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# THE XHOSA AND THE TRUTH AND RECONCILIATION COMMISSION: AFRICAN WAYS

*Douglas H. M. Carver\**

## I. Introduction

This paper has a bifurcated purpose. On the one hand, it is an examination of the culture and customs of the Xhosa, one of the principle ethnic groups in the Republic of South Africa. On the other hand, it is an examination of the Truth and Reconciliation Commission, set up in South Africa after the fall of the apartheid regime to reknit a fractured society, one that had been purposely riven on racial and ethnic lines. As its source and inspiration, the Truth and Reconciliation Commission drew on the Xhosa concept of *ubuntu*, a term that encompasses notions of harmony and reconciliation particular to chthonic, and African, concepts of justice. By understanding the Xhosa, and considering the Truth and Reconciliation Commission, one can better understand how South Africa was able to heal its wounds *not* through punishment but through a process that focused on confession and openness.

These two strands of the new South Africa are combined in the person of Nelson Mandela, descended of Xhosa nobility, international symbol of resistance to apartheid, and the first president of the post-apartheid nation. Throughout his autobiography President Mandela mentions the importance of his Xhosa heritage and upbringing to his identity, and as a source of his strength.<sup>1</sup> During his infamous treason trial, the one that sent him to his long imprisonment on Robben Island, Mandela made the connection between his cultural heritage and the struggle against apartheid explicit:

I entered the court that Monday morning [the first day of his trial] wearing a traditional Xhosa leopard-skin *kaross* instead of a suit and tie. . . . The *kaross* electrified the spectators. . . . Winnie [his then-wife] also wore a traditional beaded headdress and an ankle-length Xhosa skirt.

I had chosen traditional dress to emphasize the symbolism that I was a black African walking into a white man's court. I was literally carrying on my back the history, culture and heritage of my people. That day, I felt myself to be the embodiment of African nationalism, the inheritor of Africa's difficult but noble past and her uncertain future. The *kaross* was also a sign of contempt for the niceties of white justice. I well knew the authorities would feel threatened by my *kaross* as so many whites feel threatened by the true culture of Africa.<sup>2</sup>

Mandela and his Xhosa *kaross* exemplified, on that October 1962 day, the conflict between the traditional black African cultures of South Africa and the European-descended minority that dominated the government, law, and tools of repression under apartheid. The Xhosa customs

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<sup>1</sup> See generally NELSON MANDELA, LONG WALK TO FREEDOM (1994).

<sup>2</sup> *Id.* at 384-85.

were a symbol of resistance and rebellion. Three decades later Xhosa customs would be the tools by which the new South Africa was healed, and reconciled. By understanding the Xhosa, and understanding the Truth and Reconciliation Commission, we can begin to understand that journey.

## II. Conceptual Framework

### A. What is “Indigenous?”

As this paper examines what is characterized as an “indigenous” people, it would be worthwhile to take a moment to grapple with what makes a people “indigenous.” There is no agreed definition of indigenesness.<sup>3</sup> Often indigenous peoples are defined in opposition to a dominant, often European, culture.<sup>4</sup> The United Nations Guide for Indigenous Peoples notes that indigenous peoples are those who have “retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live.”<sup>5</sup> Most internationally accepted working definitions of indigenous peoples combine a geographic element, generally a physical, traditional locus; a temporal element, generally priority in time of a people in the locus; an element of self-identification; an element of cultural distinctiveness, including shared language, religion, spiritual values, customs, laws, and other traditions; and an element of subjugation to the dominant society in which the indigenous people in question live.<sup>6</sup>

Under these definitional standards, the number of indigenous peoples on the globe ranges from 200 million to 500 million people, the vast majority of whom (75 to 80 percent) live in Asia.<sup>7</sup> Only a relatively small percentage of indigenous peoples, some four percent, are considered to live in Africa, despite the numerous tribal groupings on the continent.<sup>8</sup> Africa itself poses significant challenges to the standard definitions of indigenous peoples, colored as those definitions are by the people in question being seen through the lens of European colonization and/or domination.<sup>9</sup> As Battiste and Henderson have noted:

Africa poses problems of definition, because most Africans consider themselves Indigenous people who have achieved decolonization and self-determination. Yet many relatively small nomadic herding and hunter-gatherer societies [in Africa] . . . have been displaced and oppressed (‘internally colonized’) by ethnically

<sup>3</sup> MARIE BATTISTE & JAMES (SA'KE'I) YOUNGBLOOD HENDERSON, PROTECTING INDIGENOUS KNOWLEDGE AND HERITAGE: A GLOBAL CHALLENGE 61 (2000).

<sup>4</sup> *Id.* at 21-34. See also H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 59-61 (2d ed. 2004) (Glenn, in his discussion of indigenous or traditional law, rejects those terms and uses instead “chthonic” to describe peoples who live closer to the earth, thus “attempt[ing] to describe a tradition by criteria internal to itself, as opposed to imposed criteria”).

<sup>5</sup> United Nations Guide for Indigenous Peoples, Leaflet 1, <http://www.unhcr.ch/html/racism/00-indigenousguide.html> (last visited June 28, 2008).

<sup>6</sup> For discussions on what makes a people “indigenous,” see *Indigenous Peoples – Who Are They*, <http://www.iwgia.org/sw155.asp> (last visited June 28, 2008); *Identification of Indigenous Peoples*, <http://www.iwgia.org/sw641.asp> (last visited June 28, 2008); BATTISTE, *supra* note 3, at 61-65.

<sup>7</sup> See BATTISTE & HENDERSON, *supra* note 3, at 64; GLENN, *supra* note 4, at 59 n.2.

<sup>8</sup> GLENN, *supra* note 4, at 59 n.2.

<sup>9</sup> Hence, Glenn’s preference for the term “chthonic.” See GLENN, *supra* note 4 at 59.

unrelated African peoples who have been their neighbors for a thousand years or longer.<sup>10</sup>

The definitional element of oppression, often racially tinged as being code for American and European expansionism and colonialism, becomes problematic in African (as well as Asian) contexts. The unusual history of South Africa, with its centuries-old dynamic of competing ethnic *and* racial groups (some of European origin, others not), creates even greater tension with the standard definitions of indigenosity.

#### B. “Indigenous” in a South African Context

South Africa has gone, in a rapidly short period of time, from being a nation that was a byword for racial oppression to a vibrant, multi-racial democracy. Yet the dynamic in play in South Africa challenges the standard definitions of indigenosity, as the following examples will illustrate.

