

# The status of animals in African cosmology: A non-legal perspective

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## 1 Introduction

A relevant question here is whether there is a difference in the symbolisation of animals between cultures, for example, between indigenous traditions that regard animals as sacred and those that see animals as non-sacred and as pets.<sup>1</sup>

From early Greece to the European continent, philosophers have wrestled with questions regarding the ontology of animals. Their speculative enquiry included, among others, whether animals have the ability to experience pain, whether they have a soul, whether they have a mind and can therefore reason, and whether they can be considered to be moral agents.<sup>2</sup> Antonites points out that for Descartes, animals were considered *automata*, soulless, lifeless beings with no reason and therefore without any moral worth.<sup>3</sup> Among those scholars who considered animals to be of some worth, sentience became the basis for arguing that animals deserve the same treatment as human beings. Singer, for instance, emphatically states that:

If a being suffers there can be no moral justification for refusing to take that suffering into consideration. No matter what the nature of that being, the principle of equality requires that its suffering be counted equally like suffering – in so far as rough comparison can be made – of any other being.<sup>4</sup>

Singer's view sets the context for the debates on animals as they have evolved in South Africa.

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<sup>1</sup>Olupona 'Some notes on animal symbolism in African religion and culture' (1993)18 *Anthropology and Humanism* 5.

<sup>2</sup>For an in-depth discussion see Antonites 'Do animals have moral worth? The contemporary debate with special reference to Aristotle' (2004) 5 *Phronimon* 17 - 37.

<sup>3</sup>*Id* 21.

<sup>4</sup>Singer *Animal liberation: Towards an end to man's inhumanity to animals* (1976) 9.

Towards the close of the year 2011, I had the privilege of attending a conference on *Animals and the law*.<sup>5</sup> Listening to the various speakers and in my later private reading on animals in general, I was struck by two related points which this paper will address. Firstly, the debates are deeply rooted in Western philosophy. For instance, in an introduction to his edited book titled *Animal others: On ethics, ontology and animal life*, Steeves<sup>6</sup> states that the collected essays in the volume will deal with the theme of the status of non-human animals from the perspective of continental philosophy. He writes further that:

Within this broad topic are included various questions concerning the moral status of animals, the question of animal minds and animal phenomenology, the body of the animal, what it is to be an animal, what it is to be with an animal, as well as the roles that animals play in the thought of such authors as Husserl, Heidegger, Nietzsche, Levinas, Merleau-Ponty and Derrida.

This kind of enquiry is problematic for two reasons. The first point of concern is that, to an African, reliance on Western philosophy in matters that are culturally determined should in itself sound a warning bell.<sup>7</sup> After all, the difference between Western and African philosophy is well documented.<sup>8</sup> Secondly, Western philosophy is content with a speculative enquiry on being in isolation to reality in general. In this case, the Cartesian maxim *cogito ergo sum* comes to mind. For an African, an enquiry such as that suggested by Singer that will focus on 'the question of animal minds and animal phenomenology, the body of the animal, what it is to be an animal, what it is to be with an animal' in isolation is philosophically unthinkable. The African ontology is holistic in that being is discussed in relation to other beings. This holistic ontology makes no distinction between the material and the spiritual, the animate and the inanimate, and the religious and the secular. The African view of the cosmos and how an individual relates to the other beings that inhabit it does not bear any resemblance to the Western one. For a great majority of African people south of the Sahara, therefore, the debates as they currently stand, espouse a view which is not only unfamiliar to them, but one to which they cannot relate. Africans inhabit a world that is religious, interconnected and communitarian in nature. This worldview

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<sup>5</sup>The three day conference was held from 28-30 November 2011 under the theme *Animals in law and society: Perspectives from Africa and beyond*. The conference was organised by the department of Jurisprudence of the University of South Africa (Unisa).

<sup>6</sup>Steeves *Animal others: On ethics, ontology and animal life* (1999) 2.

<sup>7</sup>See Wiredu 'How not to compare African traditional thought with Western thought' (1997) 75/76 *Transition: The anniversary issue: Selection from transition, 1961-1976* at 327 endnote 7 where he warns that: 'The African philosopher cannot take the sort of cultural pride in the philosophical achievements of Aristotle or Hume or Kant or Hegel or Marx or Frege or Husserl in which the Western student of philosophy may indulge himself. Indeed an African needs a certain level-headedness to touch some of these thinkers at all'.

<sup>8</sup>Mbiti *African religions and philosophy* (1969); Coetzee and Roux (eds) *Philosophy from Africa* (2002) and Wiredu (n 7) 320 -327.

informs not only the African philosophical enquiry on animals and their teleology but also how humans relate or should relate to them.

