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CULTURAL DIVERSITY, HUMAN RIGHTS AND THE FAMILY IN CONTEMPORARY AFRICA: LESSONS FROM THE SOUTH AFRICAN CONSTITUTIONAL DEBATE

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1. INTRODUCTION

The Interim Constitution which came into force on 27 April 1994 was a result of many bruising months of political horse-trading and compromise. It marked the culmination of four momentous years in the political history of South Africa. During that period ordinary South Africans began to realize that they could bring about genuine changes in their lives by ensuring the incorporation of their vision into the constitution. Organizations and individuals took up the challenge, and the politicians negotiating a new dispensation found themselves under pressure to accommodate a wide variety of views ranging from the religious to the cultural, from the ideological to the practical. Underpinning these demands was the widespread belief of many South Africans in a future that would be democratic, non-racist and non-sexist.[1] There was a general consensus that the new South Africa should have a 'human rights culture': the inclusion of a bill of rights[2] in the interim constitution meets this demand.

The final stage of the negotiating process, styled the Multiparty Negotiating Forum, involved twenty-six political parties and groupings.[3] This stage began in March 1993 after months of the stop-start progress represented by CODESA I and II.[4] It is a stage that was characterized by a sense of urgency, especially after an election date had been set.[5] Most of the work was done in 'technical committees' the most important of which, for our purposes, was the Technical Committee on Fundamental Rights During the Transition. The finished product finally appeared as Chapter 3 in the Interim Constitution which was enacted into law by the tri-cameral Parliament as the Constitution of the Republic of South

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Africa, Act 200 of 1993. This was part of a set of draft statutes agreed upon by the plenary body of the Multiparty Negotiating Forum to regulate events in the period preceding the election and the transitional period thereafter.[6]

2. CULTURAL DIVERSITY IN THE NEGOTIATIONS

A brief overview of the process such as the one given above cannot begin to describe the intensity of the various debates that were waged around the bill of rights. Because of the heterogeneity of South African society there was no shortage of lobbies intent on driving home their particular concerns. Amongst the most widely publicized points of difference were the quest of rightwing Afrikaners for a 'Volkstaat'[7] and the insistence on 'real' federalism by the Inkatha Freedom Party amid veiled threats of secession by KwaZulu/Natal from Chief Mangosuthu Buthelezi. Feminist and other groupings concerned with women's issues were no less active. They were acutely aware of the danger that the new South Africa may be more 'non-racist' than 'non-sexist' as had happened in other parts of Africa, and there was consensus that the opportunity offered by the negotiations to insert an equality clause in the constitution should be seized.

Very early on in the debate it became apparent that there was a certain tension between gender issues and the status quo: that the claims for the eradication of women's oppression would inevitably be met with resistance from many quarters. It was clear, too, that such quarters included the political, social and economic structures of a patriarchal society. The debate was thus largely about who stood to lose if gender oppression were abolished. An important part of this debate sought to understand the effect of claims for women's emancipation, based as they are on human rights notions, on societies in which the status quo is routinely defended on the basis of culture and tradition. This brought into sharp relief questions about the indigenous African value system and what it entailed for women.

There were strong assertions that the value system of a new South Africa should broadly reflect the culture of the majority of the country's inhabitants. That, in social and political terms at least, South Africa should display a family resemblance to the continent of which it was part rather than to Western Europe. Concretely, this was expressed in the form of strong moves to exempt indigenous law from any constitutional provision guaranteeing equality and non-discrimination.

Not surprisingly, human rights activists were unhappy at this prospect. They were concerned that if these claims prevailed some practices which are incompatible with 'constitutional norms' would be indirectly sanctioned. A particular fear was the threat that patriarchal and sexist domination of African women would be shielded from constitutional

scrutiny, resulting in the unacceptable situation where women in South African society would not all enjoy the same rights.

The attempt to exempt indigenous law from the reach of the equality and non-discrimination clause was led by the traditional leaders, many of whom are organized under the banner of the Congress of Traditional Leaders of South Africa (CONTRALESA) which is ANC-aligned. (The rest, of course, belong to other groupings or operate independently.) During the constitutional negotiations the traditional leaders lobby was seen as quite important, and was courted by both the African National Congress and the Government. As a result they had registered some notable successes.

Not only had they secured a commitment in the Constitutional Principles recognizing the position of traditional leadership as constituted under customary law but they had also reached agreement on the insertion of a provision in the Draft Interim Constitution (Article 32) recognizing the right of communities 'which observe a system of customary law' to be governed by that law in their interpersonal relations. This right was to be subject to the requirement that the legislature and the courts should be active, during the interim period, in guiding the development of customary law to a point where it conformed with the values embodied in the constitution, especially the notion of equality. In other words, there was no threat to the continued existence of customary law if it accepted some gentle coaxing into the twenty-first century. This compromise was not to everybody's liking but it was widely acknowledged as an eminently sensible approach under the circumstances.

