

UNFAIR DISCRIMINATION WITHIN THE SOUTH AFRICAN DEPARTMENT OF  
CORRECTIONAL SERVICES AGAINST INMATES WITH ANCESTRAL CALLING  
(UBIZO)



By

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(2525829)

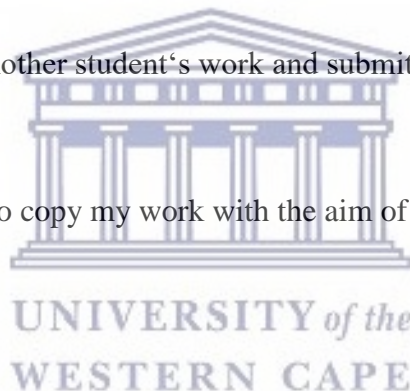
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the LL.M degree in the Faculty of Law,  
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SUPERVISOR: PROF RADLEY HENRICO

## Declaration

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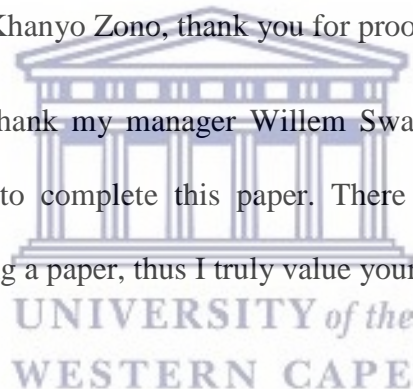
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Importantly, I would like to thank my manager Willem Swarts for his assistance and for allowing me the opportunity to complete this paper. There are very few managers that understand the burden of writing a paper, thus I truly value your assistance.



## Dedication

This dissertation is dedicated to my father, Ngqezana Zono; may he continue to rest in peace and be your family's great ancestor.

## Abstract

The dissertation examines unfair discrimination within the South African Department of Correctional Services against inmates with ancestral calling (ubizo). Inmates (like everyone) have fundamental rights as enshrined by the Bill of Rights as contained in the Constitution of the Republic of South Africa, 1996. However, the aforesaid rights can be limited, to the extent that it is reasonable and justified in an open and democratic society based on human dignity, equality and freedom. Consequently, fundamental rights of any inmate – by virtue of their incarceration in a correctional facility - are automatically limited on grounds of it being reasonable and justifiable. Freedom of movement is just one example. The significance of this study is to examine the right to freedom of religion in the form of ancestral calling (which is part of the African traditional religion), with specific attention being had to the expression of such religious rights on the part of inmates within the South African Department of Correctional Services. An integral aspect of this study involves taking into account the notional and conceptual distinction between mainstream and non-mainstream (or marginalised) religions. Examples of the former include Christianity, Judaism, Islam, and Hinduism, while examples of the latter are minority religions such as ancestral calling.

Ancestral calling has been part of African traditional religion (ATR) for centuries. Ancestral calling chooses the person, in the sense that s(he) is chosen by the ancestors. Certain ancestral rituals and ceremonies (which are integral to the ancestral calling religious beliefs) must be performed to appease the ancestors as their anger can cause grievous harm if ignored.

Legislation governing and regulating the South African Department of Correctional Services recognises the right to freedom of religion, and where practicable, places of worship must be provided within the correctional centre for inmates of all denominations. Inclusion of the terms “all denominations” fails to take practical account of the fact that marginal religions, for an

example ubizo have ancestral rituals and ceremonies required to be performed and it would not always be practicable by virtue of their nature. Thus, the marginal status of ancestral calling results in unfair discrimination against inmates seeking to exercise their religious freedom but are precluded from doing so. To this end, the question is raised as to the extent to which the South African Department of Correctional Services is (or ought to be) obligated to reasonably accommodate inmates with ancestral calling.

#### Keywords

African traditional religion, ancestral calling, unfair discrimination, equality, incarcerated, inmates, freedom of Religion, reasonable accommodation.



## Table of Content

Declaration.....	ii
Acknowledgements and Dedications.....	iii
Abstract.....	iv
Keywords.....	v
Table of Content.....	vi
CHAPTER 1.....	1
INTRODUCTION AND OVERVIEW.....	1
1.1 Background.....	1
1.2 Problem Statement.....	4
1.3 Significance of the Issue.....	7
1.4 Research question.....	10
1.5 Argument or answer.....	11
1.6 Originality of argument (Literature Survey).....	11
1.7 Chapter Outline.....	22
1.8 Methodology.....	22
CHAPTER TWO.....	23
BACKGROUND OF UBIZO AS A NON – MAINSTREAM RELIGION IN SOUTH AFRICA.....	23
2.1 Introduction.....	23
2.2 What is ubizo?.....	23
2.3 The connection between ATR and ubizo.....	25
2.4 Signs and symptoms of ubizo.....	26
2.5 Ukuthwasa (training).....	29
2.6 The link between ubizo, ukuthwasa (training), and traditional healers.....	30
2.7 Conclusion.....	33
CHAPTER 3.....	34
THE RELEVANT CONSTITUTIONAL, LEGISLATIVE, AND CASE LAW AUTHORITY IN SOUTH AFRICA.....	34
3.1 Introduction.....	34
3.2. The Constitution.....	35
3.2.1 Equality, unfair discrimination, and dignity.....	35
3.2.2 The right to freedom of religion and.....	42
3.2.3 Limitation clause (section 36).....	44
3.3 Promotion of Equality and Prevention of Unfair Discrimination Act.....	46
3.4 Correctional Services Act (CSA).....	48
3.5 Relevant case laws.....	49
3.5.1 <i>MEC for Education: Kwazulu-Natal and Others v Pillay</i> .....	49
3.5.2 <i>Department of Correctional Services v Police and Prison Civil Rights Union</i> .....	50
3.5.3 <i>Kievits Kroon Country Estate (Pty) Ltd v Mmoledi</i> .....	51
3.6 Conclusion.....	53

CHAPTER 4 .....	54
SADCS' DUTY TO REASONABLE ACCOMMODATE INMATES WITH UBIZO .....	54
4.1 Introduction.....	54
4.2 SADCS duty to reasonable accommodate inmates with ubizo .....	54
4.3.1 Overcrowding .....	61
4.3.2 Budgetary constraints.....	62
4.4 Conclusion .....	62
CHAPTER 5 .....	64
CONCLUSION AND RECOMMENDATIONS.....	64
5.1 Conclusion .....	64
5.2 Recommendation .....	65
BIBLIOGRAPHY.....	68



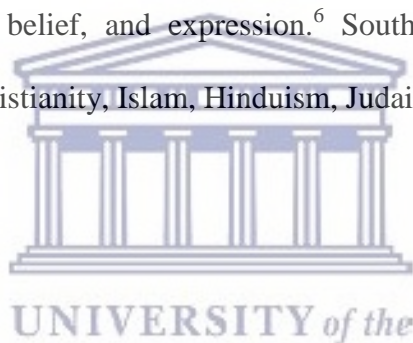
## CHAPTER 1

### INTRODUCTION AND OVERVIEW

#### 1.1 Background

Prior to 1993, the South African constitutional framework did not contain a Bill of Rights. Freedom of religion was not a constitutionally guaranteed right in South Africa.<sup>1</sup> The case of *Whittaker v Governor of Johannesburg Gaol*<sup>2</sup> paved the way for a new approach towards the rights of inmates in South African jails.<sup>3</sup>

Human rights were included for the first time in the Interim Constitution.<sup>4</sup> The Constitution of the Republic of South Africa, 1996 (the Constitution) has a Bill of Rights (BOR) that applies to everyone, including inmates.<sup>5</sup> Section 15(1) of the Constitution guarantees freedom of conscience, religion, thought, belief, and expression.<sup>6</sup> South Africa has many religions, including but not limited to Christianity, Islam, Hinduism, Judaism, ATR, and Rastafarianism.



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<sup>1</sup> Coertzen P 'Freedom of religion in South Africa: Then and now 1652–2008' (2008) 29(2) *Verbum et Ecclesia* 345 345.

<sup>2</sup> *Whittaker v Governor of Johannesburg Gaol* 1911 WLD 139.

<sup>3</sup> On appeal, the court was called upon to rule on the lawfulness of detaining prisoners awaiting trial in conditions, which amounted to solitary confinement. Two prisoners had been subjected to severe ill-treatment in gaol while awaiting trial. It was unanimously held that the Prison Governor was not allowed to discriminate against an individual prisoner even if he had been ordered to do so by the Director of Prisons. The ill-treatment was discontinued. This judgment introduced into South African jurisprudence the principle that a prisoner who has been illegally treated whilst incarcerated has the legal standing to approach the court for relief, thus paving the way for a new approach towards the rights of prisoners in South African jails. See *Whittaker v Roos and Bateman* 1912 (92) AD, para 124.

<sup>4</sup> Constitution of the Republic of South Africa Act 200 of 1993.

<sup>5</sup> For purposes of terminology and clarity, unless otherwise specified, the term 'inmate(s)' will be used throughout the study, since it is the term used by Correctional Services Act 111 of 1998, which replaced the term 'prisoner' as it was used in the now-repealed Prisons Act 8 of 1959.

<sup>6</sup> While there is a clear neighbourliness and association between these rights, I will primarily focus on religion, drawing on the crucial connection between religion and belief as these are interlinked where appropriate (these will be referred to as associational rights given their proximity within the sub-section). There is no religion without belief. In addition, although no explicit mention of culture is made, these phenomena will also play a role in the framework of religion and belief. Henrico is of the opinion that, a close nexus is apparent between the concepts of 'belief' and 'religion'; and that it is seldom for the term 'religion' to be used in isolation. Most often, it is employed alongside the term 'belief'. See Henrico R 'Understanding the Concept of Religion within the Constitutional Guarantee of Religious Freedom' (2015) 4 *Journal of South African Law* 784 787.



The Correctional Service Act<sup>7</sup> (the CSA), which is the fundamental law regulating the South African Department of Correctional Services (the SADCS), introduced substantial modifications to the protection of inmates' rights. Certain of these rights are fundamental, including the right to safety,<sup>8</sup> accommodation,<sup>9</sup> nutrition,<sup>10</sup> reading material,<sup>11</sup> hospital treatment,<sup>12</sup> exercise, and religion and belief.<sup>13</sup> “Violation or limitation of the rights provided for under the SADCS is prohibited, whether such restriction is due to the disciplinary procedure or for any other purpose; nonetheless, the Commissioner may restrict, suspend, or revise inmate amenities for different categories.”<sup>14</sup>

South Africa has a rich religious diversity.<sup>15</sup> It is permissible to practice any religion so long as it does not harm others. Inmates hold diverse religious beliefs. Their worship and beliefs differ, as some are Christians, ATR, Muslims, or Hindus. There are Christians who observe communion and those who do not perform any ancestral ritual.<sup>16</sup> Scholars have tried to define ATR despite the fact that it varies by country and tribe. Mokgobi described it as:

“An invention or creation of the human mind for regulating all human activity, and this creative activity is a human necessity that satisfies the

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<sup>7</sup> Correctional Services Act 111 of 1998.

<sup>8</sup> Section 4 of CSA.

<sup>9</sup> Section 7 of CSA.

<sup>10</sup> Section 8 of the CSA.

<sup>11</sup> Section 18 of the CSA.

<sup>12</sup> Section 12 of the CSA.

<sup>13</sup> Section 14 of the CSA. It is significant to note that s 14(1) employs the same terminology in terms of freedom of religion, belief and opinion as set out in s 15(1) of the Constitution. Section 15 of the Constitution state that:

1. Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
2. Religious observances may be conducted at state or state-aided institutions, provided that—
  - a) those observances follow rules made by the appropriate public authorities;
  - b) they are conducted on an equitable basis; and
  - c) attendance at them is free and voluntary.

<sup>14</sup> Section 4(c) of the CSA.

<sup>15</sup> Henrard K ‘The Accommodation of Religious Diversity in South Africa Against the Background of the Centrality of the Equality Principle in the New Constitutional Dispensation’ (2001) 45 *Journal of African Law* 51 51.

<sup>16</sup> Ngcobo TE ‘The Holy Communion and African rituals: An encounter between African religion and Christianity’ (2020) HTS *Teologiese Studies/Theological Studies* 1 3.

spiritual desires and needs inherent in human nature’, he further added that ATR is tribal in nature.”<sup>17</sup>

Mndende also described it as:

“ATR means African indigenous religion. African ancestors passed down the religion. It is not a fossil religion, but a religion that Africans today have made their own by living and practicing it.”<sup>18</sup>

Adherents of ATR are called traditionalists. Traditionalists are individuals who believe in ATR and ubizo and are expected, in terms of their religious beliefs, to perform specific ancestral rituals<sup>19</sup> and ceremonies<sup>20</sup>. Moreover, a traditionalist is someone who respects the existing practices and beliefs of his or her society or group and opposes their modification.<sup>21</sup> Some ATR followers believe in ubizo as a sickness<sup>22</sup>



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<sup>17</sup> Mokgobi M ‘Understanding traditional African healing’ (2014) *African Journal of Physical Health Education Recreation and Dance* 1 2.

<sup>18</sup> Mndende N *African Spiritual Journey: Rites of Passage among the Xhosa speaking of South Africa* 1 ed (2006) 10.

<sup>19</sup> Rituals that need to be performed for a person with ubizo starts from having a ceremony to inform the ancestors that the person has accepted the calling. African traditional beer needs to be prepared for the ceremony. After that, the person will have to wear beads to show that (s)he is in the process of becoming a traditional healer. The process does not stop there, as ancestors will guide the person on the next steps. The ancestors will visit them by dreams or through visions. See Van der Watt ASJ, Biederman SV, Abdulmalik JO, Mbanga I, Das-Brailsford P & Seedat S ‘Becoming a Xhosa traditional healer: The calling, illness, conflict and belonging’ (2021) 27 *South African Journal of Psychiatry* 1 5.

<sup>20</sup> Such ceremonies include slaughtering of goat, dancing through drums and worshipping. It will be unreasonable to expect the Correctional Service to allow such. They can allow them to use a room for burning incense to connect with ancestors, the same room can be used for them to worship. See Van der Watt ASJ, Biederman SV, Abdulmalik JO, Mbanga I, Das-Brailsford P & Seedat S ‘Becoming a Xhosa traditional healer: The calling, illness, conflict and belonging’ (2021) 27 *South African Journal of Psychiatry* 1 6.

<sup>21</sup> Masondo S ‘African Traditional Religion in the face of Secularism in South Africa’ (2011) 62 *The Journal of the Helen Suzman Foundation* 32 33.

<sup>22</sup> It is a sickness because a person with ancestral calling is ill due from the wrath of ancestors. The illnesses vary in that they may be physical, mental, or a combination of the two. See Van der Watt ASJ, Biederman SV, Abdulmalik JO, Mbanga I, Das-Brailsford P & Seedat S ‘Becoming a Xhosa traditional healer: The calling, illness, conflict and belonging’ (2021) 27 *South African Journal of Psychiatry* 1 2.

that requires ancestral rituals<sup>23</sup> and ceremonies<sup>24</sup> to become a traditional healer.<sup>25</sup> A person who adheres to an ATR may be referred to as a traditionalist.

## 1.2 Problem Statement

During apartheid, people with ubizo<sup>26</sup> had their religious rights violated.<sup>27</sup> The BOR preamble explicitly protects religious freedom. Now they can follow their beliefs. When ubizo inmates want to perform religious ancestor rituals, it is difficult. Many of their religious rituals and ceremonies are impossible to perform in the SADCS.

Accordingly, inmates' religious freedom rights are limited. This calls into question whether the restriction is reasonable and justified. It also raises questions about whether the SADCS will accommodate religious activities that are essential to a religion and part of religious freedom.

Section 15(1) of the Constitution guarantees freedom of conscience, religion, thought, belief, and opinion. These rights are for everyone to enjoy and express. Some may claim that being religious entails a strong commitment to one's beliefs or that religion is an integral component of one's culture. Thus, religion, belief, and culture are intertwined, as they coexist simultaneously. Nonetheless, this dissertation focuses on unfair discrimination of inmates with

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<sup>23</sup> Rituals that needs to be performed for a person with ancestral calling starts from having a ceremony to inform the ancestors that the person has accepted the calling. African traditional beer needs to be prepared for the ceremony. After that, the person will have to wear beads to show that (s)he is in the process of becoming a traditional healer. The process does not stop there, as ancestors will guide the person on the next steps. The ancestors will visit them by dreams or through visions. See Van der Watt ASJ, Biederman SV, Abdulmalik JO, Mbanga I, Das-Brailsford P & Seedat S 'Becoming a Xhosa traditional healer: The calling, illness, conflict and belonging' (2021) 27 *South African Journal of Psychiatry* 1 6.

<sup>24</sup> Ceremonies includes beating drums, dancing, having alcohol for those who consume it. Worshipping ancestors by praising. See Ogana W & Ojong VB 'A Study of Literature on the Essence of Ubungoma (Divination) and Conceptions of Gender among Izangoma (Diviners)' (2015) 28(1) *Journal for the Study of Religion* 52 63.

<sup>25</sup> Each culture has their own terminology for their traditional healers. They are called (Xhosa's -Iggirha, Zulu-Isangoma, Venda – Mungome, Sotho – Ngaka). See Mokgobi M 'Understanding traditional African healing' (2014) *African Journal of Physical Health Education Recreation and Dance* 1 3.

<sup>26</sup> Ubizo is the calling from ancestors to undergo training and become a traditional healer. Its training consists of a number of rituals that the novice healer goes through before they graduate and become fully-fledged traditional healers. See Bührmann MV 'Thwasa and bewitchment' (1982) 61(23) *South African Medical Journal* 877 878.