The second point that struck me and which flows from the first is the proposal to extend constitutional protection to animals.<sup>9</sup> The argument advanced is that animals have fundamental interests in their own right that deserves legal protection.<sup>10</sup> My problem is not with the concept itself, but with the effect it will have on the constitutional imperative of healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights.<sup>11</sup> It is trite to say that South Africa is not composed of a homogenous group of people. There are people of, among other things, different cultures, languages, religions and race. These differences inevitably inform their diets, values, forms of worship, rites of passage, worldview and for the purpose of this paper how they relate to their non-human counterparts. Both the right to culture and to religion are constitutionally protected. As each cultural group asserts its right to culture or to religion, differences will emerge as they already have in what has become popularly known as the *Ukweshwama* case.<sup>12</sup> Given the differences that exist between the Western approach to animals and the African one, the 'clash of cultures'<sup>13</sup> in these matters is inevitable. This paper seeks to argue that the rights discourse is not a desirable tool to use especially in sensitive matters that relate to differences that are cultural. As Van Der Reyden J in the *Ukweshwama* case pointed out, 'there may be other appropriate authorities to deal with matters such as the slaughter of the bull and the manner in which this is done'.<sup>14</sup>

Notwithstanding the fact that sub-Saharan Africa is home to people of different cultures, religions and languages, there is a common thread among Africans in as far as their relationship to animals is concerned. Such a thread provides a basis for this paper which will be presented in five parts. In the first part I seek to draw from some examples in history to validate a claim that how people relate to animals is informed by their worldview. To this end the first section will deal with the phenomenon of the prosecution of animals both in Europe and Africa. In the second part the paper will present an African cosmology emphasising the fact that in Africa everything is religious, interrelated and communitarian. The status of animals within the African cosmology is informed by this worldview. The rituals performed are also informed by this view. In the third

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<sup>9</sup>Bilchitz 'Does transformative constitutionalism require the recognition of animal rights?' (2010) 25 *SAPR/PL* 267-300, Bilchitz 'Moving beyond arbitrariness: The legal personhood and dignity of non human animals' (2009) 25 *SAJHR* 38-72.

<sup>10</sup>*Id* 40.

<sup>11</sup>Preamble to the Constitution of the Republic of South Africa, 1996.

<sup>12</sup>*Stephanus Smit NO v His Majesty King Goodwill Zwelithini Kabhekuzulu* (case no: 10237/2009) at <http://www.saflii.org/za/cases/ZAKZPHC/2009/75.pdf> (accessed 2012-01-12). Hereafter referred to as the *Ukweshwama* case).

<sup>13</sup>*Id* 7.

<sup>14</sup>*Id* 17.

part I seek to argue against the extension of constitutional rights to animals. The argument that this paper seeks to advance is that in most African societies every traditional ritual is religious and involves the slaughtering of one kind of an animal or another in a prescribed manner. Including animals in the rights discourse therefore, may open up an avalanche of cases brought by interest groups mainly against black people. Such a move will be contrary to the constitutional imperative of healing the divisions of the past and of establishing a society based on democratic values, social justice and fundamental human rights. In the fourth part the paper will conclude.

## **2 Prosecution of animals as though they were human**

From time immemorial, human and non-human beings have cohabitated the earth. The rules of their cohabitation have to a large degree been determined by human beings, guided among other things by their religion, culture and the need for survival and sustenance. Culture, in part, is an embodiment of how people see themselves, the environment, and their belief system. It marks the contours of how they relate to each other and the environment they inhabit. The primacy of culture has become the subject of scholarly research in areas such as development, health and good governance among others.<sup>15</sup> Throughout history, non-human animals have played a pivotal role in the lives of human beings and their cultures. As Slabbert points out, animals have played a vital role in the evolution, development and sustainability of human cultures in one form or another.<sup>16</sup> One such area is the role played by dogs in the field of medicine during the medieval and renaissance periods.<sup>17</sup> According to Slabbert, the key to understanding the symbolism that these animals represented lies in the worldview of the people of the Middle Ages. The practice of medicine as she continues to point out was deeply influenced by a specific worldview in which factors such as destiny, sin, superstition and astral influences played a dominant role.<sup>18</sup>

Different cultures have given different accounts of the origins of animals, and their purpose *vis-a-vis* their human counterparts. The Judeo-Christian sacred document, presents everything as having been created by God. It was only when

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<sup>15</sup>See Du Plessis and Rautenbach 'Legal perspectives on the role of culture in sustainable development' (2010) *PER/PELJ* 27-70; Ntibatirirwa 'Cultural values, economic growth and development' (2009) 84 *Journal of Business Ethics* 297-311; Dube "'I am because we are": Giving primacy to African indigenous values in HIV and AIDS prevention' in Murove (ed) *African ethics: An anthology of comparative applied ethics* (2009) 188-217; Tambulasi and Kayuni 'Ubuntu and democratic good governance in Malawi: A case study' in Murove (ed) *African ethics: An anthology of comparative applied ethics* (2009) 427-445.

