THE AFRICAN CUSTOMARY LAW OF MARRIAGE AND THE RIGHTS CONUNDRUM

Thandabantu Nhlapo

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Thandabantu Nhlapo[**]

South African society is undergoing very rapid transformation on many fronts. Indeed, for many people the function of the government is defined in terms of change. These people think that the old order should be overturned and that new structures and institutions should be established. The formal authority for all this activity is the South African Constitution. Away from the official arena, that same document has led many ordinary South Africans to consider the implications of transformation for their daily lives. Employers and employees, educators and students, leaders and followers, service providers and clients, players and spectators, are all still groping for a working relationship that realises that in the new South Africa it cannot be "business as usual".

In all this jockeying for position it is sometimes forgotten that some of the most important relationships to be negotiated are, unfortunately, also the relationships over which the past casts the longest shadows. I classify in this category all those relationships which have ethnicity and/or culture at their centre. It still appears to be uncommonly difficult in South Africa today to discuss with any degree of objectivity and impartiality any matter which involves traditional African institutions and practices, on the one hand, and so-called "western" values on the other. The area of justice and rights is as good an example of this difficulty as any.

It is my contention in this paper that one of the obstacles to fruitful cross-cultural dialogue (An-Na'im 1994, 170-75) in South Africa is the impatience of western culture and its adherents with African traditional institutions and practices, deeming the latter backward and out of place in a modern democracy. This impatience invariably manifests itself in the hostility of some South Africans, white and black, to certain local customs, amongst which

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[**] BA (Law) UBLS, LL.B (Hons) Glasgow, DPhil (Oxon)
Deputy Vice-Chancellor, University of Cape Town; formerly Full-time member, South African Law Reform Commission

one can count the *lobolo* practice[1], polygyny and circumcision. There are also occasional rumbles against ritual slaughtering from animals rights activists.[2]

This chapter proceeds on the assumption that it is common knowledge that African societies have been in a constant state of transformation since the first contact with Europeans; that there is hardly an African country in which the so-called clash of cultures is not an issue; and that in many of these countries the indigenous culture is subordinate to the one introduced by the colonising power. South Africa is no different: amongst the many relationships which have to be negotiated is the relationship between the dominant western culture and the subordinate indigenous culture.

In this chapter, I seek to explore the role of, "rights talk" as an inhibiting factor in efforts to promote cross-cultural dialogue in South Africa. I stress the point that not all "rights talk" has this effect on the local cultural debate: only "rights talk" which is used to mask the impatience I have already alluded to. Using the area of the customary law of marriage, I argue that in many instances human rights arguments are used to criticise certain African institutions and practices when the real motive behind the hostility is a fundamental unwillingness by the dominant culture to co-exist with other cultures it considers inferior.

Justice and rights and the problem with "Rights Talk"

Ordinarily, the notion of human rights should play an important supportive role towards the achievement of social justice. Acknowledging that the citizens of a country are holders of rights can be asserted against other citizens and against the state should be an important component in the promotion of a just society. And at this stage one does not necessarily require a highly theoretical definition of "just" or "justice" for our purposes here. The ordinary South African does have a working definition of justice – anything that is an improvement on the apartheid past is relatively just, as apartheid was universally acknowledged to be "unjust". The notion of rights, on the other hand, presents a problem in a number of ways. For instance: (i) there is a problem with ordinary perceptions of what is meant by a right. There is confusion about who is entitled to what. At this level, people routinely take more than their share, believing "right" to mean "what I want to do". This is what happens, for instance, when students previously disadvantaged by the apartheid education system demand a "right" to sit easier examinations or to be marked more leniently than their counterparts in the rest of the country. (ii) A different problem of public perception is sometimes inadvertently promoted by officialdom itself, when rights are offered or granted

(or advertised) without due emphasis on correlative obligations. This encourages a culture of entitlement – as if there could ever be entitlement in a vacuum. (iii) Then there is the classical problem of a legitimate clash between two or more rights – i.e. even where there exists no misconception about the meaning of "right". In these cases emphasis on one right necessarily harms the other, and a *balancing* act is required to make sense of the co-existence of both.

The significant difficulty, though, with "rights talk" is the perception that its particular history and origins place it squarely in the western value system, and this system is embodied in the international human rights discourse when it is wearing its United Nations cap. The 1948 Universal Declaration of Human Rights embodied a philosophy of human rights that was directly descended from the religious, social and political struggles in England and France between the seventeenth and nineteenth centuries, and in the United States of America for part of that time. It marked the culmination of the fight against absolutism whose early beginnings can be traced back to the ideas of Hobbes and Locke, and to such significant events in European and American history as the trial of Charles I in 1649, the Virginia Declaration of Rights in 1776 and the French Declaration of 1789. These moves developed against the background of strong natural law and contrary theory ideas, and the present-day international human rights ideal still bears the imprint of those origins (Nhlapo 1989, 3). People do not often realise that this is a huge problem, if they seek to make human rights "stick" in societies newly arrived in the self-government arena. These are societies over which the hand of authority was so heavy in the past that the habit of acting independently as moral agents has not developed fully amongst the majority of the population. If a "culture of rights" is to take root in such a society – and in a sustainable fashion – the association of human rights with western thought and a western world-view in the minds of the general populace does not help. It simply clutters up an already acrimonious debate when public disapproval of selected aspects of 'western' culture begins to include the area of human rights as well.

