

‘THE STUBBORN PERSISTENCE OF PATRIARCHY’? GENDER EQUALITY AND CULTURAL DIVERSITY IN SOUTH AFRICA

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I find this insulting and affecting my dignity. I can speak whenever I want to and I didn't come here as 'your woman'. We are not your women. We come as citizens of this country. We are equals.

Nomboniso Gasa, (then) Chair of the Commission for Gender Equality, to Inkosi Mwelo Nonkonyana of the Congress of Traditional Leaders of South Africa¹

Traditions are designed to protect vulnerable women and children, not to discriminate against them. [I]n the pursuit of ... a western-inspired individualist human rights culture, we ... [should] not end up denying the vulnerable and insecure the protection which our cultures, customs and traditions avail.

Inkosi Patekile Holomisa, Chair,
Congress of Traditional Leaders of South Africa²

For there is no standard that is agreed. The Constitution says there are diversities. It recognises this. And that we should respect the culture of others. No-one has the right therefore, to use his or her own to judge others. It is unconstitutional to do so.

Jacob Zuma, President of the RSA³

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¹ Parliamentary Hearings on the Traditional Courts Bill, 2008 available at www.mg.com (*Mail and Guardian*, 16 to 22 May 2008.)

² P Holomisa 'A traditional leadership perspective of gender, rights, culture and the law' in K Bentley & H Brookes *Agenda Special Focus* (2005) 48, 49.

³ Zuma pushes for debate on national moral code' *Mail and Guardian Online* 23 February 2010, <http://www.mg.co.za/article/2010-02023-zuma-pushes-for-debate-on-national-moral-code>.

[Male primogeniture] is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with equality under this constitutional order.

Pius Langa (then) Chief Justice⁴

1 Introduction

These four opening quotes illustrate the ongoing tensions between claims to culture and claims to gender equality in South Africa's constitutional democracy, especially in relation to the cultures, traditions and customary law of black South Africans. After, traditional leaders failed to insulate the cultural domain from constitutional scrutiny in the 1993 Constitution,⁵ a series of laws and court judgments have secured important equality rights for women living under customary law. Yet, even as parliament and courts have granted women equal rights within the family and to inheritance and recognition as traditional leaders;⁶ a 'stubborn persistence of patriarchy'⁷ means that these rights remain contested in the public and private spheres. Women's rights of access to communal land and within customary courts remain sites of struggle between the claims of traditional leaders and those of community members, including women. Much of this currently centres on the nature and extent of traditional (male) power over land, property and community.⁸

⁴ *Bhe & Others v Khayelitsha Magistrate & Others* 2004 ZACC 17; 2005 1 SA 580 (CC); 2005 1 BCLR 1 (CC), *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA* 2005 1 SA 580 (CC); 2005 1 BCLR 1 (CC) para 91.

⁵ Traditional leaders had unsuccessfully proposed that customary law and male primogeniture in accession to chieftainship be excluded from the operation of the new Bill of Rights, especially the equality clause. See C Albertyn 'Women and the transition to democracy in the new South Africa' (1994) *Acta Juridica* 39.

⁶ The Recognition of Customary Marriage Act 120 of 1998; *Bhe* (n 4 above); *Shilubana v Namwita* 2008 9 BCLR 914 (CC); 2009 2 SA 66 (CC); Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

⁷ *Gumede v President of the RSA* 2009 3 BCLR 243 (CC); 2009 3 SA 152 (CC) para 1.

⁸ Traditional leaders have successfully persuaded the executive to redefine the content of laws, such as the Communal Land Rights Act 11 of 2004 and the Community Courts Bill of 2007, to enhance traditional power and limit the rights of community members, especially women, after both had been through an extensive period of research and consultation. See A Claassens 'Women, customary law and discrimination' in M O'Sullivan & C Murray *Advancing women's rights* (2005); *Tongoane v National Minister for Land and Agricultural Affairs* Case No 11678/2006, North Gauteng High Court, Pretoria, 30 October 2009 (unreported); C Walker 'Women, gender policy and land reform in South Africa' (2005) 32 *Politikon* 297; C Albertyn 'Rights at work – The transition to constitutional democracy and women in South Africa' in C Jenkins *et al* (eds) *Law, nationbuilding & transformation: The South African experience in perspective* (forthcoming). See also A Claassens 'What's wrong with the Traditional Courts Bill' *Mail and Guardian Online* 2 June 2008.

Although traditional leaders and their organisation, the Congress of Traditional Leaders of South Africa (CONTRALESA), have been the major advocates for enhancing the status and power of traditional leaders and for limiting women's rights in the name of traditional power and culture in policy and law reform processes the accession to power of President Jacob Zuma has coincided with a more visible public expression of the importance of culture within the South African social fabric. This assertion of culture is a positive recognition of its role in making sense of the world and raises important questions about the nature of, and relationship between, our diverse cultural norms and practices and the Constitution.

Both the form and substance of traditional claims suggest the persistence of a chauvinist and bounded view of culture, protected in a private sphere that tolerates little internal or external dissent. It has thus enabled the (re-)emergence of patriarchal views of women, defined in terms of their reproductive and sexual roles, and as objects to enhance the status of men, rather than human beings with equality and dignity.⁹ In a political and social sense, this approach reinforces a patriarchal worldview inimical to the idea of gender equality and women's human rights.

In contrast to traditional leaders' early attempt to exclude customary law and culture from the operation of the Bill of Rights (and thus to exclude the cultural sphere from constitutional rights),¹⁰ the language of rights has often formed the basis of traditional leaders' (and other) objections to women's rights and of the invocation of culture by public figures to justify particular norms and practices.¹¹ This suggests that, at least in the realm of politics, a conflictual relationship persists between claims to culture and claims to gender equality in which the assertion of the former as a right, directly or by implication, undermines, marginalises and overrides the value of the latter.

⁹ There is much evidence of this in political discourse and the media. However, the most prominent examples have been the debates around President's personal life – his polygynous marriages and number of children born out of wedlock. This has raised questions about attitudes to women and appropriate sexual behaviour in the context of an HIV epidemic. Those defending the President have tended to cite culture as a complete defence, requiring no further explanation. An earlier, legal, example is the use of the 'cultural defence' in the 2006 rape trial of Zuma: *S v Zuma* 2006 2 SACR 191. For a discussion of the Zuma trial in the context of traditionalism versus sexual rights, see S Robins 'Sexual politics and the Zuma rape trial' (2008) 34 JSAS 411.

¹⁰ See Albertyn (n 5 above); F Kaganas & C Murray 'The contest between culture and gender equality under South Africa's interim constitution' (1994) 21 *Journal of Law and Society* 409.

¹¹ JL Comaroff & J Comaroff, in *Ethnicity Inc* (2009), have noted how the language of rights and legality has permeated 'ethnicity', that 'taken-for-granted species of collective subjectivity that lies at the intersection of identity and culture'. (1, 53-59)

In a constitutional sense, it is not difficult to argue that this is impermissible – at least in the sense of culture or cultural rights ‘trumping’ equality or equality rights. The 1996 Constitution addresses the apparent conflict between culture and equality by recognising the importance of cultural identity and cultural diversity¹² and embracing legal pluralism,¹³ at the same time as it renders these subject to the values and rights of a supreme Constitution.¹⁴ These include a strong commitment to equality as one of the foundational values and substantive rights of the Constitution. The text suggests, at minimum, a liberal approach to multiculturalism that accommodates religious and cultural diversity as long as this is exercised consistently with fundamental rights.¹⁵ Any claim to defend a cultural or religious rule, norm or practice that discriminates against women must be justified in terms of the Constitution and its democratic values of equality, as well as human dignity and freedom.

Of course, the interpretation of the Constitution is contested, producing competing narratives about the nature of democracy and South African society. Different ideas of multiculturalism generate divergent views on the interpretation of, and relationship between, cultural identity/association/diversity and gender equality/patriarchy. Underlying these are deeper disagreements over the nature of culture, gender relations, the place of the individual in the group, the form of the public/private divide and the significance and interpretation of rights and values, such as equality, dignity and freedom. If some of these approaches have – by accident or design – fallen on the side of a cultural or equality trump,¹⁶ a growing body of critical scholarship has sought to value, and reconcile, both cultural diversity and gender equality. Drawing on the notion that culture is fluid and contested rather than bound and static, and that values are both contested and open to interpretation through deliberative engagement within and across cultural difference, this work offers the best interpretation of South Africa’s Constitution as committed to cultural diversity and gender equality, and the best way of dealing justly with claims relating to culture and gender equality under the common normative platform of the Constitution.

The starting point for this is a discussion, in part 2, about the nature of culture. This section identifies two opposing views of culture: a bounded, monolithic and privatised view and a more fluid,

¹² Constitution of the Republic of South Africa 1996 secs 30 & 31.

¹³ Section 211.

¹⁴ Sections 1, 2, 8, 30, 31 & 211.

¹⁵ *Christian Education of SA v Minister of Education* 2000 10 BCLR 1051 (CC); *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 3 BCLR 355 (CC).

¹⁶ S Moller Okin ‘Feminism and multiculturalism: some tension’ (1998) 108 *Ethics* 667.

contested and porous conception. Each of these generates a different approach to patriarchy and gender equality. The article explores the assumptions, relevance and application of both approaches in South Africa and suggests that the latter meaning better captures the manner in which people live, and the particular nature of culture and customary law in South Africa. A dynamic approach to culture also underlies a form of cultural diversity and legal pluralism that is open-ended and allows an active and participatory engagement with, and development of, constitutional norms and values. By contrast, a bounded and static notion of culture inhibits change, forecloses deliberation and tends to reinforce hierarchies and inequalities.

Although, there is a degree of academic consensus on the open and contingent nature of culture amongst 'multiculturalists', there is less work on what this means for legal understandings of culture and equality, and the manner in which the law should address intra-cultural inequalities.¹⁷ In South Africa, legal academics have tended to concentrate on *inter*-group inequalities, and how various religious norms and practices might be accommodated under our Constitution, rather than competing equality claims within a cultural group.¹⁸ Part 3 of this article focuses on South Africa's equality jurisprudence, suggesting how this might be developed to address matters that raise competing claims to gender equality and culture. I argue that a contested view of culture underlies a context-sensitive approach and requires a detailed elaboration of the values underlying the equality right and a proper consideration of the cultural purposes of the alleged discrimination. Much of this approach is already present or implicit in the jurisprudence. The jurisprudence also enables a deliberative approach – permitting multiple voices, including those

¹⁷ F Lovett 'Book reviews/ Political theory' (2008) 6 *Perspectives on Politics* 166, 166.

¹⁸ There is a small body of work on freedom of religion, religious and cultural diversity. See, for example, P Lenta 'Religious liberty and cultural accommodation' (2005) 122 *South African Law Journal* 352; 'Muslim headscarves in the workplace and in schools' (2007) 124 *South African Law Journal* 296, P Lenta 'Cultural and religious accommodation to school uniform regulations' (2008) 1 *Constitutional Court Review* 259; P Lenta 'Taking diversity seriously: Religious associations and work-related discrimination' (2009) 126 *South African Law Journal* 827; S Woolman 'On the fragility of associational life: A constitutive liberal's response to Patrick Lenta' (2009) 25 *South African Journal of Human Rights* 280. Most of this work does not directly address the contested nature of religious and cultural groups and equality claims by internal members against group practices, but rather interrogates liberal arguments around religious and cultural diversity, and the accommodation of religious and cultural groups. This article enters the debate from a different perspective and is particularly concerned with culture, rather than religion, and how the presence of internal equality disputes shapes our jurisprudence. (In this respect see V Bronstein 'Reconceptualising the customary law debate in South Africa' 1998 (14) *South African Journal of Human Rights* 388 for an excellent early discussion of gender equality and culture.) The extent to which religion and culture differ (I think they do) and the application of these arguments to the relationship between religious and associational freedom, and equality, is the task of another paper.

of women, community members and traditional leaders. Such an approach, however, raises challenges for courts in terms of process and remedies. It also acknowledges the importance of deliberation beyond the courtroom, and thus of engaging law and politics, the state and society/community on cultural rules, norms and practices.

