2 Culture, Gender and the Law

Recent Thinking and Practical Strategies

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Conceptual Framework

The issue of the relationship between gender equality and the claims of culture has been identified as an important factor to be considered in Commonwealth efforts to improve the status of women (Coomaraswamy, 2000, para. 22). The conflict between women's human rights and some practices embedded in cultural traditions raises challenging questions. Does human rights discourse seek to impose universal values or culturally relative ones? Are conflicts over human rights indicative of an irreconcilable 'clash of civilisations'? Do human rights instruments like the Convention on the Elimination of All Forms of Discrimination against Women reflect a Western/liberal/Christian world-view that is inconsistent with Islamic/African/Asian/Aboriginal values? How can the claims of international human rights law and the claims of culture be reconciled? This paper will seek to provide an overview of recent thinking on the nature of this conflict and practical strategies for dealing with it. It provides no single criterion of analysis or plan of action. Rather, it argues for a complex, contextualised analysis to identify the role cultural claims play in a particular political context and for a subtle and wide-ranging array of strategies for building a new consensus on the relationship between culture and gender equality.

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The paper is divided into five parts. Part 1 explores the nature of the notion of culture at play in legal debates. Part 2 considers the justification for cultural rights and the limits that may be put on them when they violate gender equality. Part 3 enumerates factors that make the eradication of traditional practices that impact on women particularly problematic. Part 4 develops the idea of using cross-cultural and inter-cultural dialogue to find ways in which human rights values are consistent with traditional cultural values. Finally, Part 5 identifies

ways in which Commonwealth nations can use the law reform process to engage cultural communities in the process of reformulating traditional practices to conform with gender equality.

1 Unpacking the Notion of 'Culture'

The right to 'culture'

Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the right to participate in the cultural life of one's community. The right to pass on cultural beliefs to one's children through choosing their education is referred to in article 26(3). Article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides that:

> In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This article has been interpreted to require not merely that governments do not impair minority cultural life but that they take affirmative steps to protect culture. It has been applied in relatively few cases and the scope of its potential application is not clear (Renteln, 2002).

Conversely, CEDAW requires State parties to "undertake all appropriate measures, including legislation, to modify or abolish laws, regulations, customs and practices" that discriminate against women. In particular, they undertake to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".[1] This construction suggests that where the rights to culture and gender equality come into conflict, gender equality should take priority.

Rights to the accommodation of cultural difference have been incorporated into domestic law in some Commonwealth countries. Several have drafted their national constitutions

with a view to giving effect to article 27. For example, the South African Constitution substantially reproduces the rights in article 27 in sections 30 and 31.[2] A key difference is that while article 27 contains no limitations clause, the rights in the South African text are explicitly limited. Culture is only guaranteed to the extent that its enjoyment is consistent with the enjoyment of other provisions of the Bill of Rights, including the right to equality on the basis of sex and gender. Similarly, Section 27 of the Canadian Charter of Rights and Freedoms mandates that Charter rights be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada, but does not give cultural claims priority over those of equality.

Some Commonwealth nations guarantee multicultural rights in domestic legislation as well. Canada adopted a policy of official multiculturalism in 1971 and passed the Canadian Multiculturalism Act in 1985. This Act places Federal institutions under an obligation to recognise and promote multiculturalism, which includes ensuring that all individuals receive equal treatment and equal protection under the law while respecting and valuing their diversity (section 3(1)). The South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000 clarifies that gender-based discrimination includes "any practice, including traditional, customary, or religious practice, which impairs the dignity of women and undermines the equality of women and men, including the undermining of the dignity and well-being of the girl child" (s.8).

Still other Commonwealth nations have chosen to exclude certain traditional practices or the regime of customary law from constitutional review. For example, the Constitution of Kenya prohibits discrimination based on sex but these protections do not apply to laws relating to marriage, divorce, inheritance and other aspects of customary family law. In essence, this means that these laws cannot be challenged as unconstitutional even if it is clear that they violate women's rights. A draft constitution released in 2002 abolishes some of these exemptions but would continue to exclude Muslim family law from the ambit of constitutional review (Human Rights Watch, 2003).

Culture defined

> Culture is a dynamic value system of learned elements, with assumptions, conventions, beliefs and rules permitting members of a group to relate to each other and to the world, to communicate and to develop their creative potential.
>
> (Canadian Commission for UNESCO, 1977)[3]

Debates over the impact of human rights norms on cultural practices often rely on two rival models of culture. In the first, the static model, a culture is understood as the way of life of a discrete people. The essence of the people is expressed in an integrated system of ideas and practices. Each element of this culture fulfils a necessary human function and is integrated with other elements in a perfectly balanced system (Bennett, 1991:16). A culture persists through history by reproducing itself through inserting individuals into their social roles in this system. The agency of individuals is shaped by and expressed through their social roles with little remainder. In this model, culture is a fragile, organic structure that flourishes if left alone but can be destroyed through even small changes. Such destructive change may come about through direct intervention from outsiders or through the abandonment of traditional ways by members.

The alternative conception is a more dynamic one. This sees a culture not as an organic whole but as a shifting set of texts, images and practices that has no central core features. The link between these materials and a particular people is wrought by history rather than by logical necessity. A cultural group maintains a sense of identity through acts of collaborative narration that organise changing materials into a story of identity and continuity. It is the capacity and desire to elaborate such stories that is key to the perpetuation of a culture:

> Groups negotiating their identity in contexts of domination and exchange persist, patching themselves together in ways different from a living organism. A community, unlike a body, can lose a central 'organ' and not die. All the critical elements of identity are in specific conditions replaceable: language, land, blood, leadership, religion. Recognised, viable [groups] exist in which any one or even most of these elements are missing, replaced, or largely transformed. (Clifford, 1998:338)

If we employ this more complex and dynamic notion of culture, it becomes apparent that change in cultural norms and practices is inevitable. The debate shifts from the legitimacy of any and all changes brought about by human rights to the substantive merit of the proposed changes and legitimacy of the mechanisms through which they are implemented.

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The kinds of practices that are defended as part of culture or tradition

The category of practices that are defended in the name of culture or tradition is quite broad and potentially unlimited because many practices can be defined or redefined as integral to cultural life. Practices may always have seemed important or may have become so more recently in response to political struggles. There are, however, certain patterns of practices that appear frequently:

Marriage practices

Culture may be invoked to justify the marriage of girls under the age of 18. Early marriage is correlated with higher incidence of health problems in pregnancy and childbirth and higher rates of HIV infection. It is also linked with decreased economic development opportunities as young women tend to have more children, less power within their marriage, less education and less income earning power. Other marriage-related practices that may be challenged as violations of women's rights are polygyny (a husband taking more than one wife), levirate marriage (a widow being required to have sexual relations with and/or marry another member of her husband's family), bridewealth (payments made by the husband's family to the wife's family as part of the marriage contract) and abduction for purposes of rape which is then legitimised by marriage between the victim and perpetrator.

Traditional practices harmful to women's health

Culture is invoked to justify female genital mutilation,[4] dietary taboos in pregnancy that deny women and their growing babies nutritious foods, and ritual 'cleansing' of widows through sexual relations with men who may put them at risk of contracting sexually transmitted diseases.[5]

Property rights

Women may be characterised as incapable of owning property so that they cannot inherit or claim ownership of anything they produce. Inheritance practices may exclude women so that when a man dies, his estate passes to his eldest son or other male relatives, leaving his widow and daughters without property. Women's wages become the property of their husbands or guardians.