There are several factors which contribute to this difficulty. The first must surely be the prestige or "clout" carried by the movement sometimes characterised in university curricula as International Protection of Human Rights (including its regional variations). There is no doubt that from the Universal Declaration onwards it has been impossible to ignore the immense moral weight of the United Nations-driven international human rights system. Widely ratified instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, simply

underline the nature of the system as embodying an international moral consensus on issues of minimum standards of treatment for human beings.

How can such a positive state of affairs be a problem? It can be a problem when the movement is made to perform like a juggernaut, sweeping all in its path and brooking no opposition. "Opposition" is itself a problematic word to use. Subjectively, one who questions any aspect of the international human rights movement may not be intending to "oppose" it at all, merely to understand or fine-tune, or explore the possibilities of accommodation between competing interests. In a national debate, one might, for example question whether the ratifying of a particular convention would not amount to the importation of expectations that in practice would be difficult or impossible to fulfil in any number of contexts, such as those of Third World or poor countries, and/or rural, non-Christian, drought-stricken or war-torn societies. Zealous defenders of human rights have been known to bristle about such mere questioning, quick to characterise the questioner as uncivilised or reactionary. It has sometimes been argued that perceived Third World hostility to human rights as a 'western construct' may be true of civil and political rights, but can hardly be said to be true of social and economic rights, which after all address precisely those issues that are of concern to poor people. The point may be conceded; but it may be pointed out, nevertheless, that it is invariably the so-called first generation civil and political rights which will be invoked in debates involving a clash of cultures.

Closely allied to the previously mentioned problem is the belief of human rights activists that the best protection for rights is not to give an inch even on relatively trivial ones. This is the "slippery slope" argument. If a deviation from a well-known and well-loved right, such as non-discrimination, is allowed, how soon will society find itself back in the terrible times of slavery, racism, or sexism? Thus the abolition of a relatively innocuous African practice, such as the transfer of lobolo in consideration of a marriage, may be relentlessly pursued by activists, on the argument that it is an "obvious" example of discrimination, despite overwhelming evidence that the practice does not represent wife-purchase.

A third defect inherent in the strength and popularity of the human rights movement is the failure of some of its proponents to distinguish between ends and means. Human rights are accorded some superior, almost mystical status, and their original role as a means to the laudable end of justice for all is forgotten. At this point the movement ceases to force itself to

question what makes for a *better* world. The assumption is simply made that the accumulated wisdom of "civilised nations" has finally got it right. We *know* what a better world is: it is one that has certain attributes (parliamentary democracy, a market economy, individual rights, etc.) which are themselves uncontested. In multi-cultural contexts this certainty or "cocksureness" is as much a threat to justice as is the rhetoric of despots who are genuine enemies of human rights. This is because societies still struggling to develop and establish their own approaches to a better life become *defensive* in their response to human rights arguments, and in the process individual rights may suffer just as much as they would under any despot.

Multiculturalism and Culture

Ordinarily, multiculturalism ought to refer to the *right* of a people to retain their cultural identity (linguistic, religious, social, etc.) even in a political state concerned with the creation and promotion of an overarching national identity. While that right may possibly be debatable in abstract terms, that is not the case under South Africa's positive law. Several provisions in the Constitution either grant the right expressly, or set out the essential elements for claiming a right to cultural identity.

Thus after granting "everyone" the right to freedom of conscience, religion, thought, belief and opinion in Section 15(1), the Constitution of the Republic of South Africa makes a significant concession to family law in Section 15(3)(a), which reads: "This section does not prevent legislation recognising (i) marriage concluded under any tradition or a system of religious personal or family law; or (ii) systems of personal and family law under any tradition adhered to by persons professing a particular religion." This proviso is a strong weapon in the hands of anyone claiming the right to a family lifestyle based on the tenets of his or her religion or the rules and observances of African custom and tradition. As will be seen below that lifestyle may well clash with notions of individual rights, be it in the treatment of women as equals or in the upbringing of children.

Section 30 provides that everyone has the right to use the language and to participate in the cultural life of their choice. Section 31(1) spells out this right further by providing: "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of their community, to (a) enjoy their culture, practice their religion and use their language; and (b) form, join and maintain cultural, religious and linguistic associations and other organs of civil society." Read together, these sections lay the foundation for

arguing that the framers of the Constitution recognised the multicultural nature of South African society and sought to provide for it. They did so cautiously, making sure that cultural practices were subordinate to the Bill of Rights as a whole. Thus the right in Section 30 may not be exercised "in a manner inconsistent with any provision of the Bill of Rights."[3] A similar qualification is placed on the rights set out in Section 31(1) by Section 31(2).[4] Even the relatively strong recognition of a personal family law found in Section 15(3)(a) "must be consistent with this section and the other provisions of the Constitution" by virtue of Section 15(3)(b).

