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The Contest Between Culture and Gender Equality Under South Africa's Interim Constitution

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On 25 January 1994 South Africa's State President signed the new Constitution of the Republic of South Africa proclaiming a new order founded on the principle of equality.[1] As is well known, this historic event was the culmination of four years of extraordinarily difficult negotiations. The text of the Constitution itself is the product of eight months of hard work and, at times, heated debate.[2] Because it represents an accommodation between parties whose support had never been tested in a democratic election, it was designed to be temporary and, most importantly, it sets in place a procedure by which a democratically-elected legislature will draft a new constitution after two years. This will have to be accomplished within the framework of thirty-four 'constitutional principles'[3] which not only form part of the interim Constitution but also establish the basic principles that must be incorporated in the next one.

The very existence of the constitutional principles evidences both the lack of trust between the parties at the negotiating table and the fact that the interim Constitution embodies uneasy compromises. These constitutional principles reflect the baseline: parties would not proceed unless the values listed there were secured. However, both the major parties, the African National Congress and the Nationalist government, made important concessions and, to achieve as inclusive a result as possible, also took cognisance of the interests of numerous other groups. The text of the interim Constitution attests to many detailed pacts concluded in order to resolve contentious issues.

One of the vociferous groups taking part in the negotiating process comprised representatives of the traditional leaders. Unexpectedly to many, the issues of culture and the status of those leaders emerged as being particularly complicated and controversial. And it soon became apparent that, for the traditional leaders, one of the most troubling features of the

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draft Constitution was that the commitment to equality at its heart encompassed a commitment to gender equality.

Their representatives in the negotiating process mounted a challenge to this emphasis on equality. For instance, Mwelo Nonkonyana, chief negotiator for the Cape Traditional Leaders repeatedly and provocatively insisted that women are not the equals of men.[4] This attitude was not surprising, given that customary law, the legal system over which traditional leaders preside, does not recognize women and men as equals. Nor was it surprising that views like this were presented as axiomatic, as the articulation of time-honoured values of which these leaders were the natural and legitimate custodians.

In asserting their legitimacy and in seeking to justify their position, traditional leaders have consistently maintained that they are 'above' politics. For instance, the president of the Congress of Traditional Leaders of South Africa (CONTRALESA) has claimed that a system of traditional leadership is not inconsistent with democracy:

> The traditional leader acquires his position without being elected. He is decreed by custom and birth to be the leader. Heredity and the fact that he comes from the correct lineage confer legitimacy . . . . The fact that the traditional leader is required to act in the interests and according to the wishes and the will of the people ensures that he does not undermine the democratic rights of his people.[5]

Moreover:

> The institution of traditional leadership is correctly regarded by those who truly understand and cherish its role as the repository of the norms, customs and traditions of the African people, as the custodians of the land, for and on behalf of the people.[6]

The dispute about cultural practices, in particular customary law, and women's right to equality became very acrimonious. At times the issue was almost certainly used by traditional leaders as a bargaining chip to secure a formal role for themselves in the new constitution.[7] However, because of the patriarchal nature of customary law, to subject it to scrutiny on the basis of the right to equality would directly threaten the power that traditional leaders wield in their own communities and there is, therefore, every reason to believe that their challenges to the right to equality arose out of a genuine fear of disempowerment.

The battle between equality and culture was joined at Kempton Park, where the negotiations were conducted, over an attempt by the traditional leaders who participated to secure special treatment of culture and customary law in the 'Bill of Rights' (the 'fundamental rights' enshrined in the Constitution). As the far-reaching effects of a constitutional regime which entrenched a bill of rights and granted the courts the power of judicial review became apparent, these African traditional leaders were alarmed that their traditional systems (and their power bases) would be destroyed. In an attempt to pre-empt any challenge to customary law, they demanded that the Bill of Rights should not apply to customary law.

Because the very process of negotiating at Kempton Park constituted a recognition of the oppression of the majority of South Africans under apartheid and a denial of their dignity and culture, claims for cultural autonomy carried weight. But the appeals to protect an institution which had been weakened and subverted by both colonial rule and the system of apartheid[8] were vehemently opposed by women. Led by black women delegates at Kempton Park and firmly supported by emerging rural women's organizations, a lobby group was formed, uniting women across party lines. Assertions that traditional leaders simply implemented the wishes of all their people (belied by the authoritarian tone of their claims) were contested and, in a significant victory, a clause which would have enacted a compromise between the traditional leaders and those who demanded that the fundamental rights should apply to customary law was rejected, leaving customary law in the same position as South African civil law. And, while the Constitution contains a right to participate in one's culture, it also guarantees gender equality.

It is clear that questions relating to fundamental rights, culture, and tradition will remain. Most obviously, women argue that many provisions of customary law are inimical to their right to equality and to their quest for freedom from gender discrimination. Indeed, it has been pointed out that the translation of constantly evolving customary practices into the more rigid body of rules implemented by the colonial authorities was marked by the influence of African men seeking to secure their dominant position.[9] Under the system that now obtains, women are, for example, always subject to the authority of a patriarch, passing from the guardianship of their fathers to that of their husbands; their contractual capacity and standing in law are limited; and their children 'belong' to their husbands. The list goes on.[10] Outside the law too, women's subordination is purveyed as part of a valued cultural heritage. For instance, the *ubuntu-botho*[11] syllabus used in KwaZulu schools promotes the traditional Zulu family and describes it as being headed by the man: 'The woman knows that she is not equal to her husband'.[12] Yet, in response to calls for change, traditionalists such as the chiefs demand that their cultural institutions must none the less be protected.

The clash between cultural norms and equality is not unique to South Africa and there are examples in other jurisdictions of the problems that can arise.[13] Probably the most prominent of these is the case of *Lovelace* v. *Canada*.[14] Although this case was ultimately decided on different grounds, it raised the conflict in that the UN Human Rights Committee was asked to determine whether Canadian legislation governing Indian status violated the principle of equality under the Covenant on Civil and Political Rights. Closer to home is the *Unity Dow* case,[15] decided in 1991 by the Appeal Court in Botswana, a jurisdiction which, like South Africa, recognizes customary law.

The issue that the Botswana court considered was similar in many ways to that which arose in *Lovelace*. The Botswana Citizenship Act stipulated

that children born within a marriage should follow the citizenship of their father. Unity Dow, a mother and a Botswanan citizen, was married to an American and living in Botswana. The effect of the Act was that their children, who were born in Botswana, could not have Botswanan citizenship and, consequently, that their right of residence in the country was tenuous. Dow challenged the Act, claiming that it discriminated on the basis of sex and, therefore, conflicted with certain provisions of the Botswanan Constitution. The court, divided three to two, upheld her claim.

What is significant about the case for the purposes of this paper, is the basis of the strenuous opposition that the State mounted against Dow's claim.[16] Although a wide range of technical points of constitutional law and statutory interpretation were made, the defence case seems to have been driven primarily by a belief that the structure of Botswanan society made it impossible for the Constitution to outlaw sex discrimination. Thus Bizos JA quotes the Attorney-General as saying: 'The whole fabric of the customary law in Botswana is based on a patrilineal society which is gender discriminatory in its nature.'[17] The court was urged to listen to the 'heartbeat of Botswana' rather than to what the rest of the world had to say.[18] In a similar vein, the court had been told that 'it is not unfair to say that if gender discrimination were outlawed in customary law, very little of customary law would remain'.[19]

This paper will consider how a South African court might deal with a challenge, based on the guarantee of equality, to customary law or to other cultural practices. First, it examines the right to participate in cultural life contained in the Bill of Rights. Its interpretation of this right is informed by the Bill as a whole, the Constitution, and the dominant understanding of a right to culture in international human rights law. It goes on to argue that an analysis of the law supports the view that equality should take precedence and then turns, for further support for that proposition, to an examination of the nature of culture. It proposes an understanding of culture as dynamic and flexible, constantly subject to challenge and change. In this context the paper concludes that in all but very unusual circumstances, cultural rights in South Africa cannot be taken to 'trump' the right to equality.