Permanent minority

The law may define women as perpetual minors who never become full legal persons. This means they cannot enter into contracts, sue or be sued in court, own property or act as guardians to other minors, including their own children. In particular, it means they cannot negotiate to enter into or to end their own marriages.

Violence

The authority of husbands and fathers to discipline women and children in the family is both defined as a key aspect of cultural tradition and an important means of allowing men to insure respect for cultural traditions. Such discipline may range from physical chastisement for perceived disobedience to murder to punish conduct that violates the family's 'honour'. The invocation of culture may prevent such conduct from being defined as a crime at all or may be accepted as a defence in court.

2 The Importance of Understanding and Accommodating Cultural Differences

The political challenge of accommodating cultural difference

Conflicts over culture and gender may emerge where the dominant values of the majority in a State, perhaps as embodied in law, conflict with human rights norms. They may also emerge where it is the practices of a minority cultural community that violate human rights norms, and perhaps also violate the norms of the general civil law. Philosophers of multiculturalism argue that "dealing with culturally-based claims is the greatest challenge facing democracies today" (Kymlicka, 1991).

Most Commonwealth States approach the problem of cultural toleration in the context of cultural pluralism. Cultural pluralism is a state of affairs in which participants in a variety of cultural communities live together within the borders of a single society. It is to be distinguished from cultural monism, a possibly imaginary situation in which all members of a political community share a single cultural identity.

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The *Parekh Report on the Future of Multiculturalism in Britain* (the Commission on the Future of Multi-Ethnic Britain, 2000) identified four political strategies for coping with the fact of cultural pluralism:

1 Proceduralist

The State creates no national culture, only a neutral framework in which cultural groups go about their lives. Distinct systems of personal law allow people to live entirely within their own faith- or ethnicity-based community. Examples include the Ottoman Turkish 'millett' system and some forms of British colonial indirect rule.

2 Nationalist

In this model, cultural pluralism is seen as a source of insecurity, instability and potential for conflict and violence. The State has a duty to ensure that everyone assimilates into the national culture. Members of society should share a thick set of common values, i.e. they should speak the same language, learn the same history and values, enjoy the same artistic expressions and worship the same god.

3 Liberal

Liberals suggest we need a common civic and political culture in which political values like the rule of law and democracy, which make peaceful social interaction possible, are shared. Beyond this thin set of shared values, however, individuals are free to follow minority cultural practices in their private lives. The key point is that cultural difference is tolerated but the State remains entirely neutral between private cultures, treating minority and majority the same. This is the American ideal, if not the reality.

4 Multicultural/pluralist

In this model, ethnic culture and civic culture are seen to over-

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lap. It is acknowledged that the State cannot be neutral but always favours the ethnic culture of the politically dominant group and disables that of minorities. The law should alter public/civic culture to accommodate difference. The key difference from the liberal approach is that the law does not merely tolerate difference but celebrates and enables it. This approach informs Canadian policy and has increasingly guided recent British planning.

The significance of culture to human flourishing

Put very briefly, philosophers of multiculturalism argue that liberal democracies have a duty to respect and accommodate cultural differences because involvement in a cultural community is one of the basic necessities for a person to have a minimally satisfying life. Individuals need cultural communities or cultural structures in order to have a sense of personal identity, to have a sense of self-respect, to have a sense of belonging and to have a basis to critically evaluate their life choices (Kymlicka, 1989: 164–66).

However, it follows that if culture is worthy of respect because it enables human flourishing, cultural practices that undermine the human flourishing of women cannot be preserved where challenged as violations of women's equality. Cultural practices that undermine women's self-respect or express contempt for them, and cultural practices that deny women the opportunity to reflect upon and make important choices in their lives, are not entitled to toleration in a liberal State.[6]

3 Factors Complicating Arguments over Gender and Culture

Women as cultural defenders and cultural symbols

Women are often associated more intimately with the idealisation of cultural traditions than are men for a number of reasons.

i. Women may in fact be more traditional because they are excluded from the public sphere of work and politics and not exposed to other forms of life. Indian women may con-

tinue to wear traditional dress, for example, while the men in their families have adopted Western dress (Narayan, 1997:26). Patterns of migrancy to take advantage of employment opportunities may mean that women remain in less developed rural areas while men migrate to more cosmopolitan cities and abandon traditional practices (Walker, 1982:7).

ii. A key strategy for accommodating cultural pluralism in multicultural societies has been to develop national laws relating to crime and commerce while allowing religious and cultural communities to govern the family under regimes of personal law. In practice, this means that the cultural institutions over which the community retains control are centrally concerned with the regulation of women's conduct in marriage, divorce, custody, domestic violence and succession.

iii. Even if women are not in fact more traditional than men in their behaviours, they may play a symbolic role as defenders of cultural integrity. Women's conduct may be a repository of family honour.

iv. This role as symbols of cultural continuity is reinforced by women's involvement in child-bearing and child-rearing in which they reproduce and educate new members of the community. It may reflect women's involvement in political struggles on behalf of the community (Yuval-Davis and Anthia, 1989).

v. Women who are otherwise disenfranchised may cherish their association with tradition as a source of esteem in their own eyes and the eyes of the community.

vi. The equation of women with tradition may be a particularly important one to communities that understand themselves to be engaged in a nationalist struggle against a political majority in their own State or against other state or international bodies. Homi Bhabha describes the paradoxical relationship between two key elements in the identity of such groups. On the one hand, they want to see themselves as the logical development of a historically and geographically embedded culture. On the other hand, they

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want to see themselves as a free and rational new generation capable of creating new forms of authentic cultural expression. How can one people both be artefacts unchanged through time and active unconstrained agents? Anne McClintock (1995:359) suggests that gender does the work of linking these conflicting demands:

> the temporal anomaly within nationalism – veering between nostalgia for the past and the impatient, progressive sloughing off of the past – is typically resolved by figuring the contradiction in the representation of time as a natural division of gender. Women are represented as the atavistic and authentic body of national tradition (inert, backward-looking and natural), embodying nationalism's conservative principle of continuity. Men, by contrast, represent the progressive agent of national modernity (forward-thrusting, potent and historic), embodying nationalism's progressive or revolutionary principle of discontinuity.

The centrality of gender as an organising principle in these communities makes transforming gender relations a complex task.

The legacy of colonialism

Parallels between contemporary women's rights legislation and colonial era attempts to extinguish customary law as repugnant to public policy may lead some to characterise these new laws as tainted with colonialism. For example, debates over the future of polygynous marriage in sub-Saharan Africa resonate with Victorian campaigns to eradicate polygyny for reasons of religious ideology and in order to undermine homestead farming to free up labour to work for European employers (Simons, 1968:21; Bozzoli, 1983:139, 158). The notion that women's rights legislation has been adopted in order to conform to the norms of international law may allow some to argue that they reflect a bowing to imperialist pressures. Indeed, some argue that human rights norms themselves are a form of modern imperialism, enforcing Western values on the developing world (Pollis and Schwab, 1980:7).