<sup>27</sup> Traditional healing and the use of traditional medicines were traditionally banned during South African apartheid. As a result, they have concealed their calling and practices. See Maluleka JJ 'The status of traditional healing in the Limpopo province of South Africa' (2020) 76(4) *Theological Studies* 1 11.

ubizo within SADCS, and examines whether such unfair discrimination is justified and if SADCS can reasonably accommodate inmates with ubizo.

The state is prohibited from directly or indirectly discriminating unfairly against anybody based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.<sup>28</sup> According to the aforementioned constitutional clause, “everyone” has the right to religious freedom. Consequently, it is not unexpected that section 14(1) of the CSA guarantees inmates the right to religious freedom. This means that all inmates have the right to religious freedom and cannot be prohibited from practising their religion unless doing so would violate the rights of others. Then, their right to freedom of religion may be limited under section 36 of the Constitution (limitation clause). Only then is the unfair discrimination justified.

The Promotion of Equality and Prevention of Unfair discrimination Act<sup>29</sup> (PEPUDA) promotes all the constitutional rights. It allows affirmative action, which is outside the scope of this dissertation, and promotes fairness and eliminates workplace unfair discrimination. As such, it should be considered as a supplementary law<sup>30</sup> that inmates could use when their rights to equal treatment with regard to religious freedom<sup>31</sup> and expression are violated in a way that constitutes direct unfair discrimination. Thus, PEPUDA prohibits both indirect and direct unfair discrimination based on the grounds listed as well as unlisted grounds (which are to be alleged and proven by an applicant).<sup>32</sup>

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<sup>28</sup> Own emphasis. See section 9(3) of the Constitution.

<sup>29</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>30</sup> PEPUDA.

<sup>31</sup> Section 2 of PEPUDA sets out the objects of the Act, which are mainly to give effect to section 9 of the Constitution.

<sup>32</sup> Van der Linde DC ‘Poverty as a Ground of Indirect Discrimination in the Allocation of Police Resources – A Discussion of *Social Justice Coalition v Minister of Police* 2019 (4) SA 82 WCC (2020) 23 PER / PELJ 1 4.

Due to their incarceration, South African inmates, whether convicted or not, have certain rights limited, such as the right to freedom of movement, which inevitably restricts the rights of inmates with ubizo, as some of their rituals and ceremonies should be done outdoors.<sup>33</sup> Section 14(3) requires SADCS to provide religious facilities for inmates of all faiths.

The preceding section emphasised that the right to religious freedom is specifically guaranteed to all individuals by the Constitution and the CSA. The term “everyone”, includes inmates, whose rights are limited by law due to their incarceration. In essence, the provisions of the SADCS give effect to their constitutional rights, as stated in the BOR. Consequently, there can be no dispute about the fact that inmates' freedom of religion is recognised as one of their fundamental rights. However, the provision in section 14(3) of the SADCS that “when practical, every correctional facility shall offer places of worship for prisoners of all religious faiths” may be quite restrictive for some religion. Several ceremonies and rituals must be performed for ubizo, and it is impractical to perform them while the individual is incarcerated.

The use of the phrase “whenever practicable” would depend on the facts of each case. Express reference to “places of worship” is consistent with the provision of a chapel or “space” for religious worship at every correctional center. A “place of worship”<sup>34</sup> is a structure where people congregate to worship, such as a church, synagogue, or mosque.<sup>35</sup> For purposes of this thesis, unless otherwise stated, places of worship include all places relevant to a believer’s religious convictions. Existing guidelines do not accommodate minority faiths (in this case,

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<sup>33</sup> Singh A & Maseko TW ‘The protection of prisoners’ rights to health care services in South African law: Is it adequate?’ (2006) 31 *Journal for Juridical Science* 80 81.

<sup>34</sup> A place of worship is not only limited to those highlighted above. Section 4(1) of the South African Charter of Religious Rights and Freedom states that ‘Every person has the right to private access to sacred places and burial sites relevant to their convictions. Such access, and the preservation of such places and sites, must be regulated within the law and with due regard for property rights’. Subject to the duty of reasonable accommodation and the need for SADCS to accommodate inmates with ubizo, prison cell can be used as a place of worship for inmates with ubizo.

<sup>35</sup> Whytock JC ‘The reformation of space for public worship: Past and present – Continuing the discussion’ (2018) 52(3) *In die Skriflig* 1 1.

inmates with ubizo) in the manner in which their ancestral religious rituals and ceremonies must be done. Some may argue that section 14(3) is prima facie evidence that the SADCS does not unfairly discriminate against any religion, citing provisions such as, “an inmate must be allowed freedom of conscience, religion, thought, belief, and opinion”, and “where possible, places of worship must be provided at each correctional facility for inmates of all religious denominations.”

In light of what has been said about mainstream and non-mainstream religions, it is argued that ubizo cannot be practised in the correctional facility. This is due to the nature of the ancestral rituals and ceremonies involved. Meanwhile mainstream religions can hold prayers or taking communion in a chapel or room in a correctional facility. This argument is predicated on the fact that the SADCS acknowledges the right to religious freedom and even supports its expression, for instance by offering a “place of worship” where religious songs or prayers (on behalf of mainstream religions) may be performed. Regarding the exclusion of non-mainstream religious liberties, such as ubizo, this is not the case. If mainstream religions may be accommodated but others cannot, the issue arises as to the degree to which inmates with ubizo are subject to unfair discrimination on the grounds of religion.

### 1.3 Significance of the Issue

Clearly, the SADCS may accommodate mainstream religion,<sup>36</sup> such as Christianity and Islam, by providing a place of worship, such as a chapel or prayer room, both of which are places inside the “correctional facility”. The same does not apply to minority or marginalised religions

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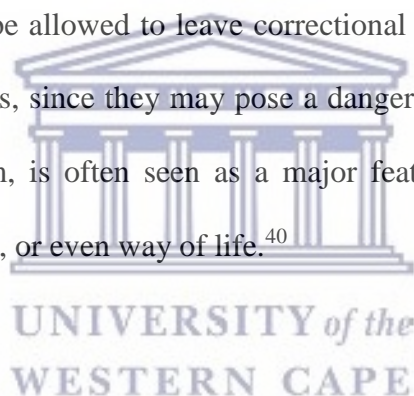
<sup>36</sup>For the purpose of this thesis, mainstream religions refers to a religion, where people, activities, or ideas are regarded as the most typical, normal, and conventional because they belong to the same group or system as the majority of others of their kind. See Van der Walt JL ‘Religion in education in South Africa: was social justice served?’ (2011) 31 *South African Journal of Education* 381 383.



such as Rastafarianism,<sup>37</sup> Animism,<sup>38</sup> or ATR with ubizo. To connect with and maintain touch with their ancestors, inmates with ubizo are compelled to conduct certain ancestral rituals.

There are ancestral ceremonies that cannot be performed in the SADCS because they include the slaughtering of animals and the use of alcohol.<sup>39</sup> These ancestral rituals need the presence of those from the outside, such as the individual's family and trainer. Providing a place to worship and burn traditional incense, as well as ubizo gatherings with other inmates, may be deemed a reasonable accommodation by the SADCS; however, this must vary depending on the circumstances of each case, since some criminals are aggressive. The offender's aggression and potential for damage may be used to justify denying the violent offender a reasonable accommodation.

Alternatively, inmates cannot be allowed to leave correctional institutions to engage in such ancestral rituals and ceremonies, since they may pose a danger to society. Religion, whether mainstream or non-mainstream, is often seen as a major feature of an individual's belief, conscience, philosophy, culture, or even way of life.<sup>40</sup>



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<sup>37</sup> Rastafarian is defined as a creed, movement, tradition, way of life or a phenomenon. See Chawane MH 'The Rastafarian Movement in South Africa: A Religion or Way of Life?' (2014) 27(2) *Journal for the Study of Religion* 214 216.

<sup>38</sup> Van Rheenen G define 'Animism as the belief that personal spiritual beings and impersonal spiritual forces have power over human affairs and that human beings must discover what forces are influencing them in order to determine future action and, frequently, to manipulate their power'. See Van Rheenen G 'Animism, Secularism and Theism: Developing a Tripartite Model for Understanding World Cultures' (1993) 10(4) *International Journal of frontier missions* 169 169.

<sup>39</sup> The case of *Prince v President of the Law Society, Cape of Good Hope* 2003 (3) BCLR 231 (CC) and *Smit NO and Others v King Goodwill Zwelithini Kabhekuzulu and Others* 2009 JDR 1361 (KZP), the right to exercise certain religious practices was limited in accordance with the Constitution. In the *Smit* case, animal activists opposed, what they contended was torture of an animal whilst it was still alive. They did not oppose the slaughter of the animal per se, but were fighting against the ritual of mutilating the bull while it is still alive. The limitation in *Prince's* case was imposed owing to the prohibition of cannabis usage, despite the fact that cannabis is part of Rastafarian faith practise.

<sup>40</sup> *MEC for Education: KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC), para 87.

Considering South Africa's prison overcrowding<sup>41</sup> in the context of fundamental human rights<sup>42</sup> as articulated in the BOR, the shortage and constraints of resources in SADCS generates conflict. On one hand, an inmate is referred to in the BOR as “everyone”. On the other hand, being an inmate is an exception to the aforementioned “everyone”, as the very act of incarceration following conviction and receipt of a custodial sentence has the effect of limiting the inmate's rights as such limitation is reasonable and justified under section 36 of the Constitution. How then can this fundamental tension be resolved? Is it resolvable? Is it viable or even practicable for the SADCS to provide adequate accommodations?

As an inmate, one is inevitably deprived of the ability to express or exercise some fundamental rights. The right to privacy under section 14 of the Constitution is an example. This is of particular significance in light of the practical problem of overcrowding inside the SADCS.<sup>43</sup>

Section 14 (3) of the CSA includes the phrase where practicable. What this implies will depend on the specifics of each situation. Nonetheless, it is also obvious from the aforementioned clause that freedom of religion is granted not just where practicable, but also in places of worship that must be provided in every correctional facility for inmates of all religious groups.

As an inmate, one is inevitably deprived of the ability to express or exercise some fundamental rights.

To my knowledge, very few, if any, publications have been published concerning inmates with ubizo inside the SADCS, despite the extensive literature on religious unfair discrimination in the workplace and society in general. From this standpoint, this study will explore and assess whether or not SADCS discriminates unfairly towards inmates with ubizo. A dissertation on

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<sup>41</sup> There is (30 112/110 836) which is 28% e of overcrowding in correctional facilities in excess of approved bed space capacity. See 2022/23 Annual Performance Plan.

<sup>42</sup> These fundamental rights include the rights to dignity, equality, and life, among others.

<sup>43</sup> See Murhula P ‘A Critical Analysis on Offenders Rehabilitation Approach in South Africa: A Review of the Literature’ (2019) 12 *African Journal of Criminology and Justice Studies* 21 43.



this topic would be new in that it would provide a greater understanding of the grounds upon which such inmates are unfairly discriminated against as well as examine the SADCS's practical alternatives for accommodating such inmates in consideration of their circumstances.

#### 1.4 Research question

The aim of this dissertation is to assess the rights to freedom of religion of inmates with ubizo within the SADCS. The Constitution, the CSA, and PEPUDA do provide the right to freedom of religion on the part of everyone. Conversely, they seek to address situations in which the right to freedom of religion (and the expression thereof) is violated in a manner that constitutes unfair discrimination. An obvious caveat thereto would be that the exercise of such rights cannot violate another person's rights in a manner that would be a violation of their fundamental rights or constitute unlawful conduct. ATR is a minority group of religion, and people with ubizo are part of the ATR. Since the SADCS caters essentially for mainstream religions (and the expression of the respective beliefs associated therewith) to the exclusion of minority religions, such as ubizo, inmates with ubizo are unfairly discriminated against. This raises the question of the extent to which the SADCS can (or ought to) reasonably accommodate ubizo as a religion.

Having regard to the aforesaid, ubizo is not a mainstream religion. Expression of religious freedoms on the part of inmates who are members of mainstream religions can be (and is) accommodated in the SADCS.<sup>44</sup> Marginalised religions followed by inmates who have ubizo (and the expression of their religious beliefs) cannot be accommodated as is the case with mainstream religions. This raises the issue of the extent to which inmates with ubizo are

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<sup>44</sup> An example is the chaplaincy in SADCS. It is associated with Christianity as it focuses more on praying, preaching and pastoral care. The primary purpose of Spiritual Care Service, which is a chaplaincy component, is to provide needs-based spiritual care services and programmes, in partnership with churches and their respective faiths. See Spiritual Care Policy (2007) 3. See [http://www.dcs.gov.za/?page\\_id=4320](http://www.dcs.gov.za/?page_id=4320) (accessed 23 November 2022).

unfairly discriminated against by the SADCS when precluded from exercising their religious freedom and how, if at all, the SADCS can reasonably accommodate such inmates.

### 1.5 Argument or answer

Unfair discrimination against any individual is a great concern. Section 15(1)<sup>45</sup> of the Constitution prohibits unfair religious discrimination (as read with sections 9<sup>46</sup> and 10<sup>47</sup> of the Constitution). Religion provides individuals with hope and faith, which may influence their conduct. During incarceration, inmates seek any kind of positive and constructive support. Regarding the aforementioned, religion provides a “lifeline” in a variety of ways. Since every religion influences its adherents’ behaviour, it is important to keep in mind religions (and the followers of a particular religion or religious faith) should be treated according to their respective needs.

The significance of this dissertation stems from unfair discrimination against minority religious groups. Since ubizo is also based on faith practise, it is appropriate to make accommodations for its adherents whenever possible.

The constitutional protection of religious freedom compels one to analyse and evaluate the rights of inmates with ubizo (as a minority religion) and then to question the degree to which the SADCS can reasonably accommodate inmates with ubizo, if at all.

### 1.6 Originality of argument (Literature Survey)

Academics in South Africa and abroad have debated religious freedom. In various contexts, they have addressed religious freedom issues. Freedom of religion as referred to in section

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<sup>45</sup> Right to freedom of religion and belief.

<sup>46</sup> Equality.

<sup>47</sup> Human dignity.

15(1) of the Constitution cannot be considered in isolation. Due account must be taken of the associated rights therein contained, namely belief, conscience, thought, belief and opinion.<sup>48</sup> Durkheim defines religion as “a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden – beliefs and practices which unite into one single moral community called a church, all those who adhere to them.”<sup>49</sup> SADCs treatment of inmates' with ubizo is unfair religious discrimination. South Africa has a long history of inequality and unfair discrimination, which unfortunately continues with the current socio-economic and political instability. Ubizo is a marginal religion, as mentioned. Equality jurisprudence has established that minority groups are entitled to the BOR's rights and freedoms. Furthermore, substantive equality requires us to acknowledge South Africa's inclusivity agenda in its ongoing transformation into an egalitarian nation.

Coertzen states that from 1962 to 1994 there was no freedom of religion in as much as either the government or the policies of the ruling party controlled the relation between church and state.<sup>50</sup> “Christian churches and other religions were tolerated and were subjected to the control of the government.”<sup>51</sup> Religious freedom and the exercise thereof are now subject only to the supremacy of the Constitution and the rule of law. Individuals must be permitted to exercise their right to religious freedom.

Mestry believes that the problem with the right to freedom of religion starts when single faith observance is forced through policy.<sup>52</sup> This results in the violation of the right to freedom of religion.<sup>53</sup> When a single mainstream religion is preferred over less dominant religious beliefs, it essentially renders the mainstream religion conceptually and notionally more superior than

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<sup>48</sup> Coertzen P ‘Freedom of religion in South Africa’ (2008) 29(2) *Verbum et Ecclesia* 345 365.

<sup>49</sup> Durkheim E *The elementary forms of the religious life* (1915) 47.

<sup>50</sup> Coertzen P ‘Freedom of religion in South Africa’ (2008) 365.

<sup>51</sup> Coertzen P ‘Freedom of religion in South Africa’ (2008) 365.

<sup>52</sup> Mestry R (2007) 65.

<sup>53</sup> Mestry R (2007) 65.

less dominant religions. Ubizo, as a minority religion, has been negatively affected by perceived misconceptions in that it is sometimes associated with witchcraft and dark magic.

Coertzen is of the opinion that South Africa clearly needs a fully recognized system of religious legal pluralities, a system that will take into account and truly recognize various religions.<sup>54</sup> He states, much work needs to be done within the religions of South Africa to ensure that their religious freedom is fully utilised'.<sup>55</sup> He further states:

“South Africa has never officially had an established religion, although it can be said that for many centuries Christianity was a privileged religion in the country.”<sup>56</sup> This changed in 1994, when freedom of religion became the privilege of all religions in the country.<sup>57</sup> “Both the state and the religions in South Africa must take it upon themselves to respect, protect, promote, and fulfil the rights and freedoms of all religions in the country.”<sup>58</sup>

Hence, the importance of addressing the issue of religious unfair discrimination against inmates with ubizo within the SADCs based on the general prohibition against unfair discrimination, but in particular where such unfair discrimination is directed at an already marginalized group.

Bogopa believes it is crucial for elders from different cultural backgrounds to teach their children about ancestral worship.<sup>59</sup> Oral tradition has been used to keep history alive. He emphasizes that children should be taught about the importance of their cultural traditions and encouraged to participate in ancestral ritual ceremonies.<sup>60</sup> Among the teachings, educational endeavours are needed to promote cultural tolerance, understanding, and respect among

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<sup>54</sup> Coertzen P ‘Constitution, Charter and religions in South Africa’ (2014) 14 *AHRLJ* 126 140.