And then out of the blue, in an inexplicable change of tactics, the traditionalists squandered their advantage. Apparently believing that they had the other negotiators on the run, they sought to press their advantage by reneging on Article 32 at the last minute, and proposing instead a blanket protection for 'cultural rights' as opposed to customary law specifically. The resultant disgust of the other members in the relevant committee[8] led to a widespread withdrawal of sympathy for the customary law argument as a whole, and the finely-tuned and hard-fought compromise that was Article 32 was expunged from the final version. In angry reaction to the chiefs' clumsy manoeuvring, calls for the abolition of customary law began to be heard from some feminist quarters. (In the latter part of this paper I take issue with this kind of response.)

In a more elaborately argued submission, the KwaZulu Government, within its proposed federal framework, advocated the recognition and protection of customary law by state rather than federal law. The reason was explicit: major areas of relevance to customary law (such as family, property and inheritance) 'are related to subject matters which in many federations are left to the jurisdiction of member states' and, in any case, in the absence of countrywide uniformity in these areas 'social and

cultural formations should be able to regulate their interests in autonomy and outside the interference of government'.[9]

The upshot of these claims for the protection of cultural interests in the Constitution was that matters such as family and property, which crucially affect the rights of women, were likely to be relegated to a 'private' sphere, away from any form of constitutional (and in some cases ordinary legislative) control.

To the extent that it appeared to pit the human rights activist against the 'retrograde' forces of traditionalism, the debate was progressing along fairly orthodox lines. Unfortunately, neither of these positions is unproblematical. But before we address the problems, something needs to be said about the basic arguments involved. It is my contention that both viewpoints have a large measure of validity. The feminist's fears that the protection of 'cultures' will insulate areas such as African family law from the bill of rights are well founded: at the same time it must be realized that the claims of the majority culture to a greater visibility in the new South Africa are not all spurious.

I will take the two arguments in turn. In the first place, I will attempt to sketch out some of the basic tenets of the traditional African value system in so far as they relate to gender questions, and then I will set out the relationship of that system to emerging international and local human rights mores. The family will be identified as the abiding feature of this value system. The relationship itself will be shown to be one of tension, and it is suggested that the arena for balancing the divergent claims that arise will be the bill of rights itself and the way it is interpreted and utilized.

3. THE FAMILY IN THE AFRICAN VALUE SYSTEM

The link between the family and the traditional value systems of most African societies is not difficult to establish (Kuper 1947, 1963; Phillips 1953; Radcliffe-Brown 1950). The family is where African peoples construct the foundations of their social lives. The systems of kinship and marriage in pre-capitalist times sought to serve the purposes of an agrarian society in which the family constituted a centre for production, distribution and consumption. It is not surprising that the structure which emerged had as its overriding value the communal or non-individual imperative in marriage and family life (Nhlapo 1991:138). This communal ethic arose from the position and role of marriage in many African societies as a vehicle for the attainment of ends and the protection of interests deemed to be superior to those of the marrying couple. In the main, these ends had to do with survival.

But in these societies political leadership and decision-making were the prerogatives of male elders. In the event, the rules and institutions which emerged were largely *about* women and children, not *by* them. It

was thus possible to mask inequality under the guise of group interests where women and children (having no say in the articulation of those interests) were certain to be disadvantaged. Such patriarchal structures are still the subject of attack today and this underlines the truth of the statement that family matters invariably resolve themselves into 'women's issues' precisely because in the African context women are (or are seen as having the obligation to be) first and foremost, wives and mothers. The greatest threat to the constitutional protection of women's interests is likely to come from structures such as the family, which can plausibly lay claim to immunity from external interference on the ground of 'culture'. Focus on the African family and the culture from which it emerged is, as will be seen in the following pages, simply dictated by an appreciation of the special claims to an enhanced profile that this culture will have in the process of establishing a new order.

4. THE PROBLEM WITH CULTURE IN A NEW SOUTH AFRICAN LEGAL AND POLITICAL ORDER

The diversity which exists in South Africa's demographic, cultural, social and political landscapes dictates that we raise, however briefly and superficially, the question of culture and the debates surrounding it. It has been pointed out that very early on in the debate the battle was joined on the issue of whether 'culture' could be legitimately invoked as a ground for ousting the jurisdiction of the Constitution over certain rules and practices followed in particular communities. The term has been used extensively but there have been few attempts to grapple with its meaning.

One can identify two primary understandings of the concept of culture in the debate, which can be characterized as 'academic' and 'lay'. (Within each understanding there may, of course, be a number of overlapping strands). The academic (or theoretical) pursuit stresses the nature of culture as a phenomenon that is essentially contested and processual rather than uniform and static. As such, cultural values in every era are continually in a process of contestation, with emerging mores challenging the dominant set and sub-cultures springing up in various forms. Typical of this approach is the work of Kaganas and Murray (1994:409–33), who point out that 'culture cannot be seen as a given . . . it is the product of constant change and sometimes opportunistic manipulation'. Citing the work of Raymond Williams,[10] Terence Ranger[11] and Eric Hobsbawm[12], among others, Kaganas and Murray endorse the idea of culture as a creative process springing from dynamic social and economic relationships and conclude that there is a danger in accepting 'values, practices and meanings merely on the basis of their claim to a traditional, cultural pedigree'. Angela Cheater (1989:105) echoes these sentiments with her view of culture as a 'set of ideological

precepts which can be mobilized in socio-political disputes' and is 'open to internal manipulation'. She sees such manipulation most effectively at work in situations where oppressed groups appear to feel more at ease with the oppression they know, resisting attempts to displace the hegemony of the local culture — a process she calls 'defensive cultural nationalism'. Rwezaura (1992:92), too, points to the role of the 'definers' of culture in society and warns of the political uses to which culture can be put.