Part 4 develops these arguments in relation to claims of unfair discrimination based on sex/gender, not only in relation to relatively easy claims of legal status and recognition in family, but also in relation to claims to public power and resources (courts, leadership, land) that have generated significant resistance from traditional leaders, as well as socially contested cultural practices such as polygamy or virginity testing. This section considers the 2008 Constitutional Court case of *Gumede v President of the RSA*¹⁹ (concerning gender discrimination in customary marriage). Part 5 then addresses claims of unfair discrimination based on culture. Using *MEC for Education, KwaZulu Natal v Pillay*²⁰ (concerning cultural discrimination) I suggest how the adjudication of these claims might avoid the inadvertent protection of discriminatory cultures.

Part 6 addresses the idea of deliberation in building diversity and solidarity, as well the role of courts in fostering this. It briefly considers *Shilubana v Nwamitwa*²¹ (concerning the position of women as traditional leaders). It suggests that the challenge of taking cultural diversity and gender equality seriously under the Constitution will not always be settled in court (although they are important fora), but might require courts to enable more open-ended processes in which court-mandated principles are developed within communities to secure rights and foster change in a manner that is respectful of cultural difference and gender equality.

2 Culture

Culture may be understood as a particular way of life of a (more or less) defined group. It encompasses the values that the group's members hold, the norms they follow and the material goods that they produce.²² Culture is important, it is an inescapable part of being human and helps us make sense of the world.²³ It shapes our identity and is central to the way we experience ourselves, our collectivities, and the world.

¹⁹ *Gumede* (n 7 above).

²⁰ 2008 1 SA 474 (CC); 2008 2 BCLR 99 (CC).

²¹ *Pillay* (n 6 above).

²² A Giddens *Sociology* (1989) 31.

²³ A Phillips *Multiculturalism without culture* (2007) 556.

Gender is a particularly important aspect of culture, as one's cultural context shapes one's understanding of appropriate gender roles and responsibilities. Gender relations, the manner in which gender roles are formed and valued, and their relationship to each other, also play a central role in 'constituting the essence of cultures as ways of life to be passed from one generation to the next'.²⁴ Women tend to be powerful symbols of the collective unity, often in terms of strict cultural codes of what it means to be a 'proper woman'. In most, if not all, cultures these roles are differently valued and accord unequal power and resources to women and men. The enforcement of traditional gender roles, defined largely by women's sexual and reproductive capacity, tends to maintain women in inferior power positions dependent upon men for status and resources.²⁵ In this way, culture sustains male power and interests and maintains women in positions of inequality and subordination.²⁶ Changes in the meaning and place of women can thus be particularly strongly contested, as they affect the distribution of political and economic power within a community, and more widely in society.

The South African Constitution recognises the importance of culture by protecting the right of individuals to participate in cultural life, to the collective enjoyment of culture, and to be free from unfair discrimination based on culture.²⁷ Although the Constitution affirms cultural communities, the rights vest in individuals rather than groups.²⁸ In addition, the Constitution expresses a commitment to cultural diversity and legal pluralism, again as rights of individuals not groups.²⁹ The Constitutional Court has affirmed the right to cultural association as an affirmation of dignity – the right to choose to live a life that is meaningful and a recognition of the equal moral worth of all.³⁰ Community practices and associations must be treated with respect, but they must also be exercised consistently with other provisions in the Constitution.³¹ How we understand this further will differ. Crucial to our legal understanding – but one which is often overlooked by legal scholars – is the definition and interpretation of culture. Is it bounded or permeable, fixed or contested, monolithic or diverse? This section considers two competing ideas of culture that are manifest in contemporary South Africa, the extent to which they

²⁴ N Yuval Davis *Gender & nation* (1997) 43.

²⁵ Yuval Davis (n 24 above) 47.

²⁶ Moller Okin (n 16 above); A Phillips 'When culture means gender: Issues of cultural defence in the English courts' (2003) 66 *Modern Law Review* 510.

²⁷ Sections 30, 31 & 9. The collective enjoyment of culture is entrenched in sec 30 and 31 and is made subject to the Constitution as a whole.

²⁸ Pillay (n 20 above) para 150, per O'Regan J (concurring).

²⁹ Sections 9, 30, 31, 211. For a consistent defence of multiculturalism as a right of an individual, rather than her group, see A Phillips *Multiculturalism without culture* (2007).

³⁰ Pillay (n 20 above) para 150-151 per O'Regan J (concurring).

³¹ Sections 15, 30, 31.

contemplate fixed or changing gender roles, their implications for the constitutional interpretation of culture and cultural diversity, as well as the relationship between cultural diversity and gender equality.

2.1 Culture, politics and law

The idea that cultures are distinct, coherent, bounded and irretrievably linked to particular racial or ethnic groups has deep social, economic and political roots in South Africa. Colonial and apartheid governments based their policies of racial inequality and subordination on the idea that cultural differences were fixed, impermeable and even 'god-given'. This interpretation of culture as 'distinct, incommensurable and essentially linked to tribal members' also appealed to black Africans as traditional leaders were able to retain authority over male migrants and the women who remained at home.³² Ethnic segregation in city hostels deepened 'tribal' differences at the same time as it provided vital ethnically-based social networks.³³ Ultimately, the legitimacy of apartheid rule and its homelands policy was 'predicated on denying the complex and shifting nature of cultural identity, both of Black and of White' and of emphasising an 'essential and unchanging connection to a particular tribal group, in a limited geographic territory, in a time outside history'.³⁴

The fixedness of tribal and racial identity was strongly resisted in the national liberation struggle in favour of a South African identity. Black South Africans were citizens of South Africa, not tribal subjects tied to 'homelands'. This resistance to the idea of culture as fixed and inevitable was also manifest in anthropological and sociological studies that revealed how black South Africans negotiated and moved between a variety of socio-economic settings — urban/rural, traditional/modern, work/home — all of which shaped their identity and way of life. For example, Belinda Bozzoli's *Women of Phokeng* shows how changing economic relations of migrancy and urbanisation allowed women to challenge and resist patriarchal cultural subordination in traditional communities by moving in and out of these communities, and by demonstrating resourcefulness and independence in building lives in urban areas that retained valued parts of their cultural identities (as respectable woman), but enabled

³² L Fishbayn 'Litigating the right to culture: Family law in the new South Africa' (1999) 13 *International Journal of Law, Policy and the Family* 147, 154.

³³ Fishbayn (n 32 above).

³⁴ Fishbayn (n 32 above) 155-6.

a degree of freedom from its (negative) patriarchal constraints.³⁵ Underlying this is an idea of culture as fluid and contested, shaped by a variety of internal and external influences, including socio-economic change.

In post-apartheid South Africa, the bounded idea of culture has continued to find support amongst traditional leaders. During the constitutional negotiations in 1993, traditional leaders argued strongly for the explicit protection of culture and the insulation of its discriminatory practices (manifest in patriarchal forms of law and leadership) from equality guarantees. The suppression of African cultures under apartheid meant that they should be allowed to develop on an equal basis with dominant (white/western) cultures and without external interference (including the idea of human rights). Opposing this, women argued that, important as culture was, ideas of equality and democracy should override claims to cultural autonomy. In the end, all South Africans were formally recognised as equal, rights-bearing citizens under the Constitution.³⁶ However, the acceptance of cultural diversity and legal pluralism in the Constitution, as well as the status of traditional leaders, recognised the value of culture and custom to people's identities and way of life.

The Constitution thus emerges from particular struggles over the nature and meaning of culture and tradition in South Africa. The two strands that shaped the text – one that culture is relatively autonomous and bounded, and the other that it is far more fluid and contested – have persisted in political and legal discourse since 1994 and support different interpretations of the Constitution, the place of traditional leaders, the understanding of cultural diversity and legal pluralism, and the possibilities of solidarity across difference.

2.2 Cultural autonomy?

Traditional leaders, as well as those who invoke culture and religion to defend particular practices, tend to assert the specificity and uniqueness of culture and tradition in a manner that promotes a hierarchical, bounded and monolithic notion of culture:

[C]ulture is understood as a way of life of a discrete people. The essence of the people is expressed in an integrated system of ideas and practices

³⁵ B Bozzoli (assisted by Mmantho Nkotsoe) *Women of Phokeng: Consciousness, life, strategy and migrancy in South Africa 1900-1983* (1991). See also V Van de Vliet 'Traditional husbands, modern wives?' in A Spiegel & P McAllister *Tradition and transition in Southern Africa* (1991); D Webster 'Abafazi Bathonga Bafuhlakala: Ethnicity and gender in a KwaZulu border community' in A Spiegel & P McAllister (n 35 above); A Kelk Mager *Gender and the making of a South African Bantustan* (1999).

³⁶ Albertyn (n 5 above); Fishbayn (n 32 above).

... A culture persists through history by reproducing itself through inserting individuals into their social roles in this system. The agency of individuals is shaped and expressed through their social roles with little remainder. In this model, culture is a fragile organic structure which flourishes if left alone but can be destroyed through even small changes.³⁷

Culture is thus portrayed as a closed and separate space that should be free from external influence. The dominant call is for the preservation of tradition, including traditional gender roles, which are often portrayed as necessary for the preservation of the group.³⁸

Within the group, only certain voices are permitted as authoritative, able to define and interpret its norms and rules. Voice tends to be defined in monolithic terms, internal contestation is muted or denied, while 'outsiders' have little or no authority to understand or criticise 'internal' practices.³⁹ In reality, the portrayal of a cultural group as a closed and monolithic unity tends to mask inequalities within, and to reproduce sectional power and interests as the elite within the group controls its membership, resources and voice.⁴⁰ It also entails deference to patriarchal cultural norms.⁴¹ Patriarchy remains intact.

In constitutional terms, the emphasis on 'cultural autonomy' can be said to recognise the value of culture and cultural identity as an aspect of human dignity, and to emphasise equality across different groups. These ideas of dignity and equality are particularly important in the light of a colonial and apartheid past that denigrated and stigmatised African and minority cultures as less worthy. The importance of fostering equal concern and respect across cultural differences is undisputed. So too is the assertion of cultural diversity, the importance of cultural values and the fact that we should not be defined by things 'colonial', 'eurocentric' and 'unAfrican'.

However, the emphasis on group-based (inter-group) difference, together with a strongly negative understanding of freedom and a

³⁷ Fishbayn (n 32 above) 158. See also Bronstein (n 18 above).

³⁸ See, for example, Holomisa (n 2 above). See also Yuval Davis (n 24 above).

³⁹ These include arguments that traditional leaders are the sole custodians and interpreters of culture and the final authority on customary law – to the exclusion of community members and even courts. In an example concerning the criticisms of Zuma's personal life, P Holomisa referred to these as inevitably 'unAfrican', contemptuous of culture and influenced by the 'colonial edifice'. 'Zuma and leadership: A Zulu too far for guardians of the colonial edifice in SA' *Business Day* 1 March 2010.

⁴⁰ For example, Anne Phillips has argued that group-based or corporatist multiculturalism 'relies too heavily on the role of elites and freezes relationships between communities by organising the distribution of resources via the groups'.

⁴¹ Phillips (n 23 above) 163-4.
n 38 above.

rigid public/private divide that insulates a closed, private cultural sphere to public scrutiny, enables a call to (the right to) culture to prevent scrutiny of, and/or to justify, norms and practices that discriminate against women.⁴² The former approach denies the standard-setting power of the Constitution. It is explicit in the words of President Zuma cited at the beginning for this article in rejecting criticism of polygamy: '[T]here is no standard that is agreed' only 'diversities'. The latter approach has been used in court by traditional leaders to justify discriminatory practices as fair discrimination.⁴³ Ultimately both approaches solidify discreet cultural and ethnic identities in ways which mitigate against the development of solidarity based on the creation of common values and unity across difference.

The 'cultural autonomy' approach has found little support in South African courts. However, it has a clear foothold in the political sphere as traditional leaders seek to consolidate power over land and decision-making,⁴⁴ and political leaders engage in the defensive use of 'culture' to limit criticism and debate, and/or to pursue particular interests.