The Afrikaners who created the notorious apartheid system first arrived in what we now know as South Africa in the early seventeenth century. While generally known as the “white invaders,”<sup>11</sup> an argument has been made that, given their long roots in South Africa as a people apart from the Dutch homeland from whence they came, Afrikaners should be considered a “white tribe.”<sup>12</sup> Afrikaners meet many elements of the definitions of indigenosity described above: they are a geographically and linguistically distinct people, with shared language, culture and values. They also have an experience of oppression, first when South Africa was colonized by the United Kingdom, and now, conceivably, Afrikaners are a disadvantaged minority group surrounded by a dominant culture. Granted, this explication may be pushing the argument somewhat, but the point is that when one thinks of indigenous peoples in South Africa, Afrikaners might not leap immediately to mind.

South Africa, like the rest of Africa, presents issues of length of habitation that are inconceivable for other nations. Southern Africa is considered, along with East Africa, as a probable point of origin for the human species. Early hominid fossils dating from over three million years ago have been found in the Transvaal.<sup>13</sup> The richest *Australopithecus* site in Africa is in South Africa, and the oldest tools were found in South Africa (approximately 1.6 million years old).<sup>14</sup> Given such incomprehensible lengths of time, and the consequent genetic mixing and population movements over time,<sup>15</sup> it is almost impossible to say who would have temporal “priority” to a given area.

Furthermore, South Africa’s national hero and first post-apartheid president, Nelson Mandela, and its present (and second) president, Thabo Mbeki, are both Xhosa. South Africa’s

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<sup>10</sup> BATTISTE & HENDERSON, *supra* note 3, at 65.

<sup>11</sup> See LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 31 (3d ed. 2001) (using the term “white invaders”).

<sup>12</sup> See generally MARQ DE VILLIERS, WHITE TRIBE DREAMING (1988) (providing a premise underlying the history of the Afrikaners). While the focus of this paper is the law and customs of the Xhosa, the question of Afrikaner “indigenosity” is addressed here, if only briefly, as it is part of the dynamic of the South African polity, one of the first nations where indigenous customs have come to the forefront of a nation’s law. This theme would provide a fruitful avenue of investigation for a future study,

<sup>13</sup> THOMPSON, *supra* note 11, at 5-6.

<sup>14</sup> PETER MAGUBANE, VANISHING CULTURES OF SOUTH AFRICA 8 (1998).

<sup>15</sup> See THOMPSON, *supra* note 11, at 6 (providing details of the genetic blending of South Africa’s peoples).

constitution and laws also incorporate traditional laws.<sup>16</sup> If the term indigenous “refers broadly to the living descendents of preinvasion inhabitants of lands now dominated by others. . . . [and indigenous people] characteristically exist under conditions of severe disadvantage relative to others within the states constructed around them,”<sup>17</sup> as one scholar has argued concerning the status of indigenous people in international law, what does one do with a people who were oppressed and are now dominant? Have the Xhosa gone from being indigenous, when they were the victims of oppression and cultural dominance, to being non-indigenous by virtue of their liberation and consequent ascension to power?

South Africa presents one additional complication. The apartheid system instituted by the Afrikaners notoriously was centered on racial identity. But unlike in the United States, one’s racial identity was not determined merely by the color of one’s skin. The implementers of apartheid grouped black South Africans into “homelands,” determined by presumed tribal identity.

The fundamental premise of South Africa’s homelands was that the basic unit of black identity was the tribe, as reflected variously in language, custom, tradition, and geography. Tribal systems and antagonisms predated apartheid, but, in its pursuit of social engineering, apartheid exploited them in a particularly nasty way: once he or she became part of a nominally independent homeland, a black South African lost all claim to South African citizenship and virtually all hope of a job except as a migrant or commuter to some distant white city across a frontier marked not by a fence but by economic disparity.<sup>18</sup>

These homelands were nominally independent, and as shown, for example, by the rise of Chief Mangosuthu Buthelezi of the KwaZulu homeland, the leaders of these homelands often had real political power in South Africa. These homeland leaders, however, including the leader of the Xhosa “homeland” of Ciskei, were considered pawns of the Afrikaner government in Pretoria and “were unpopular with their own people.”<sup>19</sup> It is bitterly ironic that the apartheid system forced an independence upon its indigenous black populations, using a definition of indigenous peoples that resonates strongly with that presently accepted in international law.

### III. Law and Customs of the Xhosa

#### A. Problems with Sources for Xhosa Traditions and Customs

A mention must be made of the problem with the sources available for ascertaining the law and customs of the Xhosa. Studies of indigenous peoples are notorious for their

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<sup>16</sup> See GLENN, *supra* note 4, at 82 n.82. See also Mothokoa Mamashela, *New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act*, 20 S. AFR. J. ON HUM. RTS. 616 (2004) (providing a specific example concerning property ownership in marriage and how post-apartheid South African laws exist in some tension with traditional law amongst South African peoples).

<sup>17</sup> S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3 (1996).

<sup>18</sup> ALAN COWELL, *KILLING THE WIZARDS: WARS OF POWER AND FREEDOM FROM ZAIRE TO SOUTH AFRICA* 140 (1992).

<sup>19</sup> THOMPSON, *supra* note 11, at 259. Chief Buthelezi managed to forge something of a proper independent power base in KwaZulu, and had an “ambiguous” relationship with the Pretoria government. *Id.* at 191.

methodological problems, usually grounded in Eurocentric ideas of what constitutes a culture, or cultural advancement. Anthropological science also often went hand-in-hand with European colonialism and imperialism. As a consequence, anthropological studies often contributed to the notion of indigenous cultures as being both static, and backwards.<sup>20</sup> South Africa has the additional problem that so many of the studies<sup>21</sup> came out of a culture that was explicitly racist. One must hold a source as racially titled as *Kaffir Folk-Lore* somewhat at arm's length. Nonetheless, by triangulating these older sources with ones written with, perhaps, a more modern sensibility, one can endeavor to filter at least the most egregious biases and approximate a proper understanding of Xhosa customs and traditions.