<sup>16</sup>Slabbert "'A curious incident involving a dog": The legal-historical significance of dog images in medieval and renaissance medical illustrations' (2010)16 *Fundamina: A Journal of Legal History* 135.

<sup>17</sup>*Id* 121-146.

<sup>18</sup>*Id* 145.

God had created non-human beings that he created human beings in his own image and likeness.<sup>19</sup> The book of Genesis paints a picture of a hierarchy of creation with human beings at the pinnacle. Humans were mandated '[t]o have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth'.<sup>20</sup> The text has received various interpretations ranging from the fact that human beings are co-creators with God and therefore need to be stewards of creation to the fact that human beings are superior to non-human beings. For the former, the text imposes a sense of duty to care for creation,<sup>21</sup> while for the latter non-humans are just viewed as creatures at the disposal of human beings.<sup>22</sup>

The history of the relationship between human beings and non-humans seems to have oscillated between animals being treated like human beings and their being treated as creatures at the disposal of human beings. For instance, in Old Testament times there were instances where human beings used their own moral world as the standard against which animals were also to be judged. Exodus, for example, outlines two possible scenarios. The first one relates to a situation where an ox gores a man or a woman to death, in which case the ox shall be stoned and its flesh not be eaten. For this first scenario, the owner escapes punishment.<sup>23</sup> In the second scenario, if the ox has been accustomed to gore and the owner was warned and did nothing about it, both the owner and the ox are to be put to death.<sup>24</sup> It is not clear whether there was a sense of appreciation of the fact that an animal had a sense of moral appreciation of its actions or not. Nevertheless, Old Testament people saw human life as being sacred. According to commentary, this provision was put in place to highlight the sacredness of life. Both the killing of the ox and the fact that its meat was not to be eaten further highlights this fact.<sup>25</sup>

In medieval Europe, the prosecution of animals in both secular and ecclesiastical courts was a common phenomenon.<sup>26</sup> It was not only a particular group of animals that was understood to have had a sense of moral appreciation of right or wrong. Medieval people seem to have understood all categories of animals to have had some sense of moral appreciation. Almost no category of

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<sup>19</sup>Genesis 1:26.

<sup>20</sup>Genesis 1:28.

<sup>21</sup>Clifford and Murphy 'Genesis' in Brown, Fitzmyer and Murphy (eds) *The new Jerome Biblical commentary* (1990) 11.

<sup>22</sup>The Bible is replete with examples of the use of animals for transport (1 Kings 1:33; 38; 44), the use of animal products (Genesis 3:21; Exodus 25:1-6), the use of animals for sacrificial purposes (1 Kings 8:62) and consumption of animal meat (Genesis 43:16; 1 Chronicles 12:39-40).

<sup>23</sup>Exodus 21:28(a).

<sup>24</sup>Exodus 21:28(b).

<sup>25</sup>Connell 'Exodus' in Davidson, Stribbs and Kevan (eds) *The new Bible commentary* (1962) 122.

<sup>26</sup>Slabbert 'Prosecuting animals in medieval Europe: Possible explanations' (2004) *Fundamina: A Journal of Legal History* 159-179.

animals was spared from prosecutions. As Slabbert points out, prosecutions included a wide range of animals such as asses, beetles, bloodsuckers, bulls, caterpillars, chickens, cows, dogs, dolphins, field mice, flies, goats, grasshoppers, horses, mice, moles, pigs, rats, sheep, snails, termites, wolves, worms and miscellaneous vermin.<sup>27</sup> The personnel presiding over these trials, the fees paid, the language and procedures followed were the same as those adopted in trials of human beings.<sup>28</sup> An appreciation of these acts which are difficult for a modern day reader to fathom lies in the worldview that informed medieval people.

Medieval people lived in a world which espoused a certain view of sin, guilt, fear and superstition, and these provide the basis for understanding the animal trial phenomenon.<sup>29</sup> Slabbert writes that those instituting legal proceedings believed in the ability of animals to have an appreciation of both the process and the verdict.<sup>30</sup> Further, the Middle Ages was engulfed in a crisis. There was a need to maintain law and order, and such trials created the impression that the authorities could indeed maintain law and order, even if the delinquents were not human beings.<sup>31</sup> The message conveyed by these practices was rather ambivalent. On the one hand the acts of punishing were clearly aimed at having a deterrent effect on other animals witnessing such executions.<sup>32</sup> On the other hand, it seems that whether the animals concerned appreciated the gravity of the whole process or not was not the point, what seems to have been important was the message such trials conveyed to the human world. About this Slabbert notes that, '[i]n some instances, the convicted animal was dressed up in human clothes in order to underlie the seriousness of the proceedings – as if the accused were human. In this regard it seems plausible that the theatrical impact of these trials could lead us to label them as morality plays, aimed at demonstrating to the town folks the power of the church and state in rooting out crime wherever it occurred'.<sup>33</sup>

Albeit for different reasons, some parts of Africa have historically had prosecutions of animals that fell within a certain category of their relationship with human beings. Unlike Europe in medieval times, in Africa the prosecutions were reserved for animals with which a particular clan had a special relationship. As Mbiti<sup>34</sup> points out, kinship plays a pivotal role in most African societies. There are certain animals which are considered to be linked to a particular group or clan. Such a relationship is expressed through a totemic relationship. In Africa, most clans whether matriarchal or patriarchal, would have a totem. A totemic relationship may relate to an animate

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<sup>27</sup>*Id* 159.

