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Building a South African Human Rights Culture in the Face of Cultural Diversity: Context and Conflict

John Cantius Mubangizi[1]
Deputy Vice-Chancellor and Head, College of Law and Management Studies,
University of KwaZulu-Natal, Durban, South Africa

Abstract
South Africa has faced enormous challenges since the advent of democracy in 1994. One of the difficulties in the post-apartheid era has been the building of a human rights culture in the context of substantial cultural diversity. In this paper, the constitutional, judicial and institutional contexts – which have consolidated and supported the expression of human rights in the face of cultural diversity – are reviewed. The focus on cultural rights in the constitution is discussed, and the relevance of several constitutional institutions in terms of ensuring human rights, is mentioned. With a clear understanding of the constitutional, judicial and institutional contexts in place, the paper discusses the potentially inherent conflict between human rights and cultural rights, using gender-related issues as a proxy. Several examples of this potential conflict are discussed, including female circumcision, virginity testing and polygamy. The importance of human rights education for informing the debate about cultural and human rights in South Africa is emphasized. The answers to the challenges associated with the clash between cultural rights and human rights are not simple, although pragmatically – in addition to the role of the available constitutional, judicial and institutional structures – they could reside in a cross-cultural debate.

Keywords
South Africa; human rights; conflict, cultural rights; gender issues

1. Introduction

In 2002, the United Nations General Assembly adopted a resolution on human rights and cultural diversity.[2] The resolution recognised that cultural diversity and the pursuit of cultural development by all peoples and nations is a source of mutual enrichment for the cultural life of humankind.[3] It also recognized that 'respect for cultural diversity and the cultural rights of all enhances cultural

[1] Professor John Cantius Mubangizi is the author of *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (Juta & Company: 2004); co-editor of *The Creation of the University of KwaZulu-Natal: Reflections on a Merger and Transformation Experience* (Excel Books: 2010) and has written chapters in several academic books, in addition to a number of book and chapter reviews. The author has published more than thirty peer-reviewed articles in accredited local and international journals.

[2] United Nations General Assembly Resolution A/RES/56/156.

[3] *Ibid.*

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pluralism, contributing to a wider exchange of knowledge and understanding of cultural background, advancing the application and enjoyment of universally accepted human rights throughout the world.'[4] The resolution called upon all states to recognize and promote respect for cultural diversity, in order to advance the objectives of peace, development and universally accepted human rights.[5]

South Africa is a typical example of a multicultural society which is characterised by extensive cultural diversity. This diversity manifests itself in terms of diverse cultural practices and beliefs, and is often associated with race, colour, language, ethnicity, religion, and class. As a result, the concept of cultural diversity has meant different things to different people in South Africa. For some people it did or still does conjure up notions of divide-and-rule strategies and differential treatment of groups, which was the whole basis of apartheid. In view of the relationship between race and culture, it is easy to see why cultural diversity has remained an issue in South Africa.

This article documents and reviews the relevant constitutional, judicial and institutional contexts within which a culture of human rights has been built in South Africa since the advent of democracy in 1994. The aim is not to initiate a debate around how these institutions adjudicate in the perceived clash between human rights and cultural rights – which is discussed later in the paper – but rather, it is firstly to provide an important legal knowledge foundation, which is frequently lacking from papers discussing cultural rights issues. This paper is a personal assessment and review of the period and issues at stake, and refers particularly to the period since the adoption of the new 1996 Constitution. The conflict between human rights and cultural rights is not unique to South Africa and is a discourse entertained across numerous African societies and states. It is impossible to meaningfully review the conflict between all cultural traditions and human rights in South Africa, and thus – as a second aim of the paper – gender-related issues are discussed as a proxy. It is hoped that the article will stimulate further analysis of the issues, such that they can eventually be negotiated and resolved. In this spirit, the importance of public education on human rights in South Africa is briefly discussed.

It is firmly held that only with a sound knowledge of the constitutional, judicial and institutional contexts relating to human rights and cultural rights in South Africa, can we successfully contextualise, interpret, understand and deal with both issues. This process is considered to be fundamental to consolidating and building a broader human rights culture in South Africa.

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4) *Ibid.*
5) *Ibid.*

2. What Is a Human Rights Culture?

The concept of 'culture' is central to the discussion in this paper. It is therefore imperative that a working definition of the concept is attempted, before it can be understood what is meant by 'a human rights culture' or 'cultural diversity'. It should be noted, however, that in this paper the word 'culture' is employed in two distinct senses. In the first sense, it is used in the way defined by Tylor in his seminal work *Primitive culture*, as 'that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.'[6] This definition has long been used by social scientists, and is consistent with Hofstede's definition of culture, as 'the collective programming of the mind which distinguishes the members of one category of people from another.'[7] Will Kymlicka has taken this definition a step further, by confining it to *societal* culture, which he describes as 'a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.'[8] It is in this context, that the concept of 'cultural diversity' should be understood.

In the second sense, the word 'culture' is used colloquially to mean a way of acting, thinking and doing things. It is in this context that the phrase 'a human rights culture' is used. It can therefore be said that a human rights culture is a culture where human rights are respected and enjoyed or, as one commentator has suggested, it is 'a way of life guided by the human rights framework.'[9] Such a culture is what another commentator has referred to as a 'lived awareness of the human rights principles in one's mind, heart, and body, carried into one's everyday life.'[10]

There is no doubt that the need to build a human rights culture is largely underpinned by, and flows from, the rationale for the protection of human rights. In other words, the very reason why human rights should be protected in fact informs the need for building a human rights culture. In that regard, the United Nations' description of human rights 'as those rights which are inherent in our nature and without which we cannot live as human beings'[11] is pertinent. Moreover, the United Nations has also described the protection of human rights as a

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6) E.B. Tylor, *Primitive Culture* (6th ed., John Murray, London, 1920, originally 1871) 1.

