religious leaders. But it limited the scope of this intervention to a narrow sexual or familial morality, a strategy that bears close resemblance to the apartheid political theology of sexual morality. But the mainline churches became increasingly critical of the ANC government and its weak delivery, its corruption, economic policy, and its internal dynamics. So the ANC put pressure on SACC leaders to conform. It also found new

religious interlocutors. A Pentecostal public emerged in the lobbying and mobilisation of the Christian Voice and United Christian Action and other alliances for “Biblical values” and against a secular state during the negotiations. At the time, this formation was unable to secure its demands. But the ANC, particularly under Zuma’s leadership, has had need for moral legitimacy. And these church groupings have sought a closer alliance with the ANC in order to win their own majoritarian public demands. At moments, Zuma and his supporters breached the secular separation of church and state in 2008 and 2009.

Although this kind of activity that beaches the separation between religion and politics has faded since the 2009 elections, there is no guarantee that it won’t be breached again. South Africa’s political culture, like that of many other post-colonial situations, is not saturated by an ideology of secularism or a public critique of religion. While it may have had elite articulation in the negotiations, it is not particularly deeply embedded in the political culture of the ANC or other parties. And because South Africa’s constitution nowhere states as a matter of principle that South Africa is a secular country, this concept has not become vernacularised in the ways in which many other elements of the constitution have been.

I have argued throughout this thesis that the distinction between religious and customary, cultural or “African” practices has had widespread political, legal and distributive consequences in South Africa. And in retaining this distinction, democratic South Africa has continued some of its earlier forms of governmentality. The distinction between religion and culture that was fundamental to the “civilising”

and indirect rule policies of colonialism and apartheid has remained largely unchallenged in the process of democratic transition.

During the negotiations and since, the modernist aspirations of the ANC were simply not strong enough to discipline and curtail traditional leadership or customary law. They were allocated a different place from that of religion in the constitution. Not secularised or autonomised in the process of state formation the chiefs were given significant place within the state. From 1994 until around 2002, the ANC made repeated attempts to limit the powers of traditional leaders in legislation and policy. Each attempt failed as local institutions of traditional leadership were neither replaced nor curtailed by alternative democratic structures and traditional leaders mobilised against potential legislative change. The *de facto* powers of traditional authorities at local level were recognised in a series of Acts in 2003 and 2004. The price of the inclusion of traditional leadership and customary law in the state and its legislation is, however, an absolute legislative subordination to the equality principle; one that does not provide for institutional autonomy or an argument of conscience. The post-apartheid years have witnessed repeated and highly contested legislative and juridical interventions into customary law, particularly with respect to gender equality. But the issues of traditional leadership and customary law are only one part of the broader question of custom. The cultural and ethnic nationalism that ANC-aligned traditional leaders disavowed during the negotiations has experienced something of a revival in the latter half of the first decade of the new century. And in parallel with the mobilisation of majoritarian concerns articulated in a discourse of sexual morality, traditional tropes have also been used by the ANC in its time of crisis. The pressures on the ANC towards the end of the decade and the personality and power base of

President Zuma have seen a revitalisation not only of degrees of ethnic nationalism, but also the performance of a traditional cultural and religious world within the state and in some cases sponsored by the state.

While the institutional and legal place of religion and tradition are in opposition in the constitution, there are increasing areas of rhetorical and performative convergence. Both traditional and religious leaders articulate a version of idealised patriarchal social stability and promise a set of social mechanisms for the rehabilitation of a social fabric. Since this is clearly beyond the capacity of the state, elements within the institutions of the state and the ANC are once again looking towards culture as an ally to rule. And the ANC in crisis, and under the leadership of Zuma, has drawn on a more labile, performative and populist rendition of religion and culture. Both the social and legitimacy concerns have provided religious and traditional leaders new avenues of influence outside the policy and legislative processes.

Conclusion

Some years ago this project began with a few simple questions. Is South Africa secular? What does it mean to be secular? What kind of secularism do we have? I asked them because religion has been so saturated by politics in South Africa's past, and politics so saturated by religion. The ANC, the churches, the press, political commentators, and people in religious communities all say that South Africa is now secular. But religion and things that look a lot like religion continue to be important and visible in South African politics. I wanted to understand the terms on which religion both changed and stayed the same from apartheid to democracy.

The first chapter of the thesis opens with a quote from Charles Taylor about studying secularism. He said "It seems obvious before you start thinking about it, but as soon as you do all sorts of problems arise." This is true. "What is secularism" has to be the biggest problem. And it leads to many others. How does political secularism relate to power, freedom and liberation? Why did the churches give up so much of their political role in the transition? How can we think about tradition and custom and things African in relation to secularism? How can we not? Why do we have traditional leaders and customary law in a democratic constitution? How can a new government found power without drawing on the legitimacies of religion?

I will not burden the readers with a summary of the chapters or methods or materials of this thesis. Instead, I want to use the conclusion to identify some of the many questions this project has opened up or had to abandon along the way.

1. What is political secularism?

Let me start with that most difficult question: What is secularism? What has it been historically, and what does it involve as a normative concept and a mode of politics? Chapter One gives an answer to this, at least in relation to politics. This answer draws on the insights of Blumenberg and Arendt from European scholarship. (Blumenberg 1966; Arendt 1958) And it takes seriously Asad's project to understand secularism as a mode of power, a project that he undertakes through the lens of Islam. (Asad 1993, 2003) What they, and an increasing number of other scholars share, is an approach that identifies the ambition of modern states to separate religion from political power as central to the operation of political secularism. (Jager 2007) They also identify the ways in which centralising modern states appropriate elements of the energy, functions and capacities of religion in the process.

The evidence that this is the case stacks very high indeed. But this does not explain why the modern state has this ambition, or how and whether it can achieve its ambitions. It does not explain its results. And these are the questions that animate many of the contemporary debates about secularism.

In Europe, political secularism was and in many respects still is closely tied to an imaginary of freedom and justice. The Enlightenment and Romantic thinkers critiqued metaphysics and religious authority and found in both rationality and sentiment a promise of freedom from tyranny and the possibility of expression and self-mastery. It was accompanied by Secularism as a political form of state that was a practical critique of the tyranny, excesses and unaccountability of the medieval Catholic

Church. It appeared in so many respects to be progress and to provide for the liberation of individuals as well as religion.

Secular modern forms of rule and statecraft were exported across the globe with two faces; the face of the gift and the face of destruction. It is certainly not true that secular modernity came to the rest of the world as rationality, freedom from tyranny or self-mastery. Quite the contrary. In the experience of people and traditions transformed by the conditions of secular modernity, this mode of power presents both its faces. The title of this thesis expresses something of this ambiguity about secularism. Secularism is both an operation of power and a mode of freedom, and individuals and heterogeneous religious traditions and institutions are compelled to navigate this contradiction.

This way of framing political secularism begs many questions. The most important in my view is whether it provides a useful way of thinking about explaining and understanding the operations and ideals of political and religious actors. It is an approach that I found helpful to structure this project's enquiry into political secularism in South Africa. Using this approach, I have concluded that there are two answers to the question "Is South Africa secular?" And these answers lead to a whole lot more questions, big and small.

2. Is South Africa secular?

The first answer is yes: South Africa is secular. The political negotiations of the 1990s settled a new regime of relationships between politics and religion; a new

dispensation. In its institutional configurations and in the ways in which political power is founded, it is undoubtedly secular. And as in many processes of state formation, this dispensation has been captured in the constitution. Law is the bearer of political secularism, and the institutions of the state are its guarantor.

As I argued in Chapter Three, there was a strong consensus about the future place of religion in the country. The diversity of religious traditions was recognized. The negotiators argued for state neutrality with respect to religion, and that there should be no state religion. Nobody sought to have Christianity or a version of it established. They recognized the importance of religion to many people in South Africa, and the intensity of their religious commitments. South Africa, as they often said, is a religious country. They asserted that religious freedom was important. The religious interlocutors of the ANC saw in secularism an imaginary of freedom and an antidote to authoritarianism. For the ANC and its religious allies this was a comment on the entanglement of the Afrikaans churches in Apartheid. Only religious freedom and religion's autonomy from the state could guarantee its integrity. For many in the National Party, strong religious freedom would offer some protection against the fear of Marxist influence in a future government and therefore a Soviet-style repression of religion. It also promised a zone of autonomy for Afrikaner culture that was so closely tied to the church.

In this process, relations between the state and Christianity were fundamentally altered, and all religions are now accorded equal legal recognition in a secular separation of religious institutions and the state. This goes hand in hand with strong constitutional protections against discrimination on the grounds of religion; the

individual right to religion, belief and conscience; and rights for religious institutions to a degree of autonomy and self-determination.

Christianity was also excluded from the legal foundations of the new constitution. As I showed in Chapter Three, this is the case both in terms of its founding provisions, and also in the modes of interpretation of the constitution. South Africa's political foundations were asserted in principle and against an attempt to recognize the sovereignty of God over the law and to institute Biblical or Christian values in the interpretation of the law.