A separate and minor strand in the academic understanding reflects the stance of scholars who are reluctant to acknowledge culture as a useful category of analysis, even in the broad sense (see Thornton 1989:20–23). Speaking of an 'African' or a 'Western' culture is viewed with suspicion as being somewhat racist — an understandable enough reaction in view of the history of the manipulation of the concept in this country in the service of segretationist ideals (Nhlapo 1992:8). In this academic tradition 'cultures' in the plural — as in 'student culture' or 'culture of violence' — fare better than culture as a monolithic concept.

The lesson that emerges from this theorizing is that we must treat with suspicion any attempt to posit the culture of any community as a given. According to this view, an invocation of culture in the human rights debate which links that concept to community values and shared understandings is flawed. It is flawed mainly because 'powerful individuals and groups tend to monopolize the interpretation of cultural norms and manipulate them to their own advantage' (An-Na'im 1992:27). In other words, the dominant culture, through its definers and spokespersons, is able to silence the voices of challenge and to present an image of immutability and consensus which may mask horrendous repression.

The 'lay' understanding occupies a position somewhat to the right of the theorizing described above. It shows little appreciation of the 'contestation' argument and happily juxtaposes culture and tradition. Ordinary people going about their ordinary business invest a great deal of emotion in the belief that they 'belong' in certain categories: that there are some things which make them 'us' and the others 'them'. This seems to be so despite the growing acceptance of theories of culture which stress similarities rather than differences in the human condition. To the vast majority of South Africans it is what culture *does* rather than what it is which is important: it gives them a sense of identity. Whether the item chosen as the distinguishing feature is mutilation in the form of slit earlobes or facial marks, or rules of exogamy in marriage, or certain funeral rituals — we ignore at our peril the centrality in people's lives of the need to belong and to be different. When South Africans speak of 'our way of life' they believe they know what they mean: they do not perceive the question of culture as being permanently 'up in the air'.[13] The added dimension of our colonial and apartheid

past, with its studied and systematic denigration of African custom, merely adds a defensive aspect to an issue that is already highly charged emotionally.[14]

It is thus possible to distinguish two separate projects here: one a necessary intellectual theorizing to establish a contemporary definition of culture and to work out why it does what it does; the other a more practical assault on the political problems of perception and resistance which will need to be overcome in South Africa if culture and human rights are to be comfortable bedfellows. Failure to see this poses the danger that the reformer may begin to exhibit signs of impatience with the lay viewpoint, seeing it as an inability to grasp the fact that 'the world has moved on'. This leads in turn to the mistake of advocating, too strongly and with insufficient sensitivity, the wholesale adoption of international (or universal, or 'civilized') norms as the only answer to such 'backwardness'. In such circumstances, backlash and resistance from the majority would become inevitable. This is why one feels compelled to enter a caveat here. Current research into social and economic movements within the majority population is useful but hardly adequate to explain the adherence of many people to 'tradition' despite mounting evidence of its constant invention and re-invention.

Statistics pointing to a rising level of Westernization among Africans are obviously accurate; but they assess only what is visible. It is easy enough to tell what someone earns and spends, and on what; where she/he lives and how many university degrees they hold. This does not begin to approach the question of attitudes. It gives little hint as to the prevalence or otherwise of an allegiance to some notional 'Africanness' – a belief that the past represents a reservoir from which one can draw to construct a present identity. People in general, and Africans are no exception, are remarkably adept at operating within two or more normative systems (Bennett 1992:17). A complete insight into the link between the old and the new, the idealized past and the present reality, lies at the heart of the problem of assigning the proper constitutional place to African cultural notions. A breakthrough here will have vast implications for the gender issue because it is the values to which African people consider themselves as owing allegiance (especially in the area of family relationships) which will determine the pace of change.

A comparison of the two approaches outlined above suggests that one of the serious problems with the use of the term 'culture' is that no distinction is made between its various components, which range from preferred forms of greeting and modes of dress, through to basic values and organizing principles of society (Ngubane 1991). Arguments are thus mounted which address culture in general when they should be directed at one particular aspect or the other.

It seems clear that in ordinary life people employ 'culture' as a medium – a language or device which enables us to give meaning to the world and to go about life in more or less familiar pathways. To assert the existence of an 'African' culture, for instance, is not to promote claims of its superiority over other cultures, nor is it to suggest that only Africans can participate in it or that none of its items overlaps with, or is replicated in, the cultural packages of others. It is simply a broad category that covers a particular set of 'more or less familiar pathways'.