SECTION 31: A RIGHT TO PARTICIPATE IN CULTURAL LIFE

Section 31 of the interim Constitution provides: 'Every person shall have the right to use the language and to participate in the cultural life of his or her choice.' Similar provisions appeared in most of the draft bills of rights that were circulated before the negotiation process started and this wording is taken more or less directly from the Nationalist government's proposals.[20] Generally speaking, the section was uncontroversial but there are also indications that its implications were not fully understood. In the following section we suggest that the reference to culture in s. 31 carries a broader

meaning than some people may have expected and that a consideration of the Constitution as a whole indicates that it should take a subordinate place to other rights, particularly to the right to equality.

1. *A way of life or 'high' culture*

The South African Bill of Rights is modelled, to a large extent, on international human rights instruments and the body of knowledge that has grown up around these provides an insight into the way the culture provision is likely to be interpreted.

Broadly speaking, the protection of culture in international law has developed in two different contexts. Some conventions deal with a right to culture alongside provisions relating to the arts and scientific progress, suggesting that, initially at least, these documents may have been concerned with 'the rights of the consumers of cultural, artistic, and scientific creativity'.[21] But 'culture' also appears in texts relating to the protection of minorities. For instance, art. 27 of the International Covenant on Civil and Political Rights requires that 'persons belonging to . . . minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'.

In popular discussions about culture in South Africa one usually encounters it in its narrower sense. Recently, for instance, under the heading 'Culture' in its 'A to Z of Election Issues', the *Weekly Mail* restricted its discussion to a description of the politics of various interest groups concerned with the arts.[22] Sachs also emphasizes the arts when he writes of culture. Thus he asserts that the challenge to secure access to 'all the cultural riches of our country' is one addressed to 'our writers, musicians, painters, and dancers, to our dressmakers and potters and carpenters, to our broadcasters and journalists and publishers, to our teachers and sound specialists and film-makers, to all our cultural workers'.[23] The lawyers, social workers, politicians, parents, and doctors who protect, reinforce, and manipulate culture in the broader sense are not included here. Nevertheless, it seems indisputable that s. 31 of the interim Constitution refers to culture as 'a way of life' and not to the more limited notion of 'high culture'.

This interpretation is supported not only by modern usage in international human rights law but also by the structure and content of the interim Constitution and by the political negotiations that preceded it.

None of the international human rights instruments attempts a definition of culture – generally debates during the drafting process of these documents has centred on the notion of minority status. In addition, the right to culture has been directly considered by international tribunals on a handful of occasions only. Nevertheless, there are now clear indications that international human rights law recognizes a right to culture that extends far beyond the 'high' culture of the concert hall and art gallery and that the right

encompasses the protection of identity. Thus, an extended description of rights relating to education and an article on cultural rights, scientific progress, and creative activity seems to comprise the 'cultural' rights of the International Covenant on Economic, Social, and Cultural Rights.

Francesco Capotorti's definitive *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*,[24] supports this view. It examines the right to enjoy culture under four separate headings: educational policy, promotion of arts and literature, dissemination of culture, and the preservation of customs and legal traditions, and quotes the definition of culture found in a 1951 UNESCO publication:

> Whereas race is strictly a question of *heredity*, culture is essentially one of *tradition* in the broadest sense, which includes the formal training of the young in a body of knowledge or a creed, the inheriting of customs or attitudes from previous generations, the borrowing of techniques or fashions from other countries, the spread of opinions through propaganda or conversation, the adoption – or 'selling' – of new products or devices, or even the circulation of legends or jests by word of mouth. In other words, tradition in this sense covers provinces clearly unconnected with biological heredity and all alike consisting in the transmission, by word of mouth, image or mere example, or characteristics which, taken together, differentiate a milieu, society or group of societies throughout a period of reasonable length and thus constitute its culture.
>
> As culture, then, comprehends all that is inherited or transmitted through society, it follows that its individual elements are proportionately diverse. They include not only beliefs, knowledge, sentiments and literature (and illiterate peoples often have an immensely rich oral literature), but the language or other systems of symbols which are their vehicles. Other elements are the rules of kinship, methods of education, forms of government and all the fashions followed in social relations. Gestures, bodily attitudes and even facial expressions are also included, since they are in large measure acquired by the community through education or imitation; and so, among the material elements, are fashions in housing and clothing and ranges of tools, manufactures and artistic production, all of which are to some extent traditional . . . .[25]

This understanding of the right to culture is again confirmed by a UNESCO General Council statement that 'culture is not merely an accumulation of works and knowledge which an élite produces, collects and conserves'.[26]

That the 'right to participate in the cultural life' of one's choice found in the South African Bill of Rights carries an equally broad meaning is confirmed by a reading of the Constitution as a whole. Although premised on a commitment to national unity and a common South African citizenship, the Constitution's recognition of indigenous law and the status given to traditional leaders indicates that it does not intend to impose a single undifferentiated cultural and legal regime on all South Africans. The extent of this pluralism is clear in the creation of a constitutional *Volkstaat* Council for right-wing Afrikaner groups with the specific function of considering the possibility of establishing a so-called *Volkstaat*[27] within the borders of South Africa. Only slightly less controversially, three tiers of traditional authorities have been set up with the right to comment on any legislation relating to traditions and customs of traditional African communities and to delay the passage of such legislation through provincial legislatures or parliament.

The long clause on languages similarly reflects the intention to foster the diversity of South African cultures. This section[28] entrenches the linguistic – and thus cultural – diversity of South Africa. It establishes eleven official languages and imposes various obligations on the state to protect and develop the many languages used in South Africa.

The various separate sections protecting dignity, freedom of religion, freedom of association, and rights relating to education, read collectively, likewise indicate a broad concern with cultural identity. The education provision, which follows the culture provision directly is explicit:

> Every person shall have the right –
> (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

Finally, the constitutional principles reflect a commitment to cultural diversity in the fullest sense. Principle XI requires that 'the diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged'. Principles XII and XIII are broader. Principle XII refers to 'collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations'. Principle XIII ensures that 'the institution, status and role of traditional leadership, according to indigenous law, shall be recognized and protected in the [next] Constitution' and that 'indigenous law, like common law, shall be recognized and applied by the courts'.

So, both international human rights law and a reading of the Constitution itself lead easily to the conclusion that the right to participate in the cultural life of one's choice extends far beyond what is known as 'high' culture to virtually every detail of the choices we make about how we live our lives. But some very difficult questions are introduced by this broad understanding of culture. These are hinted at in the constitutional principles which suggest that cultural choices are subject to substantial constraints. Principle XIII unambiguously requires that indigenous law shall be subject to the fundamental rights. On the other hand, principle XVII, which secures a right to 'democratic representation' at every level of government, resolves a potential dispute by expressly exempting the institution of traditional leadership. Principle XII, which is more ambiguous, could conceivably be read as subjecting cultural rights to the principles of non-discrimination and freedom of association.

Obviously, there is no clear, simple 'ranking' of rights to provide conclusive answers to all the questions that might arise concerning, for instance, the relationship between the rights to equality and to culture. Apart from the problems posed by unclear drafting, the meaning of equality in any case within its particular cultural setting will be a difficult question to answer. Nevertheless, the bias towards traditional, liberal civil and political rights provides an indication of the way problems are likely to be resolved under the interim Constitution and its successor.