<sup>55</sup> Coertzen P ‘Constitution, Charter and religions in South Africa’ (2014) 141.

<sup>56</sup> Coertzen P ‘Constitution, Charter and religions in South Africa’ (2014) 141.

<sup>57</sup> Coertzen P ‘Constitution, Charter and religions in South Africa’ (2014) 141.

<sup>58</sup> Coertzen P ‘Constitution, Charter and religions in South Africa’ (2014) 141.

<sup>58</sup> Coertzen P ‘Constitution, Charter and religions in South Africa’ (2014) 141.

<sup>59</sup> Bogopa D ‘Health and Ancestors: The Case of South Africa and Beyond’ (2010) 10 *Indo-Pacific Journal of Phenomenology* 1 6.

<sup>60</sup> Bogopa D (2010) 6.

different cultural groups.<sup>61</sup> Performing ancestral rituals and ancestor worshipping is part of ubizo; this calls for allowing inmates to have an ancestral worship place where they will be able to communicate with their ancestors.

Van der Vyver and Green both contend that, at a fundamental level, religion gives law its spirit and inspires its adherence to ritual, tradition, and justice.<sup>62</sup> Law and religion are interlinked since they both share similar ideas such as fault, obligation, covenant, ethics, and textual interpretation.<sup>63</sup> These two balance each other by counter - posing justice and mercy, rule and equity, discipline and love.<sup>64</sup> Without law, religion slowly slides into shallow spiritualism.<sup>65</sup> A minority religion such as ubizo needs assistance, as without the necessary assistance through the legal system (in terms of the constitutional and legislative regime, together with our courts), one's ability to express a particular religious belief would be compromised.

Du Plessis is of the opinion that the COVID-19 pandemic has made major and unprecedented challenges to human rights, especially the right to freedom of religion and belief.<sup>66</sup> During a public emergency, the right to freedom of religion can be limited indirectly by a declaration of a public emergency.<sup>67</sup> With reference to international instruments, the limitation may also arise from Article 18(3) of the International Covenant on Civil and Political Rights, which provides as follows:

“[F]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect

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<sup>61</sup> Bogopa D (2010) 7.

<sup>62</sup> Van der Vyver J.D and Green M.C ‘Law, religion and human rights in Africa: Introduction’ (2008) 08 *African Human Rights Law Journal* 337 355.

<sup>63</sup> Van der Vyver J.D and Green M.C (2008) 355.

<sup>64</sup> Van der Vyver J.D and Green M.C (2008) 355.

<sup>65</sup> Van der Vyver J.D and Green M.C (2008) 356.

<sup>66</sup> Du Plessis GA ‘COVID-19 and Limitations to the International Right to Freedom of Religion or Belief’ (2020) *Journal of Church and State* 1 29.

<sup>67</sup> Du Plessis GA (2020) 29.

public safety, order, health, or morals, or the fundamental rights and freedoms of others.”<sup>68</sup>

Section 14(3) of the CSA speaks about “where practicable, a place of worship must be provided”. Where practicable, it is highly unlikely for the SADCS to provide accommodations for people with ubizo to worship. Overcrowded correctional facilities with understaffed personnel, which also have budgetary constraints, are practical considerations that may preclude the SADCS from reasonably accommodating non-mainstream religions.

Even in emergencies, the authorities need to act in good faith, proportionally, and continuously attempt to respect fundamental human rights.<sup>69</sup> This limitation does not amount to a violation of the right to freedom of religion, as there is scientific evidence to support religious gatherings as a spreader of COVID-19 infections. The limitation is rational and reasonable, as the aim is to save human lives. The case of *Mohamed Others v The President of the Republic and Others*,<sup>70</sup> is significant in this regard. The High Court held that the Regulations had been implemented to limit the spread of the coronavirus. They were a rational measure adopted to achieve an objective that was a reasonable and justifiable limitation of the right to freedom of religion. The applicants argued that the Regulations prevented them from fulfilling their religious obligation of attending mosque for their five daily prayers, and sought an amendment to the Regulations to allow for movement between places of residence and places of worship. During the COVID-19 epidemic, the right to religious freedom of people living outside SADCS was also restricted due to the spread of COVID.

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<sup>68</sup> International Covenant on Civil and Political Rights, which was signed by South Africa as a member on 3 October 1994. See <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (accessed on 04 January 2022)

<sup>69</sup> Du Plessis GA (2020) 29.

<sup>70</sup> *Mohamed Others v The President of the Republic and Others* 2020 (7) BCLR 865.



Singh and Maseko contend that case law has played a significant role in ensuring that inmates are given the necessary protection for quality health care, as stated in the BOR.<sup>71</sup> The Constitution does protect the inmates' right to health care services; however, the lack of resources on the part of the state presents an impediment for inmates to fully enjoy such rights.<sup>72</sup> They state that what this in effect translates to is that while inmates can avail themselves of the protection afforded in terms of legislation; such protection is clearly not adequate.<sup>73</sup> The same can be said for those inmates with ubizo since the SADCS is lacking to accommodate them. However, the reality is that reasonable accommodation cannot be expected where it would be unreasonable or pose a risk to other inmates.<sup>74</sup> Therefore, the possibility of reasonable accommodation should not simply be ignored given the not unrealistic request of providing, for example, a place for inmates to burn traditional incense and communicate with their ancestors or allowing them to wear beads as an expression of their religious beliefs.

Muntingh argues that imprisonment poses risks to the rights of individuals and that the state has an obligation to promote and protect the rights of citizens as required by the Constitution.<sup>75</sup> Imprisonment poses a risk to the right to life, as the prison is a dangerous place. Through services and the general prison administration, the state has a positive duty to create opportunities for inmates to attain their full human potential.<sup>76</sup> A relationship between the state and the Constitution needs to be established to address failures on the government's side to provide the necessary services derived from the BOR and to implement the SADCS services fully.<sup>77</sup> Inmates have been left vulnerable and the rule of law abused by a lack of accountability

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<sup>71</sup> Singh A & Maseko TW 'The protection of prisoners' rights to health care services in South African law: Is it adequate?' (2006) 31(1) *Journal for Juridical Science* 80 98.

<sup>72</sup> Singh A & Maseko TW (2006) 98.

<sup>73</sup> Singh A & Maseko TW (2006) 98.

<sup>74</sup> Impossible things to do includes slaughtering of goat, inviting other people with ancestral calling to come and dance, having a family to attend such in the SADCS.

<sup>75</sup> Muntingh L 'Prison in the South African Constitutional Democracy' (2007) *The Centre for the Study of Violence and Reconciliation* 1 26.

<sup>76</sup> Muntingh L (2007) 26.

<sup>77</sup> Muntingh L (2007) 26.

and half-hearted attempts at accountability by the correctional service officials who violate the rights of inmates.<sup>78</sup>

There is a great urgency to strengthen accountability measures with respect to human rights violations against inmates.<sup>79</sup> The correctional service system must be compatible with a constitutional democracy, and they should retrain their staff to ensure that they are not only aware of all inmates' rights but that they are able, in their daily tasks, to promote and uphold such rights.<sup>80</sup> The training of both staff and inmates should be one of the priorities of the SADCS to ensure continuity and sustainability.<sup>81</sup>

Budgetary constraints are the major issue that the SADCS faces when it comes to accommodating the rights to freedom of religion. In *MEC for Education: Kwazulu-Natal and Others v Pillay*,<sup>82</sup> the Constitutional Court stated that “reasonable accommodation” requires that an employer take “positive measures”, even if it means incurring additional hardship or expenses, to ensure that all employees enjoy their right to equality. Although the ratio relates to employment law, the principle of reasonable accommodation is relevant for the purposes of this dissertation. Reasonable accommodation of the right to the expression of religious freedom on the part of inmates with ubizo poses challenges; however, the SADCS should make reasonable accommodation for such inmates where such accommodations are possible. The SADCS could, for example, use some of the cells as a place of worship.

Motlalekgoši states that correctional service authorities should ensure the respect, protection, and promotion of the inmates' rights to freedom of religion, belief, and opinion are consistent

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<sup>78</sup> Muntingh L (2007) 27.

<sup>79</sup> Muntingh L (2007) 27.

<sup>80</sup> Muntingh L (2007) 28.

<sup>81</sup> Muntingh L (2007) 28.

<sup>82</sup> *MEC for Education: KwaZulu Natal and Others v Pillay* 2008 (1) SA 474 (CC).



not only with the Constitution but also with international law and African continental law.<sup>83</sup> The exercise of this right by inmates must be without any prejudice or influence from the correctional service officials.<sup>84</sup> The correctional authorities and community at large have to deal with sensitive and complexity of the freedom of religion of inmates.<sup>85</sup> Recognition of this right will ensure that those incarcerated feel free to congregate, praise, and worship according to the beliefs of their choice.<sup>86</sup> The SADCS should allow them to perform ancestral rituals that involve burning traditional incense. Given grave nature of their crime, releasing inmates to do ancestral rituals may pose a danger to society and community at large. However, the SADCS can accommodate them and provide a place to use for such purposes.

The challenge of overcrowding and understaffing is considerable and something that the SADCS faces regularly, whilst also being obliged (in terms of the CSA) to protect and promote the right to freedom of religion.<sup>87</sup> This has an impact on the inmate's right to human dignity.<sup>88</sup> The inmate's right to freedom of religion is currently more of a pipe dream than a reality.<sup>89</sup> As result of insufficient space for religious practices,<sup>90</sup> the possibility of observing religious ancestral rituals on certain days is hindered,<sup>91</sup> and there are reportedly problems with regard to the types of meals suitable for members different faiths.<sup>92</sup>

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<sup>83</sup> Motlalekgosi HP 'Religious Freedom and the Law: A Reality or Pipe Dream for Prisoners in South Africa?' (2019) 32 *Journal for the Study of Religion* 1 20.

<sup>84</sup> Motlalekgosi HP (2019) 20.

<sup>85</sup> Motlalekgosi HP (2019) 20.

<sup>86</sup> Motlalekgosi HP (2019) 20.

<sup>87</sup> Motlalekgosi HP (2019) 21.

<sup>88</sup> Motlalekgosi HP (2019) 21.

<sup>89</sup> Motlalekgosi HP (2019) 21.

<sup>90</sup> [www.achpr.org/files/sessions/37th/missionreports/prisons2004/misrep\\_specmec\\_priso\\_southafrica\\_2004\\_eng.pdf](http://www.achpr.org/files/sessions/37th/missionreports/prisons2004/misrep_specmec_priso_southafrica_2004_eng.pdf). (accessed on 16 January 2022).

<sup>91</sup> A/HRC/10/8/Add 2, para. 53.

<sup>92</sup> A/HRC/4/21/Add 1, para 23 and 58-60, and A/HRC/10/8/Add 2, para. 53.

Amoah and Bennett are of the opinion that the Zionist church synthesized elements of both Christianity and traditional religions.<sup>93</sup> Inculturation<sup>94</sup> is an indirect method for protecting traditional African life and beliefs from proselytization by Western counterparts.<sup>95</sup> Absolute protection of the right to freedom of religion has some challenges in practice as it prioritizes some religions over others.<sup>96</sup> Ubuntu can manifest itself through Christianity; some people have a gift or are called to be prophets. This shows that both religions can be manifested in one person at the same time. Different ancestral rituals and ceremonies have to be performed. Both of these religions have an element of ethics and obedience as central tenets of faith.

Mofokeng believes that “the courts have failed in their duty to protect the different rights of people to practice their religion by not recognising that the right to freedom of religion does not only include mental aspects of belief but also freedom to practice and have legal protection of the rules of their religion.”<sup>97</sup> The courts’ alleged stance in favour of mainstream religions like Christianity indicates unfair discrimination against other religions.<sup>98</sup> For example, inmates who practise Christianity get support in the form of prison ministry and bible distribution while incarcerated, and this is considered a rehabilitation programme.<sup>99</sup>

Mndende is of the opinion that religion in South Africa is still prejudiced against African tradition.<sup>100</sup> Thousands of missionary churches have been opened to demonise ancestors.<sup>101</sup> In support thereof, the following observation is made: “colonial heritage is still dictating the

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<sup>93</sup> Amoah J and Bennett T ‘The freedoms of religion and culture under the South African Constitution: Do traditional African religions enjoy equal treatment?’ (2008) 8 *African Human Rights Law Journal* 357 373.

<sup>94</sup> In Christianity, inculturation is the adaptation of Christian teachings and practices to cultures.

<sup>95</sup> Amoah J and Bennett T (2008) 373.

<sup>96</sup> Amoah J and Bennett T (2008) 374.

<sup>97</sup> Mofokeng LL ‘The right to freedom of religion: an apparently misunderstood aspect of legal diversity in South Africa’ 2007 *Law Democracy and Development* 121 130.

<sup>98</sup> Mofokeng LL (2007) 130.

<sup>99</sup> Found by Grace Prison Fellowship South Africa. See <https://foundbygrace.co.za> (accessed on 23 November 2023)

<sup>100</sup> Mndende N ‘Law and religion in South Africa: An African traditional perspective’ (2013) 4 *Icamagu Insitute* 74 82.

<sup>101</sup> Mndende N (2013) 82.

relationship between law and religion as far as ATR is concerned.”<sup>102</sup> The prejudice exists for ATR. More specifically, ubizo, which is sometimes stigmatized as being demonised, and allegations are made that people with ubizo are considered to worship demons, as some people believe the dead cannot speak.

Du Preez makes the point that the most important challenge for imprisoned women is to deal with their loss of freedom and the guilt of leaving their children behind.<sup>103</sup> To deal with these feelings, most of the women rely on religion to cope, as their spirituality provides a form of upliftment, which in turn gives them a sense of belonging.<sup>104</sup> This shows that religion has a way of reviving the spirit and giving hope to those who are vulnerable. Inmates with ubizo also need to be accommodated by being allowed to burn traditional incense and communicate with ancestors to uplift their spirits.

Henrico asserts the need for the democratic dispensation to go further than merely tolerating those that are different; there is a need to celebrate our differences in a pluralistic society.<sup>105</sup> The concept of tolerance needs to be addressed in order to treat everyone with respect, irrespective of his or her religious beliefs.<sup>106</sup>

Henrico believes that different opinions about religion and belief will always exist, and what matters is the way in which those differences are dealt with.<sup>107</sup> Harmony and peace should coexist in a larger society or workplace.<sup>108</sup> “Religious beliefs, differences, and diverseness must be accommodated under the broader expansive notion of celebration rather than mere

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<sup>102</sup> Mndende N (2013) 82.

<sup>103</sup> Du Preez N ‘Spiritual Care of Women in South African Prison: Historical Development and Current Situation’ (2008) 34 *Studia Historiae Ecclesiasticae* 191 205.

<sup>104</sup> Du Preez N (2008) 205.

<sup>105</sup> Henrico R ‘Revisiting a Culture of Tolerance Relating to Religious Unfair Discrimination in South Africa (Part 1)’ (2017) *Obiter* 229 241.

<sup>106</sup> Henrico R (2017) 241.

<sup>107</sup> Henrico R ‘Revisiting a Culture of Tolerance Relating to Religious Unfair Discrimination in South Africa (Part 2)’ (2017) *Obiter* 574 587.

<sup>108</sup> Henrico R (2017) 587.

toleration.”<sup>109</sup> Ubizo should be celebrated as a belief. People with ubizo should not feel like they are tolerated. The lack of accommodations in the correctional service shows this tolerance.

Maluleka believes that “traditional healing still remains marginalised, and healers are working on their own outside the country’s healthcare system.”<sup>110</sup> Western medicine practitioners often undermine traditional healers’ work.<sup>111</sup> The country’s health care system should accommodate traditional healers, and the government should intervene to ensure that healers are formally incorporated into the system.<sup>112</sup> The government should implement and enforce any laws that were passed on behalf of traditional healers.<sup>113</sup> Regulating traditional healers will assist in eliminating any bogus traditional healers from operating in the country.<sup>114</sup>

Awolalu believes that non-Africans would find it difficult to study ATRs.<sup>115</sup> Ubizo is deeply rooted, as it is more associated with culture. Understating it is difficult, and this lack of understanding often contributes to a violation of the religious rights in instances where a correctional service official treats the inmate unfairly. Conducting more training and raising awareness about minority religions is the most imperative objective. In this respect, while much literature has been written on religious unfair discrimination in general or in the workplace, this dissertation seeks to make a novel contribution to equality jurisprudence.

Beyers is of the opinion that religion is universal and that it is expressed contextually according to local culture.<sup>116</sup> A broader scope for understanding religion should include an African point

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<sup>109</sup> Henrico R (2017) 588.

<sup>110</sup> Maluleka JJ ‘The status of traditional healing in the Limpopo province of South Africa’ (2020) 76(4) *Theological Studies* 1 11.

<sup>111</sup> Maluleka JJ (2020) 11.

<sup>112</sup> Maluleka JJ (2020) 11.

<sup>113</sup> Maluleka JJ (2020) 12.

<sup>114</sup> Maluleka JJ (2020) 12.

<sup>115</sup> Awolalu JO ‘What is African Traditional Religion?’ (1976) 10(2) *Studies in Comparative Religion* 1 10.

<sup>116</sup> Beyers J ‘What is religion? An African understanding’ (2009) 66(1) *HTS Teologiese Studies/ Theological Studies* 1 7.

of view.<sup>117</sup> African understanding of religion emphasises a holistic approach to understanding unity and social values.<sup>118</sup> These elements are found in other religions and faiths, and this shows that the African religion is not an exclusive religion. People with ubizo have to be trained to become competent traditional healers. As part of training, one must endure the stress of control from the principal, where social values such as respect and honesty are also taught.