## B. History and Background

Xhosa is principally a linguistic term rather than an ethnic term, but there is a correlation between the customs and traditions of these linguistically linked peoples that allows one to recognize the Xhosa as a distinct indigenous people. The Xhosa are part of the Nguni-speaking peoples that make up sixty percent of the Bantu-speaking peoples of South Africa. The two principle Nguni-speaking peoples, "the more distinct [Nguni] dialects," are the Xhosa and the Zulu.<sup>22</sup> "There are nine Xhosa-speaking groups . . . the Xhosa, Thembu, Mpondo, Mpondomise, Bomvana, Xesibe, Mfengu, Bhaca, and Ntlangwini."<sup>23</sup>

The Xhosa are principally located in eastern portion of the Eastern Cape province of South Africa, in the part of the province extending east from a line bisecting the province between Grahamstown and East London. What is considered traditional Xhosa lands also include part of the southern portion of KwaZulu.<sup>24</sup> Written records place the Xhosa in that region of South Africa from 1593, the date of first European contact, but oral tradition shows a longer presence along the cape, and archaeological evidence from the region of East London proves that there has been Xhosa habitation in the region since the seventh century A.D.<sup>25</sup>

The Xhosa were the first of the Eastern Cape peoples to have contact with European explorers, missionaries, traders, and soldiers. The colonial expansion of the Dutch and subsequent English colony reached the Eastern Cape in the seventeenth century. The early part of the nineteenth century brought two sources of stress to the Xhosa. On the one hand, there were pressures on the western border from clashes with the Afrikaner trekboers from the beginning of the nineteenth century. The trekboers themselves were rebelling against the new British government in the Cape Colony. While the Xhosa had the upper hand militarily in the initial fighting, the tide turned by the early nineteenth century once the colonial British government joined the fray. On the other hand, the expansion of the Zulu nation was stressing the northern border of Xhosa lands, causing an influx of refugees, known as Mfengu, from

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<sup>20</sup> See BATTISTE & HENDERSON, *supra* note 3, at 30-34.

<sup>21</sup> Or at least the ones that the author was able to obtain in researching this paper. See GEO. MCCALL THEAL, *KAFFIR FOLK LORE: A SELECTION FROM THE TRADITIONAL TALES CURRENT AMONG THE PEOPLE LIVING ON THE EASTERN BORDER OF THE CAPE COLONY* (n.d.) (providing an example of one such study).

<sup>22</sup> Monica Wilson, *The Nguni People*, in 1 *THE OXFORD HISTORY OF SOUTH AFRICA: SOUTH AFRICA TO 1870 75* (Monica Wilson & Leonard Thompson eds., 1969).

<sup>23</sup> MAGUBINE, *supra* note 14, at 10.

<sup>24</sup> See Map of South Africa, <http://www.places.co.za/html/visualfind.html> (last visited July 15, 2008); Map of Eastern Cape, [http://www.places.co.za/maps/eastern\\_cape\\_map.html](http://www.places.co.za/maps/eastern_cape_map.html) (last visited July 15, 2008).

<sup>25</sup> See *id.* at 12.

Natal.<sup>26</sup> In a dynamic similar to the colonization and conquering of the American West, a combination of pressure from settlers hungry for land; aggressive military action, which included the collaboration of other native peoples, especially the refugee Mfengu who were considered a lower class by the Xhosa; and the introduced European bovine pleuropneumonia, a lung disease which devastated the Xhosa cattle, led to the dislocation and subjugation of the Xhosa. On January 1, 1866, half of the Xhosa's lands, those west of the Kei River, were incorporated into Cape Colony. Much of this area later became known as the apartheid "homeland" of Ciskei. The remnant of the Xhosa lands was made a nominally independent territory, later to become the homeland of Transkei.<sup>27</sup>

After the defeat of the Xhosa, chiefs and other leaders who were considered disloyal were replaced, and traditional practices, such as cattle raising, were discouraged. Again, parallel to the experience of Native Americans in the United States, the native enclaves in South Africa became increasingly impoverished and disenfranchised.<sup>28</sup> The Afrikaner government re-introduced rule based on tribal chiefs in the late 1950s; chiefs, it must be noted, were appointed by the government in Pretoria. This was part of the move by the Afrikaners to "solve" their African "problem" by creating independent "homelands" into which black African citizens were to be placed. Transkei was "the first homeland to accept independence in 1976."<sup>29</sup> Initially, rather than being independent, Ciskei became self-governing in the early 1970s.<sup>30</sup> Full "independence" came in 1981.<sup>31</sup> Ciskei was also forced to absorb the vast majority of the Xhosa who were systematically being cleared out of declared "whites only" areas in the rest of South Africa, a policy of the South African national government from the 1960s.<sup>32</sup>

### C. Customs of the Xhosa: Overview

Xhosa society is based on family units, largely hierarchical, and male dominated. This theme is reflected in all aspects of traditional Xhosa society, including the organization of traditional homesteads, the structure of chiefdoms, marriage customs, reverence and interaction with ancestors, and rituals such as circumcision, that mark transition from one stage of life to another. The role of cattle, as a medium of exchange and an expression of wealth, is intertwined with these other aspects of culture. Cattle also have a historical significance, and, as was referenced briefly above and will be discussed further below, played a large part in the collapse of the Xhosa as an independent people. Examination of Xhosa customs and traditions will provide an understanding of how this South African people conduct their daily affairs.

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<sup>26</sup> See THOMPSON, *supra* note 11, at 73-75.

<sup>27</sup> See generally *id.* at 75-80. See generally NOËL MOSTERT, *FRONTIERS: THE EPIC OF SOUTH AFRICA'S CREATION AND THE TRAGEDY OF THE XHOSA PEOPLE* (1992) (discussing the story of conquest of the Xhosa at great length, over 1,300 pages); J.B. PEIRES, *THE HOUSE OF PHALO: A HISTORY OF THE XHOSA PEOPLE IN THE DAYS OF THEIR INDEPENDENCE* (1982) (discussing an older, shorter study of the early history of the Xhosa, up to the crises starting in the 1850s that culminated in the Xhosa's loss of independence).

<sup>28</sup> See generally LES SWITZER, *POWER & RESISTANCE IN AN AFRICAN SOCIETY: THE CISKEI XHOSA AND THE MAKING OF SOUTH AFRICA* (1993) (discussing the post-conquest story of the Xhosa).

<sup>29</sup> *Id.* at 325.

<sup>30</sup> *Id.* at 331.

<sup>31</sup> *Id.* at 334; see Map of South Africa: Black Homelands, [http://www.lib.utexas.edu/maps/africa/south\\_african\\_homelands.gif](http://www.lib.utexas.edu/maps/africa/south_african_homelands.gif) (last visited July 15, 2008).

<sup>32</sup> SWITZER, *supra* note 28, at 336-40.

#### D. Households and Homesteads

The homestead and its constellation of households is the center of Xhosa life.<sup>33</sup> A household would usually be located on a ridge to provide both for drainage and defense.<sup>34</sup> A household consisted of the dwellings of the head of the household, his wife or wives, and their children. Traditionally the dwellings of a household would be a circular frame of poles and saplings, bound in a beehive shape and thatched with grass. Mud and dung were added to shoulder height for insulation, and were also used to create the surface of the interior floor, which would also have a small depression in the center that served as a hearth. After contact with European colonists, these buildings changed to wattle and daub structures with conical roofs. Present structures are just as often likely to be cinderblock homes, but these often retain the conical roof of the historic homes.<sup>35</sup> The dwelling would have a low doorway requiring one to stoop as they entered.