2.3 Culture and contestation

Inspired by the work of Antonio Gramsci and Michel Foucault, cultural theorists such as Raymond Williams transformed the idea of culture

from static reified phenomena common to all members of national ethnic groups into dynamic social processes operating in contested terrains in which different voices become more or less hegemonic in their offered interpretations of the world.⁴⁵

This work suggests that culture is fluid, diverse and subject to change. It incorporates opposing tendencies of 'stability and continuity' and of 'perpetual resistance and change'.⁴⁶ Culture is contested and dynamic, as cultural values, norms and practices can be challenged, subverted and amended over time. It is also flexible and permeable – shaped by 'external' influences – whether Christianity or capitalism,

⁴² Sibongile Ndashe suggests a 'deliberate confusion' in 'Human rights, gender and culture – a deliberate confusion?' in K Bentley & H Brookes *Agenda Special Focus* (2005) 37.

⁴³ *Bhe* (n 4 above); *Shilubana* (n 6 above).

⁴⁴ Traditional leaders persuaded the executive to (re)define the content of laws, such as the Communal Land Rights Act 11 of 2004 and the Community Courts Bill of 2007, to enhance traditional power and limit the rights of community members, especially women. Communal Land Rights Act 11 of 2004 [n 8 above].

⁴⁵ Yuval Davis (n 24 above) 41.

⁴⁶ Yuval Davis (n 24 above) 41.

hip-hop or human rights.⁴⁷ Members of particular groups have 'complex and multi-faceted' cultural identities, influenced by different social and economic conditions, and by local and global, social and cultural norms.⁴⁸ This idea of culture admits to the possibilities of building solidarity across difference.

While culture may demonstrate contestation and change, this is always partial and uneven, implicated by power relations and by sectional political and economic interests. This means that

those who defend practices that are harmful to women in the name of preserving their religious, cultural or ethnic identity are also often seeking to protect certain political and/or economic interests. They have a vested interest in maintaining the status quo and a set of power relations that are tied to certain practices.⁴⁹

Culture cannot be seen outside of the material conditions that shape people's lives. The nature and pace of cultural change is also grounded in changing social and economic conditions that enable movement 'in' and 'out' of one's 'culture' and that shape changing practices, behaviours and norms.

The idea of a dynamic and contested culture, in which cultural norms and practices shift in response to changing social and economic circumstances, is behind the idea of the 'living law', the notion of customary law and practice as flexible and responsive; as opposed to the 'official' customary law that was left 'unreformed and stonewalled by static rules and judicial precedent that [for example] had little or nothing to do with the lived experience of spouses and children within customary marriages'.⁵⁰

Of course the idea of contestation and change is limited. No culture is entirely contested, and there are always broad levels of consensus that enable areas of dispute. In different cultural settings, contestation may be narrow or broad, and may result in different degrees of change, or no change at all.⁵¹ Nevertheless, there is growing evidence that, in South Africa, the 'living law' has been less rigid and less defensive of traditional ideas of women's place in

⁴⁷ There is by now much evidence of the globalisation of human rights and their deployment in traditional and cultural struggles. See J & J Comaroff *Ethnicity, Inc.* (2009). In addition, by drawing on the Constitution to assert the right to culture, traditional leaders bring rights within the cultural domain. The question then becomes one of interpretation.

⁴⁸ Bronstein (n 18 above) 394; R Wilson 'Human rights, culture and context: An introduction' in R Wilson (ed) *Human rights, culture and context* (1997) 1.

⁴⁹ AM Tripp 'The politics of women's rights and cultural diversity in Uganda' in M Moyneux & S Razavi *Gender justice, development and rights* (2002) chapter 13, 414.

⁵⁰ Gumede (n 7 above) para 20.

⁵¹ B Parekh *Rethinking multiculturalism* (2 ed 2006) 148-149.

society than the official version – although the pattern of this is uneven across the country.⁵² Likhapha Mbatha's work on inheritance has shown that, contrary to the official rule of male primogeniture, women do inherit in practice: Communities that live a customary life have 'no problem' in permitting women to inherit property based on the cultural norms of responsibility and family welfare.⁵³ The high court case of *Mabena v Letsoalo*⁵⁴ is a positive example of the judicial recognition of 'living law'. Here the judge accepted that culture was capable of evolving to reflect changed economic and gender relations (in this case an urban-based, woman-headed household) so that a woman could legitimately consent to customary marriage and negotiate and receive lobola on behalf of her family.

There is also evidence that changes within the living law have relied upon 'external' ideas, values and rules to make certain claims. There are many examples in Southern Africa of women constantly negotiating civil and customary legal systems to improve their rights and access benefits within marriage (or, put another way, to secure equality).⁵⁵ Mbatha's work suggests that the constitutional environment has provided an 'enabling environment' for the development of customary practices that improve the social position of women.⁵⁶ Recent research by Aninka Claassens and Sizani Ngubane illustrates how women have drawn on principles of democracy and equality to enhance their ability to negotiate rural power struggles and gain access to customary land and resources.⁵⁷ Thus, single mothers and women trying to access or to retain land in the absence of a male relative have made successful claims based on a combination of equality and custom:

In many instances, arguments about the values underlying customary systems (in particular the primacy of claims of need) and entitlements of

⁵² In a fascinating paper, David Webster writes about differing approaches to gender identity arising out of Zulu and Tsonga tradition, in which the latter is more flexible in relating to women's changing roles. See Webster (n 35 above).

⁵³ L Mbatha 'Reforming the customary law of succession' (2002) 18 *South African Journal of Human Rights* 259, 261-3; 282.

⁵⁴ 1998 2 SA 1068 (T).

⁵⁵ Likhapha Mbatha's work on marriage showed women moving between the two systems to seek forms that offered most protection – often seeking both customary and civil marriages. L Mbatha 'Marriage Practices of Black South Africans' Centre for Applied Legal Studies Research Report (1997). Writing about the kinds of claims that women in a Bakwena village in Botswana are able to make of their male partners, Anne Griffiths reveals how women seek to negotiate the civil and customary systems to achieve results. A Griffiths *In the shadow of marriage: Gender and justice in an African community* (1997). See also A Armstrong *et al* 'Uncovering reality: Excavating women's rights in african family law' (1993) 7 *International Journal of Law and the Family* 314.

⁵⁶ Mbatha (n 53 above) 283.

⁵⁷ A Claassens & S Ngubane 'Women, land and power: The impact of the Communal Land Rights Act' in A Claassens & B Cousins (eds) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) chapter 7.

birthright and belonging are woven together with the right to equality and democracy in the claims made.⁵⁸

The 'living law' – like culture – is 'rich, varied and flexible', changing in response to changing conditions. Although it does not always guarantee egalitarian ends nor always benefit women (it has its own power dynamics), it is an important site of change, especially as the 'new' constitutional setting provides additional value resources for negotiating, resisting and justifying customary and cultural practice.

The dynamic, flexible, permeable and participative nature of culture, signified in the idea of 'living law', was largely accepted by the Constitutional Court in the cases of *Bhe* (declaring the rule of male primogeniture impermissible gender discrimination) and *Shilubana* (affirming a decision to appoint a woman as chief). In both instances, the Court described and took account of customs and practices that had developed to take account of gender equality and, in the case of *Bhe*, declared unconstitutional the official version that had excluded women. These cases demonstrate that the contested notion of culture enables a jurisprudence that can assert rights for vulnerable and marginalised members of a community in a manner that affirms both gender equality and cultural diversity, permitting the development and incorporation of constitutional and communal values.

2.4 Multiculturalism, cultural autonomy and cultural diversity

Above, I have set out two broadly opposing ideas of culture and the implications of each for addressing gender inequality and improving the status and rights of women, within different cultural settings. Both approaches are apparent in South Africa, although the bounded view of culture is more visible in the political sphere (executive and policy making), whereas the courts have tended towards a more contested view of culture and customary law. In this section, I locate these approaches within a wider debate about multiculturalism and diversity to consider the broad characteristics of a legal approach that is simultaneously committed to mitigating and reducing group-based inequalities (valuing pluralism and diversity) and protecting the fundamental rights of individuals (and thus opposed to power hierarchies within groups).

⁵⁸ A Claassens & S Ngubane (n 57 above) 177.

2.4.1 Liberal multiculturalism

Liberals have long debated the limits of reasonable pluralism or the extent to which liberalism accommodates different cultural and religious groups.⁵⁹ The range of views spans a strong emphasis on tolerance and minimal interference,⁶⁰ to a debate on which liberal values should prevail.⁶¹ Here an emphasis on (inter-group) equality may permit a significant degree of group autonomy but leave intra-group inequalities intact,⁶² whereas a concern with individual autonomy might permit a significant degree of individual disagreement with group values, as well as a greater basis for limiting discriminatory practices, but might undermine positive cultural norms in doing so.⁶³ Liberal multiculturalism thus embraces a diversity of views, in which the nature, content and relative weight of the values and principles that are identified as the basis for determining the 'limits' of cultural accommodation are determinative.

Much of the multicultural debate has focussed on the affirmation of culture as an expression of individual rights⁶⁴ and normative claims about culture, including whether minorities are entitled to special treatment and what kind of treatment.⁶⁵ Less has been said about how culture is conceptualised and how to address intra-group inequalities – the impact of multiculturalism on vulnerable members of the group. With the exception of 'strong' multiculturalists who focus almost exclusively on injustice between groups (thus concealing in-group oppression), scholars tend to agree that the accommodation of minority cultures is limited by reference to standard liberal guarantees of individual rights and shared public values. Kymlicka refers to these as 'internal restrictions' that prevent groups from discriminating against their members on grounds of sex, race or sexual preference.⁶⁶ This is less simple than it appears. The actual protection afforded the individual within the group depends on the extent to which the approach to multiculturalism defers to group norms and defines the rights whose violation justifies intervention. This, in turn, depends upon an interpretation of values (in form and content), one's approach to culture, how one conceptualises the role of the state (and the public/private divide) and how one understands

⁵⁹ Lenta (2005) n 18 above 352.

⁶⁰ C Kukathas 'Are there any collective rights?' in W Kymlicka (ed) *The rights of minority cultures* (1995).

⁶¹ W Kymlicka 'Introduction' in Kymlicka (n 60 above) 15.

⁶² Kukathas (n 60 above).

⁶³ L Green 'Internal Minorities and the Rights' in Kymlicka (n 60 above).

⁶⁴ See, for example, Charles Taylor's work on culture as an expression of dignity and recognition. C Taylor 'The Politics of recognition' in A Gutmann (ed) *Multiculturalism: Examining the politics of recognition* (1994).

⁶⁵ Pioneered by work of Will Kymlicka (n 60 above) and *Multicultural citizenship: A liberal theory of minority rights* (1995).

⁶⁶ Kymlicka (n 65 above).

(or pays attention to) questions of voice and participation within the group.

For example, Kymlicka raises the question of when it is reasonable for a state to intervene to act against discrimination within a cultural group. He suggests that while it might be permitted to prevent a 'gross and systematic violation of human rights', it might otherwise not be appropriate to impose liberal principles upon a group, especially if there is a consensus within the community on the legitimacy of restricting individual rights.⁶⁷ This 'weak' multicultural approach tends to overlook the nature and form of group inequalities, and tends to treat ideas of culture and identity as monolithic and uncontested.⁶⁸ It thus offers limited protection for gender-based discrimination within groups. Indeed, a concern with the limits of cultural rights often entails assumptions that cultures or cultural groupings are more unified, integrated and bounded than they are, and fails to address the manner in which groups interact with other cultures, are internally varied and contested, as well as fragmented by, for example, class and gender.⁶⁹

The limits of internal discrimination have sometimes been mediated by ideas of 'exit' and 'voice'. The former suggests that an individual is free to leave her group if she wishes, and, as long as the right of exit is there and she is not 'forced' to submit to the laws and practices of the group, discrimination is permitted.⁷⁰ 'Voice' tests the extent to which group members have been able to express their preferences and 'consent' to particular practices. Shachar correctly dismisses the right to exit solution as unjust, 'imposing the burden of resolving conflict upon the individual – and relieving the state of any responsibility for the situation'.⁷¹ It also fails to recognise that many women do not enjoy the substantive conditions that make exit a real option. The 'right to exit' poses women with the 'choice' of deferring to the norms of the powerful within the group or leaving. The place of women as members of the culture, able to challenge, define and reinterpret its norms and practices is denied. 'Exit' can only constitute an appropriate mediating principle in circumstances where it is a real and positive alternative for escaping discrimination. Similarly, the idea of 'voice' offers some traction for assessing discriminatory practices, but only where the substantive conditions exist that permit sufficient participation and voice.