## 1.7 Chapter Outline

Chapter one serves as the introduction, setting out the problem statement, research aim, research methodology, and chapter outlines.

Chapter two deals with the background of ubizo as a non-mainstream religion in South Africa.

Chapter three deals with the relevant Constitutional and legislative framework and case authority in South Africa pertaining to the right to religious freedom (and the expression thereof) on the part of inmates in the SADCS.

Chapter four deals with the unfair discrimination against inmates with ubizo within the SADCS with a view to determining the extent, if any, to which the SADCS can be said to be under a duty to reasonably accommodate inmates with ubizo and the expression of their religious beliefs.

Chapter five will be the conclusion and the recommendations.

## 1.8 Methodology

This study will be based on desktop research, drawing on primary (constitutional and legislative) and secondary sources (peer-reviewed journal articles, books, book chapters,

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<sup>117</sup> Beyers J (2009) 7.

<sup>118</sup> Beyers J (2009) 7.

unpublished theses, newspaper reports, and sources obtained from the internet) to critically analyse and discuss the right to freedom of religion of inmates with ubizo in the SADCS. Case law is analysed to determine how the courts have dealt with the right to freedom of religion with respect to inmates.

## CHAPTER TWO

### BACKGROUND OF UBIZO AS A NON – MAINSTREAM RELIGION IN SOUTH AFRICA

#### 2.1 Introduction

This chapter will address the meaning of “ubizo” as well as its implications. Since ubizo is a spiritual journey, a link will be made between it and ATR. The signs and symptoms of ubizo are emphasised and addressed to illustrate the difficulties that ubizo individuals encounter. In addition, this chapter will explore ukuthwasa (training) and the relationship between ubizo, ukuthwasa, and traditional healers. The methods and ancestral rituals that must be undertaken will be emphasised in order to determine if the SADCS has the resources to accommodate and properly care for inmates with ubizo.

#### 2.2 What is ubizo?

Ubizo refers to a person's calling to become an initiate or novice in order to learn and become a traditional healer.<sup>119</sup> It is advised that the summoned individual and their family members seek confirmation or denial of ubizo from a number of traditional healers, since the summoned

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<sup>119</sup>Ensink K & Robertson B 'Indigenous Categories of Distress and Dysfunction in South African Xhosa Children and Adolescents as Described by Indigenous Healers' (1996) 33 *Transcultural Psychiatric Research Review* 137 149.



individual often resists the diagnosis.<sup>120</sup> Since training and treatment are time-consuming, rigorous, and expensive<sup>121</sup>, the majority of individuals who are called reject ubizo.<sup>122</sup> Not only the patient but also the patient's family members must accept the results, since their participation in treatment and training will be crucial.<sup>123</sup> Ubizo is a spiritual journey, thus the ancestors only bestow it on a chosen individuals.<sup>124</sup>

Diviners believe that a person will be doomed to ill health and misfortune if they do not follow their true calling.<sup>125</sup> However, as the individual embraced ubizo, the illnesses and symptoms diminished.<sup>126</sup> Ubizo may be uncomfortable since it alters the energy balance of each individual, necessitating a shift or transition.<sup>127</sup> However, the process of adopting ubizo and becoming a traditional healer results in the individual's healing.<sup>128</sup>



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<sup>120</sup>Ensink K & Robertson B 'Indigenous Categories of Distress and Dysfunction in South African Xhosa Children and Adolescents as Described by Indigenous Healers' (1996) 33 *Transcultural Psychiatric Research Review* 137 149.

<sup>121</sup> Time is involved since the seeker must visit and spend considerable time with the diviner. The initiate is given extensive instruction to enable him or her to comprehend ancestor communications. They also study various herbs and their therapeutic uses. See Ogana W & Ojong VB 'A Study of Literature on the Essence of Ubungoma (Divination) and Conceptions of Gender among Izangoma (Diviners)' (2015) 28(1) *Journal for the Study of Religion* 52 59.

<sup>122</sup> The money will be used to buy things like traditional outfits, beads, goats, and animals for the big finale event. For the diviner to train the initiate, he or she must be compensated or given live cattle as payment. See Edwards SD 'A Psychology of Indigenous Healing in Southern Africa' (2011) 21(3) *Journal of Psychology in Africa* 335 340.

<sup>123</sup> Edwards SD 'A Psychology of Indigenous Healing in Southern Africa' (2011) 21(3) *Journal of Psychology in Africa* 335 342.

<sup>124</sup> Edwards SD 'A Psychology of Indigenous Healing in Southern Africa' (2011) 21(3) *Journal of Psychology in Africa* 335 338.

<sup>125</sup> Moagi L 'Transformation of the South African health care system with regard to African traditional healers: The social effects of inclusion and regulation' (2009) 4 (4) *International NGO Journal* 116 118.

<sup>126</sup> Van der Watt ASJ, Biederman SV, Abdulmalik JO, Mbanga I, Das-Brailsford P & Seedat S 'Becoming a Xhosa traditional healer: The calling, illness, conflict and belonging' (2021) 27 *South African Journal of Psychiatry* 1 4.

<sup>127</sup> Van der Watt ASJ, Biederman SV, *et al* (2021) 5.

<sup>128</sup> Van der Watt ASJ, Biederman SV, *et al* (2021) 5.

### 2.3 The connection between ATR and ubizo

ATR refers to the indigenous religious beliefs and practices of the African people. The religion developed from the enduring faith of modern-day Africans and a huge percentage of Africans of all shades and tenors adhere to it.<sup>129</sup>

In order to connect with and appease the ancestors, adherents of ATR perform ancestral rituals and organise celebrations. ATR is predicated on the notion of impersonal<sup>130</sup> power.<sup>131</sup> Africans see ancestors as mediators between God and the living,<sup>132</sup> and they believe ancestral ceremonies facilitate connection with ancestors. ATR is in the genre of primitive religion.<sup>133</sup> Primitive religions are characterised by their relative isolation from other civilizations throughout their evolution.<sup>134</sup> Isolation is a consequence of Western religion's unfamiliarity with and prejudice against ATR, which leads to unfair discrimination against such religion.

Ubizo is part of ATR, since the ancestors call ubizo-bearing individuals to it. ATR is characterised by ceremonies and ancestral rituals, which are performed when someone embraces ubizo. When slaughtering a goat or cattle for sacrifice in ceremonies and ancestral rituals, it is crucial that the goat or cattle be speared so that it bellows in its final moments.<sup>135</sup> The bellowing of the sacrificed animal indicates that the ancestors approve.<sup>136</sup> If the sacrifice animal failed to bellow, the ritual would be halted until the cause is determined. The distinction

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<sup>129</sup> Awolalu JO (1976) 1.

<sup>130</sup> Impersonal powers are supernatural powers, which can control everyday events. See Walsh G *'The Role of Religion in History'* (1998) 10.

<sup>131</sup> Beyers J (2009) 3.

<sup>132</sup> Mndende N *'African Religion and Religion Education'* (unpublished Masters of Arts thesis, University of Cape Town, 1994) 18.

<sup>133</sup> Beyers J (2009) 1.

<sup>134</sup> Beyers J (2009) 1.

<sup>135</sup> Gumede MV *Traditional Healers: A Medical Doctor's Perspective* (1990) 62.

<sup>136</sup> Gumede MV (1990) 62.



between ATR and ubizo rituals is that ATR rituals are done for the whole family, whereas ubizo rituals are performed for the chosen individual.

#### 2.4 Signs and symptoms of ubizo

It may present itself in several bizarre ways, including anxiety, fear, mental confusion, auditory and visual hallucinations, delusions, mood swings, and social isolation. The person may show antisocial<sup>137</sup> features, which may result in the commission of several crimes or even a western medical diagnosis of mental illness. Using the “harm principle” of John Stuart Mill, one may claim that the development of antisocial qualities makes the religion violent.<sup>138</sup> “The only justifiable reason to exert authority against the will of a member of a civilized society is to prevent harm to others.”<sup>139</sup> The harm principle of Mills will enable inmates with ubizo to be denied the ability to exercise their religion if doing so poses a threat to the civilised society.

While this may seem to be the truth, the behaviour in question occurs only when ubizo has not been embraced; if ubizo is accepted, the individual's behaviour changes because it was the cause of the ancestors' wrath against individuals.<sup>140</sup> If committing a crime was a result of refusing to accept ubizo, then this action becomes positive with acceptance. The individual's character changes from criminal to law-abiding after accepting ubizo. This implies that if a person was committing a crime due to a delay or refusal to accept ubizo, their behaviour would change and they would no longer be a problem in society; nevertheless, the issue would continue if they refused to embrace ubizo.

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<sup>137</sup> Anti-social behaviour is characterised by delusions, hallucinations, disorganised speech, and a disorganised or abnormal lifestyle, such as engaging in activities that violate social norms. See Buhrmann MV *Living in two worlds: Communication between a white healer and her black counterparts* (1986) 35.

<sup>138</sup> Mill's 'harm principle', states that people should be free to act however, they wish unless their actions cause harm to others. It states further, that the government may infringe on one person's freedom only to prevent harm to another. See Holtug N 'The Harm Principle' (2002) 5(4) *Ethical Theory and Moral Practice* 357 362.

<sup>139</sup> Ripstein A 'Beyond the Harm Principle' (2006)34 *Philosophy & Public Affairs* 215 216. <http://www.jstor.org/stable/3876391> (accessed 10 September 2022).

<sup>140</sup> Van der Watt ASJ, Biederman SV, *et al* (2021) 4.

Ubizo is a gift from the ancestors, and it chooses the individual since not everyone is chosen. The chosen individual must accept the task or suffer grave penalties such as bad luck, prolonged sickness, and hallucinations.<sup>141</sup> The symptoms of ubizo include agitation, maltreatment, anger, and violence.<sup>142</sup> Due to the similarity between the signs and symptoms of ubizo and those of anxiety, depression, and personality disorders, medical and mental health professionals commonly misdiagnose it.<sup>143</sup>

Africans would always consult a diviner when experiencing hallucinations, despair, weird voices, or images of non-existent things.<sup>144</sup> If the requests of the ancestor are not honoured, the candidate will never obtain peace.<sup>145</sup> The selected person will not achieve peace until he or she has accepted ubizo and performed ancestral rituals and ceremonies. Instead of selecting a career, traditional healers are summoned into divination by their ancestors, sometimes known as the “living dead”<sup>146</sup>.<sup>147</sup>

Ancestors are compassionate “living-dead” spirits with blood links to people who believe in them.<sup>148</sup> In general, the ancestors' attitude toward the living is parental, protective, corrective, and concerned with the group's well-being.<sup>149</sup> However, their authority and power are much superior to those of the living since their acts and innermost thoughts are constantly

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<sup>141</sup> Ogana W & Ojong VB 'A Study of Literature on the Essence of Ubungoma (Divination) and Conceptions of Gender among Izangoma (Diviners)' (2015) 28(1) *Journal for the Study of Religion* 52 60.

<sup>142</sup> Ogana W & Ojong VB 'A Study of Literature on the Essence of Ubungoma (Divination) and Conceptions of Gender among Izangoma (Diviners)' (2015) 60.

<sup>143</sup> Bührmann MV & Gqomfa JN 'The Xhosa Healers of Southern Africa – The Songs Sung in a Healing Ceremony' (1981) 26 *Journal of Analytical Psychology* 297 298.

<sup>144</sup> Burhmann MV *Living in two worlds: Communication between a white healer and her black counterparts* (1986) 34.

<sup>145</sup> Buhrmann MV (1986) 34.

<sup>146</sup> Etuk refers to the 'living dead' as ancestors because he believes they are always there and close by, with just a thin veil separating them from the living. Mbiti refers to them as the 'living dead' who keep constant and healthy communion with the living. See Ukwamedua NU 'The Ontological Status of 'The Living Dead' in Post Modern African: A Discourse in Existential Metaphysics (2018) 19(1) *Unizik Journal of Arts and Humanities* 24 26.

<sup>147</sup> Ogana W & Ojong VB 'A Study of Literature on the Essence of Ubungoma (Divination) and Conceptions of Gender among Izangoma (Diviners)' (2015) 59.

<sup>148</sup> Mokgobi M (2014) 2.

<sup>149</sup> Hammond-Tooke WD *The Bantu-speaking Peoples of Southern Africa* 2 ed (1974) 331.

monitored.<sup>150</sup> ATR is the source of ubizo's background since it is related to ancestors (the fundamentals of conducting ubizo rituals<sup>151</sup> and ceremonies are derived from ATR processes.<sup>152</sup> People undertake exceptional deeds during ancestral ceremonies<sup>153</sup>.<sup>154</sup> All of the spoken words, chants, and incantations that accompany a ceremony have magical power.<sup>155</sup>

Diviners<sup>156</sup> believe that disregarding the summons would result in misfortune and severe illnesses.<sup>157</sup> Diviners are first possessed by ancestor spirits, who make their presence known by causing grave ailments on their hosts, which are best comprehended by other traditional healers skilled in the art of divination.<sup>158</sup> Resisting the calling may result in persistent ailments that cannot be cured by western medicine unless the individual accepts and conducts ancestral ceremonies to accept the ubizo.<sup>159</sup> The patient must be initiated and conduct ancestral rituals and ceremonies in order to explain the ancestors' message in a language that everyone can comprehend, all while the delusion is being cured by accepting ubizo.<sup>160</sup> The anger of ancestors might result in a lifetime of chaos and unhappiness for the living.

The illness may include schizophrenia and psychosis, as well as frequent visits from one's ancestors and apparitions directing a person in their dreams to become a traditional healer.<sup>161</sup>

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<sup>150</sup> Hammond-Tooke WD *The Bantu-speaking Peoples of Southern Africa* 2 ed (1974) 331.

<sup>151</sup> These includes processes on slaughtering of goat and cow.

<sup>152</sup> Because there is, a close relationship between these two, ubizo derives some of its processes for conducting ceremonies and rituals from ATR processes.

<sup>153</sup> Hooke defines a ritual as 'a system of actions performed in a fixed way, at regular time, by an authorised person who possessed the specialised knowledge of how these actions should be carried out'.

<sup>154</sup> Hooke SH *Middle Eastern Mythology* (1963) 12. The rituals include slaughtering of goat and cow, dancing, and chanting to the ancestors when the ceremony is conducted.

<sup>155</sup> Hooke SH (1963) 12.

<sup>156</sup> For the purpose of this thesis, a Diviner is a traditional healer who has been possessed by ancestral calling and have ubizo. Later graduated from ubizo by performing all the ceremonies and rituals needed to become a completed traditional healer. See Ogana W & Ojong VB 'A Study of Literature on the Essence of Ubungoma (Divination) and Conceptions of Gender among Izangoma (Diviners)' (2015) 28(1) *Journal for the Study of Religion* 52 53.

<sup>157</sup> Moagi L (2009) 118.

<sup>158</sup> Ogana W & Ojong VB 'A Study of Literature on the Essence of Ubungoma (Divination) and Conceptions of Gender among Izangoma (Diviners)' (2015) 59.

<sup>159</sup> Moagi L (2009) 118.

<sup>160</sup> Mbiti JS *African Religious and Philosophy* 2 ed (1990) 82.

<sup>161</sup> Mokgobi M (2014) 6.

As a punishment for poor conduct that is detrimental to the family, tribe, and ancestor spirits' memories, ancestral spirits may induce sickness.<sup>162</sup> Mental illness was either a punishment for crimes of action and omission or a painful reminder to give Caesar what is Caesar's.<sup>163</sup> In addition, when ancestors try to communicate with the selected individual via visual and aural hallucinations, the individual cannot comprehend since he or she has not been initiated into the ancestral ceremonies.<sup>164</sup> A diviner evaluates the validity of such callings and provides guidance on who should be instructed by a qualified trainer.<sup>165</sup>

Depending on the tribe, some ubizo rituals might last for years. For Zulus, Swati's, and Sotho, the ubizo journey might last up to six months; however, for Xhosas, becoming a fully certified traditional healer can take at least three years.<sup>166</sup>

## 2.5 Ukuthwasa<sup>167</sup> (training)

Due to the several initiations that must be properly completed, the ukuthwasa (training) procedure is complex and difficult. The trainees undergo rigorous training and acquire a range of talents, such as how to use herbs for healing and other, more mystical abilities, such as locating hidden items without knowing their location. During training, the trainee is forced to live with his or her trainer, the trainer's family, and other trainees, and is thus continuously assessed by the trainer.<sup>168</sup> Due to their incarceration, inmates with ubizo will not be able to stay with the diviner/trainer. Nevertheless, a weekly visit will be enough given their circumstances.

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<sup>162</sup> Mbiti JS (1990) 83.

<sup>163</sup> Kim S *Decolonizing Methodologies Research and Indigenous Peoples* 2 ed (2000) 195.

<sup>164</sup> Mamba S *Human development* (2003) 5

<sup>165</sup> Mokgobi M (2014) 6.

<sup>166</sup> Mokgobi M (2014) 6. 'For certain categories of traditional African healers such as diviners, training is a formal and meticulous process that can take between months and years depending on how fast the trainee learns the trade'.

<sup>167</sup> Moagi L 'Transformation of the South African health care system with regard to African traditional healers: The social effects of inclusion and regulation' (2009) 4(4) *International NGO Journal* 116-126 118.

<sup>168</sup> Mokgobi M (2014) 7.