The Bill of Rights of the Constitution thus complies with the injunction found in Principle XI of the Interim Constitution which required the framers of the new constitution to protect and promote linguistic and cultural diversity. But it is a cultural diversity that is hedged in by checks and balances to ensure that the rights of individuals are not sacrificed at the altar of "culture". Certain to play a major role in this balancing exercise is Section 9, the equality clause, which prohibits discrimination in strong language in the following terms:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[5]
3. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

The meaning which I attribute to the term culture in this article is influenced by the views of those scholars who find it more useful to talk about what culture *does* rather than struggling to define what it is. For example, Robert Thornton makes the following telling point about the role of culture in creating boundaries:

> Boundaries are created and maintained when people observe, learn, and finally internalise the rituals and habits of speech, the dispositions of dress of their bodies and modes of thought to the extent that they become entirely automatic and unconscious. These boundaries come to seem uniquely real and permanent. Their creation through cultural means is only obvious when we step outside our normal day-to-day interactions. (Thornton 1988)

Roger Keesing underscores one of its important uses when he refers to culture as a system of shared ideas and meanings "that underlie the ways in which people live" (Keesing 1976, 137). Reference to "shared ideas and meanings" here should not be construed as blindness to the dangers of positing the culture of any community as a given. There is ample evidence that a contemporary definition of culture must take into account the nature of culture as a phenomenon that is essentially contested, rather than uniform and static. Culture has also been described as a device which enables us to give meaning to the world, and which helps us to make statements to one another about ourselves and about the universe (Kaganas and Murray 1994; Cheater 1989; Nhlapo 1995).

In South African discourse there is a noticeable intellectual reluctance to acknowledge the existence of different cultures. This appears to stem partly from an appreciation that usage of the term "culture" in this country has a history, involving a political agenda which led directly to apartheid. There is also unease about the notion that culture can be uniquely associated with a single society or nation (Thornton, 20-23). Culture is thus viewed with suspicion as being either too vague in content to be useful as a scientific category, or simply undesirable in a society still displaying the scars of enforced differentiation.

Given the evil legacy that orthodox views of culture bequeathed upon South Africa, such reluctance is understandable. However, in the urge to refute the thinking which fed the foundations of segregation, modern scholarship seems to have one confusing side effect. Modern scholarship resonates with images of a kind of cultural facelessness which, to many Africans, presages an unwelcome vacuum in the area of social identity. This intellectual tradition appears to be uncomfortable with the use of "culture" in broad distinctions such as "African" and "western" culture, which is viewed as being somewhat racist. These suspicions are overly cautious. There appears to be no harm in using "African" and "western" as convenient categories in advancing a particular argument.

To assert the existence of an African culture 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. Similarly, the label "western culture" need not imply a value judgement or an acknowledgement of the sanctity of the boundaries of such culture. The fact that we are all able to participate, across boundaries,

in one another's cultural repertoires does not compel the conclusion that the labels themselves are meaningless (Nhlapo 1992).

It is possible to detect a hint of subjectivity in the process of constructing a sense of belonging. A person invariably has the opportunity of emphasising or de-emphasising his or her membership in the many identities which may have a claim on his or her allegiance. Thus if I raise my children in a particular way, which is different from my neighbour's, I may believe that it is because I am African, or Christian, or Zulu, or because I have had a formal education, or a history of deprivation, or a rural upbringing. What I choose to believe or reject from among these options will surely be influenced by what ***else*** I believe about myself and about life. This element of "volition" seems to be at the heart of belonging. People must believe that it is important for them to be one thing and not another. Recent works have acknowledged the notion of a group's subjective construction of its own identity. Bennett points out that close interaction with the west has had the effect of intensifying consciousness of difference (Bennett 1995, 8-9). But he cautions that the subjective construction of identity by a group is not complete until this identity has won acceptance from an opponent, since "all cultures are inherently oppositional"(8). Bennett concludes: "Self-awareness in turn suggests that members of a group have gained a certain distance from their culture and that they have begun to question their beliefs and attitudes. Paradoxically, then, a people claiming respect for their culture are most likely to be those who have already begun to lose it" (9).

The foregoing discussion already hints at difficulties inherent in any attempt to transform social attitudes and behaviours. Surely the precise problem with the use of term culture, as Ngubane notes (Ngubane 1991), is that no distinction is made between its various components: preferred forms of greeting; modes of dress; aesthetic activities and leanings; yearning for familiar ways, etc.; as well as basic values and interpretations of nature and society; the organising principles of society. There are many other components. The important point about the various aspects of culture is that some may change or may be given up quite easily. One begins to know a people when one starts to understand how readily they will change, or how firmly they will resist an attempt to make them depart from any part of what they perceive as their culture.

This is an important distinction – a distinction between the most superficial and the deeper levels of culture, between the readily changeable parts and the durable ones, or what Professor

Ngubane calls the hardware and the software. It may be difficult to define, but a few illustrations may help. For instance, it may be easy to give up modes of dress and greetings; it may not be so easy to adopt a whole new view of what it means to be a person. Similarly, aesthetic values and musical or artistic practices may change over time. Ways of dealing with life's crises, such as birth or death, do not change. Such a distinction explains the tenacity of certain practices in the face of changing social contexts. A common example in South Africa is that of ancestral feasts, which invariably involve the slaughtering of goats, sheep or cattle. Since the demise of that great pillar of apartheid, the Group Areas Act, the transfer of this practice to previously "white" suburbs by black middle-class residents is a continuing source of friction.