Conversely, human rights advocates need to be aware of the ways in which challenges to traditional practices may be co-opted by interest groups in order to serve ulterior purposes in

the context of national or international conflict. Ratna Kapur's work has demonstrated how Hindu nationalists in India have used the language of human rights to argue for the rights of Muslim women as part of a conscious project to undermine the Muslim minority (Kapur, 1999).

Globalisation

"'Globalisation' refers to those processes, operating on a global scale, that cut across national boundaries, integrating and connecting communities and organisations in new space-time combinations, making the world in reality and in experience more interconnected" (Hall, 1993 *supra*: note 74 at 299). This may undermine one's capacity to take for granted the legitimacy of the practices of one's own culture by rendering visible the conscious choices that create and perpetuate them.

In a globalised world, people do not adopt and retain traditional practices uncritically. Their choices may be shaped by politics, law and demographics. The adoption of the veil is a good example. The veil may be adopted by Muslim women as a rejection of identification with Western values and assertion of Muslim nationalism as in revolutionary Iran (Haddad, 1985) or as a matter of convenience to avoid unwanted attentions from men in public places. It may also be adopted by individual young women as an act of rebellion against their more secular parents (Moghadam, 1993: 148–49). On the other hand, it may be supported by men as a means of fundamentalist renaissance and intensification of control of women. Those seeking to transform traditional practices must seek to understand precisely what role or roles the impugned traditional practice plays in its concrete contemporary context.

4 Responses to the Cultural Objection to Women's Human Rights

Patriarchy is a feature of all cultures

The argument that women's human rights are inconsistent with local cultural norms suggests that this situation is unique to traditional communities or societies. However, it is clear that cultural factors play a role in perpetuating discrimination

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and hampering women's human rights everywhere. In the West, for example, Christian religious ideology is characterised as inconsistent with the recognition of women's rights to abortion and contraception (Cerna and Wallace, 1999:623, 639–40); values of family intimacy and solidarity are seen as threatened by women's rights to be free from physical and sexual violence in the family (Olsen, 1985); and women's employment opportunities are limited by gendered stereotypes that do not envision wage earners as having significant family responsibilities.

A related argument suggests that it is inappropriate to criticise traditional practices in other cultures while ignoring the exploitation of women in the West. Rather than disciplining the developing world, Western critics should ask, for example, why wearing the veil is a more exploitative form of dress than wearing a mini-skirt (Al-Hibri, 1999). Proponents of women's human rights are, or should be, seeking to alleviate women's disadvantage, whatever form it takes. This argument does, however, counsel openness and flexibility in identifying the nature and extent of discrimination entailed in traditional practices. Careful analysis of the precise harms of impugned practices may provide more tailored and effective remedies. For example, the South African Law Commission determined that the problem with polygynous customary marriage was not its inconsistency with English notions of civil marriage, which mimicked Christian marriage, but its impact on the economic well-being of prior wives who saw their share of family resources diminished when husbands took new wives. Rather than seeking to abolish the practice of polygyny, therefore, the Law Commission recommended that this precise problem be remedied by requiring that husbands divide their existing assets with their first wife before taking a second wife. In this way, the economic disadvantage to first wives was diminished, while the possibility of engaging in the traditional practice of polygyny, under new economic terms, was retained (South African Law Commission, 1998:90).

Human rights values are consistent with a wide range of cultural values

Those who oppose women's rights in the name of culture suggest that these rights are inconsistent with essential elements

of their cultural traditions. However, those who make this argument elide the ways in which religious and cultural traditions undergo a process of interpretation, selection and refinement. There are very often counter-tendencies, alternative interpretations and insurgent schools of thought competing for dominance within the cultural community. Even where civil law purports to be the codification of customary or religious law, lawmakers have had to select from among competing schools of thought about its meaning and implications and about which revisions of the law would best implement this interpretation.[7] Codification does not end the debate either, a fact apparent to anyone who has read a judicial opinion in which judges disagreed on the interpretation of a statute.

A number of human rights theorists recommend encouraging the exploration of these dissonant voices in order to uncover ways in which human rights values can be seen as consistent with local cultural values. For example, Martha Nussbaum argues that human rights documents can provide the occasion and the template for dialogue about the norms of sexual equality within religious traditions and between religious groups. She also recommends involving religious communities by inviting them to submit plans for reform that articulate how they would integrate a commitment to equality and the perpetuation of their traditions (Nussbaum, 1999: note 36 at 217–8).

In the context of the South African customary law debate, Thandabantu Nhlapo argues that reliance on dialogue can enable the preservation of the substantive values of underlying customary law while changing the forms in which they are expressed (Nhlapo, 1998: 625). In particular, he stresses that it is possible to find non-discriminatory means of expressing the values of respecting and providing for elders, commitment by the wider family to the well-being of children and the valorisation of the role of mothers (Nhlapo, 1991: 141–45). Dialogue within and between cultural communities is an important part of this process:

> The importance of understanding these approaches is two-fold. In the first place, searching for the underlying principle encourages communities to engage in a little introspection: They may discover that they disagree less than they thought they did. Secondly, whatever the outcome, the communities concerned

> feel affirmed by taking charge of their own affairs and this undercuts any arguments about imposed changes in customary law. (Ibid: 626)

Indeed, including members of traditional communities in the process of identifying norms may often result in uncovering flexible egalitarian adaptations that are already in place but that are not reflected in formal accounts of customary law (Nyamu, 2000: 381–415).

A version of this strategy has been approved by the South African Constitutional Court in its judgement in S. *v. Makwanyane* (1995 (3) SA 391 (CC)). In addressing the permissibility of the death penalty, Justice Makgoro applied both the European notions of human rights to life and dignity and the customary notion of *ubuntu*, which she interpreted as expressing the values of group solidarity, compassion, respect, human dignity, conformity to basic norms and morality (ibid: para. 308). While they derive from different sources and are expressed in different ways, she suggested both conceptions repudiated the death penalty. She suggested that, in developing a constitutional jurisprudence for a unified and democratic South Africa, these commonalties should be identified and merged into an all-inclusive value system.

Abdullah An-Na'im suggests a discursive remedy that allows the integration of local and human rights norms to be explored. However, he emphasises that while participants in a cultural community can benefit from financial and moral support from outsiders committed to egalitarian change and from cross-cultural dialogue with them, significant voices within the community must be involved in order to legitimate these changes. He stresses the importance of supporting an internal discourse on the identification and legitimation of egalitarian themes and modes of redefinition within the culture (An-Na'im, 1994).[8] A recent account argues that successful interventions to alter harmful traditional practices have all involved the generation of an alternative internal discourse that can demonstrate authoritatively how women's rights fit within the existing cultural paradigm.[9]

Rhoda Howard objects that approaches that aim at identifying and developing egalitarian strands within the explanatory frameworks of illiberal cultural practices cannot solve the

problem where there is in fact no indigenous norm that parallels important human rights norms (Howard, 1995:56). Indeed, reference to local norms plays an important legitimating role but cannot be the end of the story. In the context of debates over customary law in South Africa, there are some values, such as a commitment to patriarchal authority, that may not be able to be resolved into values consistent with women's human rights.[10] These views need to be heard, however, so that they may be examined and deconstructed through a process in which all parties participate. Appeals to rights will be unsuccessful if illiberal elites feel so marginalised that they give up trying to make themselves heard within law reform processes and choose instead to ignore mandates for legal change (Minow, 2002).