Equally clear is the fact that cultural packages across South Africa and the continent are not uniform; neither is their content. What is contained within these packages ranges from the trivial to the extremely important; from the neutral to the controversial; from the good to the bad. It is implausible to place at the same moral level 'cultural' practices such as a dance or children's fireside fables on the one hand, and the ill-treatment of widows and forced marriages, on the other. It is in this respect that one detects a certain subjective element in the process of constructing a sense of belonging: a possibility of choice (Nhlapo 1992:9). A person usually has the option of emphasizing or de-emphasizing one's membership in the many identities which may have a claim on her/his loyalty. As a Zulu I may strongly support a particular kind of relationship between youngsters and their elders; as a Christian I may abhor polygamy; as the recipient of a post-secondary education I may be indifferent to witchcraft or lukewarm on lobolo. This we may call 'intensity of allegiance'. In the South African human rights debate this element of 'volition' may yet prove to be crucial in establishing a system which allows people to 'opt out' of the particular cultural package attributed to their group. On the gender issue, it would undercut the power of the 'definers' of culture in society and enable the general member to embrace a culture and not have it dictated to him or her.

Unfortunately, what appears above does not dispose of the matter. In this country there also exists a purely practical reason why cultural arguments cannot be easily dismissed. Decades of political and cultural domination have left African peoples highly suspicious of the agenda of the proponents of modernization. The culture protection lobby are concerned that, without appropriate language in the constitution specifying the rights of peoples 'to be themselves', the international human rights movement with its individualistic influences will swamp them on its march towards re-creating the world in the image of the West. What is unacceptable in this for many Africans is the notion that theirs is a delinquent culture which requires to be 'sorted out' by a more advanced and superior one: the very kind of thinking that many people believed had disappeared with the passing of the early colonial period. In this respect, liberation has been eagerly awaited as a chance to redress the

imbalances caused by cultural domination and apartheid. A 'democratic' and 'non-racist' South Africa will have to grapple seriously with the need to reassure the majority that there is no conspiracy to 'Westernize' them against their will.

5. CULTURE VS HUMAN RIGHTS: A FIGHT TO THE FINISH?

From the foregoing it is clear there are two kinds of dynamics at play here: an intellectual one and a political one. The former is largely theoretical and seeks to understand and explain both women's oppression and the traditionalist forces, amongst others, which seem to perpetuate it. The latter is a more immediately practical programme on both sides to mobilize public opinion (i.e. voter power) and other strategies to get the best possible deal. It is the thesis of this paper that failure to distinguish between these two dynamics and the way in which the debate shifts from one to the other and back again renders a resolution of the problem that much more difficult to reach.

The first step, then, is to find a less polemical approach to the discourse. It is possible to take issue with the impression created in the debate that under African customary law women's rights are a non-existent issue, while they are certain to thrive under the international human rights system: that the solution is thus to substitute the latter for the former.

In the first place, the call for the abolition or supplanting of customary law is invariably made by people whose knowledge of the subject is no deeper than that of the missionaries of a century ago. The distortions that have crept into African custom as a result of the colonial process thus receive very little attention. To me that deeper understanding is crucial because it enables one to convince African people that one knows what used to be good and decent in their way of life, and what has been perverted. This affords the reformer a much better chance of engaging fruitfully with the subject whose behaviour he/she wants to change. The alternative is to bombard a community with lectures about its own 'backwardness'. If you tell people long enough that their value system is worthless and has nothing to contribute to the national debate, they will either resist you or ignore you, neither of which advances the cause of social transformation.

Secondly, I believe that the fault often lies in the way the issue is approached, especially when the debate is in its 'intellectual' (rather than 'political') mode. The tendency of the reformer and the activist to assume that the merits of human rights are self-evident and do not require explaining ignores the widespread scepticism in Africa about the international human rights system. People are alive to the fact that they had no input in the Universal Declaration and the other UN documents which form the basis of the universal human rights movement

(Nhlapo 1989:3): that some countries which preach the doctrine most vociferously have been known to collude with apartheid. A certain scepticism is to be expected. If people want to pause a while and renegotiate South Africa's new value system from *understood* and self-experienced starting points, that should not present a problem. The reformer's insensitivity to these doubts plays into the hands of the cultural relativist who preaches that the international community has no business judging African practices by a foreign standard.

On the other hand, it must also be remembered that the traditional values which permeate African family law and which are often sought to be protected under the heading of 'culture' are themselves not immune from criticism. These values, and the customary law which ostensibly underpins them, are often not at all 'traditional'. What African nationalist governments inherited from the colonial authorities were societies governed by 'customary' law of the type where the adjective is always accompanied by inverted commas. It was an official version of African custom which had gone through various kinds of interaction with the colonial process itself. Acknowledging the 'construction' of this law in a historical process marked by destabilizing social and political changes and the responses to those changes, some commentators have referred to it as 'defensive customary law' (Rwezaura 1983). The process usually took the form of an alliance between the colonial authorities and African male elders who, being the holders of 'strategic' resources in the form of land, cattle, women and children, defended their vested interests by promoting the growth of rigid legal rules in place of custom when the latter system could no longer protect them from the effects of change. Post-colonial governments in many cases inherited this relationship and used it to ensure their dominance. The built-in conservative bias in this alliance in part explains the decline of human rights in African societies after 'independence'. The danger of collusion between a new South African government and the 'traditionalist' lobby is a real one.