⁶⁷ Kymlicka (n 65 above) 152 - 165.

⁶⁸ For criticism of Kymlicka's model of multiculturalism from this perspective, see A Shachar *Multicultural jurisdictions: Cultural differences and women's rights* (2001) 22 - 32 and S Song 'Majority norms, multiculturalism and gender equality' (2005) 99 *American Political Science Review* 473, 474.

⁶⁹ Song (n 68 above) 474. See also R Wilson (n 48 above) 9.

⁷⁰ See Kukathas (n 60 above).

⁷¹ Shachar (n 68 above) 41.

A further principle that has been applied to determine when and how to intervene to protect women against intra-group discrimination has been to interrogate the kind of good that is being denied through the discrimination, and the extent to which it is attainable elsewhere.⁷² Again, the efficacy of this approach would depend upon a careful contextual analysis of the power relations underlying the denial of the good and the actual options available to the group members. As with the notions of exit and voice, an assessment of the nature of the good requires a methodology that would lead to just results.

Ultimately, exit, voice or goods are limited tools for determining the limits of multicultural accommodation – at least in so far as they operate as abstract or case by case principles within a philosophical context that defers to the group, that underplays the contested nature of culture, that accepts a bounded sphere of private discrimination, that pits women or equality against their culture, and that fails to acknowledge the complexities of achieving multiculturalism and diversity within an overarching, normative commitment to common values.

Liberal multiculturalism provides an important philosophical and political platform for the inclusion of different cultural and religious groups. However, some of its primary characteristics are also its shortcomings. It tends to create a value hierarchy in which liberal values become the central frame of reference,⁷³ and operate as dominant ‘universal’ norms that are imposed upon, and limit, minority cultures. (Hence the anxiety from some writers about ‘too much’ intervention). This has several consequences for an exploration of the relationship between multiculturalism and gender equality.

Firstly, feminist writers, such as Song and Philips, have argued that it can miss the extent to which the dominant norms are patriarchal and act to shore up or reinforce gender inequality within other cultural domains. The ‘problem’ of patriarchy tends to be located in another, minority culture rather than a concern within and across all cultures.⁷⁴ For example, it is well-documented that current forms of discrimination against women in customary law in Southern Africa are the product of an interaction between African cultural representatives and colonial authorities, and between customary and

⁷² Woolman (n 18 above) discusses this phenomenon in the wider context of social capital.

⁷³ Parekh (n 51 above) 111.

⁷⁴ Song (n 68 above); A Phillips ‘Multiculturalism, universalism and the claims of democracy’ in M Molyneux & S Razavi *Gender justice, development and rights* (2002) chapter 4, 124-125.

civil law, in codifying rules that prejudice women.⁷⁵ The historic and current forms of patriarchy within civil law are also well documented.

Secondly, the dominance of particular forms of liberal content can also ignore or deny the possibility of normative 'common ground'. The concern seems to be that 'liberal-egalitarian' values are inevitably foreign and that one cannot 'force minority cultures to reorganise themselves in accordance with these norms'.⁷⁶ Yet, recognising the manner in which norms and values are porous, contested and capable of different meanings, and the extent to which ideas of justice have purchase across the world, is an important step to opening spaces for debate and common values about the status and treatment of women – one that addresses cultural diversity and gender equality. So too, is the idea that people participate in giving meaning to shared values, that such meanings cannot merely be imposed upon them.

2.4.2 *A deliberative approach that values cultural diversity and gender equality*

How then we best ensure a commitment to cultural diversity and gender equality? Put another way, what approach best allows us to value cultural diversity, but not at the expense of vulnerable or marginalised members of the group? In this section, I briefly summarise some of the elements of this approach before considering, in detail in part 3, how equality law might best achieve this.

Fundamental to such an approach is the explicit acceptance of culture as contested, dynamic and permeable. This also requires an understanding of the public and private sphere as interlocking and as sites of multiple power relations in which individual choices are shaped by one's place in the community, as well as the surrounding political, social and economic conditions.

The recognition that inequalities exist within and across groups envisages a form of cultural/legal pluralism in which cultural and legal domains intersect and overlap (without losing a degree of specificity). This reflects a reality in which many people live within the intersection of law, custom and culture:

⁷⁵ M Chanock *Law, custom and social order: The colonial experience in Malawi and Zambia* (1985); S Burman 'Fighting a two-pronged attack: The changing legal status of women in Cape-ruled Basutoland, 1872-1884' and J Guy 'Gender oppression in Southern Africa's precapitalist societies' both in C Walker *Women and gender in Southern Africa to 1945* (1990).

⁷⁶ Kymlicka (n 60 above) 14.

both custom and customary law will shape and mould the lives of people either through the medium of the formal legal system or as a dynamic force within the community.⁷⁷

The Constitution and its rights and values are already implicated in this plurality. This is evident in those who rely defensively on the right to culture, as well as those who draw on constitutional values as a resource to improve their social position in communities.⁷⁸ Albeit in different ways, both groups draw on the Constitution (and offer differing interpretations of its values) to influence community norms and practices, and to defend or secure particular claims and interests. This idea of cultural pluralism respects and promotes an equality of different cultures, recognises the supremacy of the Constitution's normative platform,⁷⁹ but understands that the process of giving meaning to both constitutional and cultural values is a contested one.

In this way, as in others, the Constitution is always present and contested (even when it is denied). The values and principles that it contains are not abstract, universal principles, but are the product of politically agreed values, determined within a particular historic context of negotiation and compromise. These values resonate with a past struggle against apartheid and should be given a contemporary meaning by courts engaged in a democratic dialogue with other parts of the state and civil society (in all its diversity).

Since principles of justice are always potentially skewed by the conditions of their formulation, and the understanding of social practices is always open to reinterpretation in the light of new knowledge and experience, ... principles and policies should always be worked out with the fullest possible involvement of all relevant groups. ... [N]ot just 'global citizens', ... nor religious and cultural leaders representing the principles of 'their' culture or religion, but also the more hidden constituencies with what may be their very different experiences and perspectives and concerns ...⁸⁰

In addition, I believe that a commitment to cultural diversity and gender equality coheres with the idea that the Constitution promotes an active agenda of change and transformation, affirming and promoting diversity at the same time as it seeks to improve the quality of life of all. The Constitution does not promote a static multiculturalism that protects and preserves groups 'as they are', but rather poses an idea of diversity that constitutes a range of political, social (and legal) spaces that are 'sites upon which to act in pursuit of

⁷⁷ Armstrong *et al* (n 55 above) 323.

⁷⁸ This is common throughout the world. In an era of political and economic globalisation it is impossible to live anywhere without encountering rights. See Wilson (n 48 above) 9, Comaroff & Comaroff (n 11 above).

⁷⁹ See *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) para 51.

⁸⁰ Phillips (n 74 above) 130.

change'.⁸¹ This project entails the ongoing development of a value system that accepts both diversity and a wider sense of human solidarity, the disavowal of domination and subordination, the expression and realisation of human agency and the absence of power hierarchies and opposition.⁸² It sets itself against all forms of oppression and subordination, and accepts the participation of all in defining what that means and which norms, rules and practices impede or advance this project. Importantly, it is people – through deliberation and practice – who participate in giving meaning to these values,⁸³ and to building solidarity across difference.⁸⁴

3 Equality

The 'best' approach to addressing equality claims in a manner that values cultural diversity and gender equality emphasises the importance of context, values and guiding principles, and a deliberative and inclusive process in equality adjudication. Shona Song has emphasised a 'context-sensitive' approach to evaluating claims of inequality within a multicultural situation.⁸⁵ This entails a close look at the origin and the history of a rule or a practice, its importance and purpose, and the extent to which it is supported or contested within the group. It also requires a consideration of the effects that outlawing or permitting the practice would have on different members of the group. Attention to context always insists that we take account of the actual reality of people's lives, their place within the community and the power, resources and interests implicated by the dispute. Mullally proposes an approach that does not abstract rights from the concrete realities of people's lives, and argues that this is best achieved through a deliberative process. She stresses the importance of identifying principles that enable a

⁸¹ D Cooper *Challenging diversity* (2004).

⁸² Cooper (n 81 above) 15.

⁸³ S Benhabib *Situating the self: Gender, community and postmodernism in contemporary ethics* (1992); S Mullally 'Feminism and multicultural dilemmas in India: Revisiting the Shah Bano case' (2004) 24 *Oxford Journal of Legal Studies* 671.

⁸⁴ This combination of difference, commonality and deliberation is explicit in O'Regan J's minority judgment in *Pillay*: 'Cultural rights are protected in our Constitution in the light of a clear constitutional purpose to establish unity and solidarity amongst all who live in our diverse society; and solidarity is not best achieved by simple toleration arising from a subjectively asserted practice. It needs to be built through institutionally enabled dialogue ... Shared identity like shared justice is defined discursively.' *Pillay* (n 20 above) para 157. See also *Gumede* (n 7 above) para 22 (Moseneke DCJ).

⁸⁵ Song (n 68 above) 486-7. Song is particularly concerned with the manner in which majority cultures are implicated in the maintenance of hierarchies and inequalities within minority cultures, as well as the need to be vigilant about the interconnections between struggles for gender equality in mainstream and more marginal cultures.

decision between competing sets of narratives.⁸⁶ These points are largely echoed in South Africa's equality jurisprudence.

Equality jurisprudence relating to unfair discrimination is distilled in the *Harksen v Lane*⁸⁷ test that – in its fullest form – entails a contextual assessment of the impact of an impugned rule or conduct with due regard to the degree of disadvantage suffered by the complainant and his or her group, the purpose of the act/conduct and the extent to which the complainant's rights and interests are invaded. These factors are weighed up within an overall assessment of the impairment of human dignity, generally defined as a failure to be treated with equal concern and respect.⁸⁸ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (The Equality Act), the primary mechanism for private discrimination, also mandates a contextual enquiry and the assessment of disadvantage, purpose and impairment of dignity, but includes a broader range of factors within a consideration of unfair discrimination.⁸⁹

Although the *Harksen* test has been criticised as being somewhat formulaic, if it is engaged in a process of substantive rather than formal reasoning, it enables positive results. Ironically, this point is well illustrated by 'bad' cases in which the Constitutional Court has split, with a majority that distorts and misapplies the jurisprudence and a minority that demonstrates the effectiveness of a proper legal approach to equality and an emphasis on context, impact and values.⁹⁰ However, the test remains inadequate, in that it unduly prioritises and limits the values and principles that underlie equality. Dignity is prioritised, while the purpose of remedying disadvantage is suppressed. Questions of agency and choice – captured by freedom – are implicit, at best.

⁸⁶ Mullally (n 83 above).

⁸⁷ 1998 1 SA 1300 (CC).

⁸⁸ See *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 43; *Harksen v Lane NO* (n 88 above) para 51 and *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) 1 SA 6 (CC) para 19.

⁸⁹ Sec 14. Unlike sec 9, the Equality Act includes justificatory factors found in sec 36 of the Constitution in the determination of fairness. In *Pillay*, the Court commented on the differences in the Act's assessment of fairness and the lack of drafting clarity, noting that they could not be interpreted to lessen the kind of protection that would be afforded under sec 9. (n 20 above) paras 43, 137.

⁹⁰ *Volks NO v Robinson* 2005 5 BCLR 446 (CC); *The State v Jordan* 2002 6 SA 642 (CC) and *Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC); 2007 4 BCLR 339 (CC). A proper application of the test requires courts to recognise that the adjudication of context, impact and values are closely bound up with each other. Failure to engage context disables the court from engaging values in a substantive manner, resulting, for example, in statements about dignity that amount to mere assertion rather than a concern with the actual effects of the discrimination. For a detailed discussion of the application of the jurisprudence in these cases, see C Albertyn 'Constitutional equality' in O Dupper & C Garbers *Equality and labour law: Reflections from South Africa and elsewhere* (2009).