What kind of secularism does it have? It has a formation of political secularism similar in many respects to that of American first amendment secularism. But it also differs in one important way. There is no legal disestablishment. The significant access that Christian groups had to the state under apartheid remained, but the terms of that access changed. Religious clergy and observance are still in schools, prisons, hospitals, chaplaincies, and also in public broadcasting. But the terms of inclusion in these spaces and institutions did change. Institutionally it changed in that all religions can now access that space. By consensus, institutional Christianity lost its monopoly on the state and state-aided institutions.

The negotiations produced a normative account of the place of religion in the state. To do so they excluded a Pentecostal-charismatic and some Muslim versions of the place of religion. They excluded and countered the demands of those religious formations that contest liberal humanism. And they did this with the support of the most significant public religious groupings. But these ecumenical mainline Protestant

public representatives of religion were not necessarily representative of the views of most South Africans about the place of religion or the necessity of a religiously informed public morality. The future of this contradiction looms increasingly large.

Will this normative account of the place of religion hold now that it is fixed by its inclusion in the constitution? How will it be instituted and contested? What new pressures will be brought to bear? How will changed religious practices and political theologies and the ways in which they might contest this formation of political secularism be arbitrated through the law? Just a few of these issues were taken up in brief in chapter six.

The formation of political secularism in South Africa begs comparison with formations in America and India. They share a broadly positive political view of religion, and a tendency to appropriate rather than discipline political interventions by religion. Both are countries with strongly stated secular liberal constitutional regimes. And both have a political culture that is not fundamentally antagonistic towards religion. With respect to the law, a direct comparison between constitutions with and without a disestablishment provision will be very fruitful.

The second answer is no: There remains an extraordinary ambivalence about the status, locus, form and presence of things African. The long conversation of colonialism has continued into the post-apartheid present. The differentiating operations of secular modernity have not been fully applied to things African. On the one hand, the markers of religion, politics and culture are deeply tied to the institution of traditional authority and the institutionalisation of customary law. Traditional

leaders were not differentiated from politics. The institution of traditional leadership has not been separated from the exercise of political power. Nor has the institution been subordinated to the stated foundations of South Africa's democracy.

Once again, the institution of traditional leadership has been taken into the state. And once more it is an index of weakness. During the negotiations, this was a weakness of access, and an inability to cover a territory with a secular democratic mode of politics. And as I showed in Chapter Six, this weakness has continued even when the ANC gained control over the institutions of the state. If anything, traditional leadership has been further entrenched both in law and institutionally. This time, however, it was recognised in the structures of a government that does not base itself on racialised rule or models of cultural difference. And while the institutions of traditional leadership are included in the state, their ideological foundations of legitimation are not.

Again the first question has to be – will it work? A fundamental ambiguity has been introduced into the democratic dispensation, one that surely will lead to situations that are very difficult to arbitrate. Again, the ground covered in Chapter Six barely opens the conversations that are necessary in this area.

The focus on political secularism in this thesis is meant to restrict an enquiry in this area to the political aspects of this ambiguous and ambivalent and deeply unstable differentiation. There has simply not been the time or scope to follow up on an investigation into the concomitant argument about the destiny of the non-institutionalised aspects of African religiosity. Some are beginning to do this on the religious subjectivity of South Africans that contest these bureaucratic ambivalences –

work on witchcraft, sacrifice and ancestral presence and healing in particular. There remains the task of trying to bring these two modes of investigation into conversation.

3. The future of political secularism

This thesis has raised two issues about the future of political secularism. There is a great deal more work that can be done on both. The first relates to differentiation and the second to the relative strengths, capacities and ambitions of people who speak and act in the name of religion and in the name of government.

I have argued that most Western European and American accounts of political secularism take a differentiation between religion and politics as a given. They locate secularism's problematic in the modes of separation between religion and politics and the forms of their relationship. But secularism is impossible without this differentiation which has its historical roots in Christianity. Most other traditions, and most areas to which colonialism brought the idea and techniques of secularism, did not recognise such a differentiation.

I would like to suggest that much of what is currently threatened in normative secular relationships between religion and politics is being confounded - not at the point of separation - but at the point of differentiation. In other words, it is not only a question of whether religion and politics are separate enough or whether they have cordial and apparently disciplined relationships, the problem is that what is politics is shifting and what is religion is shifting. And we can no longer assume the naturalised distinctions between them.

This is the advantage of engaging with questions of secularism from outside of the Christian tradition. Religionists know about the impossibility of defining religion and of drawing some authoritative and real distinction between what is religion and what is not, what is say culture, or politics, economics or society. There are all fundamentally questions about how and on what grounds religion is differentiated and marked off from other things and therefore become subject to political secularism.

Clearly this matter of differentiation is an issue in relation in the engagements between the civilisation dimensions of secularism and Islam, Buddhism and Hinduism for example. And even more so for the forms of religiosity that are not based on scriptures and specialists. And these are perhaps the best places from which to reflect on the genealogy and effects of this distinction. What is religion and what is law – this is one question of Shari'a. What is religion and what is culture – this is one question of the veil. In South Africa this is the question of ancestors, sacrifice, *lobola*, initiation and healing.

As Winifred Sullivan points out, it is the law that arbitrates, often impossibly, these distinctions. (2005) Lawyers, government officials and civil society can find this same impossibility now when they ask how religion is to be distinguished from literature, from culture, from law. What is religion and what is consumption – this is one question of Pentecostalism.

The work of differentiation is not only becoming more visible because of the analysis of non-Christian engagements with secularism. A problematisation or breach of

differentiation is also increasingly part of European intellectual tradition. In Continental and deconstructionist post-modern thought, despite the predominance of explicitly atheist thinkers, there has been a marked 'return' of religion to the horizons of philosophy. This is a return of religion as an object of inspiration and as text, a return that does not necessitate consent to confessions of belief. A significant movement of contemporary continental philosophy has been discovering, as Blumenberg predicted, that "Even when philosophy conceives itself as in the sharpest possible contradiction to its theological prehistory, which it considers itself to have 'overcome,' it is bound to the frame of reference of what it renounces." (1966:69)

It is not only post-Christian thinking that seeks this return. There are also significant reiterations of Jewish tradition, most notably perhaps by Levinas, Derrida and more recently Judith Butler, all of whom are mining the seams of Jewish and Christian negative or apophatic theology. In all of their work, we find a renewal of languages of transcendence, although in metaphorical and allegorical registers of trace and difference. Derrida's work in particular deals with the spirit of the times, and the ghosts and spectres that haunt modernity. Wendy Brown asks what we are doing with all the beasts and spectres. "What must be exhausted in certain strains of secular progressive thought for quasi-theological figures conventionally opposed to such thought, and deposed by it, to be made to seem valuable, perhaps even essential?" (2001:143) Her answer is that such language provides an alternative to sociological narrative; a historical consciousness that is not dependent on "discredited narratives of systematicity, periodicity, laws of development, or a bounded coherent past and present." (Brown 2001:143)

There is much still to be examined in the affinities between the breakdown or pressure on a differentiation between religion and politics and the many ways in which religion is clearly returning to public and political life.

Aside from contesting a founding differentiation, there is also the question of the force required to separate religion and politics institutionally and ideologically. This concerns the relative strength, strategies and ambitions of the state and religion. Political secularism is not about the absence of religion. It is a balance of power between the state and religion that gives states a considerable capacity for disciplinary intervention. This begs the question of the power of the state and its bases. Because, as it is becoming increasingly obvious, many of the national bases of power and sovereignty are contested. This is true of their intellectual as well as institutional bases.

Both logically and historically, the possibility of political secularism depends on the capacity of states to mobilise ideological, administrative and institutional mechanisms to frame and discipline religion. Both logically and empirically, its sustainability also depends on the forms and ambitions of religion that are present within each nation state, their sub-national and transnational links, and how willing and able they are to contest or approve of the place to which they have been allocated.

Appendix 1: The Post-Amble to the Interim Constitution

Constitution of the Republic of South Africa, Act 82 of 1993

This constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date of 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

Nkosi sikelel' iAfrika. God Seën Suid Afrika.

Morena boloka sechaba sa heso. May God bless our country.

Mudzimu fhatutshedza Afrika. Hosi Katehisa Afrika.

Appendix 2: Excerpts from the Final Constitution

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

Preamble to the Final Constitution

*We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.*

*We therefore, through our freely elected representatives, adopt this Constitution as
the supreme law of the Republic so as to –*

*Heal the divisions of the past and establish a society based on democratic
values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is
based on the will of the people and every citizen is equally protected by law;
Improve the quality of life for all citizens and free the potential of each person;
and
Build a united and democratic South Africa able to take its rightful place as a
sovereign state in the family of nations.*

May God protect our people.

Nkosi Sikelel' iAfrika. Morena baloka setjhaba sa heso.

God Seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

Chapter 1: Founding Provisions

Republic of South Africa

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
 - a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
 - b. Non-racialism and non-sexism.
 - c. Supremacy of the Constitution and the rule of law.
 - d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Chapter 2: Bill of Rights

Equality

- 9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
-
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)

Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum –
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.

- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights

Freedom of Religion, belief and opinion

- 15 (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 or 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.

Language and Culture

- 30 Everyone had 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.