African Family Law as Cultural Right

When the provisions of Sections 15, 30 and 31 are read together, a strong argument can be made that the African customary law of the family is specifically recognised in the Constitution, together with systems of personal law based on religion. It is true that any law recognising these regimes must ensure that such recognition is consistent with the Constitution. African family law acquires its clear constitutional position not only from Section 15 but also from Section 211(3) which reads, "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".

One question is whether customary law in general, and customary family law in particular, also finds recognition in Sections 30 and 31, which recognise a person's right to participate in or enjoy his or her culture. There is no doubt that a people's law and legal system qualify as an important part of that people's culture. This is probably even more true of indigenous systems of law, which are sometimes so intertwined with other cultural and social institutions that they are indistinguishable as separate entities (Bennett 1995, 23-24). If this is true, then the right of various communities across the country to be governed by their own system of personal law – namely, the customary law of the family – finds recognition in the Constitution not only in those provisions recognising customary law, but those recognising culture as well. The difficulties inherent in this kind of constitutional recognition of culture are well known. The potential for conflict between some cultural institutions and practices, on the one hand, and the Constitutional Bill of Rights, on the other, is well documented (Bennett 1993, 269; Bennett 1995, 80; Kaganas and Murray, 409).[6] One has merely to consider the issues

surrounding female genital mutilation, from the point of view of both health and dignity, to see that culture and individual rights are not comfortable bedfellows. These conflicts specifically involving African customary law have also received much attention. I will only sketch in brief the nature of customary family law, and point out those areas where the application of a human rights paradigm might produce some tension.

The African customary law of the family is the outward and visible sign of a very deep and all-pervasive conception of the world and the meaning of life. It is a view of the world as a place where life's imperatives are survival and security – values which have spawned a maze of elaborate mechanisms for their achievement.[7] The most central and durable of these mechanisms is kinship and the institution of the family. It is impossible to exaggerate the importance of kinship in the African psyche, education and modernisation notwithstanding. In another study (Nhlapo 1995), I have questioned statistics tracing rising levels of urbanisation among black South Africans, the breakdown of the extended family and traditional authority, and other indicators of social transformation, for not revealing enough about African allegiance to some traditional institutions and practices which are closely linked with identity. In that study, I framed my concern as follows:

> Studies which go beneath the surface would be more convincing. For instance, investigation into how the 'new blacks view the question of relatives would be more illuminating than the information that they live in town, in a house with running water, in a nuclear-family model, and have developed a taste for classical music. One would want to know whether the duty to advance less fortunate kin has been abandoned, or whether it is now discharged with a cheque (i.e. boarding school for the nieces, or a cater rated as an obligation or courtesy, and so on? (Nhlapo1995)

The configurations, ceremonies and rituals found in the elaborate process of marriage are testimony to the importance that Africans attach to the formation of families. These configurations, ceremonies and rituals have over time attained among many groups a status as the single most important feature of their *identity*. Suppression by both the colonial and the apartheid state has merely served to kindle a passionate allegiance to these "badges of difference" by the people who participate in them.

These configurations within African family law and include polygyny, a classificatory form of kinship, and various kinds of social parenthood. Classificatory kinship is a system in which relatives are reckoned largely according to the *level* that they occupy on the family tree, regardless of sex. Thus when someone refers to a female as "my father" they may mean

nothing more dramatic than that she, after death of the father in question, remains as "the only surviving sibling in my father's family" (Nhlapo 1993). Most rituals and ceremonies revolve around the negotiation and transfer of lobolo between the two kinship groups and involve slaughtering, feasting and play-acting. Most anyone can find in this complex cultural package countless examples of sex-based divisions. There are "boys only" and "girls only" activities and "women only" and "men only" ceremonies. The critic will also find plenty of inequality; indeed, fundamentally the whole relationship is predicated on the pre-eminent position of the bride's family as the holders of the "prize" and the groom's family as seekers of that prize. It does not take much imagination to realise that this centrepiece of African culture, family law, which will be defended fiercely in case of attack, is also the most vulnerable to challenges from a human rights standpoint. The most common tension in this area is between the fundamentally patriarchal nature of marriage and family law in traditional African society and a whole range of individual rights that may now be claimed by women under the promise of modern Constitutions. These rights include the rights to equality, freedom of movement, expression, association; the right to education, access to courts and freedom and security of the person – even the right to life itself. This is so because a husband's or a family's decision not to allow a wife to find a job, or to visit her parents or to enrol for classes, or a family's insistence on her bearing more children when her health is at issue – all these may infringe a right that she is granted by the Constitution, or a right that she enjoys as a human being. In a sense this paper is about raising awareness of the possibility that when these challenges are mounted from a human rights standpoint, there may be other agendas at play.

Unequal Cultures and the Language of Rights

History abounds with examples of misunderstanding arising from the juxtaposition of peoples with divergent cultures. In Africa the problem has tended to be that from the earliest contact with Europeans the two cultural blocs involved in the contact have never enjoyed a position of equality. The Europeans, believing in the unquestioned superiority of their own moral, religious, political and legal institutions lost no time in suppressing various aspects of African culture by law and by force. Among those outlawed were practices relating to marriage, initiation, the monarchy and ceremonies of allegiance. This suppression set in motion a process of "othering" (Todorov 1984) of African institutions that remains relatively intact to the present.