In addition, the training includes instruction on how to use therapeutic herbs and animal extracts, analyse and interpret dreams, and connect with ancestors.<sup>169</sup> This journey necessitates the performance of specific ancestral ceremonies, including the slaughtering of animals. While some tribes begin by slaughtering chickens, others slaughter goats first. During the rituals, individual and family members, community members, diviners, and initiates slaughter the goat in the kraal. Before the goat may be slaughtered, it must bellow; if it does not, the procedure may be halted since the ancestors are not happy.<sup>170</sup> The bellows of the sacrifice goat and cow/bull both signify the same thing, since both halt the ritual if neither bellows.

## 2.6 The link between ubizo, ukuthwasa (training), and traditional healers

To understand ubizo and its consequences, one must first understand the path one must follow to become a traditional healer. Using the relationship between ubizo, ukuthwasa, and traditional healers, the journey will be evaluated. The initiate undergoes training to learn how to divine and cure others after receiving ubizo. The training approach is called ukuthwasa, which translates to “rebirth” and refers to a “coming out” or “emerging”, similar to the arrival of the new moon.<sup>171</sup> An individual with ubizo embarks on a spiritual journey.

The ancestors determine the length of the training, since the learner will be guided throughout the journey.<sup>172</sup> When the initiate accepts the summons, traditional beer must be prepared, and the family patriarch will help place beads on the initiate's body. Beads are strung from the head to the toes. The beads should not be removed until the initiate has completed all ceremonies

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<sup>169</sup> Mokgobi M (2014) 7.

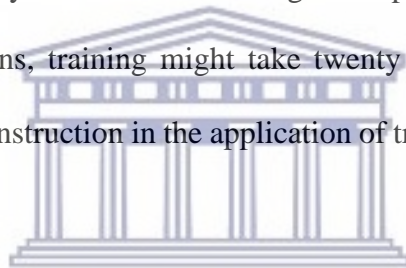
<sup>170</sup> Gumede MV *Traditional Healers: A Medical Doctor's Perspective* (1990) 62.

<sup>171</sup> Ogana W & Ojong VB (2015) 59.

<sup>172</sup> Moagi L ‘Transformation of the South African health care system with regard to African traditional healers: The social effects of inclusion and regulation’ (2009) 4 (4) *International NGO Journal* 116-126 118.

and ancestral rituals, since they signify that the individual has accepted the calling. When the person graduates<sup>173</sup> and becomes a traditional healer, the beads may be removed.

There is customary attire that the initiate must wear, and it is selected by the initiate's ancestor-inspired dreams. The bead colours that initiates wear vary from person to person because the ancestors reveal the colours of the beads to the individual (or initiate) in their dreams. To be taught the way ahead, the person will begin to utilise medicines and connect with ancestors. The instructor must interpret each individual's dreams, since they may disclose how the rituals should be performed. Ceremonies vary per tribe and according to ancestral instruction. Generally, the procedure for Zulu's, Tswana's, Sotho's, and Swati's takes between four and six months, although it takes years for Xhosa's. The timing varies per tribe, and the way in which the rites are done differs by individual.<sup>174</sup> Through each phase, ancestor-inspired dreams guide them. In certain situations, training might take twenty years or more; in rare cases, learners can obtain substantial instruction in the application of traditional medicine in a shorter period.



Each initiate must follow the ukuthwasa- (training) procedure's steps. The steps consist of introducing the client to the ancestral realm, articulating spirits, studying traditional medicine and healing, and reintegrating the client into the community.<sup>175</sup> The difference between these phases is that at the first step, the initiate is taught the language and dress code used throughout the initiation. In the second level, the initiate is purified to enable direct communication with the ancestors and the interpretation of their teachings.<sup>176</sup> This step requires purification so that

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<sup>173</sup>Graduation signifies the end of the process to become a traditional healer. Accepting ubizo, executing all rituals, and being returned to your house by the diviner as a fully fledged traditional healer are all part of the process. See van der Zeijst M, Veling W, Makhathini EM, Susser E, Burns JK, Hoek HW & Susser I 'Ancestral calling, traditional health practitioner training and mental illness: An ethnographic study from rural KwaZulu-Natal, South Africa' (2021) 58(4) *Transcultural psychiatry* 471-480.

<sup>174</sup> See 143 above.

<sup>175</sup> Buhrmann MV (1986) 87.

<sup>176</sup> Buhrmann MV (1986) 87.



the initiate may disclose the client's aspirations when they seek treatment. The third phase involves learning about traditional medicine and treating patients.<sup>177</sup> The diviner will educate the initiate on how to heal clients using traditional medicine, and the initiates' ancestors will come to them in their dreams to instruct them on which medicines to utilise. The diviner provides around 30% of traditional medicine, while the remaining amount is derived from the advice of the ancestors.<sup>178</sup> The diviner serves as a liaison between the ancestors and impacted customers.<sup>179</sup> The presence of ancestors might lead to chaos and sadness among the living. In the fourth step, the client is returned to his or her family and community, where communication and social integration will be simpler.<sup>180</sup>

The learner becomes a traditional healer upon completion of ukuthwasa (training), enabling him or her to consult and heal without the trainer's aid. A “traditional healer” in South Africa is someone who can receive spiritual instruction from the ancestral realm.<sup>181</sup> The community in which he or she resides as competent to provide health care using animal or mineral substances and other specific methods based on the community's social, cultural, and religious backgrounds, as well as prevalent knowledge, attitudes, and beliefs regarding physical, mental, and social well-being and sickness causation recognises a traditional healer.<sup>182</sup>

Traditional healers are summoned by their ancestors in their dreams and given training instructions.<sup>183</sup> Traditional healers are distinct from medical physicians and are not a homogeneous group.<sup>184</sup> To become a traditional healer, one must receive a specific calling from

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<sup>177</sup> Buhrmann MV (1986) 87.

<sup>178</sup> Buhrmann MV (1986) 88.

<sup>179</sup> Buhrmann MV (1986) 25.

<sup>180</sup> Buhrmann MV (1986) 87.

<sup>181</sup> Moagi L ‘Transformation of the South African health care system with regard to African traditional healers: The social effects of inclusion and regulation’ (2009) 4(4) *International NGO Journal* 116 116.

<sup>182</sup> Moagi L (2009) 117.

<sup>183</sup> Moagi L (2009) 117.

<sup>184</sup> Mokgobi M (2014) 5.

the ancestors, since they do not call everyone.<sup>185</sup> Ubizo, ukuthwasa (training), and traditional healers are interconnected in such a way that an individual cannot become a traditional healer without being called to ukuthwasa. The individual will be able to recover from sickness and other misfortunes only after accepting ubizo and completing all of the ancestral rituals and ceremonies necessary to become a traditional healer.

## 2.7 Conclusion

In conclusion, this chapter has provided an insight into ubizo and the individual's journey. The ubizo symptoms are described in order to illustrate the challenges the patient encountered while suffering with ubizo. The training steps have been discussed in order to highlight the journey that ubizo patients undertake.

Ubizo is a spiritual journey that affects an individual's life since the ancestors' anger may cause bad luck and serious illnesses that cannot be treated with western medicine. Some diseases make an individual appear psychotic and violent, which may be alleviated if they accept ubizo. After receiving ubizo, the person must undergo a series of ancestral rituals and ceremonies. After completing the ukuthwasa training program, the person will no longer be obliged to wear beads as a certified traditional healer.

The stages of symptoms and training are challenging since they must be completed for the person to be completely healed. These hurdles exist even for those who are not incarcerated; thus, there are extra obstacles or gaps for the incarcerated individual. The issues faced by inmates with ubizo have prompted a reconsideration of the legal framework's approach, which will be defined in the next chapter.

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<sup>185</sup> Mokgobi M (2014) 6.



## CHAPTER 3

### THE RELEVANT CONSTITUTIONAL, LEGISLATIVE, AND CASE LAW AUTHORITY IN SOUTH AFRICA

#### 3.1 Introduction

The following chapter discusses the relevant constitutional, legislative, and case law frameworks in South Africa related to religion freedom (and its expression) for SADCS inmates. The Constitution, case law, and legislative frameworks interpret and implement the law in South Africa's legal system. Inmates enter the correctional system with diverse religious and philosophical convictions. Considerations such as equality,<sup>186</sup> human dignity,<sup>187</sup> and the right to freedom of religion<sup>188</sup> will be brought up as material components (aspects) when addressing unfair discrimination in the context of constitutional, legislative, and judicial powers. The limitation<sup>189</sup> of the right to religious freedom will be explored in order to ascertain its effect on ubizo inmates. In addition, the chapter will examine pertinent laws and case law concerning unfair discrimination in order to determine if inmates with ubizo are subject to unfair discrimination. Due to the scarcity of data on inmates with ubizo in other countries, this study is limited to South Africa. The laws and precedent cases will assist in answering the research questions in this paper.

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<sup>186</sup> Section 9 of the Constitution.

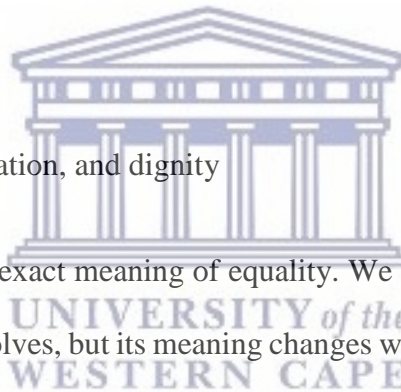
<sup>187</sup> Section 10 of the Constitution.

<sup>188</sup> Section 15 of the Constitution.

<sup>189</sup> Section 36 of the Constitution.

### 3.2. The Constitution

The Constitution of South Africa is the supreme law; no other legislation may conflict with it, and the government is prohibited from doing anything that violates it.<sup>190</sup> Any legislation that conflicts with the Constitution is invalid.<sup>191</sup> In light of the fact that religious minority groups have been subjected to unfair discrimination in the past and that some continue to confront it now, a number of rights are pertinent, either directly or indirectly, to safeguard the interests of persons who belong to religious minority groups in South Africa.<sup>192</sup> The right to freedom of religion and belief is one of the rights enumerated in the BOR.<sup>193</sup> The infringement of this right is a violation of the rights to equality<sup>194</sup> and human dignity<sup>195</sup>. Regarding SADCS inmates with ubizo, the rights to equality, human dignity, and freedom of religion will be considered in further details. The provisions of the Constitution relevant to understanding religious freedom are discussed below.



#### 3.2.1 Equality, unfair discrimination, and dignity

There is no consensus over the exact meaning of equality. We all have an instinctive grasp of what equality is and what it involves, but its meaning changes when we study it more deeply.<sup>196</sup> Everyone has the right to equal protection under the law and the ability to benefit from it.<sup>197</sup> Everyone includes inmates and inmates with ubizo. The Equality Clause prohibits the government from directly or indirectly discriminating against anybody, including SADCS inmates with ubizo. The state may not “directly or indirectly discriminate against any person

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<sup>190</sup> The Constitution.

<sup>191</sup> The Constitution.

<sup>192</sup> Fessha YT and Dessalegn B ‘Freedom of Religion and Minority Rights in South Africa’ (2021) 12(10) *Religions* 1 1.

<sup>193</sup> Section 15 of the Constitution.

<sup>194</sup> Section 9 of the Constitution.

<sup>195</sup> Section 10 of the Constitution.

<sup>196</sup> Fredman S *Discrimination law* 2 ed (2011) ch 1.

<sup>197</sup> Section 9 (1) of the Constitution.

on the basis of race, gender, sex, pregnancy, marital status, ethnic or socioeconomic origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.”<sup>198</sup> As one of the stated rights in section 9 of the constitution, a violation of the right to freedom of religion and belief is a direct act of unfair discrimination.

The right to religious freedom and belief is one of the listed rights against which the government is prohibited from discriminating unfairly. In addition, no individual may engage in direct, indirect unfair discrimination based on one, or more of the grounds stated in section 9(3) of the Constitution. Unless it is determined that the discrimination is fair, discrimination on one or more of the grounds enumerated in subsection (3) is unfair.<sup>199</sup>

The legislation makes it clear that we do not adopt a formal approach to equality law, but rather a substantive one. Since the substantive approach to equality transforms the right to equality from a non - unfair discrimination right to a substantive equality right with a positive orientation, it is both recognising and accommodating.<sup>200</sup> As it focuses more on disadvantaged people or groups, a substantive approach may help inmates with ubizo to practice their religion. As members of a minority religion, inmates with ubizo are among the most disadvantaged groups in terms of religion.

Substantive equality is both a constitutional ideal and a constitutionally protected legal right.<sup>201</sup> Inmates have the same rights as everyone else; however, some of these rights are restricted<sup>202</sup> due to incarceration. Certain rights in the BOR may be restricted by a limitation clause, particularly if the restriction serves the greater good of society. Some inmates with ubizo are

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<sup>198</sup> Section 9 (3) of the Constitution.

<sup>199</sup> Section 9 (5) of the Constitution.

<sup>200</sup> Smith A ‘Constitutionalising equality: The South African experience’ (2008) 9 *International Journal of Discrimination and the Law* 201 203.

<sup>201</sup> *Minister of Home Affairs v National Institute for Crime Prevention* 2005 (3) SA 280 (CC), para 21.

<sup>202</sup> The right to freedom of movement, right to housing, right to trade, occupation and profession are part of the rights that are limited due to incarceration.

incarcerated because they committed violent and heinous crimes, posing a threat to society. The danger presented by these inmates must be weighed against their religious freedom. The transformative effort is predicated on equality as a value and a right.<sup>203</sup> Since substantive equality is important to the mission of change, inmates with ubizo should be treated similarly with inmates of other faiths, since ubizo was formerly discriminated against.

Equality is a challenging and controversial societal goal.<sup>204</sup> The principle of equality states that people in similar situations should be treated equally.<sup>205</sup> Inmates with ubizo in SADCS should be treated similarly with those of other religions, especially the mainstream religion. A “place of worship” should be provided for inmates who believe in ubizo so that they, too, can commune with their ancestors.<sup>206</sup>

A commitment to substantive equality necessitates an investigation into a purported rights violation and its relationship to systemic domination in a society.<sup>207</sup> To optimise human growth, it targets systemic and persistent disadvantages.<sup>208</sup> Ubizo is a spirituality journey that needs acceptance to avert ancestral wrath.

*Harksen v Lane*<sup>209</sup> established a standard for unfair discrimination. In its two-stage *Harksen* test, the court bases unfair discrimination on human dignity.<sup>210</sup> The human dignity has been used in several cases as basis to determine unfair discrimination and one of those cases is *Pillay*.

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<sup>203</sup> Albertyn C & Goldblatt B ‘Facing the Challenge of Transformation: Difficulties in the Development on an Indigenous Jurisprudence of Equality’ (1998) 14 *SAJHR* 248 249.

<sup>204</sup> Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 210.

<sup>205</sup> Currie I & De Waal J (2013) 210.

<sup>206</sup> An example is ‘Found by Grace Prison Fellowship South Africa’, which teaches prisoners about Jesus while they are in prison. <http://hopeprisonministry.org/>. There are also chapel programs inside the facility; the same can be done for inmates with ubizo.

<sup>207</sup> Albertyn C & Goldblatt B (1998) 250.

<sup>208</sup> Albertyn C & Goldblatt B (1998) 250.

<sup>209</sup> *Harksen v Lane* NO 1997 (1) SA 300 (CC).

<sup>210</sup> *Harksen v Lane*.

The *Harksen* test was established when the interim Constitution was still in use, which is why it refers to section 8 rather than section 9. The first question to ask is whether the provision in question differentiates between individuals or groups of individuals.<sup>211</sup> Inmates with ubizo forms part of ATR, which is a group of people. Despite being a part of ATR, they must embark on a spiritual journey that has dire consequences if ignored.

Inmates with ubizo are discriminated against because they cannot conduct rituals or communicate with their ancestors. Mainstream faiths have sermons and bibles to revive their faith in correctional facilities. If so, the distinction must be rationally related to a legitimate government purpose.<sup>212</sup> Ubizo is a spiritual journey with many rituals to perform; therefore, SADCs may have a genuine government objective. By preventing inmates from leaving the institution for ancestral rituals and ceremonies, the state will safeguard the community and maintain order. Because of the justifiable objective, section 8(1)<sup>213</sup> is not violated. The infringement is not in section 8(1), but it might be in section 8(2).<sup>214</sup>

Section 8(2) violation requires a two-step examination.<sup>215</sup> First, determine if the differentiation constitutes unfair discrimination.<sup>216</sup> Ubizo inmates are treated differently than mainstream religion inmates, which is unfair discrimination. If the differentiation is on one of the analogous grounds then unfair discrimination is established.<sup>217</sup> The Constitution guarantees religious freedom. If it is not based on a particular basis, unfair discrimination depends on whether the ground is based on features and characteristics that have the potential to undermine the fundamental human dignity of individuals as human beings or to negatively affect them in a

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<sup>211</sup> *Harksen v Lane*, para 53.

<sup>212</sup> *Harksen v Lane*, para 53.

<sup>213</sup> *Harksen v Lane*, para 53

<sup>214</sup> *Harksen v Lane*, para 53

<sup>215</sup> *Harksen v Lane*, para 53

<sup>216</sup> *Harksen v Lane*, para 53

<sup>217</sup> *Harksen v Lane*, para 53

correspondingly severe way.<sup>218</sup> Ubizo's mental illness and severe illness symptoms lower a person's dignity.<sup>219</sup> Ignoring ubizo may lead to death thus, negatively affecting them.