2. *Culture and equality*

The 1993 Bill of Rights gives little direction that could help in the event of a clash between different fundamental rights. And to complicate matters even more, the section defining the ambit of the chapter embodying those rights is worded in a way that raises the preliminary question of its scope: are courts under all circumstances under a duty to give effect to the fundamental rights? The chapter binds only the legislature and the executive explicitly.[29] No reference is made to the judiciary and it has been argued that their decisions are not directly subject to the operation of the chapter.[30] On the other hand, one might argue that, since s. 7(2) extends the application of the fundamental rights to 'all law in force', judicial precedent too is covered.[31] Whether or not this interpretation is accepted, it is nevertheless clear that courts cannot ignore chapter 3. Section 35(3) stipulates that in interpreting any law and in applying and developing common law and customary law, courts should have due regard to the 'spirit, purport and objects' of the chapter. Although this does not impose an absolute obligation on judges to uphold chapter 3 rights, it does arm litigants with a forceful argument against any decisions that would have the effect of abrogating their fundamental rights.[32]

On the assumption, then, that judicial decisions, legislation, and administrative acts are all to some extent subject to the fundamental rights, the next question is how to deal with the situation where upholding one fundamental right will have the effect of undermining another. As we have mentioned, the Bill of Rights does not yield an obvious answer in the event of such a clash. A small group of fundamental principles is privileged over the remainder in the sense that there are more stringent safeguards against limitations on these rights.[33] But there is no other clear guidance as to the hierarchy of rights.

The problem of ranking is likely to be acute where cultural rights are claimed, as reliance on culture will frequently strengthen demands that offend against other fundamental principles. Given that cultural practices and customary law often disadvantage women, it is not difficult to predict situations where the right to engage in culturally sanctioned practices would conflict with the constitutional guarantees of equality and non-discrimination.[34] How such a clash might be resolved is open to question, but it will be argued here that all available evidence points towards a privileged place for the concept of equality.

(a) Equality in the Constitution

The Constitution as a whole is founded upon and informed by the principle of equality. That it is of overriding importance is suggested by the wording of the preamble which proclaims the 'goal' of the new dispensation to be a new order in which there is 'equality between men and women and people of all races'. The epilogue (or 'post-amble' as it has been termed) similarly

stresses non-discrimination as a basis for the organization of South African society in the future.

Rights relating to the preservation of culture and, more particularly, customary law appear to be of a lesser order. Although this fact is not so readily apparent from the main body of the Constitution, it is evident in the constitutional principles. These not only comprise the blueprint for the future Constitution, they can be deployed to interpret the interim Constitution and, indeed, are deemed to be part of it.[35] As we have already indicated, constitutional principle XIII, while providing for the recognition and protection of customary law, expressly subjects it to the fundamental rights. It is true that, in terms of s. 31 and constitutional principle XI,[36] one of those fundamental rights must necessarily protect culture. But although many elements of customary law could be said to be reflections of cultural values and practices, principle XIII must mean that, in so far as it relates to customary law, the right to protection of culture must rank below the right to equal treatment. Principle XIII would be meaningless if customary law were permitted to trump equality in the guise of indigenous culture.

As for cultural practices[37] or values that are not enshrined in customary law, we would argue that in relation to these too, the equality provision should override cultural claims and that cultural practices should be subject to it. To the extent that state bodies, for example, education departments, might discriminate against women in conformity with the cultural norms of any group, they would be acting unconstitutionally. And courts deciding private disputes focusing on cultural practices should be mindful of the central place in the Constitution occupied by the equality principle.

Support for the view that the right to equality is of supervening importance can be found in the provision describing the types of limitations on the secured rights that are permissible. The relevant section is an adaptation of the much more succinct Canadian provision which guarantees rights 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The South African provision requires that such limitations be, among other things, justifiable in a 'democratic society based on freedom and equality'.[38] While this will probably not have a direct influence on the way in which clashes between cultural rights and the right to equality are interpreted, it reasserts the privileged position of the right to equality in the new constitutional dispensation. Section 35(1) too accords priority to equality, directing courts to interpret the Bill of Rights so as to 'promote the values which underlie an open and democratic society based on freedom and equality'.

A further pointer suggesting that the right to equality should take precedence is the emphasis, both in the constitutional principles and in the body of the Constitution itself, on the individual as the subject of the rights conferred. The preamble declares that 'all citizens' should be able to exercise their fundamental rights. Constitutional principle II states that 'everyone' shall enjoy fundamental rights, freedoms, and civil liberties. And, most

important of all, s. 31 gives to 'every person' the right to participate in the 'cultural life of his or her choice'. The wording of these provisions makes it clear that all the fundamental rights, and cultural rights in particular, can be asserted only by individuals, not by groups. It is the individual who has the right to choose a cultural identity and to protest if the expression of that identity is stifled. The corollary of this is that it is also the right of the individual to resist the imposition on her, against her wishes, of cultural practices that violate the principles of equality and non-discrimination.[39]

This contention is lent force by the interpretation commonly placed on similar provisions in international human rights documents. Since the South African Bill of Rights is drafted in the tradition of international human rights instruments, an examination of how these documents are understood helps to illuminate its implications. In addition, s. 35(1), which provides that, where applicable, courts should have regard to public international law, together with s. 231(4), which states that the rules of customary international law form part of the law of South Africa, evidence an intention that the domestic law of the land should, as a general rule, be interpreted in conformity with international norms.

(b) Equality and culture in international law

Increasingly, in the international forum, ethnic minorities and indigenous peoples have been demanding protection for their cultures. United Nations documents now recognize a dual aspiration on the part of these groups: to avoid discrimination and to receive equal treatment in areas where desirable, and to receive differential treatment where this is necessary to preserve their distinct characteristics.[40] The UN Covenant on Civil and Political Rights, which goes furthest in responding to these calls, provides special rights for minorities. Article 27 affirms the right of minority groupings to a distinct identity.

However, this insistence on difference raises thorny issues. It gives rise to concerns about the fragmentation of nations and this has led to the placing of limitations on these newly created rights. Thus, Capotorti observes, with some regret, that the need to safeguard the integrity of the state and discourage separatism might be regarded as 'a natural limit to any policy of protection for minorities, even a policy pursued in the form of a very broad pluralism'.[41] His study reveals that some jurisdictions have abolished customary law in pursuit of the aim to modernize or to ensure national unity.[42] In other countries it has been argued that the right to culture in art. 27 of the Covenant on Civil and Political Rights is subject to implied restrictions in its application, lest, for example, it is used to prevent integration or to threaten the unity of the state.[43] In this context it is important to note that the concern that protecting minority identity might lead to secessionist movements or underscore differences which cause social disorder was not accepted by the international community as a reason for avoiding the promo-

tion of minority identity.[44] The 'natural limit' to which Capotorti refers is not one which justifies an absolute denial of cultural rights to minorities, but it is an interest which might be validly considered when giving effect to these rights. It seems clear that similar concerns must arise in the case of indigenous groups, whether minorities or not, whose cultural norms are out of step with the dominant norms enshrined in the national constitution.[45]

In addition to national interests as a justification for the abridgement of cultural rights, it is suggested that incompatibility with contemporary human rights standards should also justify curtailing those rights. Kamenka argues that groups should not be immune from either internal or external criticism of their customs.[46] He maintains that third-generation rights, such as the rights of peoples, should be read and understood in terms of first-generation rights, such as individual autonomy:[47] groups 'do not have the moral right, in the name of collective self-determination, to deal as they wish with their own people, any more than we now believe that governments and nation states have such a moral right'.[48]