A group of houses forming a homestead would be arranged in a semicircle facing onto a large brushwood byre for cattle, with a smaller byre for goats.<sup>36</sup> A reserve maize storage pit would be located under the floor of the cattle byre. The area between the doorway of the main house and the gateway of the cattle byre was known as the courtyard (*inkundla*). In the Great Palace of a chief or paramount chief, this is where court cases would be heard.<sup>37</sup>

Each homestead was economically self-sufficient. A homestead consisted of a man, his sons, their wives and offspring. If the head of the household was wealthy, he might have client families in the homestead as well. The clients would provide personal service (*ukubusa*) to the chief or household head, generally as herders of his livestock.<sup>38</sup>

Every household belonged to a homestead (*umzi*).<sup>39</sup> The head of an *umzi* was the person who had the greatest wealth amongst the households. Although land was cultivated, power, wealth, and social status amongst homesteads were determined by cattle ownership. "The head of the homestead would be the head of the wealthiest household in terms of his control over cattle and household labor."<sup>40</sup> The desire of *umzi* to expand their influence by poaching households from other *umzi* was a central dynamic of pre-conquest Xhosa society.<sup>41</sup>

#### E. Structure of Chiefdoms

Xhosa political organization was a pyramid, with the base being disparate related groups and the pinnacle being a chief. A particular area would generally consist of an agnatic group (related through the male line), from two to twenty *umzi* heads.<sup>42</sup> At the next level were clans.

<sup>33</sup> For the following discussion of homesteads and households, see MAGUBANE, *supra* note 14, at 18-20; see also SWITZER, *supra* note 28, at 36-38.

<sup>34</sup> MAGUBANE, *supra* note 14, at 18.

<sup>35</sup> See MAGUBANE, *supra* note 14, at 21, 28 (photographs).

<sup>36</sup> MAGUBANE, *supra* note 14, at 18.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> An explication of the difference between a household and a homestead can be found in SWITZER, *supra* note 28, at 37.

<sup>40</sup> SWITZER, *supra* note 28, at 38.

<sup>41</sup> *Id.* at 37.

<sup>42</sup> See generally SWITZER, *supra* note 28, at 36-38; MAGUBANE, *supra* note 14, at 19-22.



Various members of one clan lived in different areas, and clan leaders with followings in a particular chiefdom could represent their clan at the chief's council. Clan members descended from a putative great-grandfather. An indication of the importance of clans is that women keep their clan name after marriage, and introductions will include the use of a clan name.<sup>43</sup>

*Umzi* in a particular area fell under the authority of the local chief in whose territory they were located.<sup>44</sup> The chief, in conjunction with his council of advisors, is the top of the hierarchical pile. Xhosa society was composed of genealogically related but independent chiefdoms, in contrast to their Zulu and Swazi neighbors.<sup>45</sup> "The Xhosa chief was the guardian of his people . . . [his] main task was to ensure that everyone had an equal share of the available resources."<sup>46</sup>

The Great Place of the Chief was the administrative, social, and military center of the kingdom. The chief convened hunting expeditions, harvesting, assembled men for war, and convened the circumcision ritual (in short, everything concerned with sharp implements, which were the province of the spirits).<sup>47</sup> The chief's followers were able bodied men who were charged with protecting the boundaries of the chiefdom.

A number of privileges inherent to the chief's role served to indicate his authority. His followers contributed cattle towards the bride wealth (*lobola*) of the Chief's Great Wife. There was an annual military review at the Great Place, where the army was doctored by the war-doctor (*itola*) and the first fruits ceremony (*ulibo*) was conducted. In the latter, the crops that were to be harvested were ritually tasted by the chief before the commencement of the harvest.<sup>48</sup> All leopard skins and half of the ivory from hunts went to the chief, and the chief was the only one who could wear a leopard skin robe (*umnweba*) and ivory armband (*umxhaka*).<sup>49</sup> As the senior member of a senior lineage, the chief offered sacrifice to the shades (spirits of the ancestors) on behalf of the chiefdom as a whole.

The chief's power was more consensual than coercive. He achieved this consensus through his councilors, made up of senior members of the commoner clans.<sup>50</sup> The councilors would often be the chief's age mates, having gone through the circumcision ritual with him. The councilors' power was derived through their own bodies of followers.<sup>51</sup> The councilors also enhanced their power by exacerbating internal dynastic rivalries which "were endemic in Xhosa society."<sup>52</sup> If the chief did not treat his councilors well, or if they desired a change, they could shift their allegiance to a rival chief, taking their followers and cattle with them, and they remained autonomous when the chief died, able to exert influence on the succession to a chiefdom if there was a regent.<sup>53</sup> Thus although Xhosa society seems strictly hierarchical, the role of councilors shows how the power dynamics were more nuanced. Your station at birth was a principal determinant in your life, but those not born as well still had considerable influence.

<sup>43</sup> MAGUBANE, *supra* note 14, at 19.

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

<sup>45</sup> SWITZER, *supra* note 28, at 34.

<sup>46</sup> *Id.* at 35.

<sup>47</sup> MAGUBANE, *supra* note 14, at 20.

<sup>48</sup> *Id.* at 20.

<sup>49</sup> *Id.* (Think of Nelson Mandela's leopard skin *kaross*, mentioned in the introduction to this paper).

<sup>50</sup> SWITZER, *supra* note 28, at 36.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

One other source of authority was the diviners or healers. They were considered agents of the chief. In contrast to those with political authority, the diviner came to his role through a calling. Therefore, one could become a diviner, and thus have considerable sway in Xhosa society, regardless of the order of one's birth.<sup>54</sup>

#### F. Marriage Customs

One distinguishing factor of Nguni peoples is that they traditionally marry outside of their clans. With the Xhosa, this is particularly stringently recognized, with marriage forbidden outside of the clans of all four of one's grandparents.<sup>55</sup> A man could take multiple wives, with up to four wives at a time, though two was more customary. A family was generally divided between the Great House and the Right-Hand House, with the Great House consisting of the principal wife and her children, the Right-Hand house consisting of the lesser wife and her children. "Additional wives were referred to as rafters or supports (*amaqadi*) to the two main houses and were distinguished in rank accordingly."<sup>56</sup>

The Great Wife was responsible for producing a son and heir, the Great Son. The Great Wife of a chief was usually the daughter of a chief from a neighboring chieftain, often a Khosian or Thembu princess.<sup>57</sup> The first born son of the Right-Hand Wife, the Right-Hand Son, was also a chief or a household head, but was responsible for establishing his own chiefdom by colonizing new territory.<sup>58</sup> A chief would often marry his Great Wife later in life, with the result of the Great Son being born later than the Right-Hand Son, an ample source of friction that could lead to usurpations or divisions of chiefdoms.<sup>59</sup>