<sup>28</sup>*Id* 160-161.

<sup>29</sup>*Id* 164.

<sup>30</sup>*Id* 165.

<sup>31</sup>*Id* 164.

<sup>32</sup>*Id* 166.

<sup>33</sup>*Ibid*.

<sup>34</sup>Mbiti (n 8) 102.

or inanimate object. It entails a situation where a clan 'has an animal or part of it, a plant, a stone or mineral, which is regarded as a totem'.<sup>35</sup> For members of a particular clan, a totemic relationship imposes a sense of duty *vis-a-vis* the particular object or animal. Clan members are expected to take care of the totem in that they may not kill or eat it. A totem therefore, is a 'visible symbol of unity, of kingship, of belongingness, of togetherness and common affinity'.<sup>36</sup> Olupona<sup>37</sup> recounts a story of an anthropologist by the name of Nadel visiting the Mokwa people in northern Nigeria. To the Mokwa people crocodiles are regarded as people as well as sacred beings.<sup>38</sup> The Mokwa people believe that from time immemorial, there was a pact that people would not kill or annoy a crocodile and that crocodiles too would not harm any member of the community. To kill a crocodile would bring forth disaster on the whole clan.<sup>39</sup> A crocodile should therefore not kill or be killed. In one of his visits, however, Nadel found that a crocodile had killed a child. A court was convened; a crocodile was tried and sentenced to death for breaking the agreement. Another account by Olupona is that of Meyer Fortes among the Tallensi people of Ghana. The Tallensi people also have a totemic relationship with crocodiles. A totemic crocodile was killed overnight. The view of the Tallensi people was that such a heinous crime could not have been committed by one of them, as members of their clan would have been aware that killing a crocodile would be a sacrilege.

To this day, totemic relations continue to be prevalent in the African conception of the cosmos. Totemism is but one aspect of the religious, communal and interrelated view of the cosmos to which this paper will now turn.

### 3 African cosmology and the status of animals in it

The African universe is hierarchical. As Mbiti<sup>40</sup> writes, it consists of (1) God at the pinnacle, followed by (2) the spirits of those who died a long time ago, (3) human beings consisting of those alive and those to be born, (4) animals and plants, and finally (5) phenomena consisting of objects without biological life. Within this cosmos, everything is interpreted by human beings in relation to God in an anthropocentric and anthropomorphic way.<sup>41</sup> It is anthropocentric in that human beings view nature in relation to themselves, and anthropomorphic in that God has human attributes. God among other things is depicted as being able to eat, receive prayers, and sleep.<sup>42</sup>

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, and see also Murove 'Beyond the savage evidence ethic: A vindication of African Ethics' in Murove (ed) *African ethics: An anthology of comparative applied ethics* (2009) 28-29.

<sup>37</sup> Olupona (n 1) 7.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> Mbiti (n 8) 15-16.

<sup>41</sup> *Id* 48.

<sup>42</sup> *Id* 48-50.

An African inhabits a world that is religious in such a way that natural phenomena and objects are all seen in relation to God.<sup>43</sup> As Mbiti<sup>44</sup> points out, such a world makes no distinction between what is sacred and secular, what is religious and non-religious and what is spiritual and what is material. As if carrying a halo, an African takes his religion with him wherever he goes. About this Mbiti<sup>45</sup> writes that, 'Wherever the African is, there is his religion: he carries it to the fields where he is sowing seeds or harvesting a new crop; he takes it with him to the beer party or to attend a funeral ceremony, and if he is educated he takes religion with him to the examination room at school or in the university; if he is a politician he takes it to the house of parliament'.

In an African worldview, the universe is seen as a world of forces interacting with one another. This force is present in all things that exist whether animate or inanimate.<sup>46</sup> The degree of this life force varies according to one's status in the hierarchy of beings. As Shutte illustrates, '[t]he universe can be seen as a graded system of life force, emanating from God. Strongest are the ancestors, who have died, and heads of the clans and families, and weakest, animals and material objects'.<sup>47</sup> All these forces are necessary for the well-being and strengthening of human beings.<sup>48</sup> Death stands out as a constant threat to the life of the cosmos in general. Human beings therefore have a task to work towards defeating the enemies of life.<sup>49</sup> God has made animals, plants and minerals available as sources of vital energy for and use by human beings. However, as Bujo warns, this does not mean that persons are permitted to treat lesser forms of being arbitrarily.<sup>50</sup>

The anthropocentric view of the universe by an African is not an exclusive one. Because of the vital force that exists within each being, human beings view themselves in relation to other beings. As Murove points out, the African is in a 'perpetual state of dependence and interdependence'.<sup>51</sup> This is the fundamental principle of African philosophy. Its metaphysics is premised on the ontological unity of beings.<sup>52</sup> Personhood in African philosophy is conceived of in relation to the community.<sup>53</sup> This sense of dependence and interdependence has been given meaning through the

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<sup>43</sup>*Id* 48.