The complex and multiple forms of inequality found in South Africa require a flexible test so that courts may respond to different forms of disadvantage, stigma and vulnerability, to differing claims of recognition and redistribution and to competing claims over power, status and resources.⁹¹ In addition, any claim about intra-group inequality arising out of culturally based gender discrimination will require an assessment of competing cultural narratives that speak to conflicting interests and different interpretations of practices within a community. Not only is a contextual approach essential for this, but so is a thorough interrogation of the values and purposes underlying the disputed rules or practices and their resonance with constitutional values. Disputes about the status, role and entitlements of women, although they present as conflicts between 'gender' and 'equality', can often be distilled into competing interpretations of principle. In South African courts this translates into what is fair or unfair, when the dignity of women is undermined or not, how do different cultural arrangements achieve just results? Underlying this are different interpretations of gender relations and the place of women and men in society. Opening up the meaning of constitutional values, recognising competing interpretations of the same value and justifying interpretative choices enables this discussion. It also enables the development of clearer principles to mediate a commitment to gender equality and cultural diversity.

While the Court has adopted a contextual approach that (properly used) is both flexible and appropriately specific (allowing a court to concentrate on the details of the particular type of claim before it) the singular use of dignity undermines both that flexibility and the need to negotiate and balance a range of equality-related principles in relation to any particular claim. Rather, as previously argued, one should give substantive meaning to other constitutional values in defining the equality right. Beth Goldblatt and I have emphasised the place of the value of substantive equality (with its focus on remedying group based disadvantage. Substantive equality should inform the adjudication of unfair discrimination and not be relegated to section 9(2) (where it is currently addressed).⁹² Sandra Fredman has pointed to the principles of dignity, identity, redistribution and participation that underlie equality,⁹³ while Henk Botha suggests that dignity,

⁹¹ C Albertyn 'Equality' in H Cheadle *et al* (eds) *South African constitutional law: The Bill of Rights* (2004); C Albertyn & B Goldblatt 'Equality' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2 ed 2007) chapter 35; H Botha 'Equality, plurality and structural power' (2009) 25 *South African Journal of Human Rights* 1.

⁹² C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal of Human Rights* 248.

⁹³ S Fredman 'Redistribution and recognition: Reconciling inequalities' (2007) 23 *South African Journal of Human Rights* 214.

equality, difference and democracy should be deployed in understanding section 9.⁹⁴

It is in identifying and giving meaning to such values, and the manner in which they relate to one another, that the real work of equality jurisprudence still lies. I suggest that this starts with developing the three foundational values of the Constitution – dignity, equality and freedom – in relation to the equality right. In the following discussion, I elucidate these values as they might apply to equality claims by women concerning gender discrimination in cultural rules and practices (or by cultural groups about cultural discrimination in outlawing certain practices affecting women). They are: dignity as affirming the humanity of each person and their entitlement to equal concern and respect; equality as remedying of disadvantage and enabling redistribution (difference should not be a basis for disadvantage); an affirmation of difference and diversity (positive differences should be recognised and developed); and freedom as autonomy, participation and the establishment and nurturing of conditions for substantive choice.

However, South Africa's equality jurisprudence also requires courts to consider the purpose of the impugned rule or practice. This plays a particularly important role in claims related to custom and culture as it provides an opportunity to investigate and analyse (competing) cultural justifications. This will almost inevitably concern a balancing of individual and community, duty and autonomy, choice and responsibility and, importantly, permits the recognition of significant customary and cultural norms in the construction of diversity and solidarity under the Constitution.

3.1 Dignity as equal concern and respect

In an important legal and political sense, equality is about sameness, the abstract idea that all of us are equally important and equally valued. This idea was first captured by the South African Constitutional Court in *Hugo v President RSA*:⁹⁵

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal *dignity* and respect regardless of their membership of particular groups.

⁹⁴ H Botha 'Equality, dignity and the politics of interpretation' (2004) 19 *South African Public Law* 724.

⁹⁵ Hugo (n 88 above) para 41 (footnotes omitted)

Equality in this important sense is measured by dignity – the Kantian idea that we are all of equal moral worth, entitled to be treated as ends in ourselves, to the care and compassion of our community,⁹⁶ and equally deserving of concern and respect.

Dignity in this sense goes to questions of status and recognition. It imputes tolerance and respect, a non-hierarchical approach to groups and individuals that should condemn unequal power relations, and their manifestations in unequal status and recognition. It rejects violence, prevents stereotype and stigma and requires us to see the value of people's identities and personal choices.⁹⁷

Dignity requires that women are affirmed as human beings, that they are not reduced to the property of others or to bodies to be 'owned and disposed through rape as well as daily, banal brutalities',⁹⁸ nor are they glorified as wives and mothers, defined solely in terms of their reproductive and sexual roles to enhance the status of men. Women's humanity (dignity) is recognised when their reproductive and sexual roles are freely chosen and valued as part of a holistic, autonomous being.

South Africa's constitutional affirmation of the value of dignity as humanity is opposed to the idea of dignity as status or reputation.⁹⁹ This interpretation of dignity has often been used to hold women to particular gender roles. Women's reputation as a 'good' wife, daughter or mother, her place in culture as a 'respectable woman' or a good, respectful and obedient girl tends to conservative interpretations of gender relations that freeze women and men in predetermined roles. It is often this idea of individual dignity that underlies claims in support of discriminatory practices, and is often a thinly disguised form of social control over women. However, the importance that women themselves attach to reputation means that norms and practices that preserve reputation must be assessed with care, taking account of the values of equality (how does the practice relate to disadvantage?) and freedom (to what extent is agency exercised?).

Dignity requires that one's cultural and religious practices are neither stigmatised nor denigrated. However, this does not prevent deliberation over cultural rules and practices that are at risk of impugning the dignity of women within a community. Dignity thus needs to be viewed holistically and dynamically – a value that is

⁹⁶ See *Khosa v Minister of Social Development* 2004 6 BCLR 569 (CC) para 724.

⁹⁷ See also Fredman (n 93 above).

⁹⁸ P Govender *Sunday Times* (28 February 2010).

⁹⁹ But see J Barrett 'Dignity and the human body' (2005) 21 *South African Journal of Human Rights* 525.

engaged and debated in order to recognise the full humanity of all members of a community and society as a whole. In order to do so, one needs to have regard to how claims for dignity affect others and how other values shape our constitutional understanding of dignity.

3.2 Equality

Seyla Benhabib argues that the first condition for a just multicultural arrangement is ‘egalitarian reciprocity’, the requirement that members of a community should not be granted lesser civil, political, economic and cultural rights because of their membership status.¹⁰⁰ It was this idea of equality of rights that was fought out during the 1993 constitutional negotiations in South Africa and settled in favour of universal citizenship. Equality as equal rights is foundational to our democracy and asserted in section 9(2) of the Constitution. Two further aspects of equality that are critical for a just determination of an equality claim are equality as affirming diversity and equality as remedying disadvantage.

3.2.1 Difference and diversity

The positive nature of difference and the affirmation of diversity are particularly important aspects of equality. Cultural and religious identities and differences are central to this diversity, registering a rejection of a past in which majority and minority cultures and religions were marginalised and denigrated. This is recognised in the text of the Constitution and has been repeatedly affirmed by the Constitutional Court.¹⁰¹

Diversity is also signified by difference based of race, gender, sexual orientation and other factors. As the Court notes in *Minister of Home Affairs v Fourie*:¹⁰²

The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends upon recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic

¹⁰⁰ Benhabib (n 83 above) 29.

¹⁰¹ See for example *Christian Education* (n 15 above) paras 22-254 (in relation to religion and to association rather than equality); *Prince v Law Society, Cape of Good Hope* 2002 2 SA 794 (CC) para 171 (Sachs J, again in respect of religious diversity); *Pillay* (n 20 above) para 65.

¹⁰² 2006 1 SA 524 (CC) para 60.

and socio-cultural), affirms the right to be different and celebrates the diversity of the nation.

Attention to diversity and difference affirms group identities and insists on their recognition. It also affirms the individual as a member of his or her group, rather than an abstract individual divorced from his or her group membership. These differences are multi-faceted and cross-cutting. As implied by the contested idea of culture, cultural identities intersect with, and are influenced by, other attributes such as gender, race, etc. One cannot celebrate diversity or difference without also interrogating their relationship to inequality both *amongst* and *within* groups. Our Constitution does not permit diversity where this amounts to an uncritical acceptance of (cultural) difference that imposes impermissible 'internal' restrictions on individuals within the group. Rather, it requires that cultural differences are freely elaborated on the basis of equality for all members of a cultural group. Women, for example, should not be subject to cultural norms and practices that render them less valuable (fail to accord gender-based recognition), or that offer them no choice but to be dependent upon men for access to power, goods and resources (reinforce gendered mal-distribution).

3.2.2 Remedying disadvantage and overcoming material inequalities

Nancy Fraser has argued that, in order to avoid a wholesale and undifferentiated acceptance of cultural difference that reproduces material and other inequalities, it is important to understand the complexity of inequality and oppression (in the sense that it is multiple and multiply rooted) and thus to see that both recognition and redistribution are required to overcome this. She calls for an idea of difference that deals both with cultural misrecognition and political-economic maldistribution.¹⁰³

Equality in South Africa has a strong remedial and redistributive aspect, with section 9(2) asserting the equal enjoyment of rights and positive measures to address past discrimination. The Court acknowledges in its sections 9(2) and 9(3) jurisprudence that remedial aspects and removal of past disadvantage are central to equality. However, in section 9(3) these are currently subsumed by the dignity standard (largely focussed on recognition). To address both recognition and redistribution, and to ensure that cultural recognition is not granted in a manner that perpetuates socio-economic disadvantage, it is crucial that the principle of remedying

¹⁰³ N Fraser *Justice interruptus* (1978) 184 - 204.

disadvantage (as a manifestation of the value of equality) is given equal status with dignity in adjudicating unfair discrimination.

The relationship between group membership, power and material inequality is well documented and understood. One of the purposes of equality is to address social and economic marginalisation and the maldistribution of social goods between and within groups. While cultural identity remains important to women, all cultural groupings have demonstrated past and present forms of exclusion and marginalisation on the basis of gender. If a claim to culture fosters gender relations of inequality and domination, it is unlikely to be sustained.

It is through attention to the relationship between difference and disadvantage, and between recognition and redistribution, that we can make begin to map a path for making 'normative judgments about the relative value of alternative norms, practices and interpretations',¹⁰⁴ and for reconciling cultural diversity and gender equality.

3.3 Freedom, choice and participation

Freedom is one of the least developed values in South African jurisprudence, and it has played no role thus far in understanding equality.¹⁰⁵ Yet the presence or absence of autonomy and choice, and of the conditions that enable choice, are arguably important considerations in deciding whether a particular cultural rule, conduct or practice excludes, subordinates or (further) disadvantages an individual or group.

Negative ideas of freedom – in the sense of non-intervention – have been used to justify a 'hand-off' approach to culture, and to deny agency within. As Phillips has argued:¹⁰⁶

Culture is now widely employed in a discourse that denies human agency, defining individuals through their culture and treating culture as an explanation for virtually everything they say or do ... I argue that a more careful understanding of culture provides a better basis for multicultural policy than the overly homogenised version that currently

¹⁰⁴ As above.

¹⁰⁵ In *Pillay*, Langa CJ mentions freedom in relation to the ability to choose religious and cultural practices voluntarily – '[t]hat we choose voluntarily rather than through a sense of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity'. *Pillay* (n 20 above) para 64. Here he cites, with approval, Ackerman J's view of freedom expounded in *Ferreira v Levin* 1996 1 SA 984 (CC); 1996 1 BCLR 1 (CC) para 49, which is a largely negative concept closely linked to dignity.

¹⁰⁶ Phillips (n 23 above) 9.

figures in the arguments of supporters and critics alike. A defensible multiculturalism will put human agency much more at its centre; it will dispense with strong notions of culture.

Ideas of agency or choice are important for women in a number of ways. Benhabib has written about the need for 'voluntary self-ascription' as a core principle of multiculturalism. This goes to an idea of individual self-determination – the freedom to be a member of a cultural group. If women are subject only to group defined and controlled membership, then they become imprisoned within the group and group defined rules.¹⁰⁷ This is linked to Benhabib's requirement of an unrestricted 'freedom of exit'.¹⁰⁸ In both instances, Benhabib resists the idea that women's identity and rights are solely and irretrievably defined by the group (and by claims to nation, religion and community).