Cultural, Religious and Linguistic Communities

- 31 (1) 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, practice their religion and use their language; and,
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

- (2) The rights in subsection (10) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Chapter 6: Provinces

Provincial Legislatures

- 104 (1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power –
- (a) to pass a constitution for its province or to amend any constitution passed by it in terms of section 142 and 143;
 - (b) to pass legislation for its province with regard to –
 - (i) any matter with a functional area listed in Schedule 4
 - (ii) any matter with a functional area listed in Schedule 5
-

Schedule 4 includes ‘Functional Areas of Concurrent National and Provincial Legislative Competence’, which includes “cultural matters,” “indigenous law and customary law subject to Chapter 12 of the Constitution” and “traditional leadership subject to chapter 12 of the Constitution”.

Schedule 5 includes “Functional Areas of Exclusive Provincial Legislative Competence”, which includes “Provincial cultural matters”

Provincial Constitutions

- 143 (1) A provincial constitution, or constitutional amendment, must not be inconsistent with this constitution, but may provide for –
-
- (b) the institution, role, authority and status of traditional monarch, where applicable.

Chapter 7: Local Government

There is no specific mention of traditional leadership or Traditional Authorities in the Local Government Chapter.

Objects of local government

- 152 (1) The objects of local government are –
(a) to provide democratic and accountable government for local communities
.....

Chapter 9: State Institutions Supporting Constitutional Democracy

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

Functions of Commission

- 195 (1) The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are-
- (a) to promote respect for the rights of cultural, religious and linguistic communities;
 - (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
 - (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils of communities in South Africa.
- (2) The Commission has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advices and report on issues concerning the rights of cultural, religious and linguistic communities.
- (3) The Commission may report any matter which falls within its power and functions to the Human Rights Commission for investigation.
- (4) The Commission has the additional powers and functions prescribed by national legislation.

Composition of the Commission

- 186 (1) The number of members of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

and their appointment and terms of office must be prescribed by national legislation.

- (2) The composition of the Commission must-
 - (a) be broadly representative of the main cultural, religious and linguistic communities in South Africa; and
 - (b) broadly reflect the gender composition of South Africa.

Chapter 12 - Traditional Leaders

Recognition

- 211. (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Role of traditional leaders

- 212. (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law
 - (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
 - (b) national legislation may establish a council of traditional leaders.

Schedule 6: Transitional Arrangements

Courts

- 16 (1) Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and the exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold such office in terms of the legislation applicable to that office ...

Endnotes

Endnotes to Introduction

¹ National Archives Repository (NAR) Source Code: COD, *Inventory: NA 61, Archives of the CODESA 1991-1992*, August 2000. S Hatang and I Brink. Pretoria. *Archives of the Multi-Party Negotiating Process* (1993). Compiled by Rejoice Nefale, December 2002. Pretoria.

² I am very grateful to Gerrit Wagener, and his colleagues Zahira and Natalie for their hard work in making folders available to me as soon as possible, as well as their photocopying.

³ I have decided to follow archive procedure in dealing with individuals' names when referring to submissions. Where a submission was made in an official capacity; as a 'technical expert' or party member or on behalf of an organisation and writing on its letterhead, I have used the personal names as given on the documents. Where people have made their submissions in their individual capacities, I have protected their anonymity by using false names. In doing so, I have tried as much as possible to indicate something of their social position by fabricating personal and family names and including place names that are consistent with their race, gender and the language in which the original submission was written.

⁴ *National Archives of South Africa, Archives of the Constitutional Assembly (1994-1996)* First Edition. L Calitz, January 2000.

Endnotes to Chapter One

⁵ *Public Religions*, page 12.

⁶ *A Secular Age*, page 15.

Endnotes to Chapter Two

⁷ Quoted in Sundkler, B G (1948) *Bantu Prophets in South Africa*. London: Lutterworth Press. Page 69.

⁸ A phrase introduced by John and Jean Commaroff in their 2004 article. (Comaroff and Comaroff 2004)

⁹ Translation from the New International Version (NIV) Bible.

¹⁰ A 'British subject of European descent.' South Africa Act, 1909 section 24.d who are 'male adults' or 'males of twenty-one years of age or upwards not being members of His Majesty's regular forces on full pay.' SA Act 1909 section 34.(vi).

¹¹ Act 32 of 1961.

¹² Act 110 of 1983.

¹³ From the South African History Archive. www.ahistory.org.za/pages/chronology/thisday/1921-05-24.html. Accessed 18 March 2010.

¹⁴ See (World Council of Churches 1960)

Endnotes to Chapter Three

¹⁵ Sachs, Albie (1990)

¹⁶ (South African Law Commission 1989) Page 295.

¹⁷ Interview with Hugh Corder, Cape Town, 6 September 2007.

¹⁸ TBVC states was a collective term for the Transkei, Bophuthatswana, Venda and Ciskei; the four homelands that had been granted 'independence.'

¹⁹ Although the Ciskei signed by day two, and the IFP eventually signed an amended version.

²⁰ *Transcription of Codesa I plenary*, 20 and 21 December 1991. Source: COD NA61 Folder 18.

²¹ The IFP participated at Codesa, but Buthelezi refused to be present because of the perceived snub of the Zulu monarch as well as the KZN government. This is discussed in Chapter Four.

²² Addendum A: *Declaration of Intent on the Negotiating Process*, 29 April 1993. Source: NEG 1/4/2/8

²³ Afrikaner Resistance Movement.

²⁴ One Afrikaans newspaper famously referring to it as a 'Kaffir skiet piekniek' a 'Kaffir shooting picnic'.

²⁵ *Errata: Membership of the Constitutional Assembly*. No date. In Management Committee document pack. Source: UCT Hugh Corder Collection, Folder 2.

²⁶ There is one exception, but it was based on a misunderstanding. The Council of Muslim Theologians wrote to Codesa to suggest that religious leaders should be granted full standing at the negotiations. Thinking there was to be a Christian delegation; the Council's argument was that if one religion was represented, all should be. [See *Memorandum to all political parties in Codesa from the Council of Muslim Theologians in South Africa*. 15 December 1991. Source: COD NA61 Volume 3, File 8.] The misunderstanding may have arisen because early in the planning for Codesa, it was suggested that the Reverends Stanley Mogoba and Johan Heyns should chair. In part because of an objection by the PAC, it was decided that Judges would chair instead. Chief Justice Corbett and the first black judge in South Africa, Justice Mohamed, were chosen to chair Codesa. [See *Summary of Decisions taken at the Preparatory Meeting of Codesa held on 29 and 30 November 1991*. Source: COD NA61 Volume 1.]

²⁷ See for example section 1.5 of the *Position Paper of the South African Communist Party on the First Assignment of the Terms of Reference of Working Group Two*, Codesa. (n.d.) Source: COD NA61 Volume 41.

²⁸ In Sachs' 1992 UCT Inaugural lecture, he reflected on the cultural cosmopolitanism of the ANC in contrast to the NP. He said: "When it comes to a sense of humour we are, of course, way ahead... I think we possess people who are more widely read, more travelled and open minded (we certainly do not object to hearing the prayers of all faiths)." "Exile" he said, "has some advantages." (Sachs 1992)

²⁹ National Party Preliminary Submission to Theme Committee 4. Block 5 Item 9: Freedom of Religion, Belief and Opinion. (no date, but collated in TC4 documents of 8 June 1995) Source: NA CA2/3/1/41.

³⁰ Ibid, page 1.

³¹ Despite its acknowledgement of religious diversity, the National Party referred throughout to 'church-state relations' rather than relations between religious and state institutions or some other more inclusive formulation.

³² Ibid, pages 1-2.

³³ A phrase taken from the Article 27 of the International Covenant on Civil and Political Rights.

³⁴ *Our Future Together. Discussion Document: The National Party Proposals for the Final Constitution*. October 1995. Source: NA CA F3 1/11/12.

³⁵ This was debated repeatedly in plenary throughout the negotiations. For a comprehensive rebuttal of the NPs position on minority protection, see the ANC document titled *Minorities and Democracy: The Constitution, Minorities and a New South Africa*. No Date. Submitted to Codesa. Source: COD NA61 File 27.

³⁶ See for example the *Democratic Party Submission on Freedom of Religion, Freedom of Association and Freedom of Demonstration*, dated the 20th of April 1995. Its complete submission with respect to religion read: “every person should have the right to 1. Freedom of conscience and religion, and consequently, the State shall not favour one religion over another.” Source: NA CA 2/3/1/35.

³⁷ Freedom Front, Theme Committee 4 (Fundamental Rights) Submissions on Freedom of Religion, Belief and Opinion. No date, but attached to documentation of the 8th of June 1995. Source: NA CA 2/3/1/41.

³⁸ Submission of the Conservative Party to the Constitutional Assembly of Parliament: On Invitation. 26 January 1995. Source: NA CA 2/4/1/6/14.

³⁹ Ibid, page 4 of the submission. Source: NA CA2/4/1/6/14

⁴⁰ *ACDP submission ‘Character of the Democratic State.’* 27 January 1995. Source: NA CA 1/18/3.

⁴¹ Roman Catholic and Orthodox respectively.

⁴² For example, in India secularism was asserted to put an end of Muslim Hindu violence, and to contrast the secular India with Muslim Pakistan.