The traditional family, too, has undergone serious changes. Not only does it now have to compete with other family forms but Christianity, labour migration, influx control and wage employment have between them eroded the extended family to the point where the observation can be made that '. . . it is clear from both statistical evidence and from ethnographic studies that extended families are in no sense the norm' (Bennett 1991:167). Add to that unemployment, poverty, urban overcrowding, the erosion of the material underpinnings of the kinship ethic and the picture is bleak indeed. It is possible to agree with Bennett's realistically pessimistic assessment that, 'Whatever reform measures are now envisaged for customary law, it is unlikely that the family can be reconstituted in either an extended or even a nuclear form'. The offshoot of these trends is

that there now exists an ever-increasing gap between the idealized 'traditional' family and contemporary reality.

In this kind of situation it is interesting to see what kinds of provisions relevant to these issues finally found their way into the bill of rights.

6. CULTURAL DIVERSITY IN THE BILL OF RIGHTS

Chapter 3 of the interim constitution sets out the fundamental rights to be enjoyed by the citizen in his or her 'vertical' relationship with the state (Cockrell 1994a:24). This means that there is specific language in the constitution restricting the operation of Chapter 3 to 'all legislative and executive organs' of state [s7(1)]. Lawyers across the country are currently debating whether this device successfully precludes private relationships from the ambit of the bill of rights, ie 'horizontal application' (Cockrell 1994 6:6–7). There are strong views that despite section 7(1) the bill of rights is justiciable against private parties as well in certain circumstances (Cachalia 1994).

Guaranteed in Chapter 3 are all the classic civil and political rights frequently referred to as 'first generation' rights. Most importantly, the constitution guarantees equality and non-discrimination in section 8: no one may be discriminated against on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. At the same time, though nowhere entrenched as proposed in the old article 32, customary law is mentioned throughout the Constitution[15] and its schedules[16] in terms which make it clear that it continues to be part of the South African legal order. Participation in one's 'cultural life' is also guaranteed (s 31). The importance of the constitutional principles, for instance, lies in their role as the standards which must inform the drawing up of the final constitution. Thus, according to Principle XI [read with s 71(1)] the final constitution must promote the diversity of language and culture. Similarly, Principle XIII ensures the recognition of indigenous law in the final Constitution, and the position of traditional leadership based on such law.

It appears then that the women's lobby have won an important, but not total, victory. By blocking the attempt to insulate customary law from the reach of the equality clause they prevented the traditionalist group from gaining the high ground, from which they may have proved impossible to dislodge at the end of the interim period. But it was not possible to expunge all talk of customary law and culture from the Constitution: the constituencies involved were too strong. The position is now that the battle shifts from the national to the provincial arena.[17] The issues discussed and the arguments advanced in this paper thus retain their relevance: the debate continues.

For this reason, the concluding part of this paper addresses the difficulty of squaring the manifest need for the 'Africanization' of South Africa's legal culture with the claims of a modern constitution. It argues that a sensible approach to the problem should consider the adoption of a standard which enables both ideals to be achieved. That standard, I submit, is to be found in the notionof human dignity. It is conceded that the concept of human dignity in human rights talk is not unproblematical but the point is advanced that, unshackled from its association in non-Western societies with social role performance, the concept has the capacity to move the debate beyond cultural relativism.

7. HUMAN DIGNITY: A MODERN VIEW?

The concept of human dignity is a problematic one. Despite the association in United Nations instruments of human rights and human dignity, there are scholars (Donnelly 1982; Howard 1982, 1986; Howard and Donnelly 1986) who maintain that the two notions are distinct and should not be confused. In particular, it is argued that traditional African societies had no conception of human rights and that claims to the contrary reflect a confusion between human rights and human dignity.

The argument has been advanced in the past that traditional African society recognized human rights norms of many types, some of which coincide squarely with modern ones. As Haile (1984:587) points out:

> The fact that human rights have been part of the Western philosophic tradition from early times, does not imply that non-Western societies have no equivalent conception of human rights. Written treaties on natural law or natural rights are no prerequisites to conceptions about or commitments to human rights.

Hannum (1979) lists six traditional rights which were identified at the Butare Colloquium: the right to life, the right to education, the right to freedom of movement, the right to receive justice, the right to work, and the right to participate in the benefits and decision-making of the community. The right to life in traditional culture appears to have had a much wider ambit than its international counterpart: it included not only a prohibition against killing but also the obligation to assist in providing means of subsistence for needy members of the community. Jack Donnelly (1982:308) has argued that these are not human rights since they were not based on one's humanity *per se* but on communal membership, family, status or some other ascriptive characteristic. Insisting that non-Western societies have no conception of human rights (in the sense of individual entitlements benefiting a person by virtue of being born human), he sees most safeguards to human dignity in traditional African society as having been based on duties or on limited government, neither of which entailed an appreciation of human rights.

A clear strand running through such arguments is the assertion that traditional communitarian societies viewed human dignity only in terms of the worth attaching to a person's excellence at discharging the role socially allocated to him or her. Rhoda Howard (1982:45) says:

> . . . in what is left of 'traditional' Africa there is a concept of human dignity which is bound up in an individual's fulfilling of her socially approved role: that is, the individual who conforms to society's view of her role as daughter, wife, mother or widow will feel a sense of respect or worthiness. This view of human dignity does not accord with Western conepts of individual freedom.