This moral argument gains expression in legal terms in the generally accepted interpretation of the wording of international human rights instruments. The notion of group rights does not fit easily into the parameters of traditional human rights jurisprudence: 'Human rights instruments generally follow language which is universalist and individualist and [which] does not accept a group dimension of rights without some strain'.[49] As one writer points out, for example, the Universal Declaration of Human Rights refers to rights vesting in 'everyone, without distinction of any kind'.[50]

Even article 27 of the UN Covenant on Civil and Political Rights, which, as Thornberry says, is 'the only expression of the right to an identity in modern human rights conventions intended for universal application', does not seek to promote group interests at the expense of the individual's.[51] Like the right to culture found in article 27 of the Universal Declaration, it is phrased in terms of the individual, stating that 'persons belonging to . . . minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture'. Article 27, it is said, does not create a true group right that could be invoked against individual members of the group. The language in which it is cast identifies the individual as the subject of the rights and 'assimilates the rights to the other human rights recognized in the covenant which are the rights of individuals and not groups'.[52] Nettheim, suggesting that the right relating to culture is limited, agrees: 'Like most of the human rights recognized in international law it is focused on individuals, though it is predicated on the group.'[53] Thus communities do not have *locus standi* in terms of the covenant.[54] The Capotorti report confirms that persons belonging to minorities rather than the groups themselves are accorded rights under article 27 and intimates that one of the reasons for this is that the freedom of the individual to choose between voluntary assimilation and preservation of culture might otherwise be disregarded by the group in an effort to preserve its 'unity and strength'.[55]

As Kamenka warns: 'The rights of peoples can become rights against one's own people'.[56]

In making the same point, Thornberry gives as examples the treatment of women in Islam and the Hindu caste system, stating that the covenant's approach is that 'no individual against his or her will can be coerced into acceptance or adoption of such practices in the interests of group solidarity and continuity'.[57] To do so would violate other rights under the covenant.[58] He concludes that the balance is tipped in favour of the individual; the minority has no rights as such to preserve its identity.[59]

This interpretation, conferring priority on the individual's right to equality, becomes almost incontrovertible in the context of the more recent Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[60] It differs from the covenant in that article 3(1) empowers members of groups to exercise their rights individually 'as well as in community with other members of their group'. However, the substantive rights created by article 2, including the right to enjoy one's own culture, are still framed as vesting in individuals ('persons'). So, although a number of individuals can act collectively in exercising their rights, the group still cannot impose its practices on an unwilling member.

More specifically, this 1992 declaration asserts the pre-eminence of the principles of non-discrimination and equality. First, the preamble reaffirms as one of the 'main' purposes of the United Nations the achievement of international co-operation in promoting and encouraging respect for human rights and fundamental freedoms 'for all without distinction as to race, sex, language or religion'. The declaration proceeds, in article 4(1), to place a duty on the state to take measures to ensure that 'persons belonging to minorities' may exercise '*all* their human rights and fundamental freedoms without any discrimination' (our italics). That culture must yield to other human rights such as equality is evident from the way in which article 4(2) is qualified. This provision directs states 'to take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture'. But the duty is circumscribed; it does not arise 'where specific practices are in violation of national law and contrary to international standards'.

This document confirms Thornberry's view that international human rights law requires minority rights:

> to be brought into balance with human rights or, more correctly, to be seen as part of human rights. Whatever respect must be paid to the rights of groups, the stance of modern international law is clear in according primacy to individual choice: respect for group rights does not justify 'group determinism', the overriding of individual choice by claims of the group.[61]

There can be no doubt that, in relation to women, there can be irreconcilable conflicts between culture and basic human rights, particularly equality. And the potential danger to women of privileging group-sanctioned cultural practices is specifically acknowledged in the 1993 Vienna

Declaration and Programme of Action.[62] The signatories to this document adopt as a priority the protection of women and girls rather than culture. Article 38 stresses, somewhat ambiguously, the importance of 'the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism'. However, that any conflict should be resolved in favour of protecting women becomes clear in the light of other statements in the Declaration. First, the preamble accords overriding importance to the individual (the 'human person'). Secondly, article 49 urges states to 'repeal existing laws and regulations and remove customs and practices which discriminate against and cause harm to the girl child'.

In view of all this, it could be contended that to endorse certain cultural and customary law practices in South Africa could entail the violation of both national constitutional principles and international human rights norms. The individual would be placed at the mercy of the group and would be deprived of the autonomy that underpins much of human rights law and the South African Constitution.

The argument that culture should not be preserved at the cost of sacrificing individual rights becomes even stronger when the nature of culture is examined. As Prott suggests, cultures are not static and 'even the most enthusiastic supporter of cultural preservation would no doubt find elements in the culture under consideration which no special effort should be made to preserve'.[63] The veneration and unquestioning preservation of cultural practices as if they spring, unsullied by taint of power, as if they are transhistorical manifestations of some uncontested collective will, is to ignore the way in which culture evolves.

CULTURE AND TRADITION

The argument that cultural rights cannot supersede basic, individual rights is supported by an examination of the concept of culture itself. Of crucial importance[64] for contemporary theory and ideas about culture is the notion that 'culture is not a neutral concept; it is historical, specific and ideological'.[65] Culture is actively created by the society, or groups within the society, from which it emanates. Geertz, for example, describes the creativity that underlies culture and characterizes it as the 'webs of significance [man] himself has spun'.[66] Foucault, on the other hand, focuses on the diversity of cultures within a society, pointing to 'a whole range of systems of ideologies'[67] embodied in complexes of conflicting discourses.

In elucidating this understanding of culture, Raymond Williams offers a perspective that is particularly useful. He emphasizes that culture is always in the process of being reshaped, that it emerges from dynamic social and economic relationships.[68] But his theoretical framework goes further and extends to explain the heterogeneity of cultural practices in society.[69]

Williams postulates the existence of a dominant and effective system of practices, meanings, and values. This dominant culture is neither static nor absolute. Transmitted through the medium of education, it is an amalgam of values, meanings, and practices that are selected from a range of possibilities; those not selected are ignored, re-interpreted to support or at least to harmonize with the dominant culture, or demonized.[70]

Along with this process of selection and interpretation, there is a continual process of modification. The dominant culture is able to tolerate and even to incorporate alternative and oppositional practices and meanings provided they do not challenge its central tenets. These other cultures Williams names residual and emergent cultures.[71] Residual culture, deriving from some earlier social formation, must to some extent be incorporated if the dominant culture is to make sense of its past. The emergent culture embodying new or hitherto neglected practices, meanings, and experiences may also be incorporated to some degree and, in the process, may transform peripheral aspects of the dominant culture.[72] Solutions to social crises that fall altogether outside the dominant culture carry the potential for revolutionary change.

Not only does Williams provide an account of culture as a creative process, he highlights the conflict and diversity present within societies and also offers an explanation of how power operates to contain these. Finally, his work is important for our purposes for its emphasis on the flexibility and the contingent nature of culture; its substance is shaped by a process of exclusion, interpretation, and adaptation. Culture cannot be seen as a given, as immutable and sacrosanct. Rather, it is the product of constant change and sometimes opportunistic manipulation. Indeed, as Hobsbawm[73] shows, customs and traditions are constantly invented to serve the interests of particular groups within a culture.