Determining “unfair discrimination” is the second stage. If it is on listed grounds, it is unfair. Unspecified complaints must establish unfairness. The unfairness test focuses on how the unfair discrimination affects the complainant and others. To evaluate if the impact was unfair, consider the group disadvantaged, the authority used to discriminate, and the interests affected.

If this stage of the examination finds the differentiation not unfair, section 8(2) will not be violated. If the unfair discrimination is unjustified, the limits clause must be considered. Section 36 of the constitution requires the SADCs to demonstrate why ubizo inmates are unfairly discriminated against.

The right to freedom of religion and belief forms part of the specified ground in terms of section 9(3) of the constitution. As a result of South Africa's focus on substantive equality, which aims to reduce obstacles to diversity, accommodating inmates with ubizo would be a step in the right direction.<sup>220</sup> Due to their restricted privileges, inmates with ubizo cannot perform ancestral rituals or ceremonies while incarcerated, violating their right to freedom of religion.

This violation of religious freedom deprived individuals of their dignity. Only unfair discrimination is prohibited. Unfair discrimination degrades dignity. The dignity-based Harksen test proposes that a better knowledge of human dignity might help courts find similar reasons and prove unfairness. “Human dignity is harmed by unfair treatment that is premised upon personal traits or circumstances that do not relate to the needs, capacities and merits of

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<sup>218</sup> *Harksen v Lane*, para 53.

<sup>219</sup> See *Hoffmann v South African Airways* 2000 (2) BCLR 628 (CC), para 27. Dignity is impaired when a person is unfairly discriminated against.

<sup>220</sup> In the past, inmates with ubizo have been discriminated against, and it is more difficult for rituals and ceremonies to be done while an individual is incarcerated due to the rituals and ceremonies required. Consequently, any accommodation for them will be a positive step.



different individuals.”<sup>221</sup> The critical factor is not sameness or symmetry, but human dignity.<sup>222</sup> The position of the victim of the unfair discrimination in society, the purpose sought by the unfair discrimination, the extent to which the victim's rights or interests have been impacted, and if the victim's human dignity has been impaired by the unfair discrimination.<sup>223</sup> Dignity has been the central to determine impact of differential treatment.

Dignity requires honour, respect, and treating people as you would want to be treated. Dignity has come to display three elements in constitutional adjudication such as: the ontological element entails that human beings have equal inherent human dignity that cannot be waived or diminished; the second element is the claim that inherent human dignity must be recognised and respected; and the third element, the limited-state claim, entails that states have a positive obligation to progressively realise human dignity through the mechanism of socioeconomic rights.<sup>224</sup>

Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity.<sup>225</sup> The South African constitution protects human dignity, and the Constitutional Court has scrutinised it more.<sup>226</sup> Human dignity is fundamental to equality, and it is not merely a formal criteria to be considered.<sup>227</sup> The centrality of the human need for positive self-worth as a key concept of dignity also enhances comprehension of what violations of human dignity are.<sup>228</sup> In this view, giving weight to a person's self-worth is a noble value and essential to

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<sup>221</sup> *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC), para 116.

<sup>222</sup> *Minister of Finance and Another v Van Heerden*, para 146.

<sup>223</sup> *Hoffmann v South African Airways*, para 27.

<sup>224</sup> Steinmann R 'The Core Meaning of Human Dignity' (2016) 19 *PER / PELJ* 1 5.

<sup>225</sup> *MEC for Education: Kwazulu, Natal and Others v Pillay*, para 53. See, for example, *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 59 and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 26.

<sup>226</sup> Jordaan DW 'Autonomy as an Element of Human Dignity in South African Case Law' (2009) 9 *The Journal of Philosophy, Science & Law* 1 1.

<sup>227</sup> *MEC for Education: Kwazulu, Natal and Others v Pillay*, para 54.

<sup>228</sup> Shultziner D & Rabinovici I 'Human Dignity, Self-worth, and Humiliation: A Comparative Legal Psychological Approach' (2012) 18(1) *Psychology Public Policy and Law* 105 110.

resolving religious-unfair discrimination claims along with the other tests now applied by our courts.

Since it is a component of the three founding values of the constitution, unfair discrimination on any of the constitutionally prohibited grounds is degrading.<sup>229</sup> Consequently, human dignity will always be at the centre of an inquiry into equality, since we are required to be tolerant, to act with a sense of mutual accommodation of our differences, and not to objectify the individual.<sup>230</sup> Human dignity is a fundamental legal notion for interpreting and development of human rights.<sup>231</sup> The concept has also supported and helped establish several precedents and legal instruments in the case law of a number of systems.<sup>232</sup>

Human dignity is an objective ideal shared by all people.<sup>233</sup> Human dignity is an underlying ideal on which human rights such as the right to freedom of religion and belief are founded. According to this perspective, dignity stems from human intellectual and moral qualities, which entitle all human beings to the circumstances essential for self-determination and self-fulfilment, among other rights.<sup>234</sup> Justices O'Regan and Sachs have referred to the fact that unfair discrimination 'means treating persons differently in a way which impairs their fundamental dignity as human beings'.<sup>235</sup> This made human dignity the foundation of the Court's test for unfair discrimination, as it defined this test as a search for violations of human

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<sup>229</sup> Bilchitz D (2011) 14.

<sup>230</sup> Henrico H 'The Role Played by Human Dignity in Religious- Discrimination Disputes' (2014) 35(1) *Obiter* 24 38.

<sup>231</sup> Shultziner D & Rabinovici I 'Human Dignity, Self-worth, and Humiliation: A Comparative Legal Psychological Approach (2012) 18(1) *Psychology Public Policy and Law* 105 105.

<sup>232</sup> Shultziner D & Rabinovici I (2012) 105.

<sup>233</sup> Jordaan DW (2009) 2.

<sup>234</sup> McConnachie C 'Human Dignity, "Unfair Discrimination" and Guidance' (2014) 34(3) *Oxford Journal of Legal Studies* 609 610.

<sup>235</sup> *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC).

dignity.<sup>236</sup> The impact of unfair discrimination on dignity is also significant in respect of the horizontal application of the prohibition of unfair discrimination.<sup>237</sup>

In the South African constitution, human dignity is both a fundamental principle that governs the interpretation of all other rights and a legitimate and enforceable right.<sup>238</sup> Dignity can and does play a “crucial” and “determinant” role in discovering unfair discrimination; that it is an “important ingredient” in this investigation; and that it can be provided with specific, practically applicable content.<sup>239</sup> Important entitlements such as self-development, self-fulfilment, and self-worth may be denied to individuals as a result of unfair discrimination.

### 3.2.2 The right to freedom of religion

Section 15 of the final constitution includes freedom of religion, conscience, belief, thought, and opinion.<sup>240</sup> Religious freedom encompasses the right to believe, express that belief, and demonstrate that belief through worship and practice.<sup>241</sup> The limitation clause, namely section 36 of the Constitution restricts religious freedom since it is not an absolute right.<sup>242</sup> Realising religious freedom needs a cautious and intentional constitutional balancing.<sup>243</sup> Therefore, the freedom of religion of inmates with ubizo must be balanced with the safety and security of other inmates and of society as a whole.

Ubizo is a minority religion in South Africa, and practicing it poses no danger to anyone. The issue occurs when the one with ubizo is denied permission to embrace and practise it. Before

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<sup>236</sup> McConnachie C ‘Human Dignity, “Unfair Discrimination” and Guidance’ (2014) 34(3) *Oxford Journal of Legal Studies* 609 610.

<sup>237</sup> McConnachie C ‘Human Dignity, “Unfair Discrimination” and Guidance’ (2014) 34(3) *Oxford Journal of Legal Studies* 609 611.

<sup>238</sup> Jordaan D.W (2009) 3.

<sup>239</sup> McConnachie C ‘Human Dignity, “Unfair Discrimination” and Guidance’ (2014) 614.

<sup>240</sup> Section 15 of the Constitution.

<sup>241</sup> Currie I & De Waal J (2013) 316.

<sup>242</sup> Section 36 of the Constitution.

<sup>243</sup> Fessha YT and Dessalegn B (2021) 5.

the individual accept ubizo s(he) may well pose a risk of harm, namely aggression, violence, restlessness, abuse as stated previously. However, if ubizo is accepted, the symptoms completely disappear, and the person is no longer a danger to others. 'Religious observances may be held in state- or state-aided institutions under norms set by an authorised body, provided that they are fair and attendance is free and voluntary'.<sup>244</sup>

According to O'Regan J, 'religion is interpreted in an individualist sense', and religious freedom is the right to freely express one's religious or philosophical ideas via teaching, practice, worship, and observances.'<sup>245</sup>

“By associating religion with belief and conscience, which involve an individual's state of mind, a set of beliefs that an individual may hold regardless of the beliefs of others.”<sup>246</sup>

Religion and belief are options, but ubizo is a spiritual journey that an individual must accept since the ancestors chose them. Therefore, the autonomy of individuals, including the right to hold diverse beliefs and conduct, should be respected.<sup>247</sup> Ubizo's recipient must accept the ancestors' gift or face lifelong repercussions. As long as their own laws and customs do not contravene other constitutional principles, inmates with ubizo are entitled to legal protection for their cultural and religious traditions.<sup>248</sup> Ubizo is unique in that its rituals must be performed outside the facility, putting the society in jeopardy because some inmates are dangerous criminals. The greatest option for the community/society is not to release inmates, but enabling them to practise and perform non-dangerous rituals within the facility would help ensure that

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<sup>244</sup> Section 15 (2) (a-c) of the Constitution.

<sup>245</sup> Mestry R (2007) 58.

<sup>246</sup> *MEC for Education: KwaZulu-Natal and Others v Pillay* (2007) (1) SA 474 (CC), para 143.

<sup>247</sup> Bilchitz (2011) 12.

<sup>248</sup> Mofokeng LL (2007) 122.

the individual has accepted ubizo. Consequently, this will help ensure that the ancestral wrath is lifted from them.

As long as they do not violate the Constitution's ideals, linguistic and religious groups should be able to apply their own personal laws to govern their private affairs under the freedom of religion article.<sup>249</sup> Since it is in line with the Constitution, inmates with ubizo should be able to conduct and perform ancestor rituals while in a correctional facility.

### 3.2.3 Limitation clause (section 36)

In an open and democratic society based on dignity, freedom, and equality, a fair and acceptable general rule may restrict rights.<sup>250</sup> In this chapter, the SADC's ability to restrict ubizo inmates' freedom and religion is examined. Religious freedoms are not absolute rights under section 36<sup>251</sup> of the Constitution. The right to a religious belief is a fundamental right enshrined in the BOR. The importance of limiting such a right, and in particular that of an inmate or inmates with ubizo is with reference to safety and security of the society. It needs Whilst it is not the religious belief per se that may be the object of the limitation, the limitation thereof is a consequence of the incarceration that takes place pursuant to a custodial sentence being served by the inmate. The limitation is regarded reasonable since the inmates are incarcerated due to them committing crime against society. Moreover, there are no less restrictive means the SADC could employ to ensure security and safety of the citizens.

Religious freedom is limited for inmates with ubizo due to incarceration. Since they are in a correctional facility, they cannot perform ancestral rituals outside. SADC may restrict the

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<sup>249</sup> Mofokeng LL (2007) 122.

<sup>250</sup> Section 36 (1) of the constitution.

<sup>251</sup> When doing enquiry section 36(1) (a-e) needs to be taken into account, which includes the nature of the right and the scope of its limitation; the purpose; importance and the effect of the limitation; and the availability of less restrictive means to achieve that purpose.

right since ubizo needs rituals and releasing inmates before finishing their sentence or rehabilitating them creates a danger to society. Article 18.3 of the Human Rights permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.<sup>252</sup> Such limitations must not be applied in a manner that would vitiate the rights guaranteed in article 18.<sup>253</sup>

Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.<sup>254</sup> Persons already subject to certain legitimate constraints, such as inmates, continue to enjoy their rights to manifest their religion or beliefs to the fullest extent compatible with the specific nature of the constraint.<sup>255</sup> Article 18 of the Human Rights Convention does not directly create legal obligations for countries as it's not a treaty, but it has a significant effect on the development of international human rights law. Due to this SADCS must prohibit inmates with ubizo from observing and performing ancestral rituals outside the institution, but they may make adequate accommodations within.

In this case, SADCS may limit ubizo inmates' religious freedom to protect public order. In the *POPCRU* case, the employer claimed that dreadlocked employees are vulnerable to manipulation by Rastafari and other inmates trying to smuggle dagga into the prisons, which would harm inmates' discipline and rehabilitation. In *Prince v President of the Law Society of the Cape of Good Hope*,<sup>256</sup> the Constitutional Court acknowledged that the cannabis ban limited the appellant's religious freedom as a Rastafarian, but it rejected the exemption on the grounds that it would hinder the state's drug-fighting efforts and be difficult to administer. **The**

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<sup>252</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at <https://www.refworld.org/docid/453883fb22.html> (accessed on 06 February 2023).

<sup>253</sup> General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18).

<sup>254</sup> General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18).

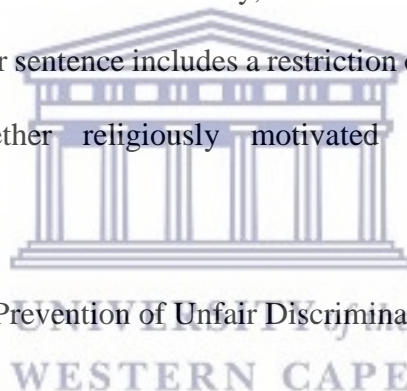
<sup>255</sup> General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18).

<sup>256</sup> *Prince v President of the Law Society, Cape of Good Hope* 2003 (3) BCLR 231 (CC), para 53.



*Prince* case was decided before the African Commission on Human and Peoples' Rights. It is significant not that in *Prince*, the applicant complained of a violation of religious freedom as Rastafarians are not granted a religious exemption from using cannabis.<sup>257</sup> The Commission has noted that the participation in one's culture should not be at the expense of the overall good of the society.<sup>258</sup> Minorities like the Rastafari may freely choose to exercise their culture but should not be granted unfettered power in violation of the norms that keep an entire nation together.<sup>259</sup>

Inmates with ubizo conducting ceremonies outside of correctional facilities poses safety and control risks. If inmates are let to leave the facility for religious ceremonies and rituals, it will be difficult to prevent others from committing the same crime. Since inmates with ubizo will be permitted to perform rituals outside of the facility, the correctional service will be considered to be lacking in discipline. Their sentence includes a restriction on their freedom of movement. *Prince* case examined whether religiously motivated cannabis prohibitions were constitutional.<sup>260</sup>



### 3.3 Promotion of Equality and Prevention of Unfair Discrimination Act

PEPUDA give effect to the Constitution by prohibiting unfair discrimination and harassment, promoting equality, and combatting unfair discrimination.<sup>261</sup> Both section 1 of PEPUDA and section 9(3) of the Constitution describe unfair discrimination in the same manner and provide similar grounds for unfair discrimination. PEPUDA establishes state and private party obligations. It bans public and private unfair discrimination. SADCs, as an organ of the state, may not discriminate against inmates with ubizo. Secondly, the state and private parties

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<sup>257</sup> *Prince v South Africa*, (Communication No. 255/2002) 2004 ACHPR, para 40.

<sup>258</sup> *Prince v South Africa*, (Communication No. 255/2002) 2004 ACHPR, para 48.

<sup>259</sup> *Prince v South Africa*, (Communication No. 255/2002) 2004 ACHPR, para 48.

<sup>260</sup> *Minister of Justice and Constitutional Development v Prince*, para 63.

<sup>261</sup> PEPUDA Preamble on page 1.

must encourage equality. PEPUDA prohibits unfair discrimination that perpetuates systemic disadvantage, undermines human dignity, or seriously impairs a person's rights and freedoms.<sup>262</sup> SADCS can promote equality by allowing inmates with ubizo to practice their religion inside the facility. The state and individuals are not allowed to unfairly discriminate against anyone.<sup>263</sup> If the complainant establishes a prima facie case of unfair discrimination,<sup>264</sup> the respondent must prove on the facts before the court that the alleged unfair discrimination did not occur,<sup>265</sup> or that the conduct is not based on one or more of the prohibited grounds.<sup>266</sup> Inmates with ubizo must prove on the balance of probabilities that the SADCS violated their religious freedom on a listed ground, resulting in unfair treatment. Section 10(1) of the PEPUDA protects freedom of religion while balancing dignity, equality, and freedom of expression.

If the unfair discrimination did take place,<sup>267</sup> on a ground in paragraph (a) unless the respondent proves that the discrimination is fair, the discrimination is unfair.<sup>268</sup> On a ground in paragraph (b) of the definition of prohibited grounds, then it is unfair;<sup>269</sup> (i) if one or more of the conditions listed in paragraph (b) of the definition of prohibited grounds is met;<sup>270</sup> and (ii) “unless the respondent proves that the discrimination is fair”.<sup>271</sup> Significantly, PEPUDA expressly introduces the additional requirement of “reasonable accommodation”, and this requirement will be discussed further in chapter 4 below.

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<sup>262</sup> Section 1 of PEPUDA.

<sup>263</sup> Section 6 of PEPUDA.

<sup>264</sup> Section 13 (1) of PEPUDA.

<sup>265</sup> Section 13 (1) (a) of PEPUDA.

<sup>266</sup> Section 13 (1) (b) of PEPUDA.

<sup>267</sup> Section 13 (2) of PEPUDA.

<sup>268</sup> Section 13 (2) (a) of PEPUDA.

<sup>269</sup> Section 13 (2) (b) of PEPUDA.