<sup>44</sup>*Id* 2.

<sup>45</sup>*Ibid*.

<sup>46</sup>Shutte 'Ubuntu as the African ethical vision' in Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 89.

<sup>47</sup>*Id* 90.

<sup>48</sup>Bujo 'Ecology and ethical responsibility from an African perspective' in Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 282.

<sup>49</sup>*Ibid*.

<sup>50</sup>*Id* 290.

<sup>51</sup>Murove (n 36) 28.

<sup>52</sup>Ama Mazama 'Afrocentricity and African spirituality' (2002) 33 *Journal of Black Studies* 219.

<sup>53</sup>Matolino 'Radicals versus moderates: A critique of Gyekye's moderate communitarianism' (2009) 28 *South African Journal of Philosophy* 159 -170.



concept of *ubuntu*.<sup>54</sup> The concept of *ubuntu* encompasses a sense of community which is also inclusive of the natural environment. As Ramose points out, to care for one another, implies caring for physical nature as well.<sup>55</sup> Among the Shona-speaking people of Zimbabwe the concept of relatedness is expressed through the concept of *ukama*. While *ubuntu* expresses the notion that a person is a person through other persons, *ukama* expresses the notion that a person is a person not only through other persons but also through the natural environment.<sup>56</sup>

Given the anthropocentric view of the universe, it follows that both animals and plants are explained in relation to human beings. As Mbiti explains, animals and plants constitute the environment within which human beings live, provide sustenance and if need be, human beings establish a mystical relationship with them.<sup>57</sup> It is not every kind of meat that people can eat. Most African cultures have different taboos with regard to the consumption of animals. Such taboos, as is the case with the people of the tropical rain forests, are sometimes aligned with the various stages of development such as age, physical and social status.<sup>58</sup> Some taboos may also be health related. For instance, among the people of the Ituri Forest in the Democratic Republic of Congo, during pregnancy, a woman and her husband are supposed to abstain from eating the meat of animals which are considered to hurt the foetus or disturb the delivery.<sup>59</sup> Violation of taboos may result in sickness or even death.<sup>60</sup> In other cases, taboos may also be because of a totemic relationship that exists between a given clan and a particular animal as discussed earlier. Beyond providing sustenance for human beings, animals do have a symbolic significance for most African cultures.<sup>61</sup> The various stages of life are celebrated through rituals that are specific to the occasion.<sup>62</sup> Rituals are also performed for cleansing purposes.<sup>63</sup> These rituals often involve the slaughtering of an animal.<sup>64</sup>

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<sup>54</sup>For the various perspectives on *Ubuntu* see Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009), Ramose *African philosophy through ubuntu* (1999), Mnyongani 'De-linking *ubuntu*: Towards a unique South African jurisprudence' (2010) 31 *Obiter* 134- 145.

<sup>55</sup>Ramose 'Ecology through *ubuntu*' in Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 309.

<sup>56</sup>Prozesky 'Well-fed animals and savage babies: Environmental and developmental challenges from process and African perspectives' in Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 301-307; Murove 'An African environmental ethic based on the concepts of *ukama* and *ubuntu*' in Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 315-331.

<sup>57</sup>Mbiti (n 8) 16.

<sup>58</sup>Terashima "The relationship among plants, animals, and man in the African tropical rain forest" (2001) 27 *African Study Monographs, Supplementary Issue* 52.

<sup>59</sup>*Ibid.*

<sup>60</sup>*Id* 53-55.

<sup>61</sup>See Olupona (n 1) 3-12.

<sup>62</sup>See Richardson 'Can Christian ethics find its way and itself in Africa' in Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 129 -154.

<sup>63</sup>Dube (n 15) 204.

<sup>64</sup>See Olupona (n 1) 11.

For a ritual to fulfil its symbolic meaning, it must be performed in a certain prescribed manner. The animal chosen must be one which is proper to the occasion. In the case of the *Ukweshwama* ceremony<sup>65</sup> for instance, the bull to be slaughtered must be black. The actual killing of the bull is done by young warriors approaching puberty. The killing is performed without a rope, thong or weapon and is done with bare hands. The animal is overpowered and disabled by the closing of its airways. Its neck is broken in a specific manoeuvre that causes a quick and painless death, and no bloodletting is allowed nor is dismemberment of any kind allowed.