The first born son of the Great Wife inherited the father's livestock. If there were multiple wives, all first born sons would get a share. The transfer of cattle upon marriage from the bride's group to the bridegroom's group was the subject of intense negotiation. This transfer was a form of insurance, for if the bride was mistreated, she would return to her family and the cattle would have to be returned to the bride's family. "The exchange of cattle was a form of circulating bride wealth, with women moving in the opposite direction from the cattle. The missionaries, erroneously believing *lobola* to be the purchase of the bride, condemned the practice on moral grounds."<sup>60</sup> Marriages are now contracted in a church or a magistrate's court, but *lobola* still exists, often paid in cash value for the market value of the cattle involved in the transaction.<sup>61</sup>

The bride's status changed over time. Initially after marriage, the bride was "a stranger in her new home."<sup>62</sup> Not only did she have to show deference, she also could not approach the houses from across the courtyard, nor could she enter the cattle byre. As she became accepted in the family, she was able to interact in the homestead normally. Post menopausal women were on

<sup>54</sup> MAGUBANE, *supra* note 14, at 20.

<sup>55</sup> This discussion of Xhosa marriage customs is drawn principally from MAGUBANE, *supra* note 14, at 20-25.

<sup>56</sup> *Id.* at 24.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 25. See generally ADAM KUPER, WIVES FOR CATTLE: BRIDEWEALTH AND MARRIAGE IN SOUTHERN AFRICA (1982) (providing a systematic discussion of the use of cattle dowry amongst the Xhosa and other southern African peoples).

<sup>61</sup> MAGUBANE, *supra* note 14, at 25.

<sup>62</sup> *Id.* at 28.

par socially with men, could attend formal beer drinks<sup>63</sup> and sacrifices, and were allowed to smoke a long-stemmed pipe.<sup>64</sup>

### G. Ancestors

Ancestor worship is a central part of Xhosa spirituality. The worshipped ancestors are generally senior males of the agnatic group. The ancestors are referred to as *iminyanya*, and are made up of clan founders, clan leaders, and important chiefs from the past. “The ancestor cult is essentially the cult of the domestic unit, the extended family.”<sup>65</sup> The deceased household head is incorporated by his sons amongst the ancestors through two sacrifices, the *umkhapo*, where an unblemished white goat is slaughtered to accompany the spirit of the deceased to the shades; and the *umbuyiso*, where an ox is slaughtered to bring back the spirit of the deceased “as an ancestor to brood over the eaves and threshold of the homestead.”<sup>66</sup> All old people who die, both women and men, become ancestral spirits, influencing their descendents, and maintaining the family connection in the afterworld.

### H. Circumcision Rituals

The circumcision ritual, a coming of age ceremony for Xhosa boys, was probably adopted from the Xhosa’s Sotho neighbors. From the Xhosa the ritual spread to other peoples. It is believed that the circumcision ritual originally had military significance, as it was “a worthy ordeal for the young men who were to serve as warriors before being eligible to marry.”<sup>67</sup> As part of the ceremony, every initiate is “presented with spears and war club by his father and his father’s brothers at the coming out ceremony (*umgidi*) held to incorporate the initiates (*abakhwetha*) back into society from the bush where they had been secluded.” Circumcision ceremony still continues in some form, both in towns and rural areas.<sup>68</sup>

### I. The Importance of Cattle

As has been seen, cattle are of central importance to the Xhosa. Xhosa wealth was generally measured in cattle, and cattle play a central part in many Xhosa customs and traditions. A bride’s *lobola* is measured in cattle,<sup>69</sup> and the cattle byre is a central place in the organization of a traditional household compound. Payment of fines for murder and witchcraft were in cattle.<sup>70</sup> Menstruating women were considered contaminating and were not allowed in the cattle byre.<sup>71</sup> During the wedding ceremony (*umdudo*), the bride thrusts a spear belonging to the groom’s father into the gatepost of the cattle byre (known as *ukuhlalsa umkhonto*) – symbolizing

<sup>63</sup> See generally Patrick McAllister, *Domestic Space, Habitus, and Xhosa Ritual Beer-Drinking*, 43 ETHNOLOGY 117 (2004) (providing additional information on the Xhosa beer drinking ritual).

<sup>64</sup> See MAGUBANE, *supra* note 14, at 22-24 (photographs).

<sup>65</sup> *Id.* at 28.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 33.

<sup>68</sup> *Id.*; MANDELA, *supra* note 1, at 30-34 (providing Nelson Mandela’s description of his circumcision ritual).

<sup>69</sup> MAGUBANE, *supra* note 14, at 20.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 28.

the influence over her of ancestors of the family into which she is marrying.<sup>72</sup> Household heads were usually buried in the cattle byre, near the gatepost.<sup>73</sup> Cattle also are important in Xhosa myths, with one creation story stating that cattle emerged first on the world, followed by mankind.<sup>74</sup> Cattle were the backdrop to traditional Xhosa lifestyles, an undercurrent and touchstone to most aspects of Xhosa traditions.

One of the last acts of resistance to white colonization of Xhosa lands also centered on cattle. In the 1850s the prophet Nongqawuse convinced the Xhosa that if they would kill all of their cattle in appeasement of the ancestors, heroes of the past would come forth and drive out the white man, and the cattle would be replaced in abundance.

The ritual propitiation of the ancestors by slaughtering cattle conformed with traditional belief and practice. . . . By the mid-1850s pressure on Xhosa society had become so severe that the appeal to the supernatural succeeded in transcending the fragmented political units, and ‘the believers’ united in performing a ‘national sacrifice’ that would propitiate the founding fathers of them all.<sup>75</sup>

In the event, there was widespread slaughtering of cattle by the Xhosa. Their destruction of the basis of their wealth and the underpinning of their culture cemented the collapse of the Xhosa before the white colonial powers.