However, the idea of freedom of exit, important as it is, remains limited if women do not enjoy the substantive conditions that enable them to exit freely. Phillips has argued that freedom must be extended beyond an abstract understanding of choice to the presence or absence of the substantive conditions that enable that choice.¹⁰⁹

Choice depends upon substantive conditions. These include, at a minimum, having the political and civil freedoms that enable one to voice an objection, and the educational and employment opportunities that make exit a genuine choice.

The substantive conditions of choice entail both participation and exit. Importantly, however, they should affirm women's ability to participate within the community and to contest, engage and (re)define its norms and rules. Exit is important in that women should be able to choose the rules and norms that apply to them, and to opt out where they wish to do so. However, where a woman chooses to remain within her culture, but desires change from within, the freedom to exit (however real) cannot be a defence to unfair discrimination. For example, the fact that women living under customary law rejected the discrimination they experienced under the old form of customary 'union' did not translate into an outright rejection of customary marriage. On the contrary, women wanted a form of marriage that respected their cultural traditions and their rights, without discrimination.¹¹⁰ Similarly, the claim of discrimination in inheritance law was not necessarily an argument for civil law rights, but for a form on inheritance that valued cultural

¹⁰⁷ Mullally (n 83 above) 686-687.

¹⁰⁸ Mullally (n 83 above) 687.

¹⁰⁹ Phillips (n 74 above) 136.

¹¹⁰ Mbatha (n 55 above).

traditions of responsibility and duty at the same time as it recognised women as entitled to inherit property in their own right.¹¹¹

Freedom thus becomes an important value in determining whether a particular rule or practice unfairly discriminates against women. Integral to understanding the context and impact of the rule or practice are the conditions in which it is exercised and the extent to which it enables agency and participation. Does it promote or impede women's ability to participate in political, social and economic life? Are women free to make choices that improve their well-being? What are the effects upon the community if the discrimination within the rule or practice is removed?

Autonomy or choice has figured in debates about Muslim girls and women wearing headscarves¹¹² and the ability to consent to virginity testing.¹¹³ It can raise difficult questions about the nature of 'choice', and when it is, in fact, exercised (more or less) 'freely'. Gender discrimination is more likely to be unfair when it limits freedom/choice. Where participation in cultural practices is an authentic expression of agency, we might be less likely to intervene and thus deem it fair.¹¹⁴ Thus, it has been suggested that choice and participation in relation to lobola and polygamy might render those practices less discriminatory.¹¹⁵ However, it will always be important to interrogate the structural conditions of such choice, as well as the extent to which a rule or practice also affects dignity and equality, as set out above.

3.4 'Reformulating' the *Harksen* test

The substance of the *Harksen* test is the assessment of fair or unfair discrimination through a consideration of the nature of the violation, the purpose of the act or conduct, the invasion of the claimants' rights and interests and the impact of this in relation to disadvantage and dignity. Although, this has resulted in significant equality victories, it has also had disappointing outcomes. Some of the reasons for this are a reliance on formal rather than substantive legal reasoning and a superficial definition and application of the idea of

¹¹¹ Mbatha (n 53 above).

¹¹² This is perhaps more true of feminist writing overseas which is concerned with issues of potential gender oppression within the group. Legal scholars in South Africa have not focussed on this aspect, but rather with the need to accommodate diversity across groups. See Lenta (2007) (n 18 above).

¹¹³ On consent and virginity testing see the debates surrounding sec 12 of the Children's Act 38 of 2005, discussed below (text accompanying fn 160 - 66).

¹¹⁴ Phillips (n 23 above) 101.

¹¹⁵ Bronstein (n 18 above); L Mbatha 'The content and implementation of the Recognition of Customary Marriages Act 120, 1998: A social and legal analysis' Unpublished LLM dissertation, University of the Witwatersrand, 2006.

dignity as ‘equal concern and respect’. The failure to engage values and principles – either by developing their content or by engaging them in substantive reasoning – is, of course, a wider issue in constitutional jurisprudence. For equality, the antidote suggested here is a rigorous focus on context and a much more explicit naming, describing and engaging the full set of values and principles that underlie the equality right. In doing this, courts should see equality as less of a formulaic test measured by a single value than a reasoned exercise of weighing the various principles implicated by equality (and thus also describing its purpose) within a contextual understanding of the impact on the claimant and the stated purposes of the rule, conduct or practice. In this sense it is important to distinguish the balancing exercise of fairness in section 9 – which focuses on the values and interests served by the right to equality – against the justification enquiry of section 36 – which then balances the state’s social goals and other rights against the right to equality.

This article suggests that the values and interests underpinning the equality right should be identified by reference to the constitutional text and its emphasis on the trio of democratic values of dignity, equality and freedom. Each – as stated above – has an important and distinct, if overlapping, role in understanding the purpose and interests served by equality, and can guide the determination of when the right has been violated.

Importantly this combination of principles enables a robust and varied understanding of inequality, and tempers an egalitarian vision that seeks to overcome social marginalisation and an unequal distribution of resources with a recognition of the importance of cultural identity. Put another way, it enables the achievement of equal participation and fair distribution as well as social recognition – based on importance of both recognition and redistribution as intimately connected and important to understanding inequality.¹¹⁶

3.5 Cultural values and justifications

A commitment to diversity affirms customary and cultural values, subject to the Constitution, and any interrogation of a cultural rule or practice must engage its justifications and underlying norms and values. These should be addressed within the understanding of context and the purpose of the act, as well as the interpretation and application of constitutional values.

¹¹⁶ Fraser (n 103 above); N Fraser ‘Social justice in the age of identity politics: Redistribution, recognition and participation’ in N Fraser & A Honneth *Redistribution or recognition: A political-philosophical exchange* (2003) 1.

Ultimately, one will be required to weigh the impact of the rule or practice on women against its cultural rationale.¹¹⁷ Here, there might be general agreement on the justifications or purpose, but disagreement on the extent to which the rule or practice meets this purpose. Customary inheritance is an excellent example of consensus around the purpose of maintaining the surviving family and meeting expected customary norms of family responsibility and duty, but disagreement on whether the purpose was still met by male heirs (who often failed to maintain the widow and children) and whether the continued exclusion of women interfered with this purpose.¹¹⁸ Virginity testing, discussed below, is an example of dispute of purpose, with arguments ranging from the claim that it instils respect and responsibility to the suggestion that it amounts to social control of women's sexuality.¹¹⁹ Again, what underlies many of these disputes and competing interpretations are differing views of the place of women in society, as well as competing claims to power and resources.

Cultural justifications are often presented as the norms and values of indigenous law versus 'westernised' norms and values of the Constitution. Again, this mode of justification – arising from a bounded view of culture – both ignores possible contestation within a community, as well as the extent to which basic values are shared, or are, at the very least, sufficiently common to enable reasoned debate. Importantly, when an equality claim is brought to court about cultural rules or practices concerning marriage, inheritance, land, virginity testing or *uhkutwala*,¹²⁰ these are neither irresolvable nor impermissible manifestations of some sort of culture/equality dilemma, but are rather (in Vicky Bronstein's words) "intra-cultural" conflicts between "internal" women and other members of the group'.¹²¹

When a woman comes to court to argue her status, she does not dislodge herself from her culture. She does not transcend her culture and find

¹¹⁷ In this sense, the fairness enquiry will inevitably overlap with the sec 36 enquiry, although the Court has often blurred this line in equality cases. See Albertyn & Goldblatt (n 92 above); S Woolman & H Both 'Limitations' in S Woolman et (eds) *Constitutional law of South Africa* 2ed (2006) Chapter 34. Song (n 68 above), writing about US jurisprudence, suggests a two-stage approach involving burden (impact) and rationale (67 ff).

¹¹⁸ Mbatha (n 53 above); *Bhe* (n 4 above). See also *Shilubana* (n 6 above) (on accession to chieftainship).

¹¹⁹ See the text accompanying footnotes 160 - 166 below.

¹²⁰ The practice of forced marriage or abduction. Although traditionally a form of 'elopement' to avoid payment of lobola, it has recently become prevalent as a form of 'abduction' in which young and underage women and girls are forcibly married to older men. Statement by the Commission on Gender Equality on 'Forced Marriages' 23 February 2009, <http://www.info.gov.za/speeches/2009/09032409451001.htm> (accessed May 2010).

¹²¹ Bronstein (n 18 above) 403.

herself in the realm of Western values. Her identity is not suddenly transformed ... The fight is not between culture and equality. Rather it is between two different interest groups battling to retain/change power relations within their very culture – a culture which is constantly evolving.

3.6 A method of deliberation and engagement

Claims of culture, gender and diversity – controversial and contested as they are – emphasise the need for multiple voices and multiple sites of engagement. The context of the claim needs to be clearly understood, competing narratives of culture aired, the interpretation and application of values made public and debated. Many writers grappling with the reconciliation of gender equality and culture suggest that deliberation is key,¹²² requiring the fullest involvement of all groups:

Cultural claims matter: they are themselves important claims about equality, and [are] not to be arrogantly dismissed by reference to a pre-ordained list of universal rights. But cultural claims are often framed by a monolithic understanding of ‘culture’ that overstates the internal consensus and misrepresents social customs that sustain male dominance as practices ‘the society’ wants to sustain. The best protection against this lies in the mobilisation of alternative voices, which will often throw up more nuanced readings of the tension between sexual and cultural equality, and may well modify our understanding of both.¹²³

Cases concerning culture and equality thus require the widest possible participation, through legal process, including the *amicus curiae* brief and joinder as parties, and through court initiated invitations to participate (a practice already followed by the Constitutional Court).

However, deliberation should not always be limited to the legal process, some cultural issues might be better addressed politically or within communities, or might move between ‘law’ and ‘politics’. These movements might also be important to retain the very idea of contested and dynamic cultural practices and the ‘living law’, to avoid a situation where fluidity and responsiveness is lost. This raises difficult questions about how, and the extent to which, courts and legislatures should intervene to establish basic rights and set standards. It also raises challenging questions for courts in crafting remedies that enable community involvement. Some of this is discussed in the next section.

¹²² Phillips (n 74 above), Song (n 68 above); Mullally (n 68 above).

¹²³ Phillips (n 74 above) 137.

4 Unfair gender discrimination

Where cases concerning gender and culture come to court under section 9, they will present as claims of unfair discrimination based on gender or sex or culture. In the 2008 Constitutional Court term the Court addressed two cases dealing with alleged unfair gender discrimination in culture and custom: cases of *Gumede v President of the RSA*¹²⁴ and *Shilubana v Nwamitwa*.¹²⁵ Only the former was decided on this basis. Foreshadowed by the 2002 case of *Bhe v Magistrate, Khayalitsha*,¹²⁶ *Gumede* provides a positive example of the principles discussed above, although it was not decided under a jurisprudence that explicitly paid attention to the values of equality and freedom.

Gumede concerned a claim of unfair gender discrimination against provisions of the 'old order' customary law, codified in KwaZulu Act and the Natal Code,¹²⁷ and against the Recognition of Customary Marriages Act, 120 of 1998, a law passed by the democratic Parliament to address the inequality faced by women in customary marriage. Although section 7(1) of the Recognition Act stipulates that customary marriages entered into after the commencement of the Act are in community of property¹²⁸ (thus guaranteeing each spouse one half of the estate upon divorce), it also states that 'the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law'.¹²⁹ In this case, the codified 'Zulu law' applied. The provisions of this code entrenched male ownership and control of matrimonial property during marriage and upon its dissolution, leaving women with no rights to property upon divorce. The Court found little difficulty in concluding that the provisions discriminated unfairly on the basis of gender.

Although the actual enquiry into unfair discrimination in *Gumede* is short, it captures all of the above principles of culture and equality. As in the case of *Bhe*, the Court notes how the official version of

¹²⁴ *Gumede* (n 7 above).

¹²⁵ *Shilubana* (n 6 above).

¹²⁶ *Bhe* (n 4 above).

¹²⁷ KwaZulu Act on the Code of Zulu Law 16 of 1985; Natal Code of Zulu Law R 151 of 1987, GG No. 10966.