<sup>270</sup> Section 13 (2) (b) (i) of PEPUDA.

<sup>271</sup> Section 13 (2) (b) (ii) of PEPUDA.

### 3.4 Correctional Services Act (CSA)

During apartheid, inmates' basic human rights were not recognised, but the Constitution assisted to ensure that all inmates' rights were protected, leading to the CSA.<sup>272</sup> The White Paper<sup>273</sup> and CSA provided a legal framework to reconcile prison policies and procedures with the new Constitution's Bill of Rights.<sup>274</sup> In addition to carrying out sentences, the CSA stated that the correctional system's objective is to keep inmates secure in custody while protecting their dignity and encouraging social responsibility and human development.<sup>275</sup> Religion is part of human development. Religion and belief are protected by the CSA. Freedom of conscience, religion, thought, belief, and opinion must be granted to inmates.<sup>276</sup>

Furthermore, "inmates may freely attend religious services and gatherings in the correctional center and may have his or her religious literature."<sup>277</sup> Every correctional establishment must provide places of worship for all religious denominations, where practicable.<sup>278</sup>

The CSA has granted inmates freedom of religion and belief and allowed them to worship whenever practicable. Ubizo inmates must perform ceremonies and ancestral rituals, as well as worship and meetings, to confirm that they have accepted ubizo.

The Constitution and CSA supports religious freedom. Due to the difficulty of implementation, relevant case law will be discussed to illustrate how the court dealt with comparable religious freedom issues.

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<sup>272</sup> Luyt WFM 'Imprisoned Mothers in South African Prisons with Children outside of the Institution' (2008) 16(3) *European Journal of Crime, Criminal Law and Criminal Justice* 299 300.

<sup>273</sup> White paper 2005.

<sup>274</sup> Rudolph J and Achiume ET 'Prison Conditions in South Africa and the Role of Public Interest Litigation since 1994' (2011) 27(1) *South African Journal on Human Rights* 183 184.

<sup>275</sup> Rudolph J and Achiume ET (2011) 183 185.

<sup>276</sup> Section 14 (1) of the Correctional Services Amendment Act, No. 32 of 2001.

<sup>277</sup> Section 14 (2) of the Correctional Services Amendment Act.

<sup>278</sup> Section 14 (3) of the Correctional Services Amendment Act.

### 3.5 Relevant case laws

The cases below discussed religious freedom. The court is engaged when the complainant brings an unfair discrimination case. These cases do not deal with ATR and particularly ubizo, but they are significant to this research because they provide guidance and criteria that must be considered when addressing the issue of religion-based unfair discrimination.

#### 3.5.1 *MEC for Education: Kwazulu-Natal and Others v Pillay*

The court had to deal with the right of the learner to wear a nose stud in one of the public schools. In this case, the majority of the Constitutional Court, per Langa CJ, stated that:

“An entitlement to respect for the unique set of ends that the individual pursues is a necessary element of freedom and of the dignity of any individual.”<sup>279</sup>

Sunali suffered unfair discrimination and cultural violations. The court underlined that “minorities” have the right to enjoy “their culture” in community with other members of their group.<sup>280</sup> Since ubizo is a minority religion, this applies to the discriminatory treatment of inmates. The Constitutional Court uses a three-prong balancing test:<sup>281</sup>

“whether the applicant's religion, which gave rise to the constitutional claim, is a recognized religion; (2) whether the practice for which the applicant seeks protection is an important aspect of the religion; and (3) whether the applicant's belief in the religious practice is genuine.”<sup>282</sup>

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<sup>279</sup> *MEC for Education: Kwazulu-Natal and Others v Pillay*, para 64.

<sup>280</sup> *MEC for Education: Kwazulu-Natal and Others v Pillay*, para 144.

<sup>281</sup> *MEC for Education: Kwazulu-Natal v Pillay*, para 152.

<sup>282</sup> *MEC for Education: Kwazulu-Natal v Navaneethum Pillay*, para 152.

The applicants had to show that the school's prohibition on *Pillay* violated the PEPUDA by interfering with Sunali's religion or culture.<sup>283</sup> Since they cannot practice ancestral rituals or hold gatherings while incarcerated, ubizo inmates must prove that SADCS's inability to accommodate them constitutes unfair religious discrimination.

The test applied in *Pillay's* case can assist in determining whether inmates with ubizo are unfairly discriminated against. Ubizo is a recognised religion in South Africa because it falls under ATR. Ubizo is genuine because their ancestors through dreams choose the individual to accept ubizo. The SADCS' failure to accommodate inmates with ubizo infringes on their religious freedom since ubizo is a spiritual journey that causes challenges in the lives of individuals who have it.

### 3.5.2 *Department of Correctional Services v Police and Prison Civil Rights Union*<sup>284</sup>

The court examined religious accommodation in the workplace. Despite their religious or cultural beliefs, employees were dismissed for not cutting their dreadlocks.<sup>285</sup> Employees said the dreadlock ban insulted their faith and culture.<sup>286</sup> The Labour Court (LC) decided that the dress code did not discriminate against any religion or culture because it was enforced equally.<sup>287</sup> On appeal the LAC (Labour Appeal Court) declared the five employees' dismissal automatically unfair based on gender, religion, and culture.<sup>288</sup>

The Labour Court concluded that the dress code's prohibition on dreadlocks violated the employees' true beliefs.<sup>289</sup> Thus, the code discriminated against the employees. In this instance,

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<sup>283</sup> *MEC for Education: KwaZulu-Natal and Others v Pillay*, para 46.

<sup>284</sup> *Department of Correctional Services v Police and Prison Civil Rights Union* 2013 (1) SA 176 (SCA).

<sup>285</sup> *POPCRU*, para 5.

<sup>286</sup> *POPCRU*, para 5.

<sup>287</sup> *POPCRU*, para 18.

<sup>288</sup> *POPCRU*, para 1.

<sup>289</sup> *POPCRU*, para 22.

the employees had to prove that the employer's dreadlock prohibition interfered with their religious or cultural practice.<sup>290</sup>

The major concern in this case is the possibility of breaching security and discipline by permitting correctional service officials to have dreadlocks, as inmates may request that they bring dagga into the correctional service.<sup>291</sup> The SADCS faces a similar risk when it allows inmates with ubizo to conduct ancestral rituals and perform ceremonies. During the ceremony, some inmates may bring dangerous weapons to their cells, putting other inmates at risk.

### 3.5.3 *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi*<sup>292</sup>

The court had to decide whether an employee with a genuine cultural belief that she must attend a training course unrelated to her job or suffer illness, even death, should be dismissed for misconduct if her employer rejects her application for leave and she refuses a direct instruction to return to work.<sup>293</sup> In upholding the decisions of the Commission for Conciliation, Mediation, and Arbitration (“CCMA”), the Labour Court, and the Supreme Court of Appeal determined that the employee's dismissal was unfair.<sup>294</sup>

The Supreme Court of Appeal emphasised the importance of considering the employee's cultural views, adding that if the employee had a real and genuine opinion that she had no alternative but to attend the training for fear of the repercussions, she was justified in being absent and defying the employer's directive.<sup>295</sup> The employee's absence may be justified.<sup>296</sup>

Ubizo has several difficulties, and ignoring it might cause serious harm. This case take place in the workplace, and the issues that the employee had in terms of symptoms and wrath from

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<sup>290</sup> *POPCRU*, para 24.

<sup>291</sup> *POPCRU*, para 20.

<sup>292</sup> *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2014 (1) SA 585 (SCA).

<sup>293</sup> *Kievits*, para 1.

<sup>294</sup> *Kievits*, para 1.

<sup>295</sup> *Kievits*, para 27.

<sup>296</sup> *Kievits*, para 27.



the ancestors are identical to those faced by the inmates with ubizo. The ancestors do not care about the individual circumstances, including whether the person is employed or not. It makes no difference whether a person is incarcerated or not.

Inmates are not engaged in these cases; rather, employers and employees are. These guidelines and criteria are also applicable to inmate cases. The *Pillay* case involved the state; hence, the premise used to establish unfair religious discrimination could be extended to instances involving inmates, as both SADCS and the school both represent the organ of the state. Government school is an organ of the state, the principal and the teachers when acting on their official capacity they are carrying out functions of the state. Similar to SADCS, while staff are on duty, they are carrying out state functions. Even though the situations concern different individuals (pupils and inmates), the same principles and criteria for determining unfair religious discrimination should be applied since both involve the state. Even though inmates with ubizo rights are already limited by their incarceration, ubizo is a spiritual journey that must be done or the individual will suffer severely from the ancestor's wrath.

The European Court of Human Rights (ECHR) dealt with several cases concerning the right to freedom of religion. The case of *Korostelev v Russia*,<sup>297</sup> concerned a practising Muslim, who was detained in a penal colony in the Yamalo Nenetskiy Region. The applicant complained of the violation of his religious rights after being reprimanded for praying during the prison's obligatory night-time sleeping period.<sup>298</sup> The Court held that there had been a violation of Article 9 of the European Convention,<sup>299</sup> finding that the interference with the applicant's

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<sup>297</sup> *Korostelev v Russia* 29290/10 [2020] ECHR 314.

<sup>298</sup> *Korostelev v Russia*, para 35.

<sup>299</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 1950 (Accessed 06 February 2023). Article 9 of the European Convention, states that 1. "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic

freedom of religion, namely the imposition of a disciplinary punishment, could not be regarded as having been necessary in a democratic society.<sup>300</sup> Although the Court recognised the importance of prison discipline, it could not accept such a formalistic approach, which palpably disregarded the applicant's situation and which failed to take into account the requirement of striking a fair balance between the competing private and public interests.<sup>301</sup> The Court also observed that the applicant's worship had not disturbed the prison population or the prison guards, since he had performed the acts of worship while in solitary confinement, without any noise or other disturbing factors.<sup>302</sup> This case is especially relevant to inmates with ubizo since the applicant (as an inmate) was ultimately treated, with reference to the finding of the Court, with due account being had to the balancing of competing interests.

### 3.6 Conclusion

This chapter addressed religious freedom in constitutional, statutory, and case law. Coverage includes three essential rights, including equality, dignity, and religious freedom. These rights are grounded in the Constitution and the CSA. PEPUDA was discussed in order to apply the equality clause and prevent unfair discrimination against vulnerable groups. This discussion led to the limitation clause, which determines whether SADCs can limit the religious freedom of inmates. Thus, case law was analysed to see how the court addressed unfair discrimination in terms of religious freedom. When religion is involved, courts have instructed parties to make reasonable accommodation. In the following chapter, reasonable accommodation will be discussed.

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society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

<sup>300</sup> *Korostelev v Russia*, para 60.

<sup>301</sup> *Korostelev v Russia*, para 63.

<sup>302</sup> *Korostelev v Russia*, para 69.

## CHAPTER 4

### SADCS' DUTY TO REASONABLE ACCOMMODATE INMATES WITH UBIZO

#### 4.1 Introduction

This chapter addresses the reasonable accommodation of ubizo inmates in SADCS. It begins with an explanation of the duty to provide reasonable accommodation. In addition, it will be considered whether the SADCS has a duty to reasonably accommodate inmates with ubizo. This chapter will also explore the challenges that the SADCS may have when offering reasonable accommodation.

#### 4.2 SADCS duty to reasonable accommodate inmates with ubizo

The community should reasonably accommodate religious differences, not just tolerate them.<sup>303</sup> The provision of religious accommodation is, at the very least, beneficial to the individuals or groups that are unfairly discriminated. A “reasonable accommodation” is defined as “any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment”<sup>304</sup>

The reasonable accommodation definition is borrowed from Employment Equity Act, Reasonable accommodation needs to be provided in order to ensure equal opportunities for those who have been discriminated against. Since reasonable accommodation can be implemented to ensure equal opportunity for the discriminated, it applies to all discriminated individuals. Employees are not the only victims of unfair discrimination; inmates with ubizo also experience unfair discrimination. Reasonable accommodation promote inclusion and

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<sup>303</sup> *MEC for Education: KwaZulu-Natal and Others v Pillay*, para 86.

<sup>304</sup> Section 1 of Employment Equity Act 55 of 1998.

diversity in order to accommodate individuals who have been unfairly discriminated against. Each instance is different and must be considered while establishing what is reasonable.

Reasonable accommodation means the organ of the state, an employer, or school must take adequate measures and possibly incur additional difficulty or expense to allow all persons to participate and enjoy their rights equitably.<sup>305</sup> SADCS's inability to reasonably accommodate the inmate's religious practice may be unfair discrimination.<sup>306</sup> South African case law discusses accommodation. A society that is both open and democratic may accommodate and govern powerful worldviews.<sup>307</sup>

If providing reasonable accommodation is too difficult, it should not be done.<sup>308</sup> Reasonable accommodation is the belief that the community, whether it's the state, an employer, or a school, must take constructive steps, potentially at a cost, to allow everyone to participate and enjoy their rights equitably.<sup>309</sup> Thus, the SADCS must provide more places for inmates with ubizo to communicate with their ancestors through its correctional services. Not forgetting the issue of overcrowding in which inmates have to share cells and beds, it will appear unreasonable to construct a cell for inmates with ubizo in order to accommodate their religion while the essential needs of other inmates are not being fulfilled. However, as was previously mentioned, ubizo is not a choice, and if it is not accepted, the chosen individual will face numerous difficulties. As the wrath of ancestors manifests itself in a wide range of ways, these difficulties affect their dignity. If the cell cannot be built, SADCS should re-purpose existing facilities, even if just for use over weekends.

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<sup>305</sup> Pillay, para 73.

<sup>306</sup> Bernard RB 'Reasonable accommodation in the workplace: to be or not to be?' 2014 (17)6 *PER / PELJ* 2870 2881.

<sup>307</sup> *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA), para 95.

<sup>308</sup> Du Plessis GA 'Religious freedom, reasonable accommodation and the protection of the conscience of learners in South African public schools' (2014) 7(1/2) *IJRF* 97 107.

<sup>309</sup> De Vos P & Freedman W (eds) *South African Constitutional Law in Context* (2014) 495.

*TDF Network Africa (Pty) Ltd v Faris*, the employer bears the burden of proving that it is impossible to accommodate the individual employee without imposing undue hardship.<sup>310</sup> The employer is under an obligation to make a concerted effort to provide the employee with reasonable accommodation.<sup>311</sup> The SADCS bears the burden to prove that it is impossible to accommodate inmates with ubizo due to overcrowding, and that a concerted effort has been undertaken. It will have to show that reasonable accommodation would impose undue hardship.

*SA Clothing and Textile Workers Union and Others v Berg River Textiles*,<sup>312</sup> stated that:

“the employer must establish that it has taken reasonable steps to accommodate the employee’s religious beliefs. Ultimately the principle of proportionality must be applied. Thus an employer may not insist on the employee obeying a workplace rule where that refusal would have little or no consequence to the business.”

From the above cases, it is evident that employers are expected to make an effort to accommodate their employees for religious reasons as long as they do not incur undue hardship. The steps taken by the employer to accommodate employee must be reasonable. The same rule should apply to inmates with ubizo; SADCS must take reasonable steps to accommodate inmates with ubizo.

In *Dlamini and others v Green Four Security*,<sup>313</sup> the respondent bore the onus of proving that it considered accommodating the applicants.<sup>314</sup> This is significant because it appears to require the employer to meet an additional criterion before the court will declare the discrimination unfair. Inmates with ubizo have a right to take the matter to court if they feel unfairly

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<sup>310</sup> *TDF Network Africa (Pty) Ltd v Faris* 2019 (40) ILJ 326 (LAC), para 38.

<sup>311</sup> *TDF Network Africa (Pty) Ltd v Fari*, para 45.

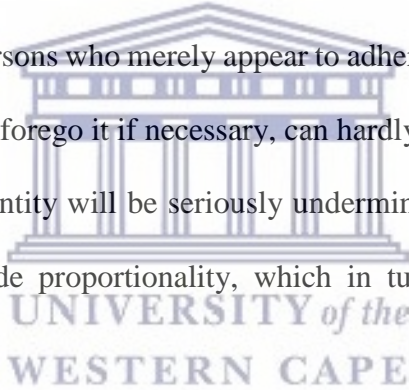
<sup>312</sup> *SACTWU and others v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd* 2012 (33) ILJ 972 (LC), para 38.6.

<sup>313</sup> *Dlamini and others v Green Four Security* 2006 (11) BLLR 1074 (LC).

<sup>314</sup> *Dlamini and others v Green Four Security* para 70.

discriminated against their religion. Reasonable accommodation involves measures that are conditional on a test of proportionality, the result of which cannot be “undue hardship”.

Using the proportionality test, the court will determine whether or not inmates with ubizo can be accommodated. Considering a principle of proportionality, “undue hardship” should be determined on a case-by-case basis.<sup>315</sup> A general principle of application is that “employers must demonstrate that they have taken every effort to accommodate an employee and that it would be impossible to modify or eliminate a requirement without undue hardship”.<sup>316</sup> In *Pillay*, the Constitutional Court emphasised that reasonable accommodation is firmly established in our law and has repeatedly stressed the necessity for religious accommodation. “The centrality of a practice or a belief must play a role in determining how far another party must go to accommodate that belief.”<sup>317</sup> The essence of reasonable accommodation is an exercise of proportionality. “Persons who merely appear to adhere to a religious and/or cultural practice, but who are willing to forego it if necessary, can hardly demand the same adjustment from others as those whose identity will be seriously undermined if they do not follow their belief.”<sup>318</sup> The facts will decide proportionality, which in turn will determine reasonable accommodation.<sup>319</sup>



In *Kievits*, the court ruled that the right approach to religion is one of reasonable accommodation in order to maintain harmony.<sup>320</sup> It then held that accommodating one another is nothing more than “botho” or “Ubuntu”, which is part of our societal heritage.<sup>321</sup> Religious

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<sup>315</sup> De La Fuente OP ‘Reasonable Accommodation Based on Religious Beliefs or Practices. A Comparative Perspective Between the American, Canadian, and European Approaches’ (2018) 10 *The Age of Human Rights Journal* 85 89.