The role-centred definition of human dignity again comes through in a later work by Howard and Donnelly (1986:8)2:

> Conceptions of human dignity, in their social and political aspects, express particular understandings of the inner (moral) nature and worth of the human person and his or her proper (political) relations with society.

In other words, the dictionary meaning of dignity as relating to 'true worth or excellence' is given a narrow interpretation suggesting that in traditional society there is no good or bad individual *qua* individual: there are good or bad (or mediocre) mothers, slaves, chiefs, tenants, healers, daughters-in-law, and so on. There is no human worth ouside one's 'place' (ie role) in the group; or if such worth exists, it is socially and politically irrelevant. This is contrasted with Western liberalism (Howard and Donnelly 1986:802) conceived of in terms of autonomy and equality (following Dworkin 1977:273). Human rights then become 'a particular social practice that aims to realize [this] distinctive substantive conception of human dignity' (Donnelly 1982:303).

There is a large measure of plausibility in all this. It explains why a 'dignified life' may be possible in societies where equality, for instance, is not highly valued. Proper wifehood (that is, socially approved and therefore 'worthy' performance as a wife) may entail rules such as that a wife should never look her husband in the eye, or that she should kneel when serving his food. And yet we would agree that such treatment of women falls short of a standard we take for granted in human rights talk: namely, equality of treatment. Similarly, a good daughter may defer to her father in the choice of marriage partner (and thus rank highly in terms of social approval), when the liberal human rights standard would emphasize free choice (ie autonomy) in that situation.

One is left with the uneasy feeling, though, that this definition is too narrow. It is appropriate in establishing the point that the authors seek to make about the correlation between liberalism and human rights as understood in the United Nations system, but it perhaps overstates the case in relation to the role-centred understanding of human dignity in traditional society. As a definition, it does not exhaust all possible, or useful, meanings of 'human dignity'. An equally valid understanding

can be one in which true worth or excellence are divorced from role and associated more closely with *being*.[18] The case does not appear to be made out that traditional society can only have one view of dignity. Even if it is empirically correct that in the countries studied by Howard (1986:1–15) dignity was a matter of role-fulfilment, an alternative understanding is not logically precluded.

The problem, one suspects, lies with the authors' preoccupation with the 'community versus individual' dichotomy. In traditional society this was not nearly as polarized as is sometimes claimed today. Adegbite (1978) analyses the situation correctly when he says, 'The problem posed for individual freedoms in traditional Africa was . . . to ensure that the community principle was not so applied as to stifle initiative (ie, affording security without freedom)'. This theme was echoed by the Butare Colloquium which concluded: 'Traditional society offered a balance between individual and collective rights that perhaps tilted toward the latter . . . it is essential to maintain a balance rather than to merely expand one set of rights at the expense of the other' (Hannum 1979:69).

Traditional society's concern with the primacy of the collective does not compel the conclusion that there was a total absence of regard for human worth divorced from social role. These were small-scale vulnerable societies and it made sense to subsume the protection of the individual in institutions geared toward the protection of the group. For example, arrangements which existed for the redistribution of resources to the needy were based on notoriously unequal relations,[19] yet it can plausibly be argued that destitution and hunger were seen as no less 'undignified' than they are considered to be in the West. Few would claim that there is any inherent dignity for an able-bodied and proud person in queuing up to receive unemployment benefits: yet this is a common policy in industrialized countries, presumably because it is accepted that the indignity of the dole is a lesser evil than the indignity of poverty.

It is difficult to identify any grounds for arguing that these ordinary meanings of dignity were not available to traditional society, and are not available now to contemporary African society. What is required is to free the concept of dignity from role-oriented definitions so that it can be influenced in its development by the needs of the times. Howard and Donnelly themselves acknowledge the significance in social and political terms of the move from small-scale societies to nation states. The condition of the citizen in a complex modern state necessitates strategies for protection which might compel a modernization of the basis for our understanding of human dignity without compromising human dignity itself as an ideal to be realized.

This seems to me to provide a way of sidestepping the debate as to whether or not traditional society recognized human rights. These soci-

eties had the same aspirations as their Western counterparts to realize human dignity, and they often had elaborate mechanisms in their moral repertoires for the achievement of this end. If we develop a re-conceptualization of dignity that is wider than role-fulfilment and which is closer to human worth in its ordinary sense, then indeed some of these mechanisms may be seen to be inadequate. When they are, they must be overhauled or abandoned.

A moral system, to be a moral system, must be universal, therefore in the final analysis, the human dignity test is a test based on moral defensibility. Racism and apartheid are morally indefensible. So is sexism. A standard which enables us to assess cultural practices on their merits, to see whether they adequately protect human dignity or not, (ie, whether they are morally defensible in a general sense) will free us to make concessions in those cases where no harm to our cause is anticipated.