7) G. Hofstede, *Culture's Consequences: International Differences in Work-Related Values* (Sage, Newbury Park, 1980).

8) See W. Kymlicka *Multicultural Citizenship* (Oxford University Press, Oxford, 1995) 76.

9) See S. Koenig 'Re: Culture of human rights' <http://www.hrea.org/lists/hr-education/markup/msg01132.html> accessed 2 June 2011.

10) See J. Wronka, 'Toward the creation of a human rights culture: The key for a socially just world' <http://www.humanrightsculture.org> accessed 2 June 2011.

11) See United Nations, 'Human Rights: Questions and Answers' (1987) 4.

necessary prerequisite for the avoidance of the creation of conditions of social and political unrest, violence and conflict.[12]

Human rights are also a necessary component of any democratic society. The protection of human rights is therefore necessary for democracy. According to Thomas Franck, the

> [t]erm 'democracy', as used in international human rights parlance, is intended to connote the kind of governance that is legitimated by the consent of the governed. Essential to the legitimacy of governance is evidence of consent to the process by which the populace is consulted by its government.[13]

Whereas Franck acknowledges the shortcomings of this conception, he further contends that it 'probably represents the limit of what the still frail system of states can be expected to accept and promote as a right of people assertable against their own, and other, governments.'[14]

3. Human Rights and Cultural Diversity in the South African Context

3.1. *The Constitutional Context*

The framers of the South African Constitution included various provisions that have a direct or indirect impact on cultural diversity. Section 6 – which recognises 11 official languages – is a good example. So too is Section 18, which protects the freedom of every person to associate with other people of his or her choice – thereby encompassing the right to participate in a culture of one's choice.[15] As will be discussed below, Section 30 deals with the right to use the language of one's choice, and to participate in the cultural life of one's choice, while Section 31 protects people's cultural, religious and linguistic rights. Moreover, Section 185 provides for the creation of a Commission to promote and protect these rights.

It is therefore submitted that the South African Constitution has played an important role in protecting and maintaining cultural diversity, and that this role has been crucial in building a culture of human rights. In their judicial and constitutional interpretive role, the courts have also made a significant contribution. So have several new institutions, which are creatures of the constitution – as discussed below.

In the specific context of cultural diversity, it is important to note that the preamble to the Constitution states that 'South Africa belongs to all who live in

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12) *Ibid.*

13) See T.M. Franck, 'The emerging right to democratic governance' (1992) 86 *American Journal of International Law* 92.

14) *Ibid.*

15) G.E. Devenish, *A Commentary on the South African Bill of Rights* (Butterworths, Durban, 1999) 418.

it, united in our diversity'. This is a powerful expression of the country's commitment and intention to build a human rights culture, through constitutional means, despite the challenges posed by cultural diversity. The preamble also clearly sets out four objectives, one of which is, 'heal[ing] the divisions of the past and establish[ing] a society based on democratic values, social justice and fundamental human rights.' This intention is further emphasised in the opening Section of the Constitution, which lists a number of values on which the Republic of South Africa – as one sovereign, democratic state – is founded. These include – but are not limited to – human dignity, the achievement of equality, the advancement of human rights and freedoms, and non-racialism and non-sexism.[16]

Reference to some of these values is repeated in several other Sections of the Constitution. For example, Section 7(1) describes the Bill of Rights as 'a cornerstone of democracy in South Africa [which] enshrines the right of all people in our country and affirms the democratic values of human dignity, equality and freedom.' Section 36, which provides for the limitation of rights in the Bill of Rights, states that these rights may be limited only in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Reference to these values is again made in Section 39(1), which requires a court, tribunal or forum, to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom', when interpreting the Bill of Rights. The repetition of these values in various Sections of the Constitution emphasises their centrality and pivotal role in the new democratic order. More importantly, it highlights that the new democratic order envisaged by the post-apartheid Constitution, can only exist in a culture of human rights.

The existence of a human rights culture in South Africa derives mainly from the human rights protection accorded by the Constitution. Indeed, as mentioned earlier, one of the most outstanding features of the South African Constitution is that it contains a Bill of Rights, which is described in the Constitution as 'the cornerstone of democracy.'[17] It is generally believed that the South African Bill of Rights is one of the most progressive in the world, mainly because it contains all categories of human rights (civil, political, social, economic and cultural) that are ordinarily included in most international human rights instruments.