⁴³ All data presented here is from the 1996 and 2001 Census data available from www.statssa.gov.za. Calculations were done by the author using simple descriptive statistical techniques.

⁴⁴ Jonathan Hyslop’s paper provides an excellent insight into the sociological processes attending this desertion of the NGK. (Hyslop 1995)

⁴⁵ These are all progressive Islamic groups, which were in regular contact in much the same way as their Christian SACP equivalents. For a well researched overview of the development of a progressive Islamic movement in South Africa over the 1970s and 1980s see (Tayob 1995).

⁴⁶ WCRP (1993) *Believers in Dialogue: Introducing the South African Chapter of the World Conference on Religion and Peace*. Source: Wits Historical Papers, CPSA PAM BL 65.04 BEL.

⁴⁷ WCRP newsletter, ‘Inter-faith: Faith in the Future’. Source: SAHA O 4.3.

⁴⁸ Letter to Codesa, WCRP. Source: COD NA61 Folder 27.

⁴⁹ World Council on Religion and Peace (WCRP) *Declaration on Religious Rights and Responsibilities*. November 1992. Source: COD NA61 Folder 27.

⁵⁰ See for example the Corder interview quoted in (Spitz and Chaskalson 2000) Page 333.

⁵¹ WCRP Submission, 15 July 1993. Source: UCT Hugh Corder Collection, Folder B, File B5.

⁵² This willingness points to the influence of progressive feminist Muslims and Christians. Farid Esack and Yasmin Sooka, for example, both had leadership positions in the WCRP and they regularly brought gender issues to the fore amongst what were often male religious leaders.

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- ⁵³ WCRP Newsletter, Volume One, Issue One. 1988. Source: SAHA O4.3.
- ⁵⁴ Ibid, page 2.
- ⁵⁵ Ibid, page 2.
- ⁵⁶ The Harare Declaration set out the ANC's conditions for beginning negotiations with the NP, and included the need for a Bill of Rights. WCRP newsletter, 'Inter-faith' 1990. Source: SAHA O 4.3.
- ⁵⁷ WCRP newsletter, 'Inter-faith: Faith in the Future', n.d. Source: SAHA O 4.3.
- ⁵⁸ The Ecumenical Monitoring Programme in South Africa (EMPSA) was sponsored jointly by the Johannesburg offices of the South African Council of Churches and the Pretoria offices of the South African Catholic Bishops Conference. Source: NA NEG 1/5/7.
- ⁵⁹ Tutu and the SACC were conspicuous in their support for the inclusion of sexual orientation in the equality provisions, a position that earned them the ire of their more conservative religionists.
- ⁶⁰ Verbatim transcription of the Public Hearing on Religion. Source: NA CA F4 1/12/6.
- ⁶¹ Presentation by Prof D De Villiers, Dutch Reformed Church to the Public hearing on Religion, 26 May 1995. Source: NA CA F4 1/12/6.
- ⁶² Letter from Swami Jivananda, 31 May 1995. Source: NA CA Volume 63, 2/4/1/5/35.
- ⁶³ Presentation by Mr Hendricks of the Muslim Judicial Council to the Public Hearing on Religion. Verbatim transcription of the Public Hearing on Religion. Source: NA CA F4 1/12/6.
- ⁶⁴ Submission to Codesa by Sheikh Toffar, Institute of Islamic Shariah Studies. Source: COD NA61 Volume 36.
- ⁶⁵ Presentation by Moushami Joshi to the Public Hearing on Religion. Verbatim transcription of the Public Hearing on Religion. Source: NA CA F4 1/12/6.
- ⁶⁶ Document: *Analysis of Submissions – Bill of Rights, Technical Committee*, 19 March 1996. Source: NA CA 1/13/3.
- ⁶⁷ Submission: Christian Science Committee on Publication. 16 January 1995. Verbatim transcription of the Public Hearing on Religion. Source: NA CA F4 1/12/6.
- ⁶⁸ Submission: *Suggestions for Inclusion in the New Constitution*, from the director of the Saivite Association, Port Shepstone. 4 March 1995. Source: CA 2/44/4/1/7/49.
- ⁶⁹ Presentation by Rabbi Cyril Harris to the Public Hearing on Religion. From Verbatim transcription of the Public Hearing on Religion. Source: NA CA F4 1/12/6.
- ⁷⁰ Submission to Codesa by EFSA (Evangelical Fellowship of South Africa). Source: COD NA61 Volume 37.
- ⁷¹ Submission to the Constitutional Assembly by His People Christian Ministries. February 1996. Source: NA CA1/19/2.
- ⁷² Submission to Codesa by the Baptist Union. 9 March 1992. Source: COD NA61 Folder 38.
- ⁷³ Submission to the Constitutional Assembly by the Christian Education Forum: Memorandum on the teaching of Religion. No date. Received by the CA on 15 March 1995. Source: NA CA 2/4/4/1/7/53.
- ⁷⁴ Individual, Somerset West. 26 May 1995. Source: NA CA Volume 63, 2/4/1/5/34
- ⁷⁵ Submitted to Codesa when interfaith prayers were introduced.

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- ⁷⁶ Codesa: African National Congress Submission to Working Group Two, 11 February 1992. Source: COD NA61 Volume 47, File 27.
- ⁷⁷ *Summary of the First Progress Report*, Theme Committee on Fundamental Human Rights during the Transition, 18 May 1993. Source: NA NEG 1/3/3/2/1.
- ⁷⁸ Fourth Progress Report of the Theme Committee on Fundamental Human Rights during the Transition, 3 June 1993. Source: NA NEG 1/3/3/2/4
- ⁷⁹ Tabulation, South African Government and ANC formulations to technical committee plus possible alternatives. No date. Source: UCT Hugh Corder Collection, Folder F.
- ⁸⁰ Source: UCT Hugh Corder Collection, Folder A1.
- ⁸¹ Ibid.
- ⁸² *Sixth Progress Report of the Technical Committee on Fundamental Human Rights during the Transition*, 15 July 1993. Source: NA NEG 1/3/3/2/6.
- ⁸³ ANC, *Comments on the Committee's Fourth Progress Report*. Sent by Albie Sachs, 7 June 1993. Source: UCT Hugh Corder Collection, Folder D1.
- ⁸⁴ *Constitution of the Republic of South Africa, Draft outline* 21 July 1993. Source: NA NEG 1/3/2/2/11.
- ⁸⁵ African National Congress Submission, 'private and confidential', sent 21 June 1993. Source: UCT Hugh Corder Collection, Folder D1.
- ⁸⁶ Ibid,
- ⁸⁷ African National Congress, 2 August 1993. Source: UCT Hugh Corder Collection, Folder D1.
- ⁸⁸ Their submission agreed that nobody wanted a situation such as in the USA. But without a disestablishment clause, the second part of the religion right was unnecessary. If it was to be included it should at least be written as a 'permissive formulation' rather than a 'provided that' formulation. *Submission: General Council of the Bar, Comment on the 7th Progress Report*. July 1993. Source: UCT Hugh Corder Collection, Folder D2.
- ⁸⁹ The LHR submission suggests 8(2) should be dropped because "it is vague and phrased as an exception – which is confusing and inaccurate". Submission by Jody Kollapen, 30 June 1993. Source: UCT Hugh Corder Collection, Folder D2.
- ⁹⁰ *Minutes of the meeting of the Negotiating Council*, 2 August 1993. Source: NA NEG 1/5/2/33.
- ⁹¹ *Tenth Progress Report of the Technical Committee on Fundamental Rights during the Transition*, 5 October 1993. Source: NA NEG 1/3/3/2/10.
- ⁹² *Minutes of the meeting of the Negotiating Council*, 7 October 1993. Source: NA NEG 1/3/3/2/10.
- ⁹³ Twelfth Report of the Technical Committee on Fundamental Human Rights during the Transition, 15 November 1993. Source: NA NEG 1/3/3/2/7.
- ⁹⁴ *Ulama* literally means 'learned ones,' and it refers to a body of Muslim clergy. They usually include men trained in the seminaries of the Middle East, the Indian-Pakistani subcontinent and locally. (Moosa 2001:125) Page 125.
- ⁹⁵ Urgent Memorandum on Muslim Personal Law, sent 2 November 1993. Sent on Department of Religious Studies, UCT letterhead, the memorandum was endorsed by the Judicial Committee of the Islamic Council of South Africa, the Muslim Youth Movement of South Africa, Majlis as-Shura al-Islami, Call of Islam and the Central Islamic Trust.

⁹⁶ This is itself a contentious proposition according to more conservative interpretations of Islamic law in which women are regarded as legal minors in their standing before courts or giving evidence.

⁹⁷ From Submission by Ebrahim Moosa, 2 November 1993. Source: UCT Hugh Corder Collection, Folder C1.

⁹⁸ Submission by the ANC to the Technical Committee on Fundamental Human Rights during the Transition and the Technical Committee on Constitutional Issues, 12 November 1993. Source: NA NEG 1/3/3/2/11.

⁹⁹ They suggested that if this issue of religious courts was to be taken up at all, it should be dealt with in the chapter on Traditional Authorities that was at the time debating customary courts.

¹⁰⁰ Addendum to the 12th Report of the Technical Committee on Fundamental Human Rights during the Transition, 16 November 1993. Source: NA NEG 1/3/3/2/13.