8. CONCLUSION

This paper tries to facilitate an accommodation between the claims of cultural diversity and those of fundamental rights. In particular, it suggests that arguments based on cultural immunity from human rights critiques can be refuted on their own ground, and must robustly be so refuted. This intellectual exercise must be supplemented by a pragmatic 'political' exercise which takes into account the human need for cultural identity, especially in a country such as South Africa where such identity has been manipulated and abused in the service of apartheid. Such an approach requires sensitivity to those areas of the majority culture which hold no dangers for the women's struggle. The role of education and research will be crucial here. The bill of rights, to truly reflect the best values of the South African nation, must be informed by a sound understanding of both the moral and the practical interests involved. A standard based on human dignity is simple enough to understand, it draws on the international moral consensus on gender issues without being susceptible to labelling as 'foreign', and may provide the best chance of resolving the tension between the need for a democracy to take cultural aspirations seriously and at the same time ensure substantial justice for all.

NOTES

[1] See paragraph one of the Preamble to the Interim Constitution which expresses this ideal in the assertion that the new South Africa should be a '. . . democratic constitutional state in which there is equality between men and women and people of all races'.

[2] In the Constitution itself this is referred to as the Chapter on Fundamental Rights.

[3] In the interests of achieving the widest possible representation, many organizations were included whose support amongst the population had never been tested in an election.

[4] The Convention for a Democratic South Africa (CODESA) had its first plenary session on 20 and 21 December 1991, after almost a year of 'talks about talks' mainly between the African National Congress and the Government. Nineteen parties and groupings were represented, with five working groups set up to facilitate the work of the Convention. A stalemate in Working Group 2 (concerned with the formulation of constitutional principles to guide the drafting of a final constitution) led to the virtual collapse of this first phase, dubbed CODESA I. CODESA II convened on 15 and 16 May 1992 in an atmosphere of suspicion and mistrust: a month later (after the start of the ANC's 'rolling mass action' to force compromises from the Government) the ANC formally suspended the constitutional talks in the wake of a massacre in Boipatong and a worsening security situation. On the history of the negotiations, see Corder (1994).

[5] Many of the flaws in the interim constitution are, arguably, attributable to the breakneck pace of the latter stages of the negotiating process.

[6] Some of the other important statutes were the Transitional Executive Act 151 of 1993; the Independent Electoral Commission Act 150 of 1993, and the Electoral Act 202 of 1993. Further enactments regulated the media.

[7] This is the name given to the idea of a separate Afrikaner 'homeland' within the borders of South Africa.

[8] This was the Ad Hoc Committee on Fundamental Rights During the Transition which was set up to resolve conflicts relating to language in the draft provisions of the bill of rights. It was in this committee that the chief negotiator for the Cape Traditional Leaders, chief Mwelo Nonkoyana achieved a measure of notoriety with his insistence that women cannot be equal to men. He was the prime mover of the resolution which torpedoed the compromise provision. See Kaganas and Murray (1994:410) and Cockrell (1994a:23).

[9] See Articles 2 and 12 of the 'Supplementary Submission by the KwaZulu Government on Traditional and Indigenous Law' to the Technical Committee on Constitutional Matters — paper A63 — dated 8 June 1993.

[10] *Problems in Materialism and Culture* (1980) (Verso).

[11] 'The Invention of Tradition in Colonial Africa' in E. Hobsbawm and T. Ranger (eds) (1983) *The Invention of Tradition* (Cambridge University Press).

[12] 'Introduction: Inventing Traditions' in Hobsbawm and Ranger (eds), above.

[13] Kaganas and Murray (following Williams) would see this as an example of the idea of a 'dominant culture' at work: 'an amalgam of values, meanings and practices that are selected from a range of possibilities' and which are transmitted through education (1994:422).

[14] One sometimes worries that there is scant appreciation in intellectual circles of the depth of resentment amongst Africans at the casual and insensitive way in which their culture has been brushed aside over the years. This can be illustrated vividly with the issue of the naming of children. To an African, naming a girl child 'Relebohile' or 'Sibusisiwe' (seSotho and Zulu for 'we are thankful' and 'we are blessed', respectively) is filled with meaning and significance. To be told by a schoolteacher that these are pagan names and that the child will not be registered at school until she comes back with a 'Christian' name, is insulting. Yet this was a routine occurrence in the past, and many people today are Esthers and Salomes, Johns and Ezekiels for precisely this reason. The past indignity is remembered, and feelings of anger at such examples of cultural domination are never far below the surface. Reformers and activists would do well to remember that appeals to 'international' standards (perceived by the ordinary person as 'Western') have this serious attitudinal obstacle to overcome.

[15] Sections 33, 35, 126, 181 and 182.

[16] Constitutional Principles XI, XIII and XXXIV.

[17] See the Constitution of South Africa Amendment Act 2 of 1994 which amends s126 and Schedule 6 of the Constitution so as to place matters of customary law within the competence of provincial legislatures.

[18] At this stage of the development of these ideas one can only gloss over the complex problem raised by this formulation. 'Worth' implies 'value or merit' (*Concise Oxford Dictionary* (1964)) prompting the question: 'valuable to whom or to what?' Following this line may yet show that the Howard and Donnelly distinction is illusory, and that Western societies, too, have socially defined notions of 'personhood'. Certainly in debates such as those surrounding euthanasia and abortion, for instance, one gets the impression that ideas about what constitutes a 'dignified life' are perhaps not as uncontested as might first appear.