3.2. *The Constitution's Focus on Cultural Rights*

The inclusion of cultural, religious and linguistic rights in the South African Constitution is a recognition and acknowledgement of the cultural diversity of the South African people. It must be mentioned, however, that the problem of accommodating and protecting these rights in a democratic state, was one of the most

16) S 1 of the Constitution.
17) S 7 of the Constitution.

contentious issues during the constitutional negotiations that preceded the 1994 democratic dispensation.[18]

Section 30 of the Constitution deals with two rights, namely, the right to use the language of one's choice and the right to participate in the cultural life of one's choice. This paper's focus is on the latter, although there is an inextricable link between the two. The right to participate in the culture of one's choice also has to be seen in the context of, and read together with, Section 31(1) – which guarantees the right of persons belonging to a cultural, religious or linguistic community – a) to enjoy their culture, practice their religion and use their language; and b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

As discussed below, the intention to protect and maintain cultural diversity captured in Sections 30 and 31, is given further impetus by Section 185 of the Constitution, which provides for the creation of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. It is also given recognition by Section 211(3), which provides for the application of customary law by the courts 'subject to the Constitution and any legislation that specifically deals with customary law.' This is because, it has been argued, the right to culture implies the right to recognition and application of customary law.[19]

It should be emphasised that the exercise of the right to culture in Sections 30 and 31, is subject to certain limitations. In addition to the standard limitation in Section 36, the rights in Section 30 and 31 may not be exercised 'in a manner inconsistent with any provision of the Bill of Rights.'[20] It is submitted that the inclusion of these internal limitations recognises the potential conflict that may arise from the dominance of one cultural group over other groups, in the enjoyment of their rights. It is also an expression of the desire to recognise the importance of cultural diversity within the context of a human rights culture.

It must also be noted that while Section 30 provides for an individual right (to use the language and participate in the cultural life of one's choice), Section 31, in addition to providing for individual rights, seems to recognise group or collective interests. By using the words 'belonging to a cultural, religious or linguistic community', the provision recognises that these rights 'are not rights of autonomous individuals acting separately – they are rights that can be meaningfully exercised only in concert with other members of the community.'[21] This

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18) See M. Reddi, 'Minority language rights in South Africa: A comparison with the provision of international law' (2000) 35(3) *Comparative and International Law Journal of Southern Africa* 329.

19) E. Grant, 'Human rights, cultural diversity and customary law in South Africa' (2006) 50(1) *Journal of African Law* 7.

20) Ss. 30 and 31(2).

21) N. Haysom and A. Cachalia, 'Language and culture' in H. Cheadle, D.M. Davis and N. Haysom (eds), *South African Constitutional Law: The Bill of Rights* (Butterworths, Durban 2002) 567.

recognition is arguably intended to emphasise the need to build a human rights culture, which 'seeks to harmonise and balance the interests of a plurality of cultural communities [and] has more potential to protect and promote diversity.'[22]

From the foregoing discussion, it can be seen that the Bill of Rights in the Constitution provides a powerful incentive for the development of a human rights culture in South Africa – despite the country's cultural diversity. However, for such a culture to be meaningfully sustained there ought to be reasonable mechanisms for the implementation and enforcement of the rights enshrined in the constitution. To that end, Section 7(2) of the Constitution enjoins the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights.' The implication here is that the state must not only refrain from interfering with the enjoyment of rights, but it must also act so as to protect, enhance and realise their enjoyment.[23] The state may do this in several ways: through the legislature by enacting the relevant enabling legislation; and through the executive and state administration by adopting the necessary policies and making the appropriate administrative decisions. It is mainly through judicial enforcement, however, that the realisation and enjoyment of human rights (and therefore the building of a human rights culture) takes place, and consequently, this is now discussed.

3.3. *The Role of the Courts*

One of the seminal functions of the courts is to protect human rights. In performing this function, the courts play an important role in building a culture of human rights. This happens in several ways. Firstly, it may happen through the interpretation of the Bill of Rights as stipulated in Section 39(1) of the Constitution. Under that Section, '[w]hen interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.'[24] Secondly, the courts play the role of building a human rights culture through their law-making powers of interpreting legislation, and developing the rules of the common law. In that regard, Section 39(2) of the Constitution states that: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

This confirms that the interpretational role of the courts is not restricted to Chapter 2 of the Constitution, but extends to any legislation. It also shows that courts are constitutionally obliged to interpret such legislation, and to develop

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22) *Ibid.*, 569.

23) See D. Brand, 'Introduction to socio-economic rights in the South African constitution' in D. Brand and C.H. Heyns (eds), *Socio-economic Rights in South Africa* (Pretoria University Law Press, Pretoria 2005) 9.

24) S. 39 (1).

rules of common law or customary law, in such a way that promotes the spirit, purport and objects of the Bill of Rights. In other words, courts are 'required to infuse legislation and the common law with the value system underlying the Constitution – to read the rights in the Bill of Rights under the values underlying them into the existing law.'[25] According to Danie Brand: 'This power of the courts to engage constitutionally with the existing law is, particularly with respect to the common law, an extremely important… way in which [human] rights can be advanced.'[26]

The third way through which courts can and do play an important role in building a human rights culture is: '…by adjudicating constitutional and other challenges to state measures intended to advance those rights.'[27] An example of this protective role of the Constitutional Court was illustrated in *Minister of Public Works v. Kyalami Ridge Environmental Association*[28] in which the Court, through its decision, effectively protected the right to adequate housing of flood victims from private interference.[29] Because the Constitutional Court has wide jurisdiction in constitutional matters, its role and importance in the protection of human rights cannot be over-emphasised. One important aspect in which the role of the Court is of critical importance relates to the interpretation, application and enforcement of the Bill of Rights. In playing that role, the Court is a legal watchdog that contributes to the promotion of human rights, and therefore the building of a human rights culture in South Africa.