¹²⁸ Section 6. Some commentators have criticised the fact that civil law concepts of property were used in the Recognition Act, a fact that undermines customary forms of property. See L Mbatha 'Reflection on the rights created by the Recognition of Customary Marriages Act' in K Bentley & H Brookes (eds) *Agenda Special Focus* (2005); C Himonga 'The advancement of women's rights in the first decade of democracy in South Africa: the reform of the customary law of marriage and succession' in M O'Sullivan & C Murray *Advancing women's rights* (2005).

¹²⁹ S 7(1) of the Act.

customary law produced a 'particularly crude and gendered form of inequality, which left women and children singularly marginalised and destitute'.¹³⁰ It is a particular combination of the unequal systems of customary and civil law that produced the 'fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage':¹³¹

Women, who had great influence in the family, held a place of pride and respect within the family. Their influence was subtle although not lightly overridden. Their consent was indispensable to all crucial family decisions. Ownership of family property was never exclusive but resided in the collective and was meant to serve the familial good.¹³²

This did not mean that patriarchy was not present, merely that its form was less severe:

It must however be acknowledged that even in idyllic pre-colonial communities group interests were framed in favour of men and often to the grave disadvantage of women and children.

Constitutionally inspired reform is necessary, not to return to an older (and 'better') times, but rather to overcome the chilling effects of codification and to ensure harmonisation with the Constitution.¹³³ The nub of the enquiry in *Gumede* is the impact on women of the 'fossilised' and patriarchal version of law set out in the KwaZulu Act and Natal Code.

In finding unfair discrimination, the Court concluded that the impact of the law means that:

affected wives in customary marriages are considered incapable or unfit to hold or manage property [and] ... are expressly excluded from meaningful economic activity in the face of an active redefinition of gender roles in relation to income and property.¹³⁴

In doing so, the Court acknowledges a stereotypical reliance on traditional gender roles that fails to respect women as capable of managing property (a stereotype that is a failure of dignity, and of equal concern and respect), as well as the erasure of women's agency in engaging in economic activity and active participation in social and economic life (a denial of the principle of freedom). The Court also finds that the provisions reinforce material disadvantage (equality): 'That marital property regime renders women extremely vulnerable by not only denuding them of their dignity but also of rendering them

¹³⁰ *Bhe* (n 4 above) para 17.

¹³¹ *Bhe* (n 4 above) para 17.

¹³² *Bhe* (n 4 above) para 18.

¹³³ *Bhe* (n 4 above) paras 21-22.

¹³⁴ *Bhe* (n 4 above) para 35.

poor and dependent'.¹³⁵ The offending sections of the Code are accordingly declared unfair discrimination and invalid.

The Court has a choice about where to go next. It could develop the 'living law' and articulate rules of the customary law of marriage, or it could address the matter through section 7 of the Recognition Act. It chooses the latter¹³⁶ and declares section 7 to be unconstitutional in so far as it requires marriages entered into before the commencement of the Act to continue to be governed by customary law, to the detriment of women. As a result, all customary marriages, entered into before or after the Act, are deemed to be in community of property.¹³⁷

The case of *Gumede* is an important step in the reconciliation of gender equality and customary law under the Constitution. In a general sense, it affirms customary law, whilst eradicating its patriarchal aspects in a manner that recognises women's equality, dignity and agency within the family. It recognises that patriarchy extends beyond customary law, and that its eradication is both constitutionally required and compatible with the continuance of custom and culture.

In addition, the judgment provides some useful precedent for challenging gender inequality within customary law. Courts, especially the Constitutional Court, play an important standard-setting role in ongoing debates and contests over culture and customary law. Judgments of the Constitutional Court provide resources for women, and other vulnerable groups, seeking to assert their rights and interests within a particular cultural setting. Despite legislative and court victories for women's rights in customary law, this remains a highly contested terrain. In *Gumede*, for example, both the national Minister of Home Affairs and the provincial MEC for Traditional and Local Government Affairs opposed the Mrs Gumede's claim on the basis, *inter alia*, that the inherited codes in KwaZulu-Natal constituted customary law that the Court is constitutionally obliged to apply.¹³⁸ Such an approach can only proceed from a bounded and defensive view of culture that seeks to defend the idea that women fulfil traditional roles and are dependent upon, and subject to the care and protection of, men within the family.¹³⁹

The Court gives short shrift to this argument and unequivocally dismisses the codified customary law as unfair discrimination.

¹³⁵ *Bhe* (n 4 above) para 36.

¹³⁶ For the Court's reasoning, see *Bhe* (n 4 above) paras 28-31.

¹³⁷ *Bhe* (n 4 above) paras 50-54.

¹³⁸ *Gumede* (n 7 above) para 12.

¹³⁹ *Holomisa* (n 2 above).

Although this dismissal is relatively brief, it suggests that patriarchal cultural norms have little place in customary law under the new constitutional order.

However, the case of *Gumede* represents a lost opportunity in two respects. Firstly, it fails to identify and give detailed content to the values underlying the equality right. Secondly, it misses another opportunity (after *Bhe*) to engage the idea of living law. In deciding 'how' to harmonise customary law with the Constitution, the Court elects not to develop living customary law to remove the marital power, but rather to include 'old order' customary marriages under the 1998 legislation. This has implications for how the living customary law is recognised and developed independently of civil law. These are discussed in section 6 below.

Generally, the case of *Gumede* follows the logic of *Bhe v Magistrate, Khayalitsha*,¹⁴⁰ a 2004 case that found the rule of male primogeniture in customary inheritance to be unfair gender discrimination. The Court asserted the importance of customary law and of the 'living law' (affirming diversity). It noted the manner in which the official customary law continued to stereotype women, and subject them to 'old notions of patriarchy and male domination'¹⁴¹ (the dignity principle), resulting in a denial of access to property and economic opportunities (equality as disadvantage),¹⁴² and limited their ability to assert control over their lives (freedom).¹⁴³ In *Bhe*, however, the Court addressed the cultural justification directly, namely the 'basic social need to sustain the family unit'.¹⁴⁴ The Court concluded that while the maintenance of the family remained an important communitarian purpose, the responsibility for this could not be limited elder males to the exclusion of women (or younger men and unmarried sons). It was able to reach this conclusion because it was prepared to consider the actual impact of the rule in practice (and how it affected the dignity, equality and freedom of women and children) and to measure this impact against the cultural purposes of the rule as (re)shaped by the principles of dignity, equality and freedom.¹⁴⁵

In both *Gumede* and *Bhe*, the Court has set itself firmly against forms of gender discrimination and patriarchy that stigmatise women as dependents, reliant on men for access to resources, vulnerable to economic hardship and deprived of individual agency. Rules and practices that unfairly discriminate against women by relegating them

¹⁴⁰ *Bhe* (n 4 above).

¹⁴¹ *Bhe* (n 4 above) paras 90-91.

¹⁴² *Bhe* (n 4 above) para 90.

¹⁴³ *Bhe* (n 4 above) para 90-91.

¹⁴⁴ *Bhe* (n 4 above) para 84, 89-91.

¹⁴⁵ *Bhe* (n 4 above) paras 75-94.

to positions of subservience, dependence and lack of choice should not survive constitutional scrutiny. Although not always explicit, the effect of these judgments must be seen to be antithetical to the relegation of women to traditional gender roles, and to positions of inequality and dependence.

Gumede and *Bhe*, as well as the legislation now regulating marriage and inheritance, mean that women's status and equality within the family is formally recognised within customary law (even if the practice has fallen short of this). By contrast, questions of public power and access to community resources (land) have been far more contested.¹⁴⁶ Despite this contestation, it is likely that the constitutional commitment to equality (equal rights, remedying disadvantage and equal moral worth) and the ability to review legislation in courts will enable struggles over the content of laws regulating land and traditional courts to be resolved in favour of securing meaningful rights for women. If the jurisprudence is properly applied, and if the values of dignity, equality and freedom are interpreted as suggested above, then inscribing gender equality into formal laws will eventually prevail.¹⁴⁷

Far more difficult, however, is the question of practice - both in terms of implementing rules and in terms of day to day custom and practice. Here - outside courts - there is real contestation over the relevance and meaning of cultural practices ranging from *ukhutwala* and virginity testing to claims about appropriate sexual and reproductive roles and practices. All of these pit (often powerful) patriarchal norms against more egalitarian values, but they are also defended in terms of cultural values that have resonance for many communities. Where these conflicts reach a court, equality jurisprudence provides a good framework for assessing competing interpretations of values, the actual impact of these practices on those who are vulnerable and the relationship between this impact and the purpose of the practice. However, in the many instances where the court is not a forum for deliberation, it will be important for community members to draw on the public meaning of constitutional values as legitimate resources for challenging, resisting and subverting discriminatory practices. In addition, spaces need to be created for institutionally enabled dialogue.

¹⁴⁶ See Communal Land Rights Act 11 of 2004 (n 8 above).

¹⁴⁷ There is, of course, no guarantee of such an outcome, as the cases of *S v Jordan* (n 90 above) and *Volks NO v Robinson* (n 90 above) amply demonstrate.

5 Unfair discrimination based on culture

Sometimes a conflict between culture and gender equality will present in court as a claim of unfair discrimination based on culture. This might be the case where a cultural practice, such as virginity testing, polygamy or *ukhutwala* is outlawed and traditional leaders might wish it to be retained, or where an applicant asks for accommodation of a cultural practice under the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000. Does the equality jurisprudence under the Constitution and the Act enable a full discussion of the competing principles at stake, not only the alleged discrimination against the group (cultural), but also the possibility of intra-group inequalities (based on gender) that mitigate against recognition of the cultural practice?

If the claim involves legislation, then it will be heard under section 9 of the Constitution. This requires, first, an assessment of whether the law has interfered with a particular cultural practice (is there discrimination on the basis of culture), and secondly, whether that is unfair.¹⁴⁸ Here a commitment to multiple voices and a proper consideration of the context of the prohibition and its purpose (both required under the *Harksen v Lane* test) provide sufficient space to adduce questions of gender inequality. In all other instances, the claim will be brought under the Equality Act. Here the first step of determining discrimination seems to be identical to the constitutional step,¹⁴⁹ while the enquiry into fairness is even wider in terms of the competing considerations that come into play.¹⁵⁰

The Constitutional Court has only considered cultural discrimination in one case: *MEC for Education, KwaZulu-Natal v Pillay*,¹⁵¹ decided under the Equality Act. This case considered whether a school should have granted a religious or cultural exemption in terms of its Code of Conduct for wearing a nose stud. The Court found that the failure to accommodate the learner constituted unfair discrimination under the Act.

Langa CJ, writing for the majority, engaged the first step in some detail, namely whether the wearing of a nose stud qualified as a cultural practice (and hence whether there was discrimination on the basis of culture). Significant here was the definition of a constitutionally protected cultural practice. In particular, should the

¹⁴⁸ *Pillay* (n 20 above) para 46.

¹⁴⁹ *Pillay* (n 20 above).

¹⁵⁰ Sec 14 of the Act conflates issues of the fairness analysis under sec 9 and the limitations analysis under 36 of the Constitution. See *Pillay* (n 20 above) paras 70, 137.