5 Policy Recommendations

1 Abolish cultural exceptions to laws protecting women's human rights

Equality norms must be given precedence in cases where the rights to culture and gender equality conflict. This balance between competing rights should be expressed in constitutional documents, human rights legislation, administrative regulations and rules and official government policy.

If liberal democracies have a duty to protect cultural structures to the extent that these structures foster human flourishing, cultural practices that deny women's full humanity cannot be justified as expressions of the right to culture. Equality norms must be given precedence in cases where the rights to culture and gender equality conflict. This balance between competing rights should be expressed in constitutional documents, human rights legislation, administrative regulations and rules and official government policy. However, attention should be paid to how this principle is implemented in order to ensure that it is legitimated and acted upon.

If oppressive forms of private law are to be retained, for example, under a plural family law regime, women must be able to opt out of private law into a general civil law regime (Coomaraswamy, 1997:24). Care must be taken to ensure that women can really access these exit strategies. For example, in the Indian case of Shah Bano the wife was allowed to opt out of the Muslim civil law regime that denied her claim and was awarded maintenance under the civil penal law. Riots ensued and the Rajiv Gandhi government amended the law to prevent such results in future (ibid). In other contexts, women who

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have challenged their disadvantage under customary law complain that they have been ostracised from their communities.

2 Integrate education regarding the re-evaluation of traditional norms into the law reform process

Legislation to eradicate traditional practices that violate women's human rights has the advantage of being a public statement regarding the wrongfulness of a practice. It translates the claims of women from inchoate interests to justiciable legal rights. It moves women's disadvantage from the private sphere into that of public accountability.

Some argue, however, that legislation also creates a host of troubles that interfere with the implementation of human rights norms. As noted above, legislation may be perceived as a form of colonial or imperial intrusion by governments or international institutions or an attack on local minority ethnicity. Some argue that education is preferred to legislation because it allows the impetus for change to come from inside communities.

However, education about values on its own may be an excessively slow process. It is clear that legislative change must be supplemented by educational programmes. It is also important to find occasions within the law reform process itself that can be used as educational opportunities by allowing members of the community to understand the need and justifications for particular law reforms measures.

Education should aim to:

(a) Identify the ways in which cultural practices form part of a system that allows men to dominate women;

(b) Cultivate awareness that cultural practices are complex, contested and changing;

(c) Disseminate the history of particular local customs to show how they have waxed and waned in light of changing political circumstances;

(d) Disseminate awareness of variations in local customs to show how they adapt to local circumstances;

(e) Encourage inquiry into the purposes served, or believe to

be served, by discriminatory practices and the design of new practices to serve the same function in a non-discriminatory way;

(f) Empower women to describe and value their own views regarding cultural practices;

(g) Encourage the expression of multiple views of traditional norms in public life.

3 Involve the community in identifying ways in which traditional practices can be made consistent with women's human rights

Involving the community can assist in effective law reform strategies for both theoretical and practical reasons. On a theoretical level, respecting the right to culture entails ensuring that cultural communities can continue to operate as discourses that are instrumental to autonomy. Eradicating discriminatory policies through legislative or judicial fiat may delegitimise participation in dialogue within minority cultural communities. It may also silence the diverse voices emanating from customary communities in public discourse. It follows from a notion of culture as a contested and changing product of dialogue and negotiation within communities that these processes of cultural articulation be enabled by law reform rather than silenced.

On a pragmatic level, legislation or judgements that impose policies that have not been developed and justified in terms that a significant number of members of these communities can understand and accept risk being ignored, constituting admirable 'paper law', but incapable of creating social change of use to disenfranchised women. An essential component to this process of legitimation is attempting to link contemporary developments in the civil law with already existing forms of social regulation in the customary sphere.

Sally Falk Moore identifies two factors that affect the success of attempts to implement legal change. Firstly, state-authored law is only one of many layers of social regulation. Legal change may be effective only to the extent that it imposes norms that are in fact accepted by participants in the

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social field subject to the regulation or where it can be manipulated to suit the interests of a powerful party within it (Moore, 1973:723, 744). Even where women are fully aware of their rights to be free from certain forms of discrimination or violence, they often choose on balance not to exercise these rights because their community is not persuaded that doing so is morally acceptable. So, for example, a woman might have the right to seek a divorce for her husband's adultery, but bringing this action would lead to her ostracism by her family and community. Even where the law has been changed, the cost of using it may be too high if the moral norms that govern women's everyday lives have not been changed (IRRRAG, 1998).

Secondly, those who enjoy power under the pre-existing social arrangement may continue to do so even where they are explicitly deprived of legal rights. For example, the wealth, status and networks of obligation that accrue chiefly to families are not immediately lost when the privileges of traditional leadership are formally abolished. On the contrary, these advantages may permit members of these families to successfully acquire positions of authority based on education, merit and political connections (Moore, 1973:740–41). Race and gender-based privileges built up under regimes of organised inequality also create entrenched forms of advantage and disadvantage that are not eradicated by the abolition of formal legal inequality (ibid:741).

Moore provides an example of changes to judicial administration that enjoyed more success when the new legal forms tracked pre-existing forms of normative regulation. The Tanzanian Government created arbitration tribunals in 1969 to attempt to resolve customary law disputes before they reached the formal legal system. These tribunals were used to a much greater extent where their jurisdiction tracked pre-existing political units rather than when they attempted to create new ones (Moore, 1985:165). Moore concludes that effective law reform strategies attempt to co-opt existing power structures rather than to supplant them. While courts or legislatures can make custom law, it is the semi-autonomous social field that can make law its custom (ibid).[11] Law reform must therefore attempt to legitimate egalitarian changes by involving existing authorities in developing, implementing and explaining the implications of these changes.

Communities can be included in exploring the way cultural practices should be developed to respect women's human rights by:

(a) *Encouraging courts to adopt a complex notion of culture in adjudicating conflicts between gender and culture*

Rather than finding that traditional practices and gender equality come into conflict, judges employing a dynamic conception of culture can explore the ways in which traditional practices are variously understood and practised. They can vindicate interpretations of tradition that best comport with human rights in their judgements. For example, in the South African case of *Mabena v. Letsoalo*, (1998) (2 SA 1068 per Du Plessi J) the court had to determine whether a valid customary marriage existed between Mrs Mabena and her deceased spouse. Her husband's parents argued that no valid marriage existed because the brideprice paid for her had not been received by a male guardian but by her mother. They argued that customary law could not recognise a female guardian. The judge begged to differ. Interpreting customary law in light of the Constitution's commitment to human rights, he found that patterns of migrancy, economic upheaval and family breakdown meant that some conceptions of customary law now recognised the female-headed householder and allowed her to negotiate valid marriage agreements on behalf of her children. The judge was able to integrate the preservation of customary law notions of marriage as an arrangement between families rather than individuals and the notion that women might sometimes act on behalf of their families.

Rather than finding that traditional practices and gender equality come into conflict, judges employing a dynamic conception of culture can explore the ways in which traditional practices are variously understood and practiced. They can vindicate interpretations of tradition that best comport with human rights in their judgements.