Since its inception, the Constitutional Court has passed numerous innovative and landmark judgments, many of which have a direct bearing on the protection of human rights, and the building of a human rights culture. Lourence du Plessis[30] gives an eloquent synopsis of the Court's equality jurisprudence relative to the issues of identity and difference in South Africa, and discusses how it has challenged several 'mainstream' preferences relating to a number of cultural issues, including religious considerations, and sensitive 'taboo' topics previously relegated to the 'private sphere'. The issue of equality jurisprudence was also discussed by Hoyt Webb through an analysis of some of the earlier Constitutional Court cases including *S v. Makwanyane and Another*[31] which outlawed the death penalty.[32] In an earlier publication, Brice Dickson analysed the decisions of the

25) *Supra* note 23, p. 39.
26) *Ibid.*
27) *Ibid.*, p. 38.
28) 2001 3 SA 1151 (CC).
29) *Ibid.*
30) L. Du Plessis 'Affirmation and celebration of the 'religious Other' in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?' (2008) 8(2) *African Human Rights Journal 376*.
31) 1995 3 SA 391 (CC).
32) See H. Webb, 'Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law' (1998–1999) 1 *University of Pennsylvania Journal of Constitutional Law* 205.

Constitutional Court during its first two and a half years of existence and showed the important role the Court had played in the building of a human rights culture.[33] Another issue area that has been developed by the Constitutional Court is the enforcement of socio-economic rights. Indeed, through a number of groundbreaking decisions, the South African Constitutional Court has demonstrated – rather innovatively it must be added – by using the common law and existing legislation, that socio-economic rights are enforceable and justiciable. The first case to engage directly with the enforcement of such rights was *Soobramoney v. Minister of Health, KwaZulu-Natal*[34] which involved an application for an order directing a state hospital to provide the appellant with ongoing dialysis treatment and interdicting the respondent from refusing him admission to the renal unit. The *Soobramoney* case was followed by *The Government of the Republic of South Africa v. Grootboom*,[35] in which a group of adults and children who had been rendered homeless as a result of eviction from their informal dwellings applied for an order directing the local government to provide them with temporary shelter, adequate basic nutrition, health care and other social services. The Constitutional Court held that the state had failed to meet the obligations placed on it by Section 26 and declared that the state's housing programme was inconsistent with Section 26(1) of the Constitution. The Constitutional Court's decision in *Minister of Health and Others v. Treatment Action Campaign and Others*[36] is probably the *locus classicus* on the enforcement of socio-economic rights in South Africa. In that case, the Treatment Action Campaign (TAC), a non-governmental organisation, in a bid to force government to provide anti-retroviral drugs under the public health care system, specifically demanded that nevirapine, a drug that could reduce by half the rate of HIV transmission from mothers to babies, be freely distributed to women infected with the virus. The Court held that the government's policy and measures to prevent mother-to-child transmission of HIV at birth fell short of compliance with Section 27(1) and (2) of the Constitution and ordered the state to provide the required medication and remedy its programme.

The depth and scope of this paper do not lend themselves to a detailed discussion of the entire Constitutional Court's socio-economic jurisprudence. Suffice to say that there are several other cases involving socio-economic rights that have come before the South African Constitutional Court through which the Court has demonstrated the role it can play in the judicial enforcement of socio-economic rights and the building of a human rights culture in South Africa.

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33) See B. Dickson, 'Protecting Human Rights through a Constitutional Court: The Case of South Africa' (1997–1998) 66 *Fordham L. Rev*. 531.
34) 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696.
35) 2000 (11) BCLR 1169 (CC).
36) 2002 (5) SA 703 (CC).

3.4. *The Institutional Context*

The constitutional imperative to protect and promote human rights, thereby building a human rights culture, is not the sole preserve of the courts. Certain constitutional institutions (sometimes generically referred to as human rights institutions) also play a vital role. Chapter 9 of the 1996 Constitution provides for, and establishes, the following 'state institutions [to] strengthen constitutional democracy in the Republic':

(a) The Public Protector;
(b) The South African Human Rights Commission;
(c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;
(d) The Commission for Gender Equality;
(e) The Auditor-General; and
(f) The Electoral Commission.[37]

Not all these institutions play the same role in the promotion and protection of human rights. Furthermore, only those that are relevant to the theme of building a human rights culture, particularly in the context of cultural diversity, are discussed here. One of those is the Public Protector. Under the 1996 Constitution, the powers and functions of this functionary are laid out in Section 182. Under that provision, the Public Protector has the power:

a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
b) to report that conduct; and
c) to take appropriate remedial action.

The role of the Public Protector in the protection of human rights is indirect. A close look at Section 182(1) reveals that the functions of this office are three-fold – to investigate any improper conduct in state affairs or public administration, to report such conduct, and to take appropriate remedial action. It may be argued that in performing these functions, human rights abuses resulting from state misconduct and public maladministration are curbed.

The other relevant institution is the Human Rights Commission. The powers and functions of the Commission are laid down in Section 184 of the Constitution. Firstly, the Commission is obliged to:

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[37] S 181(1) of the Constitution.

a) Promote respect for human rights and a culture of human rights;
b) Promote the protection, development and attainment of human rights; and
c) Monitor and assess the observance of human rights in the Republic.[38]

Secondly, the Commission has the powers as regulated by national legislation necessary to perform its functions, including the power to investigate and report on the observance of human rights, to take steps to secure appropriate redress where human rights have been violated, and to carry out research and education.[39]

A closer look at Section 184 shows that the Human Rights Commission has extensive powers, and performs important functions insofar as the protection of human rights is concerned. It exercises those powers and carries out those functions in various ways. These include education and public awareness, making recommendations to parliament, reviewing legislation, investigating alleged violations of human rights, and assisting victims of human rights violations in order to secure redress. By carrying out these functions, the Commission serves a pivotal watchdog function regarding human rights protection.