¹⁵¹ *Pillay* (n 20 above).

practice be determined objectively or subjectively, and, can it be a voluntary rather than an obligatory practice? Although Langa CJ finds it unnecessary to decide whether a cultural practice should be objectively or subjectively determined, he does find, on the facts, that it was sufficient for there to be a subjective, sincere belief that the nose stud was a cultural practice.¹⁵² He concludes that a voluntary practice is sufficiently important to the constitutional commitment to diversity for it to be recognised as a constitutionally protected practice for the purposes of determining discrimination.¹⁵³

O'Regan J disagrees, citing three difficulties with a subjective approach. Firstly, it does not sufficiently acknowledge the associative nature of cultural practice.¹⁵⁴ One needs to distinguish a personal habit or preference from a practice that is recognised by some, if not all of, the community. Secondly, it tends towards a bounded and defensive idea of culture, a 'society of atomised communities' without seeing the need for commonality and solidarity across all communities.¹⁵⁵ Thirdly, it too easily admits of toleration of sincere beliefs rather than an approach to culture based on dignity and diversity.¹⁵⁶ Justice O'Regan's concern is well-placed. An overly subjective approach tends towards a bounded view of culture which allows certain cultural representatives to assert a cultural practice, without it being tested against the community. Although Langa CJ asserts a contested view of culture,¹⁵⁷ contestation does not imply automatic acceptance of partial and subjective views. Rather it requires a full interrogation of contested views to determine whether a particular practice can be deemed sufficiently 'associative' or communal to be deemed a cultural practice. For example, the fact that Zuma claimed a particular cultural defence in his 2002 rape trial, namely that he was culturally bound to satisfy a woman who was sexually aroused,¹⁵⁸ does not mean that this qualified as a cultural practice. It must be more than a subjective belief, rather it must be shown to be a 'practice that is shared in a broader community of which he or she is a member and from which he or she draws meaning'.¹⁵⁹

But there is a further consideration: does the practice also have to be constitutionally compliant? In other words, does the first step of finding discrimination on the basis of culture entail an investigation into whether the practice in question is consistent with the

¹⁵² Pillay (n 20 above) para 58.

¹⁵³ Pillay (n 20 above) paras 61-67.

¹⁵⁴ Pillay (n 20 above) para 154.

¹⁵⁵ Pillay (n 20 above) para 155.

¹⁵⁶ Pillay (n 20 above) para 156.

¹⁵⁷ Pillay (n 20 above) para 54.

¹⁵⁸ *S v Zuma* 2006 2 SACR 191 (W).

¹⁵⁹ Pillay (n 20 above) para 159.

Constitution, or can this be addressed under the enquiry into fairness? This is not addressed directly in *Pillay*. O'Regan J sets a higher threshold than the majority by insisting that the practice is objectively associative, but neither speak directly to consistency with the Constitution. The *Harksen* test has generally been applied in a manner that permits a low threshold at stage one (is there discrimination?), with a more substantive analysis at stage two (is it unfair?).¹⁶⁰ If this approach is followed in relation to cultural discrimination under sec 9 or the Equality Act, then most claims will reach the enquiry into fairness. How does one then ensure that all relevant considerations are canvassed?

Firstly, the question of whether discrimination has occurred on the basis of culture must be determined with reference to evidence of an associative practice, rather than a subjective belief. In addition, the nature of the harm flowing from this must be specified. In other words, Justice O'Regan's minority judgement is correct. It will provide a minimum threshold of protection that will exclude partial and subjective cultural beliefs. It will also provide an opportunity to highlight the contested nature of a particular practice for more detailed consideration in the fairness enquiry. For example, virginity testing, revived as a traditional practice in the past two decades, is widely practiced and justified as a cultural practice that protects girls against HIV and unwanted pregnancies, that celebrates their status as girls and virgins, and that instils cultural values of sexual responsibility and self-respect.¹⁶¹ However it is also strongly contested by human rights and women's groups who claim that it is a new form of social control of women in the context of anxieties over the HIV epidemic,¹⁶² and that it amounts to a harmful practice that violates the rights of girls, places sexual responsibility on girls alone and stigmatises those found to be 'impure'.¹⁶³

A putative claim about virginity testing is likely to pass stage 1 as an associative practice whose prohibition harms a cultural community. The question then arises as to the question of fairness. Here it is important that the enquiry focus not only on the impact of the alleged discrimination on the complainant, namely those who seek to defend the practice, but also on the girls who are most affected by it. This is certainly possible under the Equality Act which merges the fairness and justification enquiries. The Constitutional

¹⁶⁰ See Albertyn & Goldblatt (n 92 above).

¹⁶¹ Submission of the Human Rights Commission to the Select Committee on Social Services, October 2005; L Law 'Virginity testing: In the 'Best Interests of the Child'?' Briefing Paper 145 for the Catholic Parliamentary Liaison Office (November 2005).

¹⁶² S Leclerc-Madlala 'Virginity testing: Managing sexuality in a maturing HIV/AIDS epidemic' (2001) 15 *Medical Anthropology Quarterly* 533.

¹⁶³ Commission for Gender Equality *Virginity Testing Report* (June 2004).

Court has also adopted a relatively flexible approach to fairness under section 9 which would enable all relevant considerations to be aired, especially if a deliberative approach allows multiple voices to be heard on the issue.

An approach based on context and impact, with due regard to contestation, would require a thorough investigation of the origins of the practice, and the different claims around impact. Attention to the values of equality, dignity and freedom – as well as the cultural values that sustain the practice – will enable a debate about how virginity testing advances or retards the status, autonomy and position of girls. Properly aired, this should pit opposing views of girls and women against each other. On the one hand, women as the custodians of culture, as solely responsible for sexual morality, and expected to conform to traditional roles as chaste, obedient and responsible beings. On the other hand, women as autonomous and dignified individuals, able to make decision about their bodies (not subject to violation through testing), and on whom virginity testing places an unfair burden of responsibility to the exclusion of that of men. Holding women to particular sexual and moral roles is a form of subordination and social control that is impermissible under our Constitution.

Were a court to follow the precedents set in *Bhe* and *Gumede*, it is unlikely that it could condone a practice that caused the type of harm to girls occasioned by testing. Nor is it justified as method of preventing HIV and unplanned pregnancies. Virginity testing on girls denies their agency and fundamentally violates the equality principles set out by the minority judgment in *S v Jordan*:

Thus, a man visiting a prostitute is not considered by many to have acted in a morally reprehensible fashion. A woman who is a prostitute is considered by most to be beyond the pale. The difference in social stigma tracks a pattern of applying different standards to the sexuality of men and women ... *[T]he stigma is prejudicial to women, and runs along the fault lines of archetypal presuppositions about male and female behaviour, thereby fostering gender inequality.*¹⁶⁴

Of course, virginity testing is regulated in section 12 the Children's Act 38 of 2005. The initial outlawing of this practice in the proposed Children's Bill had resulted in strong protests from traditional leaders and the 'compromise' clause limits testing to girls over the age of 16, after informed consented and counselling. The results may not be disclosed without her consent and her body may not to be marked in any manner.¹⁶⁵

¹⁶⁴ *Jordan* (n 90 above) paras 64 and 65 (my italics).

¹⁶⁵ Sec 12 (4) - (7).

Section 12 was the result of deliberative process that enabled multiple voices on the matter. Although this provision is regarded as a pragmatic response to a widespread practice – defended by traditional leaders and some community members – there remain strong objections to its continuance in any form.¹⁶⁶ The practice is still contested. The current status of virginity testing is symbolic of some of the difficulties of addressing cultural diversity and gender equality. It also suggests some of the costs and benefits of a deliberative process. In the end, however, the clause does have benefits for both sides – virginity testing is outlawed up to the age of 16 and permitted with conditions thereafter. Making it work and ensuring that the substantive conditions exist to enable a proper ‘choice’ to be exercised after 16 are the next steps in a longer process of deliberation and change. Eradicating testing altogether and affirming the full dignity, equality and freedom of women and girls remain part of the wider struggle for gender equality across all cultures.

6 Culture, change and deliberation

Culture matters. So do women. This article has suggested that in order to value the cultural diversity and a commitment to gender equality in South Africa, it is necessary to oppose group-based multiculturalism and affirm the idea that all cultures are open, porous and dynamic, and that the content and application of constitutional and cultural values is contested, offering positive opportunities for deliberative engagement over what is just. Deciding whether a rule or practice is just requires multiple voices in determining its impact on women (and other groups) and the extent to which it affirms or undermines their humanity, status, socio-economic disadvantage and agency (dignity, equality and freedom). In doing so, attention to diversity, cultural values and justification, and positive community practices is important.

In cases such as *Bhe* and *Gumede*, the Constitutional Court has generally accepted an approach that results in important norm-setting judgments about the place of women in families and communities. These judgments are not mere impositions of constitutional standards, but attempt to affirm customary practice as reflected in ‘living law’. At the same time, these judgments have been criticised for failing to enable community development of customary practice in line with customary values and constitutional

¹⁶⁶ For a detailed exposition of these arguments, see L Le Roux ‘Harmful traditional practices, (male circumcision and virginity testing of girls) and the legal rights of children’ unpublished LLM dissertation, University of the Western Cape, 2006.

imperatives.¹⁶⁷ In both instances, the Court rejected an invitation to develop customary law and to enable this development under court-defined guidelines.¹⁶⁸ Instead, it imposed statutory provisions based on civil law concepts of property, inheritance and family.¹⁶⁹

In both instances, the Court was motivated by the need to secure rights for previously excluded groups in an unambiguous manner. Its actions speak to a larger debate about the appropriate mechanisms for nurturing change, including the place of individual rights within a flexible, communal system and the role of courts in enhancing deliberation over contested issues.

In this context, the case of *Shilubana v Nwamitwa*¹⁷⁰ is especially interesting.¹⁷¹ The case concerned a dispute over chieftainship of the Valoyi traditional community in Limpopo between a female and male candidate.¹⁷² A major point of dispute was sex/gender as both the respondent and CONTRALESA sought to argue that the exclusion of women from chieftainship was fair discrimination.¹⁷³ The Court avoided a direct engagement with the question of discrimination. Instead, it found the appointment of a woman chief to be a constitutionally compliant development of customary law, bringing 'an important aspect of their customs and traditions into line with the values and rights of the Constitution'.¹⁷⁴

This case has significant value in its recognition of the dynamic and adaptable nature of customary law and the power of communities to amend their customs and traditions to reflect changed circumstances. It confirms that such developments must be in line with the Constitution, including its strong commitment to gender equality.¹⁷⁵ It sets out the criteria for identifying and 'proving' the living law,¹⁷⁶ and, in doing so, rejects a simple reliance on past practice (thus enabling movement and change).¹⁷⁷ The case also

¹⁶⁷ Himonga (n 128 above).

¹⁶⁸ *Bhe* (n 4 above) paras 109-119; (per Langa CJ rejecting development of law); paras 224-239 (per Ngcobo J dissenting); *Gumede* (n 7 above) paras 28-30. Development was perhaps more difficult under *Gumede* as it would have required extensive evidence as to customary values and practices in respect of matrimonial property.

¹⁶⁹ Himonga (n 128 above); Mbatha (n 128 above).

¹⁷⁰ *Shilubana* (n 6 above).

¹⁷¹ See D Cornell 'The significance of the living customary law for an understanding of customary law: Does custom allow for a woman to be Hosi?' (2009) *Constitutional Court Review* 395.

¹⁷² *Bhe* had not addressed the constitutionality of male primogeniture in contexts such as traditional leadership and status. *Bhe* (n 4 above) paras 88-94.

¹⁷³ *Shilubana* (n 6 above) paras 30-31; 40.

¹⁷⁴ *Shilubana* (n 6 above) para 68.

¹⁷⁵ *Shilubana* (n 6 above) para 47.

¹⁷⁶ *Shilubana* (n 6 above) paras 44-49.

¹⁷⁷ *Shilubana* (n 6 above) paras 51-57.

establishes the authority of the community and its traditional leaders to develop its customs and bring them in line with Constitution.¹⁷⁸

Shilubana is a positive example of the interaction of 'living law' with the 'higher law' of the Constitution, and community based change is clearly a particularly powerful mechanism for reconciling gender equality and cultural norms and practices. The regulation of virginity testing by Parliament in the Children's Act is a different and equally important example of institutionally enabled deliberation over competing claims and interests.

As the case of virginity testing partly illustrates, egalitarian results are neither inevitable nor easy. Cultural practices are always traversed by power and interests, and it will always be necessary to enforce values and principles that protect the vulnerable. This is true across and within all cultures as the tension between patriarchy and gender equality is 'universal'.¹⁷⁹ Courts remain important forums for standard-setting, often acting as a place of last resort for women seeking to secure their rights. In this role, courts need to ensure that their judgments enhance rather than impede the deliberative process. The cases of *Bhe*, *Gumede* and *Shilubana* suggest that two particular challenges lie, firstly, in paying more attention to the content of values and their resonance with communities, and secondly, in finding ways of generating court enabled dialogue with and within communities.

¹⁷⁸ *Shilubana* (n 6 above) para 73.

¹⁷⁹ Song (n 68 above) 86.