(b) *Engaging in formal consultations with representative groups that include women in the development of legislation*

The lengthy consultations undertaken by the South African Law Commission in its Project on the Harmonisation of Civil and Customary Law is an example of a process that engaged stakeholders in debate over the future of customary institutions in light of the Constitution's commitment to women's human rights.

(c) *Delegating deliberation and decision-making to local government structures that include women and are mandated to ensure women's rights are respected*

For example, as part of the process of land redistribution undertaken by the South African Department of Land Affairs, the Communal Property Associations Act 28 of 1996 requires that all communities seeking a grant of land or the return of land improperly appropriated by the apartheid regime must promulgate a constitution that details rules for entitlement to allocations. These rules may not discriminate on the basis of gender. Staff from the Department work with these communities to help them articulate the reasons for which gender has acted as a proxy.[12]

Appeals to women's alleged moral or intellectual incapacity can thus be translated into non-discriminatory rules. Men in some communities express fears that women will sell land rather than keep it in the community because their role in providing support to dependent family members leads them to be concerned with short-term sustenance rather than to share men's concerns for long-term welfare or social prestige annexed to land owning (Cross and Friedman, 1997). Rules could be developed that recognise these different priorities and strike some balance between them. Men also suggest that women should be denied allotments because they may follow husbands to other areas, leaving the land vacant. The propensity of women to move must be put in the context of their incapacity to provide land for their families under customary law. Having given women entitlements, rules could be developed to require that any allotment holder reside in and contribute to the welfare of the community or to require that only applicants with children be granted allotments (Claassens, 1996).[13]

(d) *Involving stakeholders in determining how courts should remedy violations of women's human rights*

In a recent decision, the Supreme Court of Canada found that a provision in the Indian Act that did not allow band members who lived off the reserve lands to vote in band elections violated the equality rights of non-resident band members. However, rather than simply declaring that the voting regulations were invalid and effectively re-writing them to allow all

non-residents to vote, the court employed the remedial device of the suspended declaration of invalidity. They declared the rule invalid but stated that their declaration would not take effect for 18 months. During this time, the federal government would have time to consult with indigenous (First Nations) organisations on how these new rights should be administered and implemented in ways that would be most consistent with their culture. The eventual result reflected their own negotiation of the tension between cultural norms and constitutional rights mandates. The result was more subtle and perhaps more acceptable to the community because they had been involved in its development.[14] Caution should be taken in recommending suspended declarations of invalidity, however, to ensure that the government does undertake the consultations and does proceed with appropriate legislation before the time period lapses.

(*e*) *Giving women a stronger voice in developing cultural norms by giving them more economic and political clout*

Education that gives women economic options so that they can avoid practices they have come to see as harmful is an effective tool in eradicating violations of women's human rights (Gunning, 1999:669). For example, in South Africa, the Government's decision not to abolish polygyny flowed in part from their diagnosis of the problem as one of lack of economic options on the part of women. They found that urban women who had employment opportunities had largely turned their back on the practice. They addressed the problem by giving women within polygyny greater economic rights and by continuing to increase women's overall economic opportunities so that marriage was not the only means of livelihood open to them. The South African Law Commission commented that equalising women's proprietary capacity, contractual capacity and rights to be included in local decision-making would give women the bargaining power to refuse polygynous marriages.[15]

Education that gives women economic options so that they can avoid practices they have come to see as harmful is an effective tool in eradicating violations of women's human rights.

(*f*) *Training community leaders to initiate dialogue about harmful practices*

Train local experts within the community, such as health practitioners and midwives, to engage community members in dis-

cussion about the cultural legitimacy of impugned practices such as FGM. Encourage them to use their local legitimacy to help develop alternative practices.

(g) Funding research

Funding should be made available to support research into the changing nature of customary practices and to support the publication and discussion of results through conferences involving cross-sections of the relevant communities. The excellent work of Women and Law in Southern Africa (WLSA) is a prime example that has served to develop and support consensus about the need for changes to codified customary law.

Funding should also support research into the unexpected impacts of past law reform efforts. For example, the Canadian Government funds research into the impact of changes made in 1985 to implement international law by equalising the rights of First Nations' women to gain and retain their Indian status. A recent call for papers asks for an inquiry into the impact of these changes and "what policies can be put in place to promote women's right to full band life to best welcome off reserve Indian women returning to the band, while maintaining their culture?" (Canadian Status for Women website, Call for Proposals, 15 September 2003).

(h) Funding groups arguing for more egalitarian interpretations of traditional practices

Women's groups seeking to promote discussion of the ways in which human rights and traditional values can be integrated in their own communities should be funded. This funding should aim to support both direct educational efforts and programmes that engage in transformative discussion while delivering other services.

(i) Empowering women by educating children in a curriculum of civic values alongside cultural/ religious values so that they have a sense that they can choose to conform to or revise their traditions

The Ousley (2001) Report on community fragmentation in Bradford, UK, recommends a programme of citizenship education in schools that teaches shared values and anti-racist education in the workplace. Shared values include the rule of law, parliamentary democracy, the role of the free press, the

role of individuals in effecting social change, the source of cultural pluralism and the importance of respecting diversity. A key objective should be to teach children skills of critical reflection and mutual respect for others.[16] On this view, a civic values curriculum has the dual purpose of including cultural minorities in the mainstream cultural dialogue and fostering respect for the choice of retaining or adopting minority cultural practices.

Conclusion

This paper has contended for a consciously complex approach to the problem of gender equality and traditional practices. On a theoretical level, advocates for women's human rights must adopt a dynamic and contextualised understanding of the notion of culture. In practical terms, they must seek to legitimate cultural conceptions that understand human rights values to be consistent with some revised forms of traditional practices. In these ways, customary communities and women demanding equality rights can arrive at consensus on remedies through consideration of what liberal right requires and through articulating with greater precision the functions that custom performs. Neither discourse is silenced by the interaction although both are reshaped. Feminist activist Gwendolyn Mikell urges for using such a 'dual strategy' of law reform and education in order to achieve social change. Legal reform is coupled with attempts to work through parallel institutions in civil society and to revive traditional institutions that have the potential to increase women's participation and power in culturally familiar ways (Mikell, 1995).[17] Women may thereby secure gender equality and exercise their right to culture on a basis of equality with traditionalists from positions within their own communities.

Notes

1 CEDAW articles 2(f) and 5(a). Similar commitments are contained in the Inter-American Convention on Violence against Women (article 7(e), the African Charter on Children's Rights (article 21.1) and the Convention on the Rights of the Child (article 24.3).

2 Constitution of the Republic of South Africa, No. 108 of 1996:
Section 30: Language and Culture
Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.
Section 31: Cultural, Religious and Linguistic Communities
(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
(a) to enjoy their culture, practise their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

3 As quoted in Renteln, 2002: 195.

4 FGM is predominately practised in sub-Saharan Africa, although immigrant communities continue these practices to some extent in Europe and North America. Estimated prevalence rates range from over 90 per cent in Djibouti, Somalia and Sudan to 55 per cent in Nigeria, 40 per cent in Chad, Côte d'Ivoire, Kenya and Togo and 15–20 per cent in Cameroon, Ghana, Senegal, Tanzania and Uganda (Packer, 2002).