Ranger[74] confirms Hobsbawm's thesis in the context of colonial Africa. He contends that both European and African traditions were invented. For example, he says, white colonists drew on invented European tradition to clothe themselves with status and authority[75] while those who set out to establish tribal identities emphasized tribal culture.[76] Ultimately, authentic indigenous culture was largely crushed by colonial rule and replaced with a newly invented, modified version. The law was implicated in this process and was a significant force in legitimizing and entrenching vested interests. Sally Engle Merry[77] examines the role of the law in furthering the colonial enterprise and notes its effectiveness in assisting in the transformation of indigenous culture:

> [L]aw, along with other institutions of the colonial state, transformed conceptions of time, space, property, work, marriage and the state. The role law played in the colonizing process is an instance of its capacity to reshape culture and consciousness.[78]

Customary law, she observes, was 'a product of the colonial period'.[79]

Appeals to custom are made to confer on choices, whether to change or to resist change, 'the sanction of precedent, social continuity and natural

law as expressed in history'.[80] Traditions, the ritualized practices surrounding custom, are invented to create or to symbolize social cohesion, to establish or legitimize institutions, status or authority, or to inculcate norms.[81] The history that is invoked to fulfil all these purposes is itself a construct. It is the history 'selected, written, pictured, popularized and institutionalized by those whose function it is to do so'.[82]

While these inventions are perceptible throughout the ages, Hobsbawm argues that they are more likely to occur in times of rapid transformation. Existing practices must be modified or new ones devised which are appropriate to altered circumstances.[83] This is borne out, suggests Hassim,[84] when one observes the efforts of Inkatha to re-invent Zulu tradition in the face of the social dislocation prevailing in South Africa. Through appeals to the past, Inkatha has sought to carve out for the Zulus a strong ethnic identity.[85] Significantly, tradition in the form of an authoritarian, patriarchal family structure has been the focus of Inkatha's response to social ills.

The creation of custom and tradition is a value-laden exercise, tending to privilege the inventors and to benefit vested interests. The selective and in many ways novel re-invention of customary law in Southern Africa by (male) African leaders together with the colonial authorities has been well documented.[86] Codification of the previously fluid customary law system not only created a set of rules designed to uphold values and meanings approved by the colonial authorities and powerful indigenous groups, it also fixed those rules in rigid legal form, reducing its capacity for development and change.[87] The effect of the choices made on those without power, such as women, was and is often detrimental. It is said that colonial meddling with customary law resulted in the reinforcement of women's subordination while simultaneously depriving them of the safeguards afforded them by the pre-colonial way of life.[88] Ranger describes how in colonial Africa, tradition was deployed to ensure that male control over women was not lost.[89] More recently, the edifice of the family built by Inkatha has restricted women even more than the traditional practices they purport to be applying.[90] There can be little doubt that culture is a concept open to manipulation and this point is not lost on writers concerned with human rights protection in Africa. For example, Howard describes how it can be used to disguise political repression[91] and An-Na'im points out that 'powerful individuals and groups tend to monopolize the interpretation of cultural norms and manipulate them to their own advantage'.[92]

Culture, then, is the product of an active process; norms and practices are constantly being contested, reaffirmed or discarded. Often, culture is deliberately fashioned. And, until recently, women have had little influence on the shape cultures have taken. This is something that is perhaps not sufficiently acknowledged by those who accuse feminists of being implicated in the cultural oppression of indigenous societies. For instance, Leila Ahmed says:

> The ideas of Western feminism essentially functioned to morally justify the attack on native societies and to support the notion of the comprehensive superiority of Europe .

> ... Anthropology, it has often been said, served as the handmaid to colonialism. Perhaps it must also be said that feminism, or the ideas of feminism, served as its other handmaid.[93]

Criticisms of this kind, while stamping feminist values as illegitimate and alien, assume the purity and unimpeachable legitimacy of traditional cultural values. In the case of South Africa, the indigenous culture itself bears the imprint of colonialism and it is not self-evident why women should continue to bear the burdens that preserving it unchanged would entail. It is essential, therefore, for South Africans to refuse to accept values, practices and meanings merely on the basis of their claim to a traditional, cultural pedigree. Although a practice, for example, may appear a time-honoured, immutable, and inevitable part of life, it may also be designed to privilege some and so oppress others. And while most people within a culture subscribe in general terms to its meanings and practices, they may not adopt them wholesale; cultures are contested from within as well as from the ranks of oppositional and alternative cultures. The South African Women's Charter of 1954 and the Women's Charter for Effective Equality of 1994 testify to this. The women represented at Kempton Park who fought against special protection for customary law demonstrate this. So do the women's groups campaigning against polygyny. Increasingly, South African women are unwilling to sacrifice their interests in the cause of cultural preservation.

It is necessary to examine every culture critically, in the context of its history and its present observance, to determine what ideology it is perpetuating, whose interests it serves and to assess its effects on others. It is important to be alert to the possibility of coercion which 'underwrites and imposes meanings'[94] and to challenge the preservation of what is oppressive in any culture.

RESOLVING CONFLICTS

Our argument thus far has been that, when a cultural practice is challenged from within the cultural group itself on the grounds of its failure to comply with the constitutional guarantee of equality, generally speaking, equality should be the determining value. This argument is based both on a reading of the 1993 Constitution in its international context as well as on an analysis of what we mean by culture and the way in which cultural practices emerge and develop. We also suggest that not only does a literal interpretation of the Constitution justify giving priority to equality, its role as the repository of the norms prevailing in the country demands this.

Framed in the discourse of democratic principles and egalitarianism, the Constitution reflects the dominant ideology, which, in turn, is already implicated in the process of transforming the values and practices prevailing in the country. Already, it is possible to discern the spread of a dominant culture to which apartheid and discrimination are anathemas. Drawing on

Williams's model, one could characterize practices and traditions which deny equality between men and women, between people of different races and between the old and young, for instance, as part of a residual culture which, to the extent that it cannot be reconciled with the fundamental tenets of the dominant culture, cannot be incorporated within it. In effect, the oppositional culture must be marginalized or challenged if the dominant culture is to survive in any coherent form.

While this argument relies primarily on cultural theory and legal and political issues, one might add that it has a normative element too. It could be argued that the new constitutional framework in South Africa, and thus the values it endorses, has a moral legitimacy afforded by the inclusive and democratic nature of the process by which it was adopted.

The main thrust of our normative argument, however, relates to the very nature of culture. Because cultural practices are themselves the product of an active process of creation and subject to continuing re-evaluation and modification, they cannot be considered immune from challenge. As Hall puts it, culture cannot be seen in isolation from ideologies which 'have the capacity to intervene on the ground of common sense and popular traditions and, through such interventions, to organize masses of men and women'.[95] Cultural norms and practices are the result of choice and even invention, designed in many cases to legitimize the privileging of certain interests over others.

We are conscious, however, that the manner in which we have asserted that equality must generally trump culture may sound both too strident and insensitive to the role of culture in people's lives and the centrality of culture in all decision-making. In the last part of the paper we intend to address these concerns briefly.

While Williams alerts us to the problem of conflict between norms, Kymlicka[96] argues that, as far as the right to culture and the right to equal treatment are concerned, the potential for conflict should not be exaggerated. In his opinion, far from presenting a threat to equality, the recognition of cultural rights in reality promotes it. Culture, he says, underpins every exercise of individual rights and freedoms. Individuals have an interest in preserving their cultures; cultural structure provides people with the context within which choices can be made and life-plans evaluated.[97] Because each individual benefits from the protection of his or her culture, everyone should have an equal right to this protection. On this basis, he maintains that 'minority rights can form an important part of a recognizably liberal theory of equality'.[98] Members of a group whose culture is vulnerable to harm or destruction as a result of decisions made by those outside the culture are disadvantaged in comparison with members of the dominant culture. So, political rights are needed to correct this inequality.[99] According to Kymlicka, therefore, 'minority rights help ensure that the members of minority cultures have access to a secure cultural structure from which to make . . . choices for themselves, and thereby promote liberal equality'.[100]

As the Australian court in *Gerhardy* v. *Brown* explained, the reason for protective measures is to 'guarantee that the members of the benefited class shall have the "full and equal enjoyment of human rights and fundamental freedoms".'[101] Where there is a conflict between the claims of those outside the protected, otherwise vulnerable, group, the right to protection of its culture should normally prevail in the interests of equality.