In most African rituals, symbolism plays an important role. Failure to see beyond the actual act will therefore miss out on the relevance of symbolism. The actual slaughtering therefore is symbolically more than the actual act of killing an animal.<sup>66</sup> Dandala points out that among the Xhosa-speaking people, it is important for the animal to bellow when it is speared. Such symbolism is seen as an approval from the ancestors. For instance, he writes that when Ciskei got its independence, one of the cows slaughtered did not bellow and this was regarded as a bad omen for the new Republic.<sup>67</sup>

While the bellowing of the cow may be symbolically rich for the Xhosa-speaking people, for animal activists this may actually be an occasion to invoke the provisions of animal protection legislation. Rautenbach aptly points out that rituals have a tendency to upset individuals and communities who do not share the same values as those performing them.<sup>68</sup> South Africa is a multicultural society and it is inevitable that people of different cultures will be upset by the ritual ceremonies of other cultures. A constant recourse to the provisions of the letter of the law may not be in the interest of nation-building. It is to the use of law that this paper will now turn.

#### **4 The use of the law to protect animals**

It is often said that law is politics by another name. The history of the South African legal system is incomplete without mention of colonialism, imperialism and apartheid.<sup>69</sup> It is trite to say that the South African legal system is a by product of the imposed Roman law, Roman-Dutch law and English law, to the exclusion of the indigenous legal system that governed the day-to-day lives of the majority of

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<sup>65</sup>See the affidavit of Professor Jabulani Maphalala for a description of the *Ukweshwama* ceremony as outlined in the *Ukweshwama* case (n 12) 11-14.

<sup>66</sup>Dandala 'Cows never die: Embracing African cosmology in the process of economic growth' in Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 266.

<sup>67</sup>*Ibid.*

<sup>68</sup>Rautenbach 'Umkhosi Ukweshwama: Revival of a Zulu festival in celebration of the universe's rites of passage' in Bennett (ed) *Traditional African religion in African law* (2011) 66.

<sup>69</sup>Mnyongani 'Whose morality? Towards a legal profession with an ethical content that is African' (2009) 24 *SAPR/PL* 123.

black people.<sup>70</sup> Indigenous law which is the embodiment of the worldview of African people has still not made it to the centre of the South African legal system.<sup>71</sup> This therefore means that the African cultural system and its values are still not part of the main discourse in South Africa. The South African legislation for the protection of animals should also be seen in this context.

As pointed out earlier, the Western philosophical enquiry is premised on the fact that animals are sentient beings and can therefore feel pain. It is on this basis that section 2(1)(a) of the Animals Protection Act 71 of 1962 provides that any person who 'ill-treats, neglects, infuriates, tortures or maims or cruelly beats, kicks, goads or terrifies an animal' will be criminally liable. In the *Ukweshwama* ceremony, the young men must control and kill a bull which has been specifically chosen for its strength.<sup>72</sup> The very act of bringing the bull to the place where the ceremony will be performed will inevitably involve the contravention of one or two of the prohibited acts listed in section 2(1)(a). It must be recalled that the young men are not supposed to use a rope, thong or weapon, but their bare hands. Were the law to be strictly enforced, the arrest of those participating in the *Ukweshwama* ceremony would, like the ceremony itself, constitute an annual event. The strict use of the law may therefore not be an appropriate tool in this regard.

The South African legal position on animals is not without its own inconsistencies either. As Bilchitz points out, traditionally animals are classified as things without any rights, and yet statutory restrictions have been put in place to protect them against ill-treatment.<sup>73</sup> Despite sentience having dominated the philosophical discourse, the jurisprudence that has emerged seems to be about the feelings and sensibilities of human beings and not the animals per se.<sup>74</sup> Likewise the applicants in the *Ukweshwama* case brought their application on the basis that their freedom of conscience was impacted upon by the killing of the bull.<sup>75</sup> The fact that the jurisprudence is not based on the sentience of the animals per se, does not detract from the fact that the legislation is also aimed at the promotion of animal welfare. In a minority decision, Cameron affirmed this point when he wrote that, 'Though not conferring rights on the animals they protect, the

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<sup>70</sup>*Ibid.*

<sup>71</sup>See Mnyongani (n 54) 140 where it was argued that 'To date the South African legal system still bears vestiges of colonial domination'.

<sup>72</sup>Paragraph 9 of the Affidavit of Professor Maphalala, *Ukweshwama* case (n 12) 12.

<sup>73</sup>Bilchitz (n 9) 40; and also Van Coller 'The minority defending the interests of the vulnerable [an evaluation of the minority judgment in *NCSPCA v Openshaw* 2008 5 339 (SCA)]' (2001) 2 *Stellenbosch LR* 306.