Current debate in South Africa has so far failed to narrow the gap of misunderstanding. Condemnation of African practices may be less strident, but still appears to emanate from the

same launching pad, namely an instinctive preference for that which bears some resemblance to familiar western forms. With the possible exception of a few scholars to whom a deep understanding of the African value system seems important, much of the condemnation appears to come from people with little real understanding of African culture and, sadly, with no intention of attaining such understanding.[8] This is doubly discouraging because it shows no movement from the situation which prevailed in the early days of the "new dispensation". In 1991, concerned about a general lack of interest among some South Africans in African culture, I wrote urging all South Africans not only to learn about "the others" and what is important to them, but also to be prepared to question our own orthodoxies:

> One may well ask: what does this do for us? What purpose is served by dancing around the issues, pretending understanding for practices that strike us instinctively as abhorrent? Indeed, is that not patronising? Making an effort to understand the deep culture of other enhances our credibility. It pulls the carpet from under the feet of anyone who seeks to argue that our secret agenda is to impose our own standards on others without being ourselves willing to adopt new modes of thinking. It "disinfects" the platform from which we wish to launch social criticisms (Nhlapo 1992)

These words appear to have even more relevance today when the debate has been made more concrete by the inclusion in the Constitution of protections both for human rights and culture. Western culture is powerful, transportable and all-pervasive. It would be a miracle if this strength did not seep into all areas of discourse in South African national life – social, economic and political. When western culture claims a tie with the international human rights movement the danger increases that a non-western culture will be marginalised by arguments which now include the rights dimension. For instance, an adherent of western culture who has a low opinion of African culture and a disdain for traditional practices may now find it possible to employ the following three-step shift: (i) we do not understand your kinship system; (ii) your kinship system is so different from ours that it is a cause for concern; (iii) your kinship system violates human rights. The first two propositions may well be true. What is important when assessing the criticism is to discover if the final conclusion has anything to do with the earlier steps, or can objectively stand alone. If it cannot stand alone it represents an illegitimate use of the language of rights because the "rights talk" is being employed to mask a basic intolerance of other cultures.

This three-step process leads to an important insight into the problems inherent in the language of rights. Rights language is capable of being used in defence of privilege, sure

enough, but not necessarily in the way we might think. Debates about culture tend to start off from the premise that culture is to be viewed with suspicion because of it often masks inequality. Claims to a *right* to culture are often scrutinised and analysed to establish that they are invariably made by the privileged in society (ruling elites or beneficiaries of the patriarchal order, for instance) to the detriment of the *individual* rights of others (for example, workers or women). Thus male elders may decry the disappearance of "traditional African respect" among today's young women as a sign of society's moral decay; the latter may in turn point out that they have suffered oppression and marginalisation under the umbrella of such cultural expectations. While this is undoubtedly true in many cases, it is often overlooked that there is another level at which human rights talk may be used by the privileged in a wider national sense. One has, in effect, concentric circles of privilege where one's pre-eminent position in one's own sphere is overshadowed by the pre-eminence of someone else operating in his or her sphere, which happens to be wider. One of the widest spheres in society is that of the public media, which can only be accessed by the educated and the influential. Their views receive a great deal of exposure, including their rationalisations of their own prejudices. Ideologies can be implanted, national myths created. A rural traditional leader, though important in his area, does not have the same power. A rural housewife living under him has even less.

I am certainly more privileged than the people whose lives under customary law I write about, in the sense that I can widen the reach of my views by having them published in English. When we organise officially into political parties and lobby groups, we are even more powerful and privileged, having the ear of national newspaper chains and television talk-shows. In that position we have the power to do a great deal of damage because the language of rights can be used to defend a different kind of privilege. Specifically, this language can be used to legitimise pressures on indigenous communities to adopt ways more consonant with the *sensibilities of elites*, when such pressures would have been dismissed as ethnocentric only a few decades ago. Thus, for instance, while conceding that the missionaries got it wrong and lobolo is not wife-purchase, a person to whom the practice has always been offensive now has a second bite at the apple: he or she can now attack the practice on the basis of one of the provisions of the Bill of Rights or another. The possible existence of such hidden agendas is thrown into sharper relief when the matter involves the two cultures' divergent views on sexuality and the human body. Breastfeeding in public (common throughout Africa in buses, trains and hospital waiting rooms) appears to elicit little comment

until it occurs in culturally-mixed settings. Then it is not unusual for appeals for its prohibition (as well as the curbing of other "revealing" occasions such as some forms of traditional dancing) to be based on some loosely-defined link with patriarchy and inequality. And thus a matter that is in reality a mere prejudice is introduced into the public domain as an issue of rights.

Not all challenges to traditional practices are illegitimate. All practices must now be tested against the Constitution. It is the purpose of instituting the test that is important. One can see either a genuine attempt to make multiculturalism work (a process requiring genuine tolerance of difference), or an implacable resistance to living with any cultural variation that is unfamiliar to the dominant value-system. If the human rights argument is enlisted with regard to the latter project, I submit that that would be in defence of privilege. The privilege of elites who, having internalised the values of modernisation and westernisation, are unwilling to share moral space with alternative models of living.