5 This practice may be associated with the spread of AIDS as the cleansing may be performed by a social outcast who is paid for his services and who performs the same service for many others. Condoms are believed to interfere with the effect of the cleansing (Human Rights Watch, 2003: 4–8).

6 See generally, Okin, 1999, especially Nussbaum.

7 In the context of Islam, see An-Na'im, 2003; in the context of African customary law, see Channock, 1983.

8 An-Na'im (1990: 162) also suggests that human rights norms and Islamic principles can be reconciled by looking for the common higher order principles on which they both rely.

9 Packer (2002) argues that the abolition of Chinese footbinding was successful because of the generation of an interpretation of Confucianism that repudiated mutilation of the body. Similarly, she argues that the abolition of suttee (wife burning) in India was

linked to acceptance of arguments that Hinduism did not approve of such conduct.

10 Mutua (1995) makes the well-intentioned but disingenuous argument that the African Charter could never be used to vindicate patriarchal values because it requires the individual 'to preserve and strengthen positive African cultural values in his relations with other members of society, in the spirit of tolerance, dialogue and consultation' in article 29. There are, however, those who view patriarchy as a one of these positive values. For example, see, Dlamini, 1991.

11 'Law reform often fails because while the government proposes, the people dispose differently' (note 27 at 744). See also Alott, 1981: 229.

12 Attention will need to be paid to the issue of ensuring that these staff members act as facilitators rather than as experts prescribing an appropriate remedy. My impression of reading some early accounts of landholding policy was that they were surprisingly similar to each other. See Tshabalala, 1996 (noting that the three communities assisted by CALS elected to use the household head as the unit of allocation).

13 A Department of Land Affairs study (1998) of the implementation of communal property association constitutions notes that the majority elect to use the household rather than the individual as the unit of allotment. They caution that this may mean that men, who continue to be seen as heads of households, will continue to be over-represented among decision makers with regard to land.

14 *Corbiere v. Canada* [1999] There was perhaps a gender element in this case as well because some band members may have lost their rights to reside on the reserve due to the operation of s. 12(1)(b) of the Indian Act. Even after Canada abolished this provision in 1985 in light of the decision under the ICCPR in *Lovelace v. Canada* 1981 that gender discrimination in granting Indian status violated article 27, many women and their descendants were prevented from moving back to reserves.

15 Report on Customary Marriages, 90.B.

16 See Gutmann, 1995:557; Rawls, 1994.

17 Describing activism in Nigeria and Ghana, she comments: "Culture may be dynamic in incorporating women's rights, as opposed to being devastated by legal change. In fact, given an opportunity, cultural integrity, while further reinforcing women's legal rights".

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Reconciling Competing Rights

Catherine Muyeka Mumma

> In so far as these [human rights] standards are perceived to be alien to or at variance with the values and institutions of a people, they are unlikely to elicit commitment or compliance. While cultural legitimacy may not be the sole or even primary determinant of compliance with human rights standards, it is an extremely significant one. Thus the underlying causes of any lack or weakness of legitimacy of human rights standards must be addressed in order to enhance the promotion and protection of human rights in that society. (An-na'im, 1990)

Introduction

This paper will discuss the effectiveness of implementing international human rights principles in the context of culture. It looks at the definition of the principles of equality and non-discrimination, which are the focus of gender rights, and considers whether there are cultural definitions of these terms that are acceptable within the human rights context.

Background

Since the adoption of the Universal Declaration of Human Rights in 1948 and the International Conventions on Civil and Political Rights and Economic, Social and Cultural Rights in 1966, the human rights scene has been characterised by the formulation and drafting of more treaties that have addressed specific human rights issues, including the protection of women against discrimination,[1] the rights of the child[2] and many others. The implementation of the human rights in the various treaties is monitored by treaty bodies that are established for this purpose. Traditionally, monitoring is done by way of examination and analysis of state reports on the status of implementation of the said instruments in those States.

These bodies judge the progress in implementation by the level of incorporation of the provisions of these treaties in the domestic laws and practice on the ground.

Regional instruments have also been adopted, with organs that are specifically established to follow up on the implementation of these rights within those regions. In addition, Europe has gone further and established a functioning Court of Human Rights that helps shape a common understanding on the various concepts and complex human rights issues within the region. In Africa, the African Commission on Human and Peoples' Rights is the treaty body established to monitor the implementation of the rights in the Charter among the African member States. This system has so far not yielded the hoped for results in terms of information, guidance, precedent, decisions/comments and recommendations on the progress in implementing human rights in the African States. It was expected that the Commission would take a lead role in setting the pace on how to incorporate the observance of human rights in cultural situations. This has not happened, however, because the Commission still lacks the required support and the resources necessary to enable it to function fully and effectively. The African Court on Human and Peoples' Rights[3] is also about to be established, and it is hoped that it will be fully supported to enable it to deal with some of the uniquely African issues.

State reports under the various human rights instruments are the key measure by which the international community can judge the progress being made in the creation of enabling environments for the enjoyment of rights. However, the report-writing record of most developing countries is less than satisfactory, with many reports pending and those submitted being poor in quality. The ICCPR has generally received more attention in terms of inclusion in the agendas of human rights civil groups and also in terms of follow-up action, such as accountability and report-writing obligations. Economic, social and cultural rights, on the other hand, have been neglected by many States and the report writing under the ICESCR is poor. This is the case, notwithstanding the fact that most States from the developing world would prefer the international community to give more attention to the recognition of economic, social and cultural rights and the allocation of more global resources to facilitate the enjoyment of these rights.[4]

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Cultural Rights in International Treaties

The definition/description of cultural rights is not very clear from the current treaties in force. The ICESCR talks of the right to 'cultural development', defined in terms of participation in cultural life made of art, moral interests, science and research.[5] The various treaty bodies' work has also not given clear guidance on the topic of culture and human rights. The Committee on Economic, Social and Cultural Rights, which has a direct responsibility in relation to this right, has not given enough comprehensive direction on the issue of culture. A look at the comments on some of the State reports by this Committee indicates that culture is usually limited to the protection of the rights of indigenous people (without a survey of their cultural practices in the context of human rights). Culture is also considered from the point of view of 'harmful traditional practices' and not as a medium through which human rights should be entrenched in society. The language of the Committee on these issues is often too general, indicating little effort in helping to develop the concept in relation to human rights.