<sup>74</sup>*R v Moato* 1947 1 SA 490 (O) 490 where the court held that the aim of the legislation was 'to forbid a legal person to act with such cruelty to animals that the finer feelings and sensibilities of their fellow humans would be harmed thereby'; and *S v Edmunds* 1968 2 PH H398 (N) where the court said that the aim of the Act is 'to prevent people from treating animals in a manner which would offend the finer sensibilities of society'.

<sup>75</sup>*Ukweshwama* case (n 12) 7.

statutes are designed to promote their welfare. The statutes recognise that animals are sentient beings that are capable of suffering and experiencing pain'.<sup>76</sup>

The minority decision of Cameron has not as yet filtered through to the dominant discourse in the jurisprudence on the protection of animals. The current view is that the legislation is there to protect the feelings and sensitivities of human beings. Animals do not as yet have their own interests directly protected in South African law. This being the case, most applications will in all likelihood be about what cultural groups or activists do not like about other cultural groups. The application in the *Ukweshwama* case bears all the hallmarks of cultural disdain of one group by another. Van der Reyden J noticed this when he commented that 'the applicants proceed from the premise that they have a right to interfere with the religious and cultural practices of others that they find to be intolerable to their beliefs'.<sup>77</sup> Interesting to note, is that the applicants made no attempt to do some research on the Zulu culture and the *umkhosi wekweshwama*. As a result, the application was based on what the court called a 'jaundiced and distorted view' of the ceremony.<sup>78</sup> Secondly, communication with royal families throughout the world is highly regulated and follows strict protocol and the Zulu monarchy is no exception to this. The applicants however, showed their disdain and disregard for the King by causing their attorneys to e-mail the King in person and demanded that he enter into dialogue with them. This, as Van der Reyden J remarked, created a perception that the King's stature and position was utterly meaningless to the applicants.<sup>79</sup>

Ill treatment of animals is a reality in South Africa. There are cases, for example, where active state intervention is needed, for example, where live blesbok were presented to tigers as prey.<sup>80</sup> The state should continue to intervene and ensure that animals are protected from these kinds of abuse. But where the slaughter of animals is done within the confines of religious and cultural beliefs, such matters must be approached with circumspection. This is not the same as saying that African people must be exempted from obeying the laws of the Republic. The Constitutional Court has pronounced on this as per Ngcobo J that: '[T]he right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which laws they will obey and which they will not, the State should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and the respect for the law'.<sup>81</sup>

In South Africa today, the prosecution of those who transgress the law will in all likelihood take place within Western inspired courts. The arguments advanced

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<sup>76</sup>*National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* (262/07) [2008] ZASCA 78 (RSA) para 38 (hereafter referred to as *NCSPCA* case).

<sup>77</sup>*Ukweshwama* case (n 12) 15.

<sup>78</sup>*Id* 10.

<sup>79</sup>*Id* 14.

<sup>80</sup>*NCSPCA* case para 8.

<sup>81</sup>*Prince v President, Cape Law Society* 2001 2 SA 388 (CC) para 26.

are going to be based in a philosophical discourse that is foreign to adherents of a given cultural ritual. It has been pointed out that African ontology is holistic. Interfering with a ritual such as *ukweshama* would constitute interference in peoples' right to culture and by implication religion. The Constitutional Court has emphasised the fact that, 'Religion is not just a question of doctrine. It is part of a way of life, or people's temper and culture'.<sup>82</sup> While there is room for enforcing laws to govern human conduct, it is also equally important to give people room to participate in the cultural life of their own choice without fear of prosecution. This is also what the Constitution, albeit within limits, seeks to promote and protect.

## 5 Should animals be constitutionally protected in South Africa?

David Bilchitz has systematically and methodically constructed a compelling argument in favour of extending constitutional protection to animals.<sup>83</sup> The core of his argument is that animals have fundamental rights in their own right that should be afforded legal protection. It is not the intention of this paper to address all the points he raises.<sup>84</sup> Morally, theoretically and legally most of his arguments cannot be faulted. What this paper seeks to do, however, is to situate the proposals by Bilchitz within the South African context, especially within the context of the dissimilarities that exist within the Western and African approaches to animals. Albeit for different reasons, Bilchitz is not oblivious to the fact that South Africa may not be ready to receive some of his proposals. For instance, having outlined how he seeks to argue for a different conception of dignity and how that should pave the way for the recognition of legal personhood of animals, he then moves on to propose how that may be given effect in law. His view is that a constitutional amendment may be desirable, but as he points out, may not be necessary as the existing common law and constitutional framework can be interpreted to recognise non-human animals and their capacity to bear rights. Bilchitz then asks a very pertinent question, which this paper seeks to address. 'A key problem that arises', he writes, 'is whether South African society is ready to embrace the full implications of this recognition'.<sup>85</sup> Bilchitz is of the view that the concept of 'progressive realisation' may be of assistance in ensuring that there is no 'wholesale disjunction between the law and the attitudes of wider South African society'.<sup>86</sup>

That animals are sentient beings with a capacity to experience pain is not contested anymore. Animal activists harp on the sentience of animals to appeal

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<sup>82</sup>*Christian Education South Africa v Minister of Education* 2000 4 SA 757 para 48.