¹⁰¹ National Party, *‘Our Future Together’* discussion document, October 1995. It said: “Freedom of religion must be retained unammended and religious observances in state or state-aided institutions, including schools, must be protected as at present”. Source: NA CA F3 1/11/12.

¹⁰² Preliminary Submission of the African National Congress – Block 2. No Date. Source: NA CA 2/2/1/9/1/11.

¹⁰³ It argued for a re-arrangement of these and other clauses, but made no suggestion for substantive alteration.

¹⁰⁴ *From Verbatim Transcript of the Public Hearing on Religion*, 26 May 1995. Source: NA CA F4 1/12/6.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ This had been their position from earlier in the negotiations. See for example their submission *“Consultation on Human Rights and Religious Freedom”* dated 1 February 1993. Source NA CA 2/4/1/6/9.

¹⁰⁸ From TC4 Report and Draft Formulation; *Freedom of Religion, Belief and Opinion*, 8 June 1995. Source: NA CA 2/3/1/41

¹⁰⁹ The National Party Preliminary Submission, TC4 Socio-Economic Rights (no date) said: “With regard to the rules for religious observances referred to in section 14(2), we wish to emphasise that the ‘appropriate authority’ that may issue them should be the governing body of the institution in question and that, if need be, this should be stipulated in the constitution.” Source: NA CA 2/4/4/1/7/13.

¹¹⁰ The security police bombing of the South African Council of Churches’ Khotso House and the Pan African Congress bombing of St. James Church, while important, do not compare with the widespread anti-Catholic violence in France or Mexico, or with the persecution of Russian Orthodoxy in the foundation of the Soviet States. Nor was there any violence against the NGK which was the religious partner in the old regime.

Endnotes to Chapter Four

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- ¹¹¹ NJJ Olivier, Democratic Party Representative, Presenting to the Sub-Committee on the Participation of the King and Other Traditional Leaders. 18 March 1992. Source: COD NA61 Volume 103.
- ¹¹² Said by Chief Patekile Holomisa, ANC Member of Parliament and chair of Contralesa, in an interview with Padraig O'Malley, 16 October 1996. Source: (Accessed 20 December 2010) <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv00017/04lv00344/05lv00965/06lv01042.htm>.
- ¹¹³ These were not unrelated. See for example Said (1979), Asad (2003), Masuzawa (2005) and the Comaroffs (1991 and 1997) on the co-dependence of these forms of rule and subjectivation.
- ¹¹⁴ The Constitution of South Africa, Act 108 of 1996.
- ¹¹⁵ In this the homelands followed the same 'developmental' strategies of post WW2 and pre-independence colonial states. Young characterises such late colonialism by expanded and interventionist administrations, improved education and literacy, spectacular displays of state power, and the provision of minimal social infrastructure including health and education. (Young 2004:25-27) In the case of South African homelands, it was the apartheid state rather than the colonial metropole that funded and oversaw these developments.
- ¹¹⁶ This map was compiled by the US Central Intelligence Agency. An online edition is available at the Perry-Castañeda Library Map Collection, University of Texas at Austin. http://www.lib.utexas.edu/maps/africa/south_african_homelands.gif. Accessed 26 December 2010.
- ¹¹⁷ As told in an interview with Padraig O'Malley, 16 October 1996. Source: <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv00017/04lv00344/05lv00965/06lv01042.htm>. Accessed 20 December 2010.
- ¹¹⁸ Inkatha Freedom Party: *Opening Statement by Mr. F T Mdlalose to the Negotiating Council* on Monday 26th April 1993. Source: NA NEG 1/5/3/5A.
- ¹¹⁹ Set out in the document *Robben Islanders Take a Frank and Critical Look at the Political Situation in Natal – the Way Forward*. Discussed in Klopper. (1996:54)
- ¹²⁰ President Lucas Mangope of Bophuthatswana, *Speech at the plenary of Codesa II*, Verbatim Transcript, 15 May 1992. Source: COD NA61 Volume 102.
- ¹²¹ *Submission by the Government of the Ciskei*, no date. Source: COD NA61.
- ¹²² The Afrikaner Resistance Movement would be its English translation.
- ¹²³ Restoration of South African Citizenship Act, Act 73 of 1986.
- ¹²⁴ *Summary of Decisions Taken at the Preparatory Meeting of Codesa*, Held on 29 and 30 November 1991. Source: COD NA61 Volume 1.
- ¹²⁵ *Steering Committee Minutes and Agenda* for Meeting of 4th December 1991. Source: COD NA61 Volume 2, Folder 1. The PAC was invited to rejoin the negotiations.
- ¹²⁶ Which the ANC had failed to have recognised as a political entity for the purposes of the negotiations at the preliminary meetings.
- ¹²⁷ *Steering Committee Minutes and Agenda* for meeting on the 10th of December 1991. Source: COD NA61, Volume 2, Folder 1.
- ¹²⁸ *Plenary Transcript of the Opening of Codesa*, 20 December 1991. Source: COD NA61, Folder 18, File 70.

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- ¹²⁹ *Minutes of the Management Committee*, 13 January 1992. Source: COD NA61, Volume 103.
- ¹³⁰ *Report of the Sub-Committee on the Participation of the Zulu King and other Traditional Leaders*. [no date] By this meeting, applications for participation had been received not only from the Zulu King, but also from Ingwenya D M Mabhoko, Paramount Chiefs of QwaQwa, Contralesa, Lebowa college of Magoshi, and Transkei Kings and Chiefs. Source: COD NA61, Volume 20, Folder 2.
- ¹³¹ Ibid.
- ¹³² *Minutes of the Management Committee*, 10 February 1992. Source: COD NA61, Volume 103.
- ¹³³ *Terms of Reference: The Sub-Committee investigating possible participation in Codesa by the King of the Zulus and other Traditional Leaders*. 10 February 1992. Source: COD NA61 Volume 20, Folder 3.
- ¹³⁴ *Draft minutes of the meeting of the Sub-Committee on Participation of the Zulu King and other Traditional Leaders*, 24 February 1992. Source: COD NA61 Volume 20, Folder 3.
- ¹³⁵ *Draft minutes, working session of the Sub-Committee on Participation of the Zulu King and other Traditional Leaders*, 19 March 1992. Source: COD NA61 Volume 75, Folder 43.
- ¹³⁶ Khoshi Mothiba from the Lebowa delegation for example: "The only King we have is in the bible, the rest are Magoshi in Lebowa." And later; "It is only because of colonisation of some of the Chiefs by white people who came to this country, that they started giving – I mean trying to classify our Magoshi according to different categories. We have indunas, we have Magoshis, we have Paramount Chiefs, then we have Kings. All that terminology has been created by the white man." Source: COD NA61 Volume 103, Folder 2.
- ¹³⁷ As discussed by Slovo with Prof Mophalala. Source: COD NA61 Volume 103, Folder 2.
- ¹³⁸ In an interaction with Professor Mophalala. Source: COD NA61 Volume 103, Folder 2.
- ¹³⁹ Mophalala, for example, replied that there should be full participation and that politicians should not underestimate the intelligence of chiefs. Source: COD NA61 Volume 103, Folder 2.
- ¹⁴⁰ Khoshi Mogashoa from the Lebowa delegation: "Khoshi should be above politics. He should not be seen to be siding with any of the political parties ... So we wouldn't like to see magoshis rubbing shoulders with commoners." Source: COD NA61 Volume 103, Folder 2.
- ¹⁴¹ Traditional leaders of QwaQwa presentation. Source: COD NA61 Volume 103, Folder 2.
- ¹⁴² See for example the presentation by Chief Ramodike of the United People's Front. They ended their presentation as follows: "As a result of the demand and insistence by the IFP ... the UPF wishes, despite our reservations ... to take part in Codesa." Source: COD NA61 Volume 103, Folder 2.
- ¹⁴³ Chief Patekile Holomisa on behalf of Contralesa at the hearing, 19 March 1992. Source: COD NA61 Volume 103, Folder 2.
- ¹⁴⁴ The QwaQwa delegation made this point. "Participation of traditional leaders like ourselves at Codesa derives imperative from the premise that there are people in our areas who owe no allegiance to any political party or organisation." Source: COD NA61 Volume 103, Folder 2.
- ¹⁴⁵ All in discussion after Contralesa's presentation to the hearing, 19 March 1992. Source: COD NA61 Volume 73, Folder 43.
- ¹⁴⁶ These were "cultural" in nature according to the QwaQwa chiefs. Source: COD NA61 Volume 103, Folder 2.

¹⁴⁷ Discussion after the presentation of the Transkei delegation to the hearing, 19 March 1992. Source: COD NA61 Volume 73, Folder 43.

¹⁴⁸ A presentation by Chief Nxomalo from the Ximoko party from Gazankulu argued that most traditional leaders are just creatures of the state. If they need to organise themselves, it is self defence. Because people no longer respect their chiefs. And chiefs are now intimidated and threatened. Source: COD NA61 Volume 103, Folder 2.

¹⁴⁹ *Draft Minutes, Sub-Committee on Participation of the Zulu King and Other Traditional Leaders*, 30 March 1992. Source: COD NA61 Volume 75, Folder 43.