The concept of culture in the African Charter on Human and Peoples' Rights (ACHPR) includes the right to freely take part in the cultural life of the community; the right to promotion and protection of morals and traditional values recognised by the community; and the concept of family.[6]

The Convention on the Elimination of All Forms of Discrimination against Women addresses the issue of culture from the point of view of its negative aspects. It focuses on the modification/abolition of customary practices that discriminate against women; the elimination of prejudices associated with the marital status of women; and the elimination of negative customary practices, including forced marriages.[7]

The Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child address culture from different perspectives: the former addresses the issue in relation to placing children separated from their families in culturally appropriate environments and urges State parties to abolish traditional practices that are prejudicial to health;[8] while the latter discusses culture very comprehensively. It recognises both the individuality of the child

and the collective aspects of African communities, and pronounces both the rights and duties of the child and the community. It defines education as including the preservation and strengthening of positive African morals, traditional values and cultures. It does not discuss harmful practices in the context of the right to health; instead, it has an article on protection against harmful social and cultural practices, including those that are harmful to health, those that encourage discrimination and child marriages.[9]

The newly adopted Protocol to the ACHPR on the Rights of Women in Africa is perhaps the most elaborate instrument on issues relating to culture. It not only addresses the need to eliminate harmful practices and to discourage negative social and cultural patterns, including those that are based on stereotyped roles of men and women. It also moves the State's responsibility beyond the passing of laws by demanding that corrective measures be facilitated to also happen 'in fact'. In this regard the Protocol recommends that rights programmes include education and information communication strategies. It demands that the rights of women be equally protected in both the private and public spheres. The protocol talks of the creation of positive cultural contexts and participation by women in the formulation of cultural policies and in cultural decision-making structures. The right to protection and development of women's indigenous knowledge is also mentioned. In addition, the Protocol singles out as special the rights of the most vulnerable groups, whose vulnerability is usually linked to culture. These include widows, elderly women and the girl child. The protocol also obliges States to provide for practical implementation of these rights through budgetary and other resource provisions.[10]

The work of the treaty bodies under these instruments, and in particular that of the African Commission and now its Protocol on the rights of women, should contribute a great deal to making the connection between culture and human rights. For the majority of women whose lives are governed by cultural structures, it is important for this link to be made to enable the use of the positive aspects of culture and the negotiation for transforming and eradicating negative aspects of culture.

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needs to examine the progress made to facilitate the enjoyment of human rights by all. This audit also needs to look at the inclusion of cultural perspectives and the involvement of cultural structures in these efforts. This paper argues that there are cultural perspectives on the various principles of human rights, and these should be recognised and included as valid perspectives that can also contribute to the enjoyment of human rights. It acknowledges that there is a link between culture and human rights and suggests the need for the implementation of human rights to go beyond domestication by way of legislation that is just derived from international instruments. It argues that true domestication includes the use of cultural structures without necessarily making radical changes to the cultural lives of those involved.

This paper recognises the role played by culture in the enjoyment and violation of human rights. It asserts that existing gender-related human rights concerns are largely attributable to culture; that the current focus of international and national human rights systems on State and public structures (and not on culturally-based structures) for the implementation of human rights has contributed to the slow pace of achieving universal enjoyment of human rights – in particular the rights of women. The paper recommends the need to factor in cultural perspectives when rights instruments are formulated and also in their implementation.

Culture, Gender and Human Rights

Culture is a combination of many ingredients shared by a group of people, including their traditions, beliefs (both customary and religious), rituals, moral values, system of knowledge, arts and many other factors that form their way of life. Human rights, on the other hand, are mainly concerned about systems that allow all human beings to live in dignity. This dignity is mainly described in terms of equality, equity and non-discrimination. It is about freedom and choice by human beings, aspects that distinguish the human from the other species of animals. The general definition of human rights is widely accepted; however, the focused interpretation of some of the terms and concepts may not be universal. For example,

it has been argued that the definition of some of the terms – including 'dignity', 'freedom of the individual' and 'equality' – is not clear-cut. It has been suggested that the components of dignity, for instance, are determined by one's environment and the context within which the definition is being made. Those who believe in the universality of rights insist that the dignity of all beings is the same and cannot be measured using different scales. The effect of this debate is the common perception that culture is necessarily negative and a hindrance to the enjoyment of rights. This paper argues, however, that culture can be positive, though it also takes note of the fact that culture is often used as an excuse to violate human rights. Indeed, the dynamism of culture is such that when culture is not clearly pronounced and defined, the violator elects which bits to highlight in order to justify his/her violation. Official recognition of culture would therefore help in discussions on the various components, with a view to preserving the good and eliminating the negative.

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Many of the States that have ratified human rights instruments and domesticated the principles therein, and developing countries in particular, have large populations of people whose lives are heavily influenced by traditional cultures. However, these States rarely see the need to work with cultural structures in their attempts to implement human rights. The result is that the policies and the laws seem to be human rights friendly on paper, but the practice on the ground is in accordance with a silent but powerful law that stems from culture. In countries where the economic and social well-being of the majority is dependent on community structures, resources and values, the enjoyment of human rights by most people heavily depends on the acceptance of these rights within the power structures of these communities. To measure human rights compliance on the basis of paper policies and laws alone is therefore not adequate and may indirectly condone the violation, within communities, of the human rights of the vulnerable.

This paper makes a few assumptions about culture and argues for a deliberate effort to address issues relating to culture in a specific manner. The first assumption is that culture is not universal. There are as many cultures as there are different communities even within the context of one State. Culture is a key component in the identification of different communities

Culturally constructed gender roles are ... responsible for most of the disparities and contradictions that command the day-to-day livelihoods of men and women in many parts of the world.

and often the basis upon which the ordering of these communities is based. In this regard, the day-to-day social and economic preoccupation of the individuals in a particular community is determined in accordance with that community's cultural construction of the issues at hand. This ordering includes the determination of roles and responsibilities of members of the community in terms of gender and sex; it is heavily influenced by years of practice of cultures that propagate such roles. In most African communities, the roles and responsibilities will be based on gender and different for men, women, boys and girls. Even though the individual is important, most traditional communities tend to emphasise the community as opposed to the individual. The enjoyment (or lack of enjoyment) of human rights within these communities cannot, therefore, be contemplated, designed or effected without taking into account these cultural perspectives.

Culturally constructed gender roles are, for instance, responsible for most of the disparities and contradictions that command the day-to-day livelihoods of men and women in many parts of the world. The expectation that all human beings must fit in a particular universal module therefore cuts out millions of world citizens, whose lives and styles are dictated by culture, from enjoying the benefits that they would obtain from marrying their cultural practices with human rights. The total disregard of cultural dynamics in the practice of human rights and the processes of monitoring implementation of human rights is therefore a big mistake.

It is also important to note that culture is dynamic. It is not static and can modify to suit environmental and socio-economic changes within any society. Working with cultural structures should therefore enable States to have some influence on any changes to culture and also to pick the aspects of change that may facilitate positive interaction with culture.

Compliance with Human Rights Treaties

States and state actors are traditionally viewed by the international community as the key institutions bearing the bigger responsibility to ensure the respect, protection, promotion and fulfilment of human rights. This is in keeping with the princi-

ples of international law. However, most violations of human rights, particularly gender-based violations, are perpetrated by non-state actors in the private sphere and in cultural settings. The focus of the international bodies monitoring compliance with human rights obligations on States and State actors has therefore contributed to neglect in examining the role of culture in the delivery or hindrance of the enjoyment of these rights. The traditional indicators of the domestication of human rights are laws and policy documents incorporating agreed-to norms. States parties that have ratified the key International human rights instruments are expected to take measures that will ensure the incorporation of the rights guaranteed in these instruments, into the domestic laws and practices.