<sup>83</sup>See Bilchitz (n 9).

<sup>84</sup>For a detailed response to some of the assertions made by David Bilchitz see Metz T 'Animal rights and the interpretation of the South African Constitution' 2010 (25) SAPL 301-311.

<sup>85</sup>Bilchitz (n 9) 40.

<sup>86</sup>*Ibid.*

to humans by equating the animal liberation to the human struggles against such ills as slavery, colonialism, apartheid, or sexism.<sup>87</sup> Either that or they present factually harrowing accounts of what actually happens to animals so as to enhance their production of whatever product that may be in demand in the human world, as a basis for an alternative lifestyle.<sup>88</sup>

Within the South African context, past injustices provide a good basis for arguing against the reading of the Constitution to include animal rights. It is trite to say that both colonialism and apartheid have unleashed untold harm to the black majority in South Africa. There was virtually no aspect of the African life that was not affected. As Metz correctly points out, 'one of the main injustices of apartheid took the form of the forcible eclipse and denigration of African cultures'.<sup>89</sup> Given the fact that the African worldview makes no distinction between what is cultural and what is religious, a greater part of the African way of life was rudely interrupted. Slaughtering of animals of one kind or another is a regular expression of the African worldview. To locate the animal activism within the rights discourse will only increase litigation, and therefore continue to disrupt people's lives. This will not assist in nation building. The *Ukweshwama* case provides a good illustration of just how far apart South Africans still are in as far as their view on the status of animals is concerned. As Van der Reyden J pointed out:

From a historical perspective applications of the present are nothing new and are symptomatic of an intolerance of religious and cultural diversity. They often attempt to force the particular secular views and opinion held by one faction over others. The traditional African form of culture, religion and religious practices may not be embraced by many who subscribe to the main stream cultures and religions in western societies, and were historically often discriminated against and in some instances its followers were persecuted and punished.<sup>90</sup>

The post-1994 era has been marked by a drive to be inclusive, non-arbitrary and tolerant of each other. For a nation with a history of divisions on the basis of race, gender, and sexual orientation among others the need for inclusivity, non-arbitrariness and tolerance has become imperative. To this end, the Constitution has been held up as the glue that is supposed to hold everyone together. It embodies the dream and vision of the nascent rainbow nation. During the apartheid era, there was an exaggerated emphasis on the differences among peoples as a basis for differential treatment. In the post-1994 era however it seems that the pendulum has shifted in the opposite direction where there is no room to talk of differences. To talk of difference is almost tantamount to being unpatriotic, and therefore not supportive of the constitutional imperative of

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<sup>87</sup>Singer (n 4) 1-28, De Villiers 'Towards an ethical relation to the non-human other: Deconstruction, veganism and the law' (2012) 28 *SAJHR* 18-19.

<sup>88</sup>De Villiers (n 87) 29; Bilchitz (n 9) 70-72.

<sup>89</sup>Metz (n 84) 306.

<sup>90</sup>*Ukweshwama* case (n 12) 15.

reconciliation and nation building. If anything, this paper has been premised on the dissimilarities that exist between the Western worldview and the African one with regard to animals.

The jurisprudence in South Africa points to the fact that the protection in the legislation is still about human beings and not animals. To shift the constitutional discourse to animals, will only intensify and increase litigation which as the *Ukweshwama* case has pointed out, may lead to the clash of cultures. Litigation in South Africa is adversarial and the winner takes all. It is the view of this paper that on matters cultural, tolerance and understanding should take precedence over litigation. Noble as the idea of extending constitutional protection to animals may be, it has to be said that South Africa is not yet ready for such a move, even if it is extended following the concept of the 'progressive realisation' of rights.

## 6 Conclusion

Over the centuries, the ontology of animals has been a subject of great debates, which the South African activists and academics have now joined. Of importance to note, is that these debates are steeped in Western notions of being, with no consideration of alternative voices particularly those from Africa. This paper has argued that Western and African philosophies are worlds apart in their conception of reality. While Western philosophy is individualistic, African philosophy is communitarian. Western philosophy looks at animals as sentient beings, African philosophy looks at them from an ontological unity that sees reality as interrelated and communitarian.

South Africa is home to people of different cultures, religions and races. The paper has used the right to culture and the *Ukweshwama* case to point out that to talk of animals within the rights discourse may hamper the constitutional imperative of nation building. The paper has further argued that in light of the need for tolerance and understanding, extending constitutional protection may as yet not be necessary or possible. Perhaps what is necessary at this juncture is an understanding and appreciation of the fact that there are differences in cultural practices. Such differences include, among others, how different cultures view and relate to animals. An appreciation of this fact may be a good starting point.