The difficulty here is that of defining *who* these elites are, and *how* one goes about discovering the real purpose of the many challenges to cultural practices by various groups in society. As mentioned earlier, the ordinary problems of colonial intolerance of local customs is compounded by decades of apartheid which unashamedly used an array of weapons (law, education, the church, the media and brute force) to suppress the African identity and to create a new national myth of a master race served by an inferior, docile race who accept their station in life. Without access to psychiatric research it is unwise to make bald statements, but one can surmise that the apartheid years produced casualties amongst both the black and the white segments of the population. There were those black people who developed a revulsion to their own culture, whether as a result of being genuinely convinced of the alleged evils of this culture or for a myriad other reasons, ranging from the need to survive in a "white man's world" by offending him as little as possible, to a snobbish desire to aspire to the "civilised" standards of the master.

Whatever the reasons, in South Africa today the anti-tradition lobby is a broad alliance which comprises genuine human rights supporters who are concerned that culture should not be used to deny African women rights enjoyed by other women, but also attracts racists who are hostile to everything African and many black youths whose anti-tradition stance is as much a badge of rebellion and distance from their elders' lifestyles as is the American "rap" culture

which they affect. Somewhere in the middle of this mixture are black and white people who occasionally raise their voices in protest at some reported cultural excess (such as a death occurring at an initiation school, or news of a widow stripped of her property by male relatives) but are otherwise content to live with different cultural lifestyles.

In such a situation, it is incredibly difficult to discover the "real" purpose of a challenge to a particular cultural practice. Many challenges have a *prima facie* legitimacy which commends itself to ordinary people of goodwill. There is broad agreement that customary laws of inheritance are unfair and should be changed as a matter of urgency. Even in respect of "grey" areas (e.g. circumcision, polygyny) many participate in the debate honestly and with no hidden agendas. Yet it is also clear to any astute observer that in South Africa's rainbow nation, the dominant western culture is still largely intolerant of certain African cultural habits. There is a widespread perception among sections of the black population that multi-culturalism according to the dominant culture means a process in which the continuing assimilation of African culture is supposed finally to culminate in its obliteration, leaving it only with trivial items such as traditional clothing and dance. One of the ways one might use to unearth the real motive behind hostility to a particular traditional practice is to challenge the challengers. We must press the challenger to reveal his or her reasons for the objection. This will tell us, in the case of a challenge to the Xhosa custom according to which boys attend initiation school where they are circumcised, whether the ground of objection is that:

(i) the operation is often performed in unsanitary conditions and therefore poses a health risk;
(ii) circumcision violates the boy's right to freedom of choice;
(iii) it goes against some religious teachings;
(iv) it is generally "uncivilised" and a mark of a backward society.

If we are lucky, this preliminary test will suffice to tell us whether we are dealing with health issues (which may be resolved by changing the rules to make the operation safer) or issues of principle (which may be resolved by introducing the requirement of consent, etc.), or issues of cultural intolerance. That is assuming that our challenger gives honest answers to our query. On other occasions it will be more difficult. We will be dealing with people who are not candid about their reasons and motives. In that case it becomes necessary to engage with them in a dialogue to deconstruct their arguments. Somebody who objects to circumcision in Xhosa culture, but not in his own, should tell us what factors he is taking into account to

justify the distinction. Similarly, someone who objects to the slaughter of animals, but pickets only African weddings and not commercial abattoirs or supermarkets, should have some explaining to do. Why does a custom-like lobolo excite so much hostility as an example of blatant discrimination from people whose own cultures are replete with divisions of labour surrounding marriage, such as who proposes, who buys the ring, whose father traditionally hosts the wedding reception, and so on? Is the failure to appreciate commonalities not based on a value judgement that, essentially, dismisses the ways of others as inferior, however analogous they may be to our own? At the end of the day, it all goes back to what was said earlier; the need to examine our own orthodoxies, and motives, before launching criticisms which pressure another culture to be more like our own.

Sometimes I believe that we as scholars are occasionally guilty of some trickery here. We applaud the attribute of culture that we call "dynamic, not static", but we seem to have our eye fixed firmly on a particular result of such dynamism. We expect the end product to be "progressive"; to conform to some ideal that we have in mind. For instance, we may be happy to leave indigenous cultures alone, secure in the knowledge that slowly they will eventually become more like us – literate, ambitious, mortgaged to the hilt and, above all, fully clothed. We may not say it, but we have a firm idea of the kind of society we would like to see taking shape. One wonders how benignly we would continue view a culture's ability to adapt and develop organically if there were no guarantees that the end product would meet with our approval. If the foregoing even vaguely touches upon the truth, are we not then in danger of recognising (albeit unconsciously) as rights only the interests of those with whom we agree, or of supporting and promoting only those processes where the outcome meets with our approval?

Resolving the conflicts: a job for the Courts

The recognition of a right to culture in the constitution is, unfortunately, only the beginning of the debate, not the end. Rights to culture have to be given life in the context of the day-to-day realities of contemporary South Africa. In the first place, the grant of rights is itself hedged in with the requirement that these rights are to be enjoyed only when they are not in conflict with either the Constitution generally, or the Bill of Rights in particular. Thus, the right to language and culture in Section 30 may not be exercised "in a manner inconsistent with any provision of the Bill of Rights". The same formula qualifies the rights in Section 31 in relation to cultural, linguistic and religious communities. The recognition of religious,

personal and family laws is restricted by the requirement that such recognition must be "consistent with other provisions of the Constitution". And all of these grants are to operate in the context of the strong non-discrimination language of Section 9, which is the basis for most women's claims against cultural practices which do not treat them as equal to men.