However – and this is the issue with which our paper has been concerned – the matter is more complex where protection of a culture will entail maintaining an unequal status for some of its members. Kymlicka emphasizes that cultural rights do not protect the substantive rules operating in a group at any one time; they do not preserve any cultural practice from internal challenge and change:

> [T]he cultural community continues to exist even when its members are free to modify the character of the culture, should they find its traditional ways of life no longer worth while.[102]

Minority rights 'do not impose a particular conception of "the health of the soul" on the members of minority cultures, or penalize dissenting conceptions'.[103] The dominant group within the cultural community does not have the right to decide how all the others should apply or interpret cultural norms and practices.[104] Yet, he does admit that a point can be reached where the existence of a culture can be threatened. In such a situation, where the activities of individual members constitute such a threat, it may be necessary to restrict the rights of those members.[105] In these cases of irreconcilable conflict between the rights of individual members and the need to protect the cultural structure, he concedes, there is no obvious solution.[106] He tentatively suggests that the specific circumstances would have to determine the outcome in any particular case.[107]

Kymlicka's distinction between 'minority rights' in the abstract and substantive rules or specific practices is a difficult one and we are not certain that it can be sustained in practice. Whether or not that is the case, however, the comment made in the *Dow* case quoted at the beginning of this paper, that 'it is not unfair to say that if gender discrimination were outlawed in customary law, very little of customary law would remain', should alert us to problems with his argument; an equality–based challenge to customary law, or a series of them, could be seen as challenging the very heart of the culture from which that law purportedly stems.

Of course, there will be many situations in which South Africans will find solutions to conflicts between women's aspirations and cultural claims that accommodate both. And the dynamic nature of indigenous culture means that it is permeable by new norms, that it will not prove impervious to the newly emerging culture of emancipation and equality. Culture is always in the process of being re-invented.

More specifically, customary law is capable of evolving to become more egalitarian. As we have argued elsewhere,[108] the law is not a monolithic force directed solely at furthering the interests of patriarchy. And while changing

the law does not necessarily transform women's lives, the law does have some normative force and can influence thinking. Feminists have in the past, and will continue in the future, to improve women's lot, at least to some extent, through law reform. Already, researchers are finding that the 'lived' customary law is very different from the formal recorded rules.[109] Under the stewardship of parliament,[110] the formal rules can be changed to reflect the reality and, with lobbying and education, women will succeed in accomplishing some of their aims. However, we cannot assume that all conflicts will be resolved to the satisfaction of all by debate.

Courts, and to a lesser extent legislators, will not be able to avoid being confronted with irreconcilable conflicts, demanding stark choices between opposing interests. In order to uphold one individual's rights guaranteed in the Constitution, courts may be faced with the uncomfortable prospect of making inroads into the interests of others. As Dyzenhaus argues, coercive measures are sometimes the only method of safeguarding autonomy; it may become impossible to avoid 'trampling on individual preferences in the name of autonomy'.[111] He suggests that the 'liberal preference that all individuals should have the circumstances that makes it possible to lead autonomous lives . . . will require that liberals attempt to eradicate social practices that impose preferences on others, for example, the preference for the patriarchal life'.[112]

But, it could be argued, there is no reason to assume that a liberal preference for individual autonomy should prevail in this debate; the central values of many South Africans might be entirely different. Although this is obviously not the place for a full treatment of the complex issues and the very difficult concerns about culture raised under the banner of 'relativism', it is necessary to sketch a response.

It is argued by those taking a relativist stance that standards or values derive from culture and so cannot be separated from it. Cultures, like other discourses, are self-validating:

> A discourse as a whole cannot be true or false because truth is always contextual and rule-dependent . . . . No discourse-independent or transcendental rules exist that could govern all discourses or a choice between them.[113]

There is therefore no standard by which all cultures can be judged or by which a choice can be made between them.[114]

Pluralism is offered as the only means by which a society can contain all these diverse, often incommensurable discourses, without making invidious choices.[115] Applied consistently, relativism would allow each culture its voice within the pluralist structure, making no moral distinctions between them. However, as Gellner points out, this gives rise to a paradox: 'The relativist endorses the absolutism of others and so his relativism entails an absolutism which also contradicts it'.[116] He goes on to assert that:

> [R]elativism is simply not viable as a social or political attitude. For one thing, it offends against the very cultures whose equality it wishes to establish by 'hermeneutics': they are eager to acquire the technological power, and, for another thing, some of them at

> least (those prone to 'fundamentalism') would vehemently, and rightly, repudiate any attempt to reinterpret their convictions in a relativist spirit . . . . For another thing, relativism falls foul of a fact about our world which, in other contexts, it itself invokes: the tangled unstable over-lapping nature of 'cultures'.[117]

Relativism, then, if taken to its logical conclusion, is committed absolutely to the recognition of cultural differences and to acceptance of the validity of all cultures. It must, on this basis, also give the tyrant and the 'fundamentalist' a voice. But the hearing will inevitably be merely a polite gesture. Relativism cannot fulfil its own promises because to take those voices seriously would result in the silencing of all others.

Thus, it is not surprising that many feminist writers appear to stop short of an unqualified commitment to relativism.[118] For instance, Iris Young, while strongly infuenced by post-modernist thinkers, nevertheless asserts, that 'my claim that injustice should be understood in terms of the categories of domination and oppression holds, I think, for any social context in the world today, as well as for relations among nations or states'.[119] Behind this assertion lies the belief that oppression, in whatever culture it is to be found, is to be condemned. If this is a claim to a universal truth, it is one that feminists cannot afford to abandon.

The project of feminism is to challenge the oppression of women. And it must surely be the project of a society committed to egalitarianism and human rights to do likewise. A commitment to equality demands that the principle of autonomy take precedence and, while it is clear that there is a need for greater understanding between different cultures, this cannot mean that any appeal to culture should be inviolate.

This is not a call for insensitive intervention in cultural practices. Ideally, whether a practice is oppressive must be determined through the eyes of those who appear to be its victims. Account should, however, be taken of the possibility that coercion silences the oppressed. Whatever the difficulties, South Africans should be wary of compromising their commitment to opposing oppression in the name of those cultural meanings, values or practices which are the constructs of patriarchy, designed, at least in part, to perpetuate its power.

In practical terms, recognition of the fact that culture is not neutral in the interests that it serves and not static means that claims based on culture alone cannot displace the values South Africans seek to enshrine in a new constitution. The Bill of Rights should be interpreted to provide the means of challenging all practices that oppose the principle of equality. All the parties to negotiations committed themselves to establishing a non-racist and non-sexist democracy in South Africa; indeed, the main impetus for change is the drive towards egalitarianism and the elimination of oppression. To compromise such fundamental principles without undermining the integrity of a new constitution would require very strong justification and, as this paper argues, cultural credentials alone do not provide this kind of justification.