#### J. Conclusions Regarding Xhosa Customs

Xhosa traditions, of course, are not static, any more than those of other cultures. Changing times, changing historical circumstances, influences, and preferences all create a dynamic vibrancy to any culture. One has to be wary of what one labels “traditional.” For instance, counted amongst accounts of Xhosa traditional dress and craft are intricate beadwork ornamentation. This “tradition,” however, emerged as a result of contact with European traders when colored glass beads became readily available in the mid-nineteenth century.<sup>76</sup> Circumcision rituals were introduced to the Xhosa, and spread to other peoples, but in modern times have been questioned for health reasons. Peter Magubane’s work had photographs of a white university student participating in a Xhosa circumcision ritual, and shows one of the other initiates wearing a cardboard hat on which has been painted “Viva Constitutional Assembly”, surely not an item that would normally be considered “traditional” dress.<sup>77</sup> A photograph of a beer drinking ceremony shows the traditional beer being supplemented by Smirnoff vodka and other spirits.<sup>78</sup> Housing structures have changed. Most Xhosa are, at least nominally, Christian. Yet Magubane’s photographs also document a vibrant, living culture, one that has incorporated modern elements while resisting being subsumed by modern culture.<sup>79</sup> Not only has Xhosa culture resisted complete assimilation, it has also had a reverse effect for the Truth and

<sup>72</sup> *Id.* at 29.

<sup>73</sup> *Id.* at 28.

<sup>74</sup> JANET HODGSON, *THE GOD OF THE XHOSA* 19 (1982).

<sup>75</sup> *Id.* at 27; MOSTERT, *supra* note 27, at 1187 (providing a discussion of the “Cattle Killing” of the 1850s).

<sup>76</sup> MAGUBANE, *supra* note 14, at 15.

<sup>77</sup> *See id.* (photographs).

<sup>78</sup> MAGUBANE, *supra* note 14, at 26-27.

<sup>79</sup> *See generally* MAGUBANE, *supra* note 14.

Reconciliation Commission (TRC) set up in South Africa after the fall of the apartheid regime was a reflection of Xhosa and other African traditions of justice. The TRC and its underpinnings in the African justice paradigm of reconciliation will be examined next.

#### IV. African Customary Law

The idea of “African customary law” is one that has gained slow, even grudging, acceptance in legal studies in the West. Indeed, one mid-twentieth century scholar noted that there was confusion whether “Native law [as he put it] is properly the field of the lawyers or the anthropologists.”<sup>80</sup> The attitude reflected in Lewin’s studies is emblematic of the problems with sources discussed in Section III of this paper, *supra*. “The nomenclature conceptualizes the perception of customary law as being inferior to other laws within a legal system.”<sup>81</sup> Modern scholars have worked to reassess such biases against customary law. As Laurence Juma has noted,

For centuries, the commonly held view has been that African Customary Law represents primitive, traditional, ancient and immutable regimes non-suited for modern administration of justice. This view was reinforced by the common law tradition which perceived law as ancient and immutable. Thus, in order to search what the law “really is,” judges must study precedents. Similarly, custom was recognizable by the courts as if it were ancient and unchanging. This historical conception perceived traditional legal systems as extant and functioning in the ethnographic present. Of course, this view was predicated upon the belief that it was custom that served as law in technologically primitive societies. . . . Accordingly, “custom” must be distinguished from “law.” The former refers to practice; what people do. The latter is the norm; what people ought to do.<sup>82</sup>

Yet, as Juma argues, if law is defined as a way to order and stabilize society which includes coercive elements to compel behavior to conform to the norms of a given society, the “African traditional societies were no exception.”<sup>83</sup>

Customary or traditional law is generally defined in opposition to the legal systems and norms of the Western European and American colonial states, the common law system that predominates in the Anglo-American world and the civil law system that originated in the former Roman Empire. Such a conceptual framework does an injustice to non-Western legal systems.

[T]he term “African Customary Law” may, in itself, be misleading. The term implies a distinction between “African Law” and “laws made by the state.” This connotation assisted colonial legal architects and civil servants in distinguishing [for example] the British law applicable to them from that of the African law applicable to indigenous peoples. Not only did the term confer an opprobrious

<sup>80</sup>JULIUS LEWIN, *STUDIES IN AFRICAN LAW* 13 (1947).

<sup>81</sup> Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes*, 14 *ST. THOMAS L. REV.* 459, 460 (2002) (citations omitted).

<sup>82</sup> *Id.* at 466 (citations omitted).

<sup>83</sup> *Id.* at 467.

label to African legal systems, it lessened the worth of legal principles of the African groups living on the continent before the advent of colonialism.<sup>84</sup>

A wider view places legal systems such as the common law or civil law systems, as well as the legal systems found in, for example, Islamic or Hindu law, in a broader web of traditions.<sup>85</sup> By viewing the common law and civil law legal systems as traditions rather than the legal norms against which other legal systems are measured, a greater understanding of and appreciation for other culture's legal forms will be developed.

African customary law is considered part of the tradition of indigenous or "chthonic" law.<sup>86</sup> Amongst the elements that characterize chthonic legal traditions in the realm of criminal law, important to consider in the context of the TRC, is a focus on reconciliation as a paramount value. As Glenn has noted,

[C]rime becomes the responsibility of civil society, in the form of the groups, clans or families which make it up. Injury to a member was injury to the group; injury caused by a member was the responsibility of the group. . . . Crime was a serious social wound, usually involving physical violence. It required the attention of the entire community and the objective was not to punish, but to restore community.<sup>87</sup>

Reconciliation of community as a paramount value in criminal law is alien to Western forms of justice. Chthonic traditions focus on the re-integration of those who commit crimes into the group. In Africa, there was "no effort to eliminate chthonic legal traditions."<sup>88</sup> Rather, customary law was subjugated and made subservient to the law of the colonial powers, much as the people themselves were.<sup>89</sup> This stands in contrast to the wholesale elimination of peoples, laws and customs that occurred in the Americas. The rebuilding of African states after the vicissitudes and sometimes crippling impact of colonialism has often been through the re-emergence of customary laws and traditions.<sup>90</sup> It is precisely this approach that was used in South Africa, where African traditions of justice and reconciliation were used to re-knit a country that had first been subjugated by colonial powers, and then riven by racial domination and segregation imposed by European-descended Afrikaners.

## V. Truth and Reconciliation Commission as a Reflection of African Concepts of Justice

### A. Overview of the TRC

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<sup>84</sup> *Id.* at 469.

<sup>85</sup> See GLENN, *supra* note 4, at 343-65 (providing the same premise in his examination of the multiplicity of world traditions that form legal systems).

<sup>86</sup> *Id.* at 58-91.

<sup>87</sup> *Id.* at 68.

<sup>88</sup> GLENN, *supra* note 4, at 81.

<sup>89</sup> See John Comaroff, *The Discourse of Rights in Colonial South Africa: Subjectivity, Sovereignty, Modernity, in IDENTITIES, POLITICS, AND RIGHTS* 193 (Austin Sarat & Thomas R. Kearns eds., 1995) (discussing how the concept of customary law was used to assist in the dispossession of African peoples by colonial powers).

<sup>90</sup> GLENN, *supra* note 4, at 82.