Anyone claiming a right to some cultural observance or practice must therefore be satisfied that such observance or practice is constitutionally "clean". The issue of onus is not clear here. The only guideline that exists is found in Section 9(5) and relates to the right to non-discrimination: "discrimination is unfair unless it is established to be fair". Clearly, if a cultural or religious practice is invoked as a right, the one who asserts it must prove that where it discriminates between people, it does not do so unfairly. It is not clear that the same onus would rest on anyone asserting a practice which was challenged on grounds other than discrimination – for instance, that it restricts a woman's freedom of movement. But even the test in relation to discrimination is difficult to apply. It throws everything back onto the word "fair", which means "just". The right not to be discriminated against thus aims at achieving justice – which may yet imply recourse to culturally-determined notions of what is just.

One may of course also create some space for the operation of a particular cultural practice by invoking Section 36, the limitation clause. Any limitation of a right guaranteed in the Bill of Rights can be pursued by law only if the limitation, according to Section 36(1) of the Constitution, "is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". A court assessing whether a limitation is reasonable and justifiable will have to consider, among other factors, the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.

The third, and potentially most productive approach, is to enlist the aid of the human dignity argument. Jack Donnelly and Rhoda Howard have argued that traditional African society viewed human dignity only in terms of the worth associated with an individual's excellence at discharging some social role allocated to him or her. They assert that non-Western societies had no conception of human rights (in the sense of individual entitlements benefitting a person by virtue of being human), outside of social role (Donnelly 1982; Donnelly and Howard 1986). I have elsewhere suggested some responses to these arguments (Nhlapo 1995). Instead of opening that debate here, I wish to simply suggest that the demands of human dignity might themselves provide a reason for enforcing rights to a particular identity opposable to the claims of some wider national identity. This is probably an unexpected use

of arguments based on human dignity. It is more common to deploy the concept of human dignity in defence of individual rights, a task for which it is well suited since the express objective of the international human rights system is to protect human dignity. It appears to me that in those societies where the tensions between the individual and the group ethic are still working themselves out, it is a legitimate use of human dignity to argue that it is no less important to groups than it is to individuals.

And therein lies the conundrum. If it is an important component of human dignity to hold religious beliefs, to worship and to be devout, how is a constitution based on the three pillars of human dignity, equality and freedom to deal with a religion according to the tenents of which women, say, cannot conduct ceremonies that male church leaders conduct? If certain configurations and rituals are central to a particular people's kinship system, without which they feel a low sense of self-worth (and therefore a low sense of dignity), how is the same Constitution to protect their dignity in the face of condemnation by members and non-members alike citing human rights arguments? These are not easy questions, but perhaps a closer examination of the argument based on human dignity may yield a solution.

One of the advantages of adopting the standard of human dignity as the bridge between contemporary notions of rights and African traditional culture lies in the fact that the Constitution itself acknowledges dignity as a right to be protected. In Article 10 the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected." Section 36(1), the limitation clause, refers to limitations that are reasonable and justifiable in an open and democratic society "based on *human dignity*, equality and freedom" (my emphasis). These three values are set out in Section 1(a) which establishes "human dignity, the achievement of equality and the advancement of human rights and freedoms" as some of the founding values of the Republic. This opens the way for the courts to incorporate the standard of human dignity in practical ways when faced with competing systems of values.

This is not to suggest that the standard will be easy to apply. The difficulties become apparent when one considers the controversies surrounding activities such as the sport of midget-tossing. Concerned citizens may want the sport outlawed because it offends their sense of propriety to see an adult man used as a missile to determine which player can toss him the farthest. They would argue that this is undignified. The midgets involved may turn around and define the sport as their means of livelihood, arguing essentially: if we do not

mind, why should you?" It does not take a great leap of the imagination to conceive of similar considerations arising when the issue of the constitutionality of lobolo or polygyny, for instance, comes before the Constitutional Court. In matters involving dignity, is it ever possible to go beyond the subjective views of the person concerned?

The devices available to the court will involve two kinds of considerations. Firstly, the court can, in a technical sense, insert the concept of dignity into constitutional interpretation at various points. Thus, in interpreting Article 9(3) it may find that the different treatment of people on the basis of sex does not constitute *unfair* discrimination so long as it is not a breach of human dignity. Two issues may be important here. The first is the question whether the dignity of the individual member is in conflict with the dignity of the group. I submit that this inquiry should be resolved in favour of the individual member (Kaganas and Murray 1994). The second is that there may well be a need for the court to assess the impugned custom to find out whether or not it treats the member with dignity, and here it would be important to keep in mind that not all practices are equally important or significant. There are customs that call for a general deference of women to men, especially in company. There are those that call for her to kneel when she serves his food, or avert her eyes. Some customs delineate her role in the upbringing of her daughters as well as the husband's in bringing up of the sons. Some customs give her a say in family matters especially when she has achieved the status of elderhood; others require her to be represented by a male relative in everything, especially when she is younger.