In the context of cultural diversity, another important human rights watchdog is the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. Its primary objectives are set out in Section 185(1) of the Constitution as:

a) To promote respect for the rights of cultural, religious and linguistic communities;
b) To promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
c) To recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

In terms of the above provision, the main purpose of this Commission is to promote respect for all the cultures, languages and religions in South Africa. As such, it has power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.[40] It may be argued that the primary role of the Commission is an educative and promotional one, which role incidentally coincides with that of the Human Rights Commission (discussed above). It is therefore not surprising that according

38) S 184(1).
39) S 184(2).
40) S 185(2).

to Section 185(3), the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, may refer any matter to the Human Rights Commission for investigation.

The final institution worth mentioning is the Commission for Gender Equality, whose main objective is to promote respect for gender equality, and as such it is mandated with the development and attainment of that equality.[41] The Commission has the power, as regulated by national legislation, necessary to perform its functions – including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.[42] Clearly the Commission for Gender Equality has an important role to play in the promotion and protection of women's rights. It also has a vital responsibility of influencing attitudes towards women, in a society that has traditionally overlooked and disregarded the equal status of women and men.

Of all the constitutional institutions mentioned above, the South African Human Rights Commission has proven to be the most important and most prominent in so far as building a culture of human rights is concerned. It has, however, generally been criticised for not doing enough in the area of human rights education. It has also been criticised for not always being consistent in the way it tackles human rights issues and its failure to deal speedily and effectively with complaints by ordinary citizens about the infringement of their rights.[43] Regarding the Public Protector, there is a general perception that this institution is not the independent and fearless watchdog that the Constitution had envisaged. This perception may well have been due to the ineffectual and inefficiency of the previous Public Protector. The newly appointed Public Protector has clearly shown more independence and more vigilance in her work by successfully conducting high profile investigations that have resulted, *inter alia*, in the dismissal of two cabinet ministers.[44] As argued earlier, by conducting such investigations and curbing state misconduct and public maladministration, human rights are indirectly protected.

As for the effectiveness of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the findings of the 2007 Kader Asmal Ad Hoc Committee Report[45] are quite revealing. The Ad

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41) S 187(1).

42) S 187(2).

43) See P. De Vos 'R.I.P. Human Rights Commission?' <http://constitutionallyspeaking.co.za/rip-human-rights-commission/>, accessed 23 December 2011.

44) In October 2011, acting on the findings of the Public Protector's investigations, the State President dismissed the Minister of Public Works, Gwen Mahlangu-Nkabinde and the Minister of Co-operative Governance and Traditional Affairs, Sicelo Shiceka and placed the national Police Commissioner Bheki Cele on suspension. The investigations found Mahlangu-Nkabinde and Bheki Cele to have flouted proper processes in two police office leases, and Sicelo Shiceka to have committed numerous violations of the Executive Ethics Code (See 'Ministers axed as Zuma acts on protector's findings' at <http://www.businessday.co.za/articles/Content.aspx?id=156859>, accessed 13 January 2012.

45) See Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions <http://

Hoc Committee did not only find that the Commission had 'not settled yet on what exactly constituted a cultural, religious or linguistic community – despite the fact that it was the main task of the Commission to promote the rights of such communities', it also found that the Commission did not clearly understand its powers in terms of the Constitution. Furthermore, the Ad Hoc Committee found that the small number of complaints received by the Commission either indicated 'that the public was unaware of the work done by the Commission, or that it has no confidence that the Commission will be able to address its concerns'. The Commission on Gender Equality has been equally ineffectual. Since its inception, it has had a low profile and has most of the time been embroiled in controversy. As such it has hardly executed its constitutional mandate in any meaningful way.

As mentioned earlier, the role of national human rights institutions in building a human rights culture in a multi-racial and multi-cultural society with a multiparty democracy such as South Africa's cannot therefore be overemphasized. It is therefore surprising that the main recommendation of the 2007 Kader Asmal Ad Hoc Committee that five existing institutions be merged to form a single human rights umbrella body is yet to be implemented.

4. The Human Rights Challenge of Gender-Related Cultural Practices

The main challenge of building a human rights culture in a culturally diverse South Africa, is being able to identify the various cultures and the relevant vulnerable persons and groups. The common assumption that 'we all know who we are talking about', may not be that easily applicable in a country like South Africa, where the culture of a particular person is determined by non-homogeneous factors, and could mean different things to different people. As a result, cultural rights are sometimes interpreted as rights of minorities, although the South African Constitution has carefully avoided the use of that concept.

A special challenge, therefore, is to identify the smaller, lesser known, but vulnerable cultural groups, and to accord them the same human rights protection enjoyed by the larger or more visible cultural groups. In that particular context, liberal multiculturalists have argued in support of the right to cultural membership and the right of vulnerable minority cultures to be shielded against external pressures. Will Kymlicka argues, for example, that people should not only be

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www.pmg.org.za/node/14142> accessed 23 December 2011. The Ad Hoc Committee was appointed by Parliament to review the state institutions supporting constitutional democracy as listed in Chapter 9 of the Constitution (the so-called Chapter 9 institutions), by broadly assessing whether the constitutional and legal mandates of these institutions are suitable for the SouthAfrican environment, whether the consumption of resources by them is justified in relation to their outputs and contribution to democracy,and whether a rationalisation of function, role or organisation is desirable or will diminish the focus on important areas.