¹⁵⁰ *Draft Minutes, Working Session, Sub-Committee on the Participation of the Zulu King and Other Traditional Leaders*, 19 March 1992. Source: COD NA61 Volume 103, File 2.

¹⁵¹ Letter to Codesa from Samuel Mowagaabsui II Mankuroane, 28 February 1992. Source: COD NA61 Volume 103, File 2.

¹⁵² Documents attached to the *Minutes of the Management Committee Meeting*, 24 February 1992. Source: COD NA61 Volume 3.

¹⁵³ Representation by Chief Sandile to the Sub-Committee on the Participation of the Zulu King and Other Traditional Leaders, 18 March 1992. Source: COD NA61 Volume 103, File 2.

¹⁵⁴ ANC Border Region, 6 April 1992. *Laws Passed at the People's Assembly held in KWT on the 6th of April*. Codesa received a faxed copy on the 4th of May 1992. Source: COD NA61 Volume 103, File 2. The 'laws' also included a law against the re-imposition of the headman system in the Ciskei, claiming that it was a patronage system that undermined the position of traditional leaders.

¹⁵⁵ *Draft minutes of the Management Committee Meeting*, 27th and 28th April 1992. Source: COD NA61 Volume 22, File 17.

¹⁵⁶ *Draft Minutes of the Sub-Committee on the Participation of the Zulu King and Other Traditional Leaders*, 27 April 1992. Source: COD NA61 Volume 22, File 17.

¹⁵⁷ Available on <http://www.info.gov.za/speeches/1994/230994009.htm>. Accessed 28 December 2010.

¹⁵⁸ This decision is referenced in submissions by Contralesa and the Federated Council of Indigenous Rulers of Southern Africa. Source: NA NEG 1/1/1 and 1/2/1/1 respectively.

¹⁵⁹ *Minutes of the Meeting of the Negotiating Council*, 18 March 1993. Source: NA NEG 1/5/2/3.

¹⁶⁰ The Lebowa government made this complaint in a fax of the 25th of March 1993. Source: NA NEG 1/2/1/1. Earlier, on the 16th, the MPNP received a "Letter of Complaint from the Gazankulu Council of Tihosi" who had been left out of the Transvaal delegation. Source: NA NEG 1/2/1/1.

¹⁶¹ A letter from Contralesa on the 4 of March was concerned that homeland administrations had been appointed to constitute delegations. They suggested they or the MPNP or the OAU would be more appropriate. [B7] Two days later they sent a Memorandum which states: "Contralesa as an organisation submits that it has a right to be granted full participatory status in the MPNP planning conference, and any other structure where the role of Traditional Leaders is to be discussed." Source: NA NEG 1/2/1/1.

¹⁶² *KwaZulu Government Press Statement*, 5 March 1993. Source: NA NEG 1/1/5.

¹⁶³ Fax from Major General Bantu Holomisa, 19 March 1993. Source: NA NEG 1/2/1/1.

¹⁶⁴ The IFP initiated an unsuccessful Supreme Court challenge to the election date.

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- ¹⁶⁵ In making this point he referred to the recently adopted UN declaration on the Rights of Indigenous People.
- ¹⁶⁶ Extracts of the Negotiating Council Meeting, 21 July 1993; *Discussion on Technical Committee on Fundamental Rights during the Transition 6th Report*. Source: NA NEG 1/3/2/2/16.
- ¹⁶⁷ Many members of the Negotiating Council laughed at this.
- ¹⁶⁸ Submission: Cape Traditional Leaders, *Comment on the 6th Progress Report on Fundamental Rights during the Transition*. Signed Inkosi M Nonkonyana, Umtata, 23 July 1993. Source: UCT Hugh Corder Collection, Folder C1.
- ¹⁶⁹ *Minutes of the Meeting of the Planning Committee*, 2 August 1993. Source: NA NEG 1/4/2/28. And *Minutes of the meeting of the Negotiating Council*, 2 August 1993. Source: NA NEG 1/5/2/3/3.
- ¹⁷⁰ Later, the South African Government made a formal *Comment on the Inclusion of the Rights of Traditional Communities in the Proposed Bill of Rights*. It was sent from the Department of Justice, Pretoria, 31 August 1993. Source: NA NEG 1/3/3/4/4.
- ¹⁷¹ *Minutes of the Meeting of the Negotiating Council*, 2 August 1993. Source: NA NEG 1/5/2/33.
- ¹⁷² A similar conditional exemption was granted in Canada with respect to the rights of first nations people at the time of the passing of the Canadian constitution.
- ¹⁷³ *Draft Minutes of the Combined meeting of the Ad-hoc Committee of the Technical Committee on Fundamental Rights during the Transition*, 8 September 1993. Source: NA NEG 1/3/3/4/9.
- ¹⁷⁴ *Draft minutes of the meeting of the Ad-hoc Committee on Fundamental Rights during the Transition*, 14 September 1993. Source: NA NEG 1/3/3/5/10.
- ¹⁷⁵ *Draft minutes of the meeting of the ad-hoc committee ...*, 12 October 1993. Source: NA NEG 1/3/3/5/17.
- ¹⁷⁶ *Minutes of the combined meeting of the Ad-hoc Committee and the Technical Committee on Fundamental Human Rights during the Transition*, 8 November 1993. Source: NA NEG 1/3/3/5/19.
- ¹⁷⁷ *Minutes of the meeting of the Negotiating Council*, 16 November 1993. Source: NA NEG 1/5/2/77.
- ¹⁷⁸ Inkatha Freedom Party: *The determination of the form of state and negotiation of the process of transformation of South Africa*. No date on document. Filed with papers of 3-6 March 1993. Source: NA NEG 1/1/2.
- ¹⁷⁹ *First Report of the Technical Committee on Constitutional Issues to the Negotiating Council*, 13 May 1993. Source: NA NEG 1/3/2/2/1.
- ¹⁸⁰ *Second Report of the Technical Committee on Constitutional Issues to the Negotiating Council*, 19 May 1993. Source: NA NEG 1/3/2/2/2.
- ¹⁸¹ In the same document that set the election date.
- ¹⁸² *Third Report of the Negotiating Council on Constitutional Principles by the Technical Committee on Constitutional Matters*, 28 May 1993. Source: NA NEG 1/3/2/2/3.
- ¹⁸³ *Extracts from the draft Minutes of the Negotiating Council*, 3 June 1993. Source: NA NEG 1/5/2/12.
- ¹⁸⁴ *First Supplementary Report on Constitutional Principles by the TC on Constitutional Issues*, 15 July 1993. Source: NA NEG 1/3/2/2/6.
- ¹⁸⁵ *Minutes of the Negotiating Council*, 18 June 1993. Source: NA NEG 1/5/2/15.
- ¹⁸⁶ *Minutes of the Negotiating Council*, 23 June 1993. Source: NA NEG 1/5/2/17.

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- ¹⁸⁷ *Minutes of the Negotiating Council*, 1 July 1993. Source: NA NEG 1/5/2/23.
- ¹⁸⁸ Ibid.
- ¹⁸⁹ Because the issues of ‘regional government’ were highly contested between secessionists, federalists and those seeking a single state but with strong provincial powers, this level of government was referred to throughout the MPNP as SPR, designating “States, Provinces or Regions.” To avoid confusion, I have referred to them by the term which won out; provinces.
- ¹⁹⁰ *Minutes of the Meeting of the Negotiating Council*, Wednesday 28 July 1993. Source: NA NEG 1/5/2/30.
- ¹⁹¹ *Ninth Report of the TC on Constitutional Issues to the Negotiating Council*, 10 August 1993. Source: NA NEG 1/3/2/2/15.
- ¹⁹² *Submission to Constitutional Committee, TEC Committee and Negotiating Council*, 13 August 1993. Source: NA NEG 1/4/2/14-18.
- ¹⁹³ *Discussion Document: On Constitutional Proposals presented by Traditional Leaders*. Compiled by Z Titus, 7 October 1993. Source: NA NEG 1/4/3/17.
- ¹⁹⁴ Much of the elaboration of local government structures was only done at the Constitutional Assembly.
- ¹⁹⁵ *Final Report to the Planning Committee on the Constitutional Proposals presented by the Traditional Leaders*. Signed Z Titus, S Sigcau, M Nonkonyana and M Z Netshimbupfe. 20 October 1993. Source: NA NEG 1/4/7/10.
- ¹⁹⁶ *Addendum to the report Submitted to the Negotiating Council by the Planning Committee on 21 October 1993: In respect of the Traditional Leaders’ Constitutional Proposals*. Source: NA NEG 1/5/7.
- ¹⁹⁷ *Minutes of the meeting of the Negotiating Council*, 21 October 1993. Source: NA NEG 1/5/2/61
- ¹⁹⁸ *Role of Traditional Leaders*, 8 November 1993. Source: NA NEG 1/4/2/14-18.
- ¹⁹⁹ Accepted by the Negotiating Council on the 11th of November 1993. Source: NA NEG 1/5/6.
- ²⁰⁰ Act 196 of 1993.
- ²⁰¹ Memorandum of Agreement for Reconciliation and peace between the Inkatha Freedom Party / KwaZulu Government and the African National Congress and the South African Government / National Party. Source: Constitution of the Republic of South Africa, Act 200 of 1993.
- ²⁰² Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In Re Certification of the Constitution of the Province of KwaZulu-Natal, 1996. Judgement handed down 6 September 1996. 1996 (4) SA 1089 (CC); 1996 (11) BCLR 1419 (CC).
- ²⁰³ ANC, *Building a United Nation*. Proposals for the final constitution from the 1995 April policy conference. Source: NA CA 2/1/2/36.
- ²⁰⁴ *Memorandum re Traditional Leaders*, Copy of Press Release by Contralesa, 20 March 1995. Source: NA CA 2/4/2/1/1/17.
- ²⁰⁵ *Memorandum Submitted by Contralesa to the CA on chapter 7 of the Constitutional Text*, 7 October 1996. Source: NA CA 1/5/12.
- ²⁰⁶ Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In Re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-Natal Provincial

Legislature: In Re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995. Handed Down: 5 July 1996. 1996 (4) SA 653 (CC); 1996 (7) BCLR 903 (CC).