NOTES AND REFERENCES

1 Act 200 of 1993 as amended by Act 2 of 1994 and Act 3 of 1994.
2 See, for an account of the negotiating process, H. Corder, 'Towards a South African Constitution' (1994) 57 *Modern Law Rev.* 491.
3 Schedule 4 of the Constitution.
4 Nonkonyana's own position as leader of the Bala clan depends on a system which grants the right to succeed to political office to men only – Nonkonyana has two older sisters. But the central issue was not that of succession. Generally speaking, African customary law disadvantages women in many other significant ways. See, generally, T.W. Bennett, *A Sourcebook of African Customary Law for Southern Africa* (1991) and T.R. Nhlapo, 'The African Family and Women's Rights: Friends or Foes?' (1991) *Acta Juridica* 135.
5 Nkosi Sango Patekile Holomisa, 'The Role and Place of the Community Courts and Chiefs' Courts' (paper delivered at the University of the Western Cape, 26 March 1993).
6 Opening address by CONTRALESA president, S.P. Holomisa, at the Conference on Customary Law and the Future Role of Traditional Leaders; Broederstroom 16–18 July 1993.
7 Chapter 11 of the Constitution establishes formal structures for traditional authorities on a local, provincial and central government level.
8 'Submission to the Constitutional Committee, Transitional Executive Council and Negotiating Council: Joint Position Paper Concerning the role of Traditional Leaders', 13 August 1993, Cape, Transvaal, and Orange Free State Traditional Leaders.
9 See, for instance, M. Chanock, 'Making Customary Law: Men, Women, and Courts in Colonial Northern Rhodesia' in *African Women and the Law: Historical Perspectives*, eds. M.J. Hay and M. Wright (1982) 53.
10 See Bennett, op. cit., n. 4.
11 Described as a philosophy of humanism underlying all African societies. See S. Hassim, 'Family, Motherhood and Zulu Nationalism: The Politics of the Inkatha Women's Brigade' (1993) 43 *Feminist Rev.* 1 at 6.
12 Quoted in id., p. 7.
13 See the cases cited in 'Brief of the Urban Morgan Institute for Human Rights', University of Cincinnati College of Law, as *amicus curiae* in the matter between Unity Dow and the Attorney General of Botswana, 8 August 1990.
14 Communication no. R.6/24, 30 July 1981, 68 *International Law Reports* 17.
15 *Attorney-General* v. *Dow*, Appeal Court of Botswana, Case 4/1991.
16 The argument of the Attorney-General is at one point described as 'energetic' and at another as a 'peroration'. See p. 105 of the transcript.
17 id., p. 102.
18 id., p. 105.
19 U. Dow, 'Gender Equality Under the Botswana Constitution' in *Putting Women on the Agenda*, ed. S. Bazilli (1991) 259.
20 'Government Proposals on a Draft Charter of Fundamental Rights', clause 34 (*Monitor: The Journal of the Human Rights Trust*, October 1993, p. 100). The proposals were introduced in Parliament on 2 February 1993.
21 P. Sieghart, *The International Law of Human Rights* (2nd ed., 1984) 339, para. 23.5.3.
22 For instance, the ANC's controversial Department of Arts and Culture and the independent National Arts Council. See *Weekly Mail*, 15 April 1994.
23 A. Sachs, 'Preparing Ourselves for Freedom: Culture and the ANC Constitutional Guidelines' in *Protecting Human Rights in South Africa* (1990) 183.
24 United Nations (1979) E/CN.4/Sub.2/384/Rev.1. The 'Capotorti Report' was commissioned by the Economic and Social Council of the United Nations on the advice of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1971. Professor Francesco Capotorti was appointed Special Rapporteur and his task was to study the implementation of article 27 of the Covenant on Civil and

Political Rights. The report is justly considered one of the most important contributions to the debate on minorities.

25 M. Leiris, *Race and Culture* (1951) 20, 21 (cited in the *Capotorti Report*, para. 222).

26 P. Thornberry, *International Law and the Rights of Minorities* (1991) 187.

27 'Volkstaat' is the term used to denote an autonomous Afrikaner homeland.

28 The importance attached to languages in the South African constitutional set-up is reflected in the fact that the language section (s. 3) appears in chapter 1, 'Constituent and Formal Provisions', together with provisions relating to the sovereignty of the state, boundaries and national symbols, and the supremacy of the constitution.

29 Section 7(1).

30 Other provisions in chapter 3 of the Constitution support this reading. See ss. 33(4) and 35(3).

31 This interpretation is supported by the Afrikaans text of the Constitution which here refers unambiguously to 'law' and not 'statutes'. It is also fortified by constitutional principle XIII which refers expressly to the courts. It is undeniable that the provision is unclear and lawyers are divided on what the correct interpretation is. It is a matter that will have to be resolved by the courts.

32 In Canada, while there is no counterpart to s. 35(3), the courts have taken the view that the '*Charter* is the supreme law of Canada and, accordingly, statutes must be interpreted and the common law developed and applied in a manner consistent with the fundamental values enshrined in the *Charter*' (H. Orton, 'Using Constitutional Equality Principles to Shape Jurisprudence – *Moge* v. *Moge*, Spousal Support under the *Divorce Act* and Women's Equality', *Law Society of Upper Canada Special Lecture Series 1993* (forthcoming).) This obligation extends beyond cases involving state action: '[W]hile the *Charter* will not "apply" to private parties where no government action is relied upon, the use of *Charter* values as a jurisprudential principle means that the *Charter* is far from irrelevant in "private litigation".' (Orton, id.) The operation of s. 35(3) of the South African Constitution should likewise extend to disputes between private individuals.

33 No fundamental rights can be limited unless that limitation is reasonable and justifiable in a democratic society based on freedom and equality. However, some rights cannot be limited unless the limitation is also necessary (s. 33(1)).

34 Neither the right to equality nor the right to protection of culture is included in the group of rights subject to the necessity test in s. 33.

35 Section 232(4).

36 Constitutional principle XI states: 'The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.'

37 We do not include within the ambit of 'cultural practices' matters of religious ritual. These are dealt with under s. 14, which protects freedom of religion.

38 See, also, s. 33(3).

39 It is significant that in explaining the reference to 'collective rights of self-determination', the words found in constitutional principle XII, the technical committee on constitutional issues emphasized that the bearers of the rights would be a collection of individuals (*Third Supplementary Report on Constitutional Principles of the Technical Committee on Constitutional Issues to the Negotiating Council,* 30 June 1993, para 2.9). An insistence on the fact that rights attach to individuals is found throughout the reports of that committee. See, for example, *First Report of the Technical Committee on Constitutional Issues to the Negotiating Council* (13 May 1993), para. 3: 'Self-Determination'.

40 'Special Protective Measures of an International Character for Ethnic, Religious or Linguistic Groups', UN Doc. E/CN.4/52, section V, cited in Thornberry, op. cit., n. 26, p. 10.

41 Capotorti, op. cit., n. 24, p. 98.

42 id., pp. 67–8.