In all this diversity it seems sensible to acknowledge that some practices will pass the dignity test, and others will fail it. A particular custom may indeed be found to be discriminatory (in that it treats men and women differently) but, on a cold assessment of its impact, not *unfairly* so – either because it is too trivial to take seriously[9] or because the different treatment does not demean or degrade. A human dignity test applied to the latter category of case may help to shed some light on this grey area. The scope of the rights guaranteed in Article 9(3) would thus depend crucially on the Court's understanding of dignity and of equality. In the same way the human dignity implications may be used as a yardstick to determine whether a measure which purports to limit a fundamental right is "reasonable and justifiable" within the meaning of Article 36(1).

The second kind of consideration is more abstract. Here the Court would have to apply its mind to balancing the explicit protection of culture in Articles 15, 30 and 31 with the demands of the equality provision. It would have to confront head-on questions such as whether the equality principle requires the introduction of an artificial even-handedness in every transaction. When a traditional practice such as polygyny is challenged on the ground that it is discriminatory because a man, but not a woman, can have more than one spouse, is the problem really addressed by legislating a matching "custom" to enable women to have more than one husband? Where the obligation to pay lobolo rests only on men, does a constitutional right to equality entail the extension of the obligation to women as well? My answer to these questions is in the negative. Such artificial adjustments to African customs are too contrived to bear serious consideration, and they beg the main question: is the custom or practice, on an objective assessment of its merits, unfairly discriminatory within the meaning of the Constitution? If it is, it should be discarded: if it is not, those of us who do not adhere to it should learn to live with it despite our misgivings.

Here the best way of using the human dignity test would be to realise that there may be conceptions of human dignity that are distinctly African; that where a woman tells us that she feels "valued" by having her husband's family negotiate lobolo with her father, we should be reluctant to substitute our own beliefs about her situation, dismissing hers. This will involve an acknowledgement that the bill of rights should be the locus for a newly negotiated value system for our country: in such an exercise it is only fair that the competing world-views and cultural packages stat out as at least nominally equal. Where it cannot be conclusively shown that a particular practice is worse than a competing one, the decision to prefer the one over the other should not depend on an assertion of the general moral superiority of the value system of a particular group in society.

Conclusion

I have attempted to raise awareness of one aspect of the human rights discourse which receives little attention in the academic literature. The fact is that the United Nations based international human rights movement or the value system that may loosely be termed 'western', is sometimes used to attack certain non-western behaviours and practices, thus blurring the real motive for the criticism. I do not suggest that 'international' criticism of local practices is always illegitimate: no strong cultural relativism is being asserted here (Teson 1985). Rather, the argument is that, where the contending cultures do not enjoy equality of status, the danger increases that in its criticism of local culture the dominant culture will be tempted to enlist the prestige of the international human rights movements to mask a basic intolerance of competing world views.

I suggest that the area of African law is especially vulnerable because its institutions and practices tend to reflect a value system that challenges western precepts head-on. These challenges manifest themselves not only in the structure of the kinship system, but in the ceremonies and rituals considered important in the marriage process. Such a system provides fertile ground for human rights-based critiques. I question whether these are always legitimate. Where there is no clear constitutional ground for ousting a particular practice or institution (as when, objectively, it causes no demonstrable harm) the courts are urged to have regard for considerations that will protect the practice even where it is considered 'unusual' by the dominant culture. Theoretically this covers all traditional practices and institutions, from circumcision to lobolo, from courtship rules to mourning rituals. It pre-supposes an approach according to which each practice and institution is individually assessed on its merits, taking into account its origin, its function and its mode of expression. It also pre-supposes that the courts' protection should not be available for those practices and institutions which are found, objectively, to cause harm or to violate human rights in other ways (Nhlapo 1991; Nhlapo 1994-1995). One of the considerations may well be the notion of human dignity (Nhlapo 1995).

NOTES

1 The transfer (or any negotiation relating to the transfer) of cattle, other forms of livestock or other valuable consideration from the family of the groom to the family of the bride as part of the marriage process.

2 Though this is, by definition, not a *human* rights issue, it is worth noting because in South Africa it generates a great deal of anger and emotion, with accusations levelled against animal rights organisations, perceived to be "white", to the effect that they care more about animals than they do about black people. In the wake of the national and international furor over the Tuli elephants, a national daily ran a front-page photograph of a white driver with a dog by his side and a black man sitting in the open in the back of the pick-up truck to make the point (*Sowetan*, 22 July 1999).

3 Section 30

4 Section 31(2)

5 This possibly rates as the strongest equality clause among the world's constitutions, listing no less than seventeen grounds on which discrimination is outlawed.

6 Bennett 1995, 8-9; Kaganas and Murray 1994, 409.

7 An example of a typical survival mechanism would be the exploitation of the "respect for elders" ethic which enables the older generation to claim resources from the younger generation as a moral obligation.

8 Perhaps the single most quoted obstacle to political reconciliation and social bridge-building across the ethnic divide in South Africa is the perception by many black people that their fellow citizens of European cultural orientation have made up their minds that nothing "African" can make a positive contribution to the value system of a new South Africa. Such resentment is found in defensive statements such as: "No one who cannot be bothered to pronounce my name correctly has the right to lecture me about morality" or the even more common "I cannot be told how to marry and found a family by someone who does not consider his grandmother's sister to be a close relative."

9 Certain feasts and ceremonies are characterised by blatant discrimination in the kinds of meat that may be eaten by men and women, or elders and youngsters. It is unlikely that this would ever become the subject of a constitutional challenge.

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