²⁰⁷ *Overview of Issues requiring attention for Certification*, Draft 1., 9 September 1996. Source: NA CA 2/3/1/67.

²⁰⁸ *Memorandum Submitted by Contralesa to the Constitutional Assembly on Chapter 7 of the Constitutional Text*. Signed by Advocate Nonkonyana, 7 October 1996. Source: NA CA 1/5/12.

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²⁰⁹ From *Verbatim Transcript, Codesa I*. December 1990 Source: COD NA61 Folder 18, File 70.

²¹⁰ Michael Cassidy. 1995. *A Witness for Ever*. London: Hodder & Stoughton. Page 220.

²¹¹ From the Preamble to Constitution of the Republic of South Africa, Act 32 of 1961.

²¹² From the Preamble to Constitution of the Republic of South Africa, Act 110 of 1983.

²¹³ Act 55 of 1949.

²¹⁴ Act 21 of 1950.

²¹⁵ Although extreme and militant white right-wing groups certainly did. See for example Chidester's (1992) discussion of Barend Stydom who opened fire on black people in a crowded square in Pretoria in 1988. In court he claimed the shootings were God's will to protect the 'volk' and Christian morals in the country.

²¹⁶ On the 26th of July 1993 the Negotiating Council of the MPNP passed a *Resolution on Attack of Kenilworth Worshippers*. The resolution refers to it as a horrendous attack on "innocent people assembled in prayer in a place of worship." It continued to outline their alarm as the "desecration of a place of worship" with this "barbaric act of violence" and "Condemn in the strongest terms this callous, despicable and unforgivable act of violence against humanity in general and worshippers in particular." Source: NEG 1/4/2/27.

²¹⁷ A God of Father, Son and Holy Spirit; one that can't be mistaken for a Muslim or Jewish God.

²¹⁸ *Theme Committee one: Minutes of the Core Group Meeting*, 2 November 1994. Source: CA 2/3/1/2/5.

²¹⁹ *Preliminary Framework from the Sub-Committee to Theme Committee 1*. No date, but in documents of 8 February 1993. Source: CA 2/4/1/4/14.

²²⁰ All details of this meeting taken from *Transcription of debate on secular state*, Theme Committee one meeting 9 February 1995. Source: CA 2/4/1/2/31.

²²¹ Theme Committee one *Report on Block one*, 10 February 1994. Source: CA 2/3/1/23.

²²² Theme Committee one: *Supplementary Report to Amended Report from Theme Committee one*, 28 February 1995. Source: CA 1/18/6.

²²³ *Minutes of the Management Committee Meeting*, 25 May 1995. Source: CA 2/3/1/40.

²²⁴ Christian Voice pamphlet "*WARNING! Please circulate to all parents*". Source: CA 2/4/1/6/39.

²²⁵ Christian Voice '*Open letter to fellow Christians*'. Source: CA 2/4/1/5/33.

²²⁶ *Minutes of the meeting of the Constitutional Committee*, 26 May 1996. Source: CA 2/1/2/36.

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- ²²⁷ Press Statement by the Constitutional Assembly on the *Relationship between State and Religion*, Issued by Chairperson Mr C Ramaphosa, 26 May 1995. Source: CA 2/3/1/41.
- ²²⁸ Correspondence between Minister Chris Nissen and Mr Cyril Ramaphosa, 15 June 1995. Source: CA 2/4/1/2/34.
- ²²⁹ Neither the WCPCC nor the National Archives have a copy of the submission or a transcript of the meeting. I have relied on minutes of the meeting for the content of the discussions.
- ²³⁰ *Minutes of the meeting of Theme Committee one*, 1 August 1995. Source: CA 2/4/1/2/38.
- ²³¹ *Minutes of the meeting of theme committee one*, 7 August 1995 Source: CA 2/4/1/2/39.
- ²³² *Verbatim Transcription of Theme Committee one*, 14 August 1995. Source: CA 2/4/1/12/17.
- ²³³ From http://www.frontline.org.za/about_director.htm, accessed 9 June 2009.
- ²³⁴ *Verbatim Transcription of meeting of Theme Committee one*, 14 August 1995. Source: CA 2/4/1/12/17.
- ²³⁵ Ibid.
- ²³⁶ *Submissions to the New Constitution – Report on Phase one*, 15 November 1995. Source: CA 1/18/10.
- ²³⁷ Submission, Archbishop Tutu. 2 June 1995. Source: CA 2/4/4/1/7/85.
- ²³⁸ As stated by Frank Mdlalose of the IFP in his opening speech to the first Codesa Plenary, 20 December 1992. Source: *Verbatim Transcript, Codesa I*. December 1990 Source: COD NA61 Folder 18, File 70
- ²³⁹ Presentation by Chief Patekile Holomisa of Contralesa to the *Hearing on the Participation of the Zulu King and other Traditional Leaders*, 19 March 1993. Source: COD NA61 Volume 103.
- ²⁴⁰ See for example Contralesa’s claim that hereditary leaders ran “transparent and accountable systems of government.” In *On the Constitutional Role of Traditional Leaders*. 13 February 1995. Source: CA 2/3/1/6/11.
- ²⁴¹ Speech by Brigadier Oupa Gqozo, Military ruler of the Ciskei, at the opening of the first Codesa plenary, 20 December 1992. Source: *Verbatim Transcript, Codesa I*. December 1990 Source: COD NA61 Folder 18, File 70
- ²⁴² The QwaQwa delegation at the *Hearing on the Participation of the Zulu King and other Traditional Leaders* claimed that traditional leaders had the “divine responsibility of nation-building”. Source: COD NA61 Volume 103.
- ²⁴³ The KaNgwane Council of Chiefs for example in their presentation to the same subcommittee on the 19th of March said: “Above us is God Almighty and it was He who placed us over our tribes to rule them. Just like we cannot raise ourselves to God, the King of Kings, we do not expect politicians, who are our subjects, to raise themselves to our level. Neither are we prepared to lower ourselves to the level of politicians.” Source: COD NA61 Volume 75, File 43.
- ²⁴⁴ *Minutes of the Negotiating Council Meeting*, 30 July 1993. Debate of the TC Committee on Fundamental Rights during the Transition’s *Seventh Report*. Source: NEG 1/3/3/3.
- ²⁴⁵ *Documentation Pack, Public Hearing on Traditional Authorities*, National Assembly, 12-13 May 1995. Sources: CA 1/12/3.

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- ²⁴⁶ Contralesa draft Submission to the Constitutional Assembly, ‘*On the Constitutional Role of Traditional Leaders*’. Received 14 February 1995. Source: CA 2/3/1/6/11.
- ²⁴⁷ Submission, Ma Tseri, 21 April 1995. Source: CA 2/4/1/5/30.
- ²⁴⁸ Submission, Lufundo Livingstone, Makonde, Venda. No date. Source: CA 2/4/4/1/7/54.
- ²⁴⁹ Submission. No Date. Source: CA 2/4/1/6/9.
- ²⁵⁰ Act 34 of 1995.
- ²⁵¹ Ex Parte: Chairperson of the Constitutional Assembly; In Re Certification of the Constitution of the Republic of South Africa, 1996. Handed down 6 September 1996. 1996(4) SA 744 (CC); 1996(10) BCLR 1253 (CC).
- ²⁵² See for example *State v Makwanyane and Another*, commonly known as the death penalty case. Handed down 6 June 1995. 1995(3) SA 391 (CC); 1995(6) BCLR 665 (CC).
- ²⁵³ *Terms of Reference for Working Groups for Codesa, Working Groups 1 to 4*. no date. Source: COD NA61 Volume 20, Folder 3.
- ²⁵⁴ *Eighth Report of the Technical Committee on Constitutional Issues to the Negotiating Council*. Pages 10-11. . 26 July 1993. Emphasis in the original. Source: NEG 1/3/2/2/14.
- ²⁵⁵ Web edition. Source: <http://dictionary.oed.com>. Accessed 24 April 2009.
- ²⁵⁶ See for example, *Transcription of Public Hearing: Religious groups*. 26 May 1995. Source: CA F4 1/2/6.
- ²⁵⁷ See for example, *Theme Committee 2: Structure of Government: Traditional Authorities (Block 4)* Draft formulation as at 21 August 1995. Source: CA 2/1/2/36.
- ²⁵⁸ Ibid.
- ²⁵⁹ Oxford English Dictionary, online edition. Source: <http://dictionary.oed.com>. Accessed 24 April 2009.
- ²⁶⁰ From *minutes of the preparatory meeting* for Codesa I. Source: COD NA61 Volume 1.
- ²⁶¹ Act 34 of 1995.
- ²⁶² A brief summary of these hearings is included in *Volume Four, Truth and Reconciliation Commission of South Africa Report*. 321pp.