given the legal right to stand back and assess their moral values and traditional ways of life, but also the social conditions which enhance this capacity.[46] On the other hand, there are those who disagree and instead advocate a neutral state that, in principle, refrains from supporting particular cultures. Brian Barry, for example, argues that cultures are simply not the kind of entities to which rights can be ascribed.[47] This argument is supported by Peter Jones, who points out that:

> …cultures are not moral entities to which we can owe obligations of fairness. Insisting that we should be fair to cultures merely as cultures is like insisting that we should be fair to paintings or to language or to musical compositions… So, if we seek to deal fairly with cultural diversity, it is not cultures that will be the ultimate objects of our concern but the people who bear them.[48]

This debate, which is premised within liberal political philosophy, clearly epitomises the main challenge to the building of a human rights culture in a culturally diverse society. The other equally significant challenge is the achievement of full and effective equality, of which the non-negotiable minimum is the prohibition of discrimination as laid out in Section 9 of the Constitution. This challenge is demonstrated by the potential conflict that exists between certain cultural practices and the enjoyment of human rights (such as the right to equality) – ordinarily recognised by most international human rights instruments and the South African Constitution.

One such cultural practice is the custom of female circumcision, otherwise referred to as female genital mutilation (FGM). Although the practice of FGM is not considered to be widespread in South Africa, it has been reported in some parts of the Eastern Cape and KwaZulu-Natal Provinces. A lot has been said and written about FGM and it is widely reported in the literature in terms of its conflict with human rights. Almost all commentators and authors are agreed that FGM is rooted in a culture of discrimination against women and that it is therefore intimately linked to the unequal position of women in the political, social, and economic structures of societies where it is practiced.[49] In a critical appraisal of the practice of FGM, Alison Slack highlighted the conflict between the practice of female circumcision as a human rights violation on one hand and as a legitimate cultural tradition on the other.[50] Focusing on the conflict between the human rights perspective and the view of cultural sovereignty, she argued that any 'tradition' that routinely harms or kills people, is a human rights violation and

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46) *Supra* note 8, p. 92.

47) B. Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard University Press, Cambridge, MA, 2001) 67.

48) P. Jones, 'Political Theory and Cultural Diversity' (1998) 36 *Critical Review of International Social and Political Philosophy* 1.

49) See 'Female genital mutilation: A fact sheet' <http://www.amnestyusa.org/women/violence/female_genital_mutilation.html>, accessed 14 June 2011.

50) See A. Stack, 'Female Circumcision: A Critical Appraisal' (1988) 10 *Human Rights Quarterly* 437–486.

must be stopped.[51] Another scholar, Hope Lewis, in an influential article, discusses FGM in the context of international human rights law and shows how the practice violates a number of international human rights standards, including the right to bodily integrity, the right to life, the right to the highest attainable standard of health, the rights of children, and the rights of women and girls to equality and non-discrimination.[52]

A similarly repugnant cultural practice that is incompatible with international human rights norms and discriminates against women is that of virginity testing. This is widely practised among the Zulu people, and is therefore widespread in the province of KwaZulu-Natal. The practice of virginity testing involves the physical examination of a girl's genitalia, in order to determine whether the hymen (a small membrane that stretches across part of the vaginal opening) is intact. A girl whose hymen is found to be intact is considered to be a virgin. A girl whose hymen is found to be broken, will have failed the test. Attempts to regulate and ban the practice, especially in children, have been met with outrage by Zulu traditionalists.[53]

Polygamy is another cultural practice that impacts directly and indirectly on the fundamental rights of women, particularly the right to equality. So too is the cultural practice of marriage by abduction, also known as *ukuthwala*. This involves the waylaying or capturing of a girl and forcibly taking her to a man's home in marriage. The 'capturing' is usually done by a group of people, one of whom is the future husband. What follows is anyone's guess, but some have described it as rape.[54] The payment of bride price (*lobola*) is another custom practiced in many parts of South Africa. So too is the customary rule of primogeniture, which refers to the right of the eldest surviving male to inherit the estate of the parents.

All these cultural practices result in human rights abuses that function as instruments for socialising women into prescribed gender roles within the family and community, thereby undermining any meaningful attempts to build a culture of human rights. In the specific context of polygamy, for example, the fact that the king of the Zulu people (arguably the largest cultural group in South Africa) has more than five wives and the South African State President (a Zulu himself) has three wives, is a clear indication of the magnitude of the challenge posed by the conflict between culture and human rights. It should be noted, however, that the conflict between gender-based cultural practices that are an obstacle to the full participation of women in society – and human rights – are

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51) *Ibid.*

52) See H. Lewis, 'Female Genital Mutilation and Female Genital Cutting' *Encyclopaedia of Human Rights* (2009) 2 200–213.

53) L. Vincent, 'Virginity testing in South Africa: Re-traditioning the Postcolony' (2006) 8(1) *Culture, Health & Sexuality* 17–30.

54) See N. Wadesango, S. Rembe and O. Chabaya, 'Violation of Women's Rights by Harmful Traditional Practices' (2011) 13(2) *Anthropologist* 121–129.

not restricted to South Africa, and are also reported from various other countries. It is thus a sensitive topic, and as the practices are difficult to characterise as 'cultural oppression', introducing an informed debate around them is likely to be inherently difficult.