<sup>316</sup> De La Fuente OP ‘Reasonable Accommodation Based on Religious Beliefs or Practices’ (2018) 89.

<sup>317</sup> *Pillay*, para 86.

<sup>318</sup> *Pillay*, para 86.

<sup>319</sup> *Pillay*, para 72, 76.

<sup>320</sup> *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi*, para 26.

<sup>321</sup> *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi*, para 26.



and cultural practises should be accommodated, but not compelled. This case demonstrates that reasonable adjustments should be made where practicable.

Employers must balance accommodating employees' religious preferences with keeping their businesses running. Unless it imposed undue hardship, employers had to reasonably accommodate employees' religious freedom.<sup>322</sup> The employer must change or adjust a job or working environment to allow a religious employee to continue working or grow in her career.<sup>323</sup> According to Bernard, society has evolved, and employers should accept these changes and reasonably accommodate religious beliefs that are sincerely held if they do not cause undue hardship.<sup>324</sup>

The significance of a religious belief should be determined by how essential it is to the employee's identity, and evidence of the religious community's objective centrality is admissible.<sup>325</sup> Ubizo is a spiritual journey that must be accepted to avoid ancestor-causing misfortune and incurable diseases.

A court must consider the complainants' dignity, impact, and whether there are less restricted and less unfavourable means to achieve the goal (as detailed in POPCRU's discussion of reasonable accommodation).<sup>326</sup> The respondent must prove that the discriminating measure or prohibition accomplishes a specific goal.<sup>327</sup> Thus, the measure must be proportional to its goal.<sup>328</sup> The Supreme Court of Appeal determined that the employee's dreadlocks did not affect his job performance, did not pose a threat to the public or other employees, and did not impose an unreasonable hardship on the employer.<sup>329</sup> It was not proven that exempting respondents

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<sup>322</sup> *TDF Network Africa (Pty) Ltd v Faris* 2019 (40) ILJ 326 (LAC).

<sup>323</sup> *TDF Network Africa (Pty) Ltd v Faris*, para 48.

<sup>324</sup> Bernard RB (2014) 2888.

<sup>325</sup> *TDF Network Africa (Pty) Ltd v Faris*, para 34.

<sup>326</sup> POPCRU, para 43.

<sup>327</sup> POPCRU, para 43.

<sup>328</sup> POPCRU, para 43.

<sup>329</sup> POPCRU, para 43.

would place a hardship on the department.<sup>330</sup> Therefore, SADCS must prove that accommodating inmates with ubizo will impose an undue hardship on them; failing to do so shows that inmates with ubizo are subject to unfair discrimination.

In *MEC for Education: KwaZulu-Natal and Others v Pillay*, reasonable accommodation, particularly for religion, is emphasised.<sup>331</sup> The state (as the school) must provide adequate accommodation, as the court has rightly noted.<sup>332</sup> It raises important questions concerning PEPUDA's definition of unfair discrimination and whether cultural and religious rights are guaranteed in public schools and maybe elsewhere.<sup>333</sup> Finally, the Constitutional Court found that reasonable accommodation was crucial to religious freedom discrimination's fairness.<sup>334</sup> If SADCS is able to accommodate inmates with ubizo unfair discrimination will be justifiable.

The duty to reasonable accommodate is both positive and negative.<sup>335</sup> It can be inferred that there is a duty from SADCS to reasonable accommodate the religious practice of inmates with ubizo while incarcerated. Inmates with ubizo should not have to suffer due to their religious freedom. However, SADCS is not expected to endure hardship to accommodate the religious and cultural practices of inmates. No court will expect SADCS to incur expenses disproportionately, if it cannot accommodate the religious practices concerned. Section 25(1) (c) (iii) mandates the state to adopt codes of practice to promote equity and guidelines, including codes for reasonable accommodation.<sup>336</sup>

SADCS must accommodate inmates with ubizo unless they can prove that reasonable accommodation will impose undue hardship. Even though most of these concerns are

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<sup>330</sup> *POPCRU*, para 25.

<sup>331</sup> *MEC for Education: KwaZulu-Natal and Others v Pillay*, para 71.

<sup>332</sup> The state in this case is the school. In the case of inmates, the state is SADCS.

<sup>333</sup> *Pillay*, para 1.

<sup>334</sup> *Pillay*, para 77.

<sup>335</sup> Bernard (2014) 2880.

<sup>336</sup> Section 25(1) (c) (iii) of PEPUDA.

employer-employee, the preceding cases illustrated how the court handled the issue. Reasonable accommodation depends on considerations like whether it burdens the state. The SADCS must accommodate inmates with ubizo by providing places to communicate with their ancestors and perform ceremonies while in correctional service. As indicated in Chapter 2, ubizo brings sickness and death if not treated, so accommodating inmates with ubizo can save a life.

Denying reasonable accommodation is unfair discrimination.<sup>337</sup> The *Damon* case involves the reasonable accommodation of a permanently disabled employee. Inherent job requirement was the defence of the employer which the court acknowledged that granting reasonable accommodation due to empathy may cause confusion. Inmates with ubizo are similarly suffering from the wrath of their ancestors. However, certain of the rituals and ceremonies that are conducted are difficult to adequately accommodate as they pose risk to society and other inmates. The SADCS can re-purpose its resource to accommodate inmates with ubizo.

If reasonable accommodation is impractical or would impose an undue or unreasonable burden, discrimination is not unfair.<sup>338</sup> What is essential for promoting equality and preventing, eradicating, and eliminating unfair discrimination must be weighed against what is reasonable.<sup>339</sup> If reasonable accommodation is not considered or is deemed impossible, the respondent must demonstrate that any subsequent unfair discrimination is reasonable.<sup>340</sup> This case shows that reasonable modifications cannot be made for employees who fail basic work standards.

#### 4.3 Challenges preventing SADCS from reasonably accommodating inmates with ubizo

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<sup>337</sup> *Damon v City of Cape Town* 2022 (7) BLLR 585 (CC), para 53.

<sup>338</sup> *Damon v City of Cape Town*, para 66.

<sup>339</sup> *Damon v City of Cape Town*, para 88.

<sup>340</sup> *Damon v City of Cape Town*, para 89.

The SADCS face two obstacles in accommodating inmates with ubizo. Overcrowding and budgetary constraints are key SADCS issues.

#### 4.3.1 Overcrowding

The 2005 South African White Paper on Corrections highlighted correctional facility overcrowding as the SADCS's biggest issue.<sup>341</sup> Given the major human rights violations caused by overcrowding in correctional facilities, the alarmingly high rate<sup>342</sup> is cause for concern.<sup>343</sup> The SADCS's ability to conduct business is seriously hindered by overcrowding, and the government must act immediately to comply with constitutional constraints.<sup>344</sup> Staff and inmates at all state prisons complain about overcrowding.<sup>345</sup>

Overcrowding affects prison management, administration, and offender well-being.<sup>346</sup> Overcrowding also exacerbates staff shortages, resource limitations, and administrative flaws.<sup>347</sup> Correctional facilities make it difficult to administer effective rehabilitation programs and cause inmates physical discomfort.<sup>348</sup> Correctional Service officials cannot provide a complete rehabilitation program due to insufficient resources and staff and a high number of inmates.<sup>349</sup> Because of this problem, SADCS cannot provide a place of worship for inmates who practise ubizo, as no empty cells are available.

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<sup>341</sup> The White Paper Corrections (2005) in South Africa 12.

<sup>342</sup> There is 28% of overcrowding in correctional facilities in excess of approved beds pace capacity. See Department of Correctional Service South Africa 2022/23 Annual Performance Plan.

<sup>343</sup> Jansen R & Achiume E.T 'Prison conditions in South Africa and the role of public interest litigation since 1994' (2011) 27(1) *South African Journal on Human Rights* 183 187.

<sup>344</sup> The White Paper Corrections (2005) in South Africa 12.

<sup>345</sup> Tapscott C 'Challenges to effective prison governance in South Africa Law' (2006) 10 (1) *Democracy and Development* 1 10.

<sup>346</sup> Tapscott C (2006) 10.

<sup>347</sup> Tapscott C (2006) 10.

<sup>348</sup> Tapscott C (2006) 10.

<sup>349</sup> Tapscott C (2006) 11.

#### 4.3.2 Budgetary constraints

State prison managers reported that they did not receive the entire budget that they had prepared and submitted to regional headquarters.<sup>350</sup> This caused issues with replacing obsolete equipment and general prison maintenance.<sup>351</sup> The current COVID-19 regulations and budgetary constraints require regular reprioritisation for new and alternative strategies to be implemented based on operational needs and capacity.<sup>352</sup> The budgetary constraint is an issue within SADCS, and this will limit their ability to build a place for inmates with ubizo to communicate with their ancestors. As a result of the issue of overcrowding, additional space must be built to accommodate more inmates, which will prevent SADCS from accommodating inmates with ubizo in a reasonable manner.

#### 4.4 Conclusion

This chapter has demonstrated the application of reasonable accommodation to proportionally balance competing interests or rights. Due to their religious freedom, inmates with ubizo have rights and interests that compete with one another, which needs to be balanced. Some of their rights are automatically limited by their incarceration, while others may be restricted under section 36. Mainstream religion inmates have access to worship and religious practise. Due to safety and security concerns for the community, inmates with ubizo are prohibited from performing religious and ancestral rituals outside.

Violation of the right to religion may constitutes unfair discrimination since it is a listed ground in BOR. The SADCS must protect the community from criminality; therefore, limiting ubizo inmates' religious rights is reasonable. The limitation of inmates with ubizo religious rights is

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<sup>350</sup> Tapscott C (2006) 18.

<sup>351</sup> Tapscott C (2006) 18.

<sup>352</sup> Department of Correctional Service South Africa 2022/203 Annual Performance Plan.

beneficial to the society and community since permitting them to leave the facility and perform rituals would pose a risk to society. The courts have stressed that the respondent/ defendant must demonstrate reasonable accommodation. To that aim, they may need to use resources to develop appropriate prayer rooms in the building, adapt their restroom facilities to include washing amenities like taps in the toilet cubicles, and adjust their meals to meet religious dietary requirements. All of the aforementioned are examples of adjustments that might be made as part of a reasonable accommodation for the individuals in question.

Reasonable accommodation compensates unfair discrimination and accommodates victims. PEPUDA promotes reasonable accommodation; it provides intergration for discriminated individuals. Overcrowding and budgetary constraints affect the SADCS. hence the need to re-purpose current resources.

Like the state, religion must adjust to circumstances. As agreed in Sachs' minority decision in the *Pillay* case, the state should not compromise learners' rights if it has financial or administrative burdens. Sachs agrees that the state should compensate for diversity and individuality. Religious freedom must be reasonably accommodated by the state and government. However, reasonable accommodation should not cause undue hardship on SADCS. Hence the need to to re- purpose the existing resources.



## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Conclusion

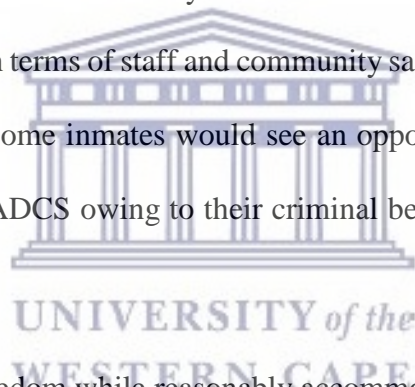
It has been determined that ubizo is one of the historically marginalised minority religions that forms part of ATR. Ubizo is more than a religion; it is a spiritual journey that a person must undertake to get his or her life restored. Refusal brings the wrath of the ancestors, whilst acceptance provides peace and health.

Before the law, everyone is equal, including inmates with ubizo, however, some of their rights are lawfully limited by incarceration. Hence, they cannot claim unfair discrimination on the basis of these lawfully limited rights. In South African equality law, substantive equality is the preferred approach since it is both recognising and accommodating. It recognises and accommodates previously disadvantaged groups and individuals by integrating them into modern society. It also accommodates disadvantaged groups and individuals, such as inmates with ubizo. Even though inmates have the rights, incarceration necessarily restricts certain of the rights protected by the Bill of Rights. The inability to freely attend religious rites, which must be held outside, directly affects their freedom of religion. Freedom of religion is not an absolute right. This grants SADC the authority to restrict religious freedom using section 36 (the limitation clause).

Based on the cases, Harksen test and PEPUDA, the limitation constitutes unfair discrimination because inmates with ubizo are members of a historically marginalised minority religion that were discriminated against in the past. The court also considered issues of human dignity and equality as a criteria for determining unfair discrimination. To be unfairly discriminated

against, treatment must impair an individual's sense of self-worth as a human being and have a negative impact on the individual.

In this scenario, unfair discrimination against inmates with ubizo undermines their dignity and self-worth as human beings since the symptoms they present are severe, and the individual may be misdiagnosed as being mentally ill. Occasionally, the individual seems psychotic, yet the illness cannot be treated with western medicine. This would be detrimental to anyone's dignity. Inmates with ubizo who are incarcerated in SADCS are still subject to the same unfair discrimination and segregation, as only mainstream religions are supported. However, due to some violent and heinous crimes perpetrated by the same inmates, it is appropriate to limit their rights, as the SADCS primary objective is the protection of society and the community. If offenders were permitted to leave the facility for ceremonies and rituals, it would place a tremendous strain on SADCS in terms of staff and community safety. That would put the safety of the public in danger, since some inmates would see an opportunity to escape and commit other crimes. Inmates are in SADCS owing to their criminal behaviour, and they are there to be reformed.



SADCS may limit religious freedom while reasonably accommodating inmates with ubizo, as the state is obligated to accommodate previously disadvantaged groups or individuals. Despite concerns or obstacles like overcrowding and budgetary limits, which are affecting SADCS's duty to accommodate inmates in a reasonable manner, SADCS can re-purpose their resources to be able to accommodate without undue hardship.

## 5.2 Recommendation

It has been noted that ubizo is a spiritual journey that has negative implications on a person's life if it is rejected or ignored. Due to the implications and complexity of the ceremonies that must be performed outside the facility, it has been established that inmates with ubizo right to

freedom of religion should be limited, as some of the inmates are violent criminals. Since some of the victims were victimised by the same inmates, the community and society must be safeguarded at all costs.

Secondly, SADCS faces difficulties in accommodating inmates with ubizo, and although the state is required to reasonable accommodate inmates with ubizo, this should not impose an undue burden/ hardship on them. What will then happen to the inmates who are truly suffering due to ubizo? Should inmates with ubizo be neglected when confronted with hardships?

The challenges facing the SADC are significant. According to CSA, a place to worship should be provided in correctional facility. Due to budgetary limitations and overcrowding, the existing buildings are at full capacity and there are no funds available to construct additional buildings as a place to worship. To solve these issues, SADCS can allow one cell to be used on weekends as a space for inmates with ubizo to communicate and connect with their ancestors. The SADCS will not need to construct a new building for this purpose.

In addition, diviners should be permitted to visit on weekends so that they can interact with ubizo inmates and assist them in communicating with ancestors by offering traditional incense and other items that are safe to be used in the correctional facilities. Christians and other religious leaders are permitted to hold sermons in the facility, so this should not be difficult. On weekends, it may be permissible for inmates to burn traditional incense while communicating with their ancestors. On such weekends, they may be permitted to wear their beads and religious attires. They may be permitted to interact and conduct ceremony with fellow inmates who also have ubizo, so they can offer each other advice when they encounter difficulties.

Permitting inmates to wear beads within the facility on a daily basis poses a risk since they can be used as a choker. Therefore, it is suggested that they wear them only on weekends when

they meet in that particular cell for a ceremony. The religious attire does not pose any risk. They may also be permitted to use herbs to clean themselves on weekend, under the monitoring of guards.

I concur that there are dangerous inmates and that allowing them to hold these gatherings could be dangerous. However, each situation should be evaluated independently by giving them a chance or even having a contract with terms and conditions that outline the rules that ubizo inmates must follow. In addition, the contract may contain a provision to state repercussions<sup>353</sup> if the inmates mistreat the facility or become aggressive. If they appease the ancestors and inform them of the obstacles that prevents them from performing other rituals, the ancestors might very well grant them additional time. When the ancestors observe that a person is heeding the call, they do listen. This will ensure that the inmates with ubizo are reasonably accommodated while the SADCS does not face an undue burden.

These proposals will benefit both sides, as inmates will be able to accept ubizo and those who accepted before incarceration will be able to communicate with their ancestors. Therefore, the SADCS will be able to accommodate inmates with ubizo without undue difficulties. SADCS can provide ubizo inmates with space<sup>354</sup> so that they can do ceremonies and rituals that poses no risk, including burning of incense and gatherings to communicate with ancestors. Those involving slaughtering of animals and traditional beers can be completed outside following the inmate's release.

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<sup>353</sup> Consequences may include SADCS refusing to allow inmates to attend and participate in ceremonies conducted by others and prohibiting inmates from using the space to connect with their ancestors. May not be permitted to wear beads or burn incense.

<sup>354</sup> The space may be a cell where they will be able to burn incense and communicate with their ancestors.

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