43 See Thornberry, op. cit., n. 26, pp. 202–3.

44 L.B. Sohn, 'The Rights of Minorities' in *The International Bill of Rights: The Covenant on Civil and Political Rights*, ed. L. Henkin (1981) 270 at 285.
45 I. Brownlie, 'The Rights of Peoples in International Law' in *The Rights of Peoples*, ed. J. Crawford (1988) 1 at 7. The author contends that the issues of self-determination, the treatment of minorities, and the status of indigenous populations are the same (at 15).
46 E. Kamenka, 'Human Rights, Peoples' Rights' in Crawford, id., p. 127 at 133.
47 id., p. 139.
48 id., p. 133.
49 Thornberry, op. cit., n. 26, p. 11. See, also, Y. Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 *International and Comparative Law Q.* 102: 'Every minority undoubtedly constitutes a group, but where it is a question of determining its rights, it is on the individual as a member of the minority that the emphasis should be placed' (at pp. 102–3).
50 Article 2. See Thornberry, id., p. 11.
51 id., p. 142.
52 id., p. 173.
53 G. Nettheim ' "Peoples" and "Populations" – Indigenous Peoples and the Rights of Peoples' in Crawford, op. cit., n. 45, p. 107 at 116.
54 Thornberry, op. cit., n. 26, p. 174.
55 Capotorti, op. cit., n. 24, p. 35.
56 Kamenka, op. cit., n. 46, p. 133.
57 Thornberry, op. cit., n. 26, p. 205. See, also, p. 176.
58 id., p. 176. In addition, article 5(1) should be read in the light of this observation. It stipulates that, 'Nothing in the present Covenant may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.' This is understood to mean that ethnic groups cannot rely on article 27 as a justification for acts aimed at the destruction of any Covenant rights, including the non-discrimination right enunciated in article 2. Because the rights conferred by the Covenant vest in individuals rather than groups, a group cannot compel any of its members to abide by its practices or prevent them from embracing the dominant culture (id., p. 205).
59 id., p. 176.
60 UN General Assembly Resolution 47/135, 18 December 1992; (1993) 32 *International Legal Materials* 911.
61 Thornberry, op. cit., n. 26, p. 394. See, also, J. Crawford, 'The Rights of Peoples: "Peoples" or "Governments"' in Crawford, op. cit., n. 45, p. 56 at 60; G. Triggs, 'Peoples' Rights and Individual Rights: Conflict or Harmony', id., p. 141 at 155; R. Howard, 'Dignity, Community and Human Rights' in *Human Rights in Cross-Cultural Perspectives*, ed. A. An-Na'im (1992) 81 at 97–8; Brownlie, op. cit., n. 45, p. 15. The decision of the Human Rights commission in *Lovelace* v. *Canada* (n. 14 above) is relevant here as it held that it was a breach of article 27 of the Covenant on Civil and Political Rights to deny Lovelace the right to live with the tribe on the basis of her marriage to a non-Indian man.
62 'United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action' (1993) 32 *International Legal Materials* 1661.
63 L.V. Prott, 'Cultural Rights as Peoples' Rights in International Law' in Crawford, op. cit., n. 45, p. 93 at 95.
64 R. Billington et al., *Culture and Society* (1991) 21.
65 A. Swingewood, *The Myth of Mass Culture* (1977) 26.
66 Quoted in Billington, op. cit., n. 64, p. 5.
67 Quoted in id., p. 43.
68 Raymond Williams, *Problems in Materialism and Culture* (1980) 34.
69 Billington, op. cit., n. 64, p. 27.

70 Williams, op. cit., n. 68, pp. 38–9.
71 id., p. 40.
72 id., p. 45.
73 E. Hobsbawm, 'Introduction: Inventing Traditions' in *The Invention of Tradition*, eds. E. Hobsbawm and T. Ranger (1983) 1.
74 T. Ranger, 'The Invention of Tradition in Colonial Africa' in Hobsbawm and Ranger, id., p. 211.
75 id., p. 220.
76 id., p. 253 (quoting J. Iliffe, *A Modern History of Tanganyika* (1979) 327–9, 334.
77 S. Engle Merry, 'Law and Colonialism' (1991) 25 *Law and Society Rev.* 889.
78 id., pp. 890–1.
79 id., p. 893.
80 Hobsbawm, op. cit., n. 73, p. 2.
81 id., p. 9.
82 id., p. 13.
83 id., p. 4.
84 Hassim, op. cit., n. 11, p. 4.
85 id., pp. 4–5.
86 M. Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1985).
87 Merry, op. cit., n. 77, p. 897.
88 See, for example, S. Burman, 'Fighting a Two-Pronged Attack: The Changing Legal Status of Women in Cape-Ruled Basutoland, 1872–1884' in *Women and Gender in Southern Africa to 1945*, ed. C. Walker (1990) 48.
89 Ranger, op. cit., n. 74, p. 254.
90 Hassim, op. cit., n. 11, pp. 7–8.
91 R.E. Howard, 'Human Rights and the Necessity for Cultural Change' (unpublished).
92 A. An-Na'im, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights' in An-Na'im, op. cit., n. 61, p. 19 at 27–8. See also T. Nhlapo, 'Culture and Women Abuse: Some South African Starting Points' (1992) 13 *Agenda: A Journal About Women and Gender* 5 at 12. While Nhlapo argues that culture is never used to justify practices by the victims of those practices, there is evidence that cultural meanings are internalized by those who could be considered victims.
93 L. Ahmed, *Women and Gender in Islam* (1992) 154–5.
94 E. Gellner, *Postmodernism, Reason and Religion* (1992) 63.
95 S. Hall, 'Cultural Studies: Two Paradigms' in *Culture, Ideology and Social Process: A Reader*, eds. T. Bennett et al. (1981) 19 at 33.
96 W. Kymlicka, *Liberalism, Community and Culture* (1989).
97 id., pp. 165–6.
98 id., p. 190.
99 id., pp. 189–90 and p. 198.
100 id., p. 192.
101 *Gerhardy* v. *Brown* (1985) 59 *Australian Law J. Reports* 311 at 339.
102 Kymlicka, op. cit., n. 96, p. 167.
103 id., p. 191.
104 id., p. 197.
105 id., p. 199.
106 id., p. 198.
107 id., p. 199.
108 F. Kaganas and C. Murray, 'Law Reform and the Family: The New South African Rape-in-Marriage Legislation' (1991) 18 *J. of Law and Society* 287.
109 For example, Ms Mamashele has found in Lesotho that parents do not necessarily leave their property to the rightful male heir; the child most likely to inherit is the one who has been most dutiful ('The Lesotho Experience: Inheritance in Customary Law' – paper

presented at *The Right of the Child to a Secure Family Life* seminar, Community Law Centre, University of the Western Cape, 26 March 1994). See, also, A. Armstrong, 'Uncovering Reality: Excavating Women's Rights in African Family Law' (1993) 7 *International J. of Law and the Family* 314.

110 Section 181 of the Constitution provides that indigenous law shall be subject to regulation by law.

111 D. Dyzenhaus, 'Liberalism, Autonomy and Neutrality' (1992) 42 *University of Toronto Law J.* 354 at 373.

112 id., p. 375.

113 J. Flax, 'The End of Innocence' in *Feminists Theorize the Political*, eds. J. Butler and J.W. Scott (1992) 445 at 452.

114 See Gellner, op. cit., n. 94, p. 49. The internal contradictions of this approach have been extensively discussed. See, generally, J. Margolis, *The Truth About Relativism* (1991):

'We cannot possibly know that and how another community uses "true". . . differently from ourselves all the while we use "true" only in the relativist's way. We cannot know that "*Schnee ist weiss*" is true in their "world" but not in ours, if we suppose we are confined to what is true in our world . . . and they are confined to what is true in their world . . .' (at p. 67). The way out of this dilemma is to restrict one's claims to the norms of societies (or cultures). Different societies have different norms: '[F]rom a God's-eye view, it would be nonrelativistically true that different folks had different obligations in different societies. What's relativistic about that is simply that the obligations of one society could, as such, not be the obligations of another' (at p. 64). This reduces relativism to a form of pluralism, says Margolis.

115 I. Young, *Justice and the Politics of Difference* (1990); Flax, op. cit., n. 113.

116 Gellner, op. cit., n. 94, p. 74.

117 id., p. 71.

118 See A. Bunting, 'Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies' (1993) 20 *J. of Law and Society* 6.

119 Young, op. cit., n. 115, p. 258.