Endnotes to Chapter Six

- ²⁶³ From his 1992 UCT Inaugural Lecture *Perfectibility and Corruptibility: Preparing ourselves for power*. (Sachs 1992)
- ²⁶⁴ Spoken by the Deputy President Zuma to a large crowd at the Heritage Day celebrations of September 2006 in KwaZulu-Natal. After a great deal of pressure from gay rights organisations who accused him of acting against the constitution, he later apologised. (Quoted in Robins 2008:186)
- ²⁶⁵ Calculated by the Development Policy Research Unit (DPRU) at the University of Cape Town, based on Statistics South Africa’s Income and Expenditure Surveys. R174 per person per month is roughly equivalent to \$2 per day on 2000 figures.
- http://www.commerce.uct.ac.za/Research_Units/DPRU/DataCorner.htm. Accessed 12 December 2010.

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- ²⁶⁶ Figure based on Statistics South Africa Labour Force Survey, analysed and reported in Kingdon and Knight. (2005:3)
- ²⁶⁷ Figures for 2000 to 2007, also from Statistics South Africa Labour Force Survey, analysed by DPRU.
- ²⁶⁸ Statistics South Africa “Key Indicators” available on www.statssa.gov.za. Accessed 2 January 2011.
- ²⁶⁹ South African Social Security Agency *Statistical Report on Social Grants*. Report number 25, October 2010. Available on www.sassa.gov.za. Accessed 12 January 2011.
- ²⁷⁰ The figures are 59.3% and 68.4% respectively. DPRU “Household Access to Assets and Services”. http://www.commerce.uct.ac.za/Research_Units/DPRU/DataCorner.htm. Accessed 12 December 2010.
- ²⁷¹ DPRU figures based on a variety of national statistics. http://www.commerce.uct.ac.za/Research_Units/DPRU/DataCorner.htm. Accessed 12 December 2010.
- ²⁷² It became the New National Party for a while, before being subsumed into the ANC.
- ²⁷³ *State v Zuma* 1995(2) SA 642 (CC).
- ²⁷⁴ Constitution of the Republic of South Africa, Act 108 of 1996. Sections 15(1) and 15(3).
- ²⁷⁵ Act 120 of 1998
- ²⁷⁶ Keynote address by the Deputy Minister of Justice and Constitutional Development, Ms Cheryl Gillwald, MP, at the launch of the Recognition of Customary Marriages Act No 120 of 1998, 15 November 2000. <http://www.info.gov/za/speeches/2000/001121101a1006.htm>. Accessed 20 February 2009.
- ²⁷⁷ Sections 4(3) of the Recognition of Customary Marriages Act, Act 120 of 1998.
- ²⁷⁸ Act 25 of 1961.
- ²⁷⁹ South African Law Commission (SALC) (2003) Project 59, *Islamic Marriages and Related Matters Report*.
- ²⁸⁰ *Ibid.* page 14.
- ²⁸¹ *Rylands v Edros*. 1997(2) SA 690 (C).
- ²⁸² *Amod v Multilateral Motor Vehicle Accidents Fund* (CCT4/98) ZACC 11, 1998(4) SA 735; 1998 (10) BCLR 1207.
- ²⁸³ The draft Bill is available on <http://www.pmg.org.za/bill>. Accessed 20 January 2011.
- ²⁸⁴ *Fourie v Minister of Home Affairs* (2005) ZACC 19.
- ²⁸⁵ As specified by the “Memorandum on the Objects of the Civil Union Bill 2006” attached to version 26B of the draft legislation.
- ²⁸⁶ It is particularly interesting that he made this speech since it was he who asked to be moved to another prison cell so that he did not have to share with the Simon Nkoli, the openly gay treason trialist. Nkoli’s role in getting the sexuality clause into the constitution is described by Cock. (2003)
- ²⁸⁷ ANC NEC statement of October 2006. Available at www.anc.org.za
- ²⁸⁸ Act 17 of 2006.
- ²⁸⁹ *Civil Union Bill is about equality for all in our country* in Cape Times, Friday 20 October 2006. Page 9.
- ²⁹⁰ Act 92 of 1996.
- ²⁹¹ http://www.anc.org.za/ancdocs/misc/anc_and_religion.html

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- ²⁹² From an interview with Chance Chagunda, Liaison Officer, SACBC Parliamentary Office, 28 September 2005, Cape Town.
- ²⁹³ Interview with Father Peter-John Pearce, Director, SACBC Parliamentary Office, 29 June 2005, Cape Town.
- ²⁹⁴ Tsele, M. (2001). General Secretary's report to the 2nd Triennial national conference of the South African Council of Churches. www.sacc.org.za
- ²⁹⁵ Quoted in *Unholy battle between ANC and churches*, by Jaspreet Kindra in Mail & Guardian, 2 November 2001.
- ²⁹⁶ *Tutu gets 99th degree then slams SA government*. Mail & Guardian, 6 September 2002.
- ²⁹⁷ SACC Asks ANC to Act Against Komphela. 2 March 2005.
<http://www.sacc.org.za/news05/komphela.html>. Accessed 10 September 2005.
- ²⁹⁸ SACC Statement on Archbishop Tutu's Mandela Lecture. 29 November 2004.
<http://www.sacc.org.za/news04/tutulect.html>. Accessed 10 September 2005.
- ²⁹⁹ Mbeki's address to the South African Council of Churches, SACC Triennial Conference (2004). Cedar Park Hotel, Johannesburg.
- ³⁰⁰ Address to the 2004 SACC Triennial Conference.
- ³⁰¹ Sibongakonke Shoba, *Voters are also churchgoers* in Business Day, 17 March 2009.
- ³⁰² *Pastor Ray: ANC at Prayer? Faith group plans to challenge Constitution* in Mail & Guardian, 11 to 17 September 2009.
- ³⁰³ An *Mkhonto weSizwe* (MK) song sung in Zulu, the title of which means bring me my machine gun. It became Zuma's hallmark electioneering song.
- ³⁰⁴ 'Pastor' Zuma calls for unity. News24.com. 6 May 2007.
- ³⁰⁵ Ibid.
- ³⁰⁶ "We did not ordain Zuma". News24.com, 8 May 2007.
- ³⁰⁷ Mpho Dube. *Zuma's God talk condemned*. The Citizen, Tuesday 6 May 2008.
- ³⁰⁸ Reported in Nkululeko Ncana's *Church is privatising Jesus* in The Times, 24 June 2009. See also Khethiwe Mabena's *ANC until 'Jesus comes'* in The Times, 22 June 2009.
- ³⁰⁹ Mpumelelo Mkhabela, *Be like Jesus' disciples for ANC* in Sunday Times, 19 April 2009.
- ³¹⁰ Ibid. Mpumelelo Mkhabela, *Be like Jesus' disciples for ANC* in Sunday Times, 19 April 2009.
- ³¹¹ *Zuma Free: State will drop charges against ANC president*. 5 April 2009
- ³¹² Phillip Dexter. *Comment: Of politicians, priests and prostitutes* in Mail & Guardian, 3 to 8 April 2009.
- ³¹³ Mmanaledi Mataboge's *Sleepless nights on his knees* in Mail & Guardian. 27 February to 5 March 2009.
- ³¹⁴ *Pastor Ray: ANC at Prayer? Faith group plans to challenge Constitution*. Mail & Guardian, 11 to 17 September 2009.
- ³¹⁵ Proclamation No. 48, 2007: Determination of Salaries and Allowances of Traditional Leaders, Members of the National and Provincial Houses of Traditional Leaders. Government Gazette, 14 December 2007.
- ³¹⁶ Regulation of Development in Rural Areas Act of 1997, Eastern Cape Provincial Government.

³¹⁷ Act 32 of 2000.

³¹⁸ Act 41 of 2003.

³¹⁹ Act 11 of 2004.

³²⁰ From the Judgement of *Tongoane v Minister of Agriculture and Land Affairs and others*. Case CCT 100/09 [2010] ZACC 10. Handed down 11 May 2010.

³²¹ *Back to the Dark Days*, in Mail & Guardian, 16 to 22 May, 2008.

³²² *Its jail for Thembu King* in The Sun, Monday 7 December 2009.

³²³ *Shilubana v Nwamitwa*. Case CCT 03/07 [2007] ZACC 14.

³²⁴ *Bhe v Magistrate, Khayelitsha*. Case CCT 40/03; and *South African Human Rights Commission v President of the South African Republic*. Case CCT 50/03.

³²⁵ *Zip Up, ANC tells JZ* in Mail & Guardian, 12 to 18 February 2010.