It is important to note that cultural groups naturally tend to be defensive of their traditions and cultural practices. Challenging people's traditions and cultural practices on the basis of human rights, is seen as a challenge to their culture. As a result, human rights abuses can and do sometimes occur, and are defended in the name of culture. In the Eastern Cape Province, for instance, the violation of the right to life through the Xhosa cultural practice of circumcision of young men[55] remains a source of consternation among human rights activists, but also a source of embarrassment to government health officials. The custom has drawn criticism because the circumcision is generally performed by unqualified traditional leaders, usually in unsanitary conditions.[56] In the month of May 2010 alone, some 39 young men were reported dead and 120 hospitalised after undergoing botched circumcisions.[57]

It must be noted, however, that despite the apparent slowness of action to challenge and eliminate harmful traditions and practices, there have been some successful debates and actions in other parts of Africa and beyond that have resulted in noticeable progress. In particular, the activities of relevant human rights bodies and non-governmental organisations (NGOs) in recent years, have led to significant progress in the fight against harmful cultural practices. In addition, a number of countries throughout the world have either taken or supported action to prevent such practices, for example, the complete ban on FGM in Senegal. In so far as international NGOs are concerned, mention ought to be made of the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children which was established in 1984, following a regional seminar on harmful traditional practices held that year at Dakar, Senegal.[58] Others include FORWARD International (Foundation for Women's Health Research and Development)[59] and Women for the Abolition of Sexual Mutilation (CAMS).[60]

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55) K. Peltzer and X. Kanta, 'Medical circumcision and manhood initiation rituals in the Eastern Cape, South Africa: a post intervention evaluation' (2009) 11(1) *Culture, Health & Sexuality* 83–97.

56) See News 24, 'Alarm over circumcision deaths', <http://www.news24.com/SouthAfrica/News/Alarm-over-circumcision-deaths-20100630>, accessed 14 June 2011.

57) *Ibid.*

58) The main areas of focus of IAC are training in information campaigns, and training of local activists and traditional birth attendants. See 'Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children', <http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf>.

59) FORWARD is an international human rights organization whose aim is to promote good health among African women and children internationally. Its main focus is information provision, advocacy, training of service providers, counseling and networking with other groups internationally. See 'Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women andChildren' at http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf.

60) CAMS (Commission Internationale pour l'Abolition des Mutilations Sexuelles) has its head office is in Dakar, Senegal and has a focus on research and awareness raising.

On the local front, there are several human rights NGOs which focus on advocacy on women's issues. The Women's Legal Centre (WLC) based in Cape Town is but one example. It was started in order to advance the struggle for equality of women, particularly black women, and it seeks to fulfil this objective through the promotion of women's human rights. Other women's non-governmental organizations include the Rural Women's Movement, the Women's Lobby, Agenda, Masimanyane Women's Support Centre, Black Sash, Tshwarananga Legal Advocacy Centre, and the Gender Advocacy Programme. It is suggested that South Africa can benefit from discourses and activities abroad, both at government and civil society levels, in its efforts to challenge and eliminate harmful cultural practices regardless of the diverse cultural settings within which they occur. It is further submitted that in such efforts the role of human rights education cannot be overemphasised. It is to that role that we now turn our attention.

5. Resolving the Clash between Human Rights and Cultural Rights: The Role of Human Rights Education

Human rights education can and does play an important role in building a culture of human rights in culturally diverse societies – not only in South Africa, but worldwide. Indeed, in its concluding document, the 1993 World Conference on Human Rights in Vienna reaffirmed the states' duty to ensure that education was aimed at strengthening the respect of human rights and fundamental freedoms.[61] The conference emphasised the importance of human rights education programmes, and the dissemination of proper information 'in the promotion and respect of human rights with regard to all individuals without distinction of any kind such as race, sex, language or religion…'[62]

It should be emphasised that the overall goal of human rights education is to educate all members of society to respect one another, regardless of cultural differences. According to one commentator, the primary goal of human rights education should be:

> building and strengthening the culture of human rights through the creation of citizens' awareness of their rights and duties… [while] the ultimate goal… is the formation of responsible, committed and caring citizens with sufficiently informed problem awareness and adequate value commitments to be contributors to their own communities, nation and global society in such a way that human dignity, equality and respect are upheld.[63]

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[61] Article 33, Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 <http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en>, accessed 30 June 2011.

[62] *Ibid.*

[63] See S. Yeshanew, 'Towards effective human rights education in Africa' (Unpublished LLM dissertation, Faculty of Law, University of Ghana 2004).

In that context, another commentator (Anja Mihr) identified three levels at which human rights education operate. The first is the cognitive (and most basic) level that deals with understanding the universal values, human rights standards and legal frameworks.[64] The second is the emotional and awareness level which 'focuses on the emotional response – addressing the conscious sense of responsibility towards human rights violations.'[65] The third level is the active level at which education promotes the ability to detect human rights violations and injustice.[66] Becoming active entails – amongst other things – helping people to protect their rights through advocacy, awareness campaigns and conflict resolution mechanisms.

Anja Mihr's analogy is particularly relevant in the context of cultural diversity, as it underscores the ultimate role of human rights education in the protection and promotion of human rights in the community, national and global contexts. In the particular context of South Africa, human rights education has generally been inadequate. There is a serious need to educate the public and create wider awareness of the Bill of Rights and the processes and mechanisms of its enforcement. Research conducted in 2004 showed that, at the time, about 33 percent of the South African population was unaware of the existence of the Bill of Rights in the Constitution.[67] Although the situation might have improved somewhat, much work remains to be done.

The crucial question that one has to ask is: whose primary responsibility is it to provide human rights education? Is it the government, the Human Rights Commission, human rights NGOs, traditional leaders, or human rights advocacy groups, or some combination of all these. It is important to note that the African Charter on Human and Peoples' Rights (the Banjul Charter) is quite explicit on the role of government in this regard. According to Article 25 'States parties… shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.'