The TRC was South Africa's solution to a historic quandary – how to create a multi-racial democratic society to replace the totalitarian, racially segregated apartheid state constructed by the Afrikaners. The Chairman of the TRC, Archbishop Desmond Tutu, described the TRC as a “third way” between the victors's justice of a Nuremberg-style tribunal and a general amnesty or national amnesia.<sup>91</sup> Amnesty for crimes committed either by members of the apartheid regime or in the struggle against apartheid was granted upon application to the TRC, and was dependent upon the individual in question fully disclosing all information relating to the crime for which amnesty was being sought. This third way “was consistent with a central feature of the African *Weltanschauung* – what we know in our languages as *ubuntu*, in the Nguni group of languages, or *botho*, in the Sotho languages.”<sup>92</sup>

That this connection to South Africa's indigenous black African cultures was not just of Archbishop Tutu's imagination is reflected in the Interim Constitution of 1994 that governed the nation at the beginning of its transition from apartheid. The importance of the African norm of reconciliation and re-knitting of society's bonds was reflected in Interim Constitution's last clause, where it was stated that past divisions:

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 victimization. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past.<sup>93</sup>

This clause was the foundation of the TRC. It is significant that the Interim Constitution used the Nguni word *ubuntu*, tying the concept of reconciliation on a Constitutional level to the African – and specifically Xhosa (as the Xhosa are the most numerous members of the Nguni language group) – norm of reconciliation.

South Africa's truth and reconciliation process has been described as “surely the most ambitious the world has ever seen. Not only was the [TRC] charged with investigating human rights abuses and granting amnesty to miscreants, but the process was expected as well to contribute to a broader ‘reconciliation’ in South Africa.”<sup>94</sup> The African National Congress (ANC), the largest and most important group that fought apartheid, itself decided that the TRC was necessary to heal South Africa as the nation transitioned from white rule to majority rule. “It must be the first time in history that a liberation movement, rather than seeking general amnesty, called for an independent truth commission so that everyone could be held accountable for the past.”<sup>95</sup>

The TRC's scope was violations of human rights between 1960 and 1994, by *all* sides in the struggle against apartheid, whether by members of the South African government's security

<sup>91</sup> DESMOND MPLIO TUTU, NO FUTURE WITHOUT FORGIVENESS 15-31 (1999).

<sup>92</sup> *Id.* at 31. Other commentators on the TRC have characterized it as a “third way” without drawing the connection to African notions of justice. See, e.g., Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 141 (Robert I. Rotberg & Dennis Thompson eds., 2000) (noting the influence of other similar commissions on the formation of the TRC).

<sup>93</sup> Jay A. Vora & Erika Vora, *The Effectiveness of South Africa's Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner, and English South Africans*, 34 J. OF BLACK STUD. 301-02 (2004) (citing interim S. AFR. CONST. ch. 16 (1994)).

<sup>94</sup> JAMES L. GIBSON, OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION? 176 (2004).

<sup>95</sup> ALEX BORAINÉ, A COUNTRY UNMASKED 11-12 (2000).

apparatus, or by members of the resistance to the Afrikaner regime. Testimony was to be heard from both victims and perpetrators of crimes. The hearings were public, and held in differing venues across the country, including churches, civic centers, and town halls. Its five-volume final report was handed over to President Nelson Mandela in a televised ceremony on 29 October 1998.<sup>96</sup> The TRC “interviewed thousands of victims of apartheid [and] granted amnesty to roughly 850 human rights violators.”<sup>97</sup>

There were three committees that undertook the work of the TRC: the Human Rights Violation Committee, which determined who was a victim of apartheid and corroborated some 50,000 cases of human rights abuses; the Amnesty Committee, which decided whether to grant a perpetrator of gross human rights abuses amnesty; and the Reparation and Rehabilitation Committee, which considered matters referred to it by the other committees, gathered evidence concerning the fate of victims and the harm done to them, and made recommendations for reparations and rehabilitation and for institutions for a fairer South African society.<sup>98</sup>

### B. TRC as a Reflection of African Concepts of Justice

One of the principal purposes of the TRC, according to the National Unity and Reconciliation Act, passed in South Africa in 1995 as part of the transition to a post-apartheid government, was to “promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past.”<sup>99</sup> The success of the TRC ended up revolving around forgiveness.

The TRC demonstrated the moral and transformative potential of truth telling as well as forgiveness. The need to elicit forgiveness was not part of its mandate, but by virtue of its importance it became a central feature in the TRC’s attempt to deal with the truth and promote reconciliation.

Properly understood, forgiveness does not mean excusing those who oppress and victimise. Forgiveness understood can never replace justice. The TRC demonstrated that forgiveness requires the perpetrators of evil to acknowledge what they have done, to take responsibility for their actions. In other words, forgiveness does not exclude the need for moral accountability. . . .

Forgiveness seeks to prevent the perpetuation of the cycle of violence, which inevitably leads to the undermining of the rule of law. It seeks the establishment of a just moral order that builds community and restores humanity.<sup>100</sup>

This is precisely the idea behind the African concept of *ubuntu* as explained by Archbishop Tutu. The Archbishop points to the harmony that came about in Namibia and

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<sup>96</sup> This summary of the TRC’s operations is from Vora & Vora, *supra* note 93, at 305-06.

<sup>97</sup> GIBSON, *supra* note 94, at 1.

<sup>98</sup> See Jonathan Thompson Horowitz, *Racial (Re)Construction: The Case of the South African Truth and Reconciliation Commission*, 17 NAT’L BLACK L.J. 67, 75 (2003).

<sup>99</sup> GIBSON, *supra* note 94, at 10 (quoting Promotion of National Unity and Reconciliation Act 34 of 1995 § 3(1)).

<sup>100</sup> John de Gruchy, *The TRC and the Building of a Moral Culture*, in AFTER THE TRC: REFLECTIONS ON TRUTH AND RECONCILIATION IN SOUTH AFRICA 167, 170-71 (Wilmot James & Linda Van de Vijver eds., 2001).



Zimbabwe after their successful revolutions as “*ubuntu* at work.”<sup>101</sup> *Ubuntu* is tied to concepts of shared humanity, harmony, friendliness, and the community.<sup>102</sup> It is precisely these values that the TRC wished to represent and reestablish in a South African society that had been quite purposefully fractured in the preceding decades.