[19] Two examples should suffice to illustrate this phenomenon. In its precapitalist form, the chieftainship in Africa entailed as many obligations as it did rights and privileges: the chief's apparent material wealth, accumulated from fines, gifts and various forms of homage represented

a community resource in times of drought or famine. Similarly, in a society without state pensions or social welfare, the main hedge against old age poverty was the upward redistribution of resources from the young to the old.

REFERENCES

Adegbite O. L. (1978) 'The Concept of the Rule of Law in African Societies', (PhD thesis, London University).

An-Na'im A. A. (ed) (1992) *Human Rights in Cross-Cultural Perspective: The Search for a Consensus*, (Philadelphia, University of Philadelphia Press,) 27–8.

Bennett T. W. (1991) *A Sourcebook of African Customary Law for Southern Africa* (Cape Town, Juta).

Bennett T. W. (February 1992) 'Human Rights and the African Cultural Tradition' (unpublished paper delivered at the Conference on Human Rights and Cultural/Historical Variations, Bochum, Germany, Ruhr University).

Cachalia A. (1994) *Fundamental Rights in the New Constitution.*

Cheater A. (1989) 'Managing Culture *en route* to Socialism: The Problem of Culture "Answering Back"', *Zambezia* XVI (ii).

Cockrell A. (July 1994) *The Place of a 'Bill of Rights' in the Transition To a Democratic South Africa* (Germany, unpublished paper presented at the XIIIth World Congress of Sociology in Bielefeld).

Cockrell A. (1994) 'The Impact of The Interim Bill of Rights on Private Law (1994)' (Cape Town, unpublished lecture presented 8–9 June 1994 in a series on 'The Scope and Implications of the Interim Bill of Rights').

Corder H. (1994) 'Towards a South African Constitution', *Modern Law Review*, Vol. 57, 491.

Donnelly J. (1982) 'Human Rights and Human Dignity: an analytical critique of non-Western conceptions of human rights', 76 *American Political Science Review* 312.

Donnelly J. and Howard R. (1986) 'Human Dignity, Human Rights and Political Regimes', *American Political Science Review* Vol 80, No 3, 801–17.

Donnelly J. (1984) 'Cultural Relativism and Universal Human Rights' 6 *Human Rights Quarterly* 417.

Dworkin R. (1977) *Taking Rights Seriously* (Cambridge, Mass, Harvard University Press).

Haile M. (1994) 'Human Rights, Stability and Development in Africa: some observations on concept and reality', *Virginia Journal of International Law* Vol 24:3, 575.

Hannum B. (1979) 'The Butare Colloquium on Human Rights and Economic Development in Francophone Africa', *Universal Human Rights* 65.

Hobsbawm E. (1983) 'Introduction: Inventing Traditions' in E. Hobsbawm and T. Ranger (eds) *The Invention of Tradition* (Cambridge University Press).

Howard R. (1982) 'Human Rights and Personal Law: Women in Sub-Saharan Africa', *ISSUE: A Journal of Africanist Opinion* Vol XII No 1–2, 45–52.

Howard R. (1986) *Human Rights in Commonwealth Africa* (Rowman and Littlefield: Totowa, NJ).

Kaganas E. and Murray C. (1994) 'The Contest Between Culture and Equality under South Africa's Interim Constitution' *Journal of Law and Society*, Vol 21 No 4, 409–33.

Kuper H. (1947) *An African Aristocracy* (OUP London).

Kuper H. (1963) *The Swazi: A South African Kingdom* (New York, Holt, Rinehart and Winston).

Murphy O. F. (1981) 'Objections to Western Conceptions of Human Rights', *Hofstra Law Review*, Vol 9, 433.

Ngubane H. (1992) 'On being a native anthropologist: anomalies and opportunities' (unpublished inaugural lecture) (University of Cape Town).

Nhlapo R. T. (1989) 'International Protection of Human Rights and the Family: African Variations on a Common Theme' *Int. Jo. Law & Fam*, vol. 3, 1–20.

Nhlapo R. T. (1991) 'The African Family and Women's Rights: Friends of Foes?' *Acta Juridica* 135–46.

Nhlapo R. T. (1992) 'Culture and Women Abuse: Some South African Starting Points', 12 *Agenda: A Journal About Women and Gender* 5–14.

Phillips A. (ed) (1953) *A Survey of African Marriage and Family Life* (London).

Radcliffe-Brown A. R. (1950) 'Introduction' in Radcliffe-Brown and Forde (eds) *African Systems of Kinship and Marriage* (London).

Ranger T. (1985) 'The Invention of Tradition in Colonial Africa' in E. Hobsbawm and T. Ranger (eds) *The Invention of Tradition* (Cambridge University Press).

Rwezaura B. A. R. (1992) 'From Native Law and Custom to Customary Law: The Changing Political Uses of Customary Law in Modern Africa' (unpublished occasional paper) (University of Hong Kong).

Sachs A. (1990) *Protecting Human Rights in a New South Africa* (1990) (Oxford University Press, Cape Town).

Thornton (1988) 'Culture: A Contemporary Definition' in E. Boonzaaier and J. Sharp (eds) *South African Keywords: the uses and abuses of political concepts* (Cape Town, David Phillip).

Williams R. (1980) *Problems in Materialism and Culture* (Verso).