It is also important to note that since its establishment, the SAHRC has dedicated itself to, *inter alia*, human rights education and training and has put in place certain public awareness programmes. It is submitted, however, that human rights education cannot be the responsibility of only the state and the SAHRC. A good example of an important role-player in human rights education is the media, who should provide citizens with all pertinent information of public interest in an unbiased manner. Another example is the role played by certain human rights NGOs. The Human Rights Institute of South Africa (HURISA) for example, is

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64) See A. Mihr, 'Minority participation: A challenge for human rights?' 2006 (1) *Journal of Social Science Education* <http://www.jsse.org/2006/2006-1/mihr-minorities.htm> accessed 30 June 2011.

65) *Ibid.*

66) *Ibid.*

67) See J.C. Mubangizi, *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (Juta, Lansdowne 2004) 149.

an NGO that offers professional services towards the promotion of a human rights culture, peace and democracy by providing training in human rights, disseminating human rights information and conducting research and advocacy.[68] While it is the primary role of the government and a functional role of the SAHRC and human rights NGOs, it is submitted that human rights education can and should be undertaken by several role-players albeit at different levels. These include the media, advocacy groups, civil society, traditional leaders, international organisations, expert bodies and members of the legal profession, to mention but a few.

Human rights education around cultural issues in South Africa should ideally promote an internal form of cultural discourse in affected communities, as well as a cross-cultural dialogue between different communities or sectors of society. 'Weaker' groups within the broader cultural community, such as women, must be able to have a debate over interpretations of cultural values, with all levels of authority – from central government down to the community itself. Human rights cannot reside only in the law – it must also be evident in the practiced culture of people in society.[69] Human rights education could be pivotal in driving this new paradigm.

6. Conclusion

South Africa is not only a country of vast cultural diversity, but it also has a unique history that has compounded this diversity. However, since the advent of democracy in 1994, several developments have led to the building of a human rights culture, amidst the said cultural diversity. Central to these developments was the new 1996 Constitution that not only contained a noted Bill of Rights, but also specifically included the protection of cultural, religious and linguistic rights. Furthermore, the Constitution established several institutions that were intended to play an important role in building a culture of human rights. In the specific context of cultural diversity, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, was one such institution. Furthermore, the courts, especially the Constitutional Court, have been of fundamental importance in building a culture of human rights.

As noted by a group of United Nations independent human rights experts: 'cultural diversity can only thrive in an environment that safeguards fundamental freedoms and human rights… [and] cultural diversity can be protected and promoted only if human rights and fundamental freedoms… are guaranteed.' The group stressed that cultural diversity should not be used to support 'harmful

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[68] See 'Human Rights Institute of South Africa – Mission Statement', <http://www.hurisa.org.za/aboutus.htm>, accessed 23 December 2011.

[69] B. Ibhawoh, 'Between culture and Constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *Human Rights Quarterly* 838–860.

traditional practices which, in the name of culture, seek to sanctify differences that run counter to the universality, indivisibility and interdependence of human rights.'[70] Unfortunately, some of the challenges identified in this paper suggest that certain cultural groups in South Africa do in fact fall fowl of this view.

All the conflicts between culture and human rights are challenges that need to be addressed, if South Africa is to realise the objective of establishing 'a society based on democratic values, social justice and fundamental human rights', as pledged in the Constitution.[71] The highly complex interplay and conflict between national human rights standards and particular cultural practices and social traditions – which are used as a proxy to illustrate the challenges of South Africa's cultural diversity in this paper – should be addressed dynamically and practically. As pointed out by Bonny Ibhawoh in a review of cultural legitimacy and human rights in Africa,[72] there are in fact pragmatic possibilities available to address the dilemma – ideally through informed national dialogue and debate. This can and should ensure that the gap between human rights provisions and cultural orientations is narrowed, such that the cultural legitimacy of these orientations is ensured. Discourses and efforts in other parts of Africa and beyond have shown that certain harmful cultural practices can be challenged and eliminated without compromising cultural legitimacy. Furthermore, the understanding and protection of human rights through proper education on the complexity of the processes involved, is seen to be of fundamental importance in establishing and securing a human rights culture in South Africa and elsewhere.

There is an inherent difficulty in building a human rights culture in a society like South Africa's, which is sometimes characterised by strong adherence to particular cultural beliefs and practices. The gender-related cultural practices discussed in this paper are a good example of this. Ideally, mechanisms could potentially be used to change and adapt cultural attitudes, so that they complement human rights, rather than conflict with them. However, cultural attitudes and dogma are likely to evolve and not transform, and this process may be complex and extremely slow. The constitutional, judicial and institutional contexts discussed in this paper support the expression of human rights in the face of cultural diversity, but they do not necessarily have the capacity to resolve the potential conflict. In short, there is no easy solution and no clear-cut conclusion – but as was so aptly expressed by Simon Tay,[73] the conflict between human rights and culture '… is a tension with which we must live and from which we must grow. We are the same, and yet we are different.'

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70) Statement by a group of United Nation experts on the 'World Day for Cultural Diversity for Dialogue and Development', 21 May 2010, <http://www2.ohchr.org/english/issues/cultural_rights/docs/statements/Statement_cultural_diversity21052010.doc >, accessed 15 July 2011.

71) See Preamble to the Constitution.

72) *Supra* note 69.

73) S.C. Tay, 'Human rights, culture, and the Singapore example' (1996) 41 *McGill Law Journal* 780.