The TRC succeeded for many reasons – not the least the involvement of Archbishop Tutu and the leadership in South Africa of Nelson Mandela. However, other factors also contributed to the TRC’s success, including its emphasis on nonretributive forms of justice.<sup>103</sup> An “open, humanized, and procedurally fair” process meant its results were “able to penetrate the consciousness” of all South Africans.<sup>104</sup> “[T]he *lack of* legalistic proceedings made the hearings more accessible to ordinary people. . . . The TRC probably succeeded in part because its processes were transparent and fair and understandable to ordinary people.”<sup>105</sup>

It is in its emphasis on *nonretributive* justice and its *lack of* legalistic proceedings that the TRC most reflects chthonic and African concepts of justice. African customary law emphasizes reconciliation over punishment, restoration of community harmony over retribution. Reintegration of offenders into the fabric of their society is the overarching goal and characteristic of African customary law. In chthonic systems, “the system of dispute resolution is open and immediately accessible.”<sup>106</sup> This was the case with the TRC, where all victims of abuses, as well as the perpetrators of abuses, were meant to come forward and tell their stories so that the nation could be healed. The emphasis on orality – that the telling of the stories was itself part of the healing – is also characteristic of African customary law.<sup>107</sup> Part of the genius of the TRC is that it defined the community so widely – *all* South Africans, whether black or white, whether of European descent or of native African descent, were considered part of the community that had to be reintegrated. This principle stands in contrast to the notion of chthonic law being a law used by small, homogenous societies.<sup>108</sup> The TRC adapted African concepts of justice, characteristic of chthonic cultures, and projected them onto a larger, more encompassing stage.

### C. Criticisms

The work of the TRC was not without criticism, both from South Africans of European descent and those of black African heritage.

Perhaps for some Africans the TRC itself actually represents a violation of the rule of law. After all, the TRC’s main job is to override the traditional criminal law that would have punished people for their criminal deeds. The TRC may therefore be understood as abrogating law instead of enforcing it. One who believes that law ought to be universally applied, irrespective of the

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<sup>101</sup> TUTU, *supra* note 91, at 32. One presumes that what has occurred in Zimbabwe in recent years, especially the reprisals and punitive laws directed against both the remaining white population of Zimbabwe and President Mugabe’s black political opponents as a lack or disappearance of *ubuntu*.

<sup>102</sup> *Id.* at 31.

<sup>103</sup> GIBSON, *supra* note 94, at 337.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 337-38.

<sup>106</sup> GLENN, *supra* note 4, at 64.

<sup>107</sup> *Id.* at 61-63.

<sup>108</sup> *Id.* at 78-79.

consequences, would surely find it difficult to support letting some of South Africa's most notorious criminals go free after admitting their heinous crimes.<sup>109</sup>

Some have pointed out that most of those who committed crimes did not testify, and those who did were forced to. "And even [then] . . . they still tried to evade, conveniently forgot, and transferred responsibility."<sup>110</sup> Interestingly, acceptance of the results of the TRC was much greater amongst South Africans of African descent than it was amongst those of European descent.<sup>111</sup> One study, in fact, compared the views of Xhosa about the TRC to the views of Afrikaners and English South Africans and found that the Xhosa were far more likely to accept that the TRC uncovered the truth and brought about reconciliation.<sup>112</sup>

## VI. Conclusions

South Africa has undergone tremendous change in the last two decades. The Xhosa were at the heart of that transformation. "No other African society in southern Africa fought harder to maintain their independence" than the Xhosa.<sup>113</sup> It makes sense then that South Africa's first President after apartheid was a Xhosa chief. It is also fitting that the Truth and Reconciliation Commission, "the first independent body established in South Africa's postapartheid era,"<sup>114</sup> was founded explicitly on the Xhosa organizing principle of *ubuntu*.<sup>115</sup>

South Africa includes its indigenous traditions in the fabric of its new governance. "[T]he Constitution does leave an important space for indigenous law and the affirmation of South Africa's diverse and formerly repressed communities. It provides for the creation of an independent commission for the promotion and protection of the rights of cultural, religious and linguistic communities."<sup>116</sup> However, Blacks still face problems accessing the law in the new South Africa. As one recent commentator noted,

Theoretically, any of the [eleven official] languages can be spoken in court and interpreters, although of varying degrees of competence, are available. However, the judges and magistrates speak English or Afrikaans as their primary language. Very few know any African language. To be effective, a lawyer must be able to articulately address the judge in one of the white languages.<sup>117</sup>

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<sup>109</sup> GIBSON, *supra* note 94, at 197.

<sup>110</sup> Frederik Van Zyl Slabbert, *Truth without Reconciliation, Reconciliation without Truth*, in AFTER THE TRC: REFLECTIONS ON TRUTH AND RECONCILIATION IN SOUTH AFRICA 62, 65-66 (Wilmot James & Linda van de Vijver eds., 2001). The criticisms found in Van Zyl Slabbert's essay are reflective of critiques of the TRC found in most studies of the effectiveness of South Africa's reconciliation process.

<sup>111</sup> See GIBSON, *supra* note 94, at 91-93. Gibson's full discussion demonstrates the complexity of the attitudes of South Africans of different races towards the TRC. *Id.* at 68-116.

<sup>112</sup> See Vora & Vora, *supra* note 93, at 308-10.

<sup>113</sup> SWITZER, *supra* note 28, at 351.

<sup>114</sup> Vora & Vora, *supra* note 93, at 305.

<sup>115</sup> TUTU, *supra* note 91, at 15-31.

<sup>116</sup> ABDULLAH OMAR, TRANSFORMATION OF THE SOUTH AFRICAN SYSTEM OF JUSTICE 13 (1998). See also South African Law Commission, Discussion Paper 76, *The Harmonisation of the Common Law and the Indigenous Law: Conflicts of Law*, <http://www.doj.gov.za/salrc/dpapers.htm> (last visited July 1, 2008).

<sup>117</sup> KENNETH S. BROUN, BLACK LAWYERS, WHITE COURTS: THE SOUL OF SOUTH AFRICAN LAW 248 (2000).

South Africa will take years to heal from the wounds caused by colonialism and apartheid. Some scars may never heal. But the TRC, grounded as it is in Xhosa and African notions of reconciliation and reintegration (*ubuntu*) grounded the new nation in a bright future.

Not only has South Africa benefited, but so has the whole continent. The TRC can also serve as a model for the resolution of conflicts in the rest of Africa. “Because Africa does not believe in solutions that are not African, it has an enormous interest in the South African experience.”<sup>118</sup> Whether the reconciliation model of the TRC can be exported to other continents is still an open question. Yet it’s utility in South Africa is demonstrable, and the reason for its success is due in part to its connection to one of its most important peoples in the country, the Xhosa.

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<sup>118</sup> Jan van Eck, *Reconciliation in Africa*, in *AFTER THE TRC: REFLECTIONS ON TRUTH AND SOUTH AFRICA* 82, 87 (Wilmot James & Linda van de Vijver eds., 2001).