It might be expected that evidence of implementation of international human rights will be indicated in the States' reports on their compliance status and the comments of treaty bodies on these reports. However, a look at the reports that have so far been received reveals very little reporting on cultural perspectives. For those States with communities that are heavily governed and influenced by their cultural beliefs and traditions, this must mean that their reports are only providing part of the full picture. Effective implementation of human rights must go beyond the mere inclusion of intentions in policy documents. The practice in many countries, especially developing countries, is that most policy plans are not usually implemented and the laws seeking to enhance human rights are also not known or accessible to the people who most need them. There is a need for more indicators and benchmarks to be developed as additional tools to policy documents and laws in the assessment of the level of compliance and implementation of human rights by State parties to human rights instruments. There are many good laws but they only benefit a very small fraction of the people they are supposed to protect. There are also good policy pronouncements on human rights that are hardly implemented because they lack recognition and are not known by the communities of the beneficiaries. It is for this reason that the argument for cultural relativism in the promotion of human rights must be seriously considered, not as a redefinition of human rights but as one of the approaches that is relevant in the efforts to have pro-rights practices within all communities.

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Rights Enforcement within Judicial Systems

The judiciary is one of the state structures that is expected to enforce the human rights laws and international instruments that States are party to. It does this through the interpretation of the laws on these rights and the pronouncement of rulings that give direction in recognition of these laws. Courts usually focus on the provisions of the law and the circumstances of the matter in question when interpreting the law and making rulings. In systems that allow for the application of multiple laws, customary law may heavily influence the decision of the court. This part looks at a few cases relating to women's right to own and inherit family property. The choice of the cases in this subject area is deliberate because it helps to demonstrate the heavy influence that culture has in African communities and how this strongly defines gender roles. It also demonstrates that cultural perspectives are recognised and taken into account in most rulings in the region's courts.

In most African legal systems, customary law is one of the applicable laws. Most constitutions recognise customary law as the law applicable on personal matters, including marriage, divorce and maintenance. The laws governing land tenure are also multiple and they include customary law as well. In most African communities ownership of land was traditionally communal and the rights to land were vested in the community as a whole. The transmission of land from one generation to another and upon the death of the family trustee was clear. In patriarchal communities, land was passed through the eldest male son, and in matriarchal communities through the eldest daughter. Wives and children were guaranteed land use, access and ownership as members of the trust (Ojienda, 2003). The role of each individual in the community determined what connection would be made between the individual and the land. A first-born son would be a trustee; a wife would have permanent access; a daughter would have temporary access until she got married (all girls were expected to get married so their roles within their communities of birth were limited). Younger sons had temporary access until they married and became heads of households when they became trustees.

The change of the land tenure system by the colonial governments in many African countries disrupted the cultural and

social order. It facilitated the absolute ownership of land rights by individuals, who are now able to defraud family members by abusing their positions of relative advantage as community trustees. Women are particularly vulnerable to this problem, given that their role does not allow them to be registered owners of family land. They also lose out on their customary right to access community land since these land registration laws facilitate the alienation of this right. The result is that, on balance, customs were more protective of women's right to access and benefit from land than the current land ownership laws that emphasise the rights of individuals against those of the community. Any monitoring of the implementation of rights to access property by women should thus not fail to look at the cultural perspectives.

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The cases below demonstrate that the cultural/customary positions on land are still so strong in many African States that the focus on implementation of the succession laws that promote individual rights without due regard to customary law is often more academic than practical. In this scenario, it is important to determine whether most women in Africa can access family land more easily through the customary land tenure systems or through the system introduced by the colonial governments. An analysis of case law in Africa on this subject indicates that the practice of law and dispute resolution on matters of women's property rights is unlikely to be based purely on international pronouncements on the human rights principle on equality; it substantially listens to cultural perspectives as well. Where this happens, it is also important to emphasise the respect by the courts of the customary positions that protected the rights of women. Courts must not be allowed to implement only the cultural positions that favour one gender.

Most courts within the Commonwealth have tended to recognise customary law in judgments (although it is mostly in relation to determining ownership of land by individuals and not on the issue of access), thereby demonstrating the difficulty in fully relying on provisions of international human rights instruments and legislation that is based on these instruments. Judicial precedents that aim at radically changing the customary practices and attitudes do not seem to have an impact on the community at large. Their 'victory' tends to

remain at the level of the particular individual involved in the case and of course the very few people who challenge traditional systems in the courts.

Some country examples

Kenya has laws that are intended to promote equal rights between men and women in the ownership of property. These include the contract law, the Registered Land Act and the Succession Act. These laws are hardly used by women, who are not aware of them.[11] Even if women understand the laws, many do not have the means to use them.[12] Others prefer not to use them in an effort to remain a part of the community in which they live and not disrupt the social order. Many women would like to be seen to be proud and supportive of their culture, and are prepared to give up a bit of what would be described as their rights in order to fit into society. Many educated and economically stable women will not, for instance, pursue their right to inherit property from their parents on equal terms. Customary law positions are still very strong and are the key determinants of what happens.

In the Zimbabwean case of *Magaya v. Magaya*,[13] a community court and the Supreme Court dismissed an applicant's claim to ownership of her father's estate on the basis that she was "a lady and therefore cannot be appointed to the estate when there is a man".[14] In dismissing the appeal, the Supreme Court took into account the fact that the Constitution of Zimbabwe stipulated an exception in the application of its non-discrimination rule and this includes the "devolution of property on death or other personal law, which in Zimbabwe, was to be governed by African customary law if the matter involved the estate of an African who was married according to African law and custom". The discrimination caused by this exception was not, in the opinion of the judge, based on the 'perpetual minority' of women but "on the nature of African society, especially the patrilineal, matrilineal or bilateral nature of some of them". He further cautioned on the need to be careful when trying to apply common law concepts to customary law situations.

In the explanation on the reasoning behind his ruling, Mr Justice Chechetere states that he took into account the patri-

lineal nature of the community concerned. He suggested that "allowing female children to inherit in a broadly patrilineal society such as in the present case, would disrupt the customary laws of that society". He also noted that the family in African society is the focus of social concern and the individual concerns are submerged under family concerns. The judge went further and stated that:

> ... women were always regarded as persons who would eventually leave their original family on marriage to join their husbands. The appointment of female heirs would be tantamount to diverting the property of the original family to that of her new family. Her property would be inherited by her children who would be members of the new family and this would be a distortion of the principles underlying customary law of succession and inheritance.

The opinion of Judge Chechetere in *Magaya v. Magaya* is not unique to Zimbabwe; it is more or less the position in the majority of communities in Africa. Indeed, it has been argued by many that the 'distortion' of the customary laws on inheritance also creates a potential for social disorder should a girl who is married in another family chose to settle with her husband on the property (usually land) inherited from her family and located in her parents' home area. This goes against custom by increasing the opportunities for 'taboo situations' to arise and risking the ruin of the usually respectful relationship between a man and his in-laws.[15] In practice, even where girls are given a portion of land as inheritance, they end up selling it or giving it up to their male siblings. Indeed most parents prefer to allocate to their married daughters portions of family land that are not strictly ancestral or clan land but family land acquired in addition to ancestral land. Most of the time this is physically located far from their home in case she chooses to settle there with her husband. The effect is that girls are still 'denied' (from the perspective of universality of rights) ownership of that family land. Many of the unmarried girls who are allocated family land end up in disputes with their male siblings and family members.

In *Ephraim v. Pastory* in Tanzania[16] the sale of clan land by a woman who inherited it from her father through a valid will was contested by a male relative (nephew to the respondent)

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and a male clan member. The court of first instance recognised the customary position that 'females had no power to sell clan land'. The district court overturned the decision on appeal, and held that the sale was valid but that since it was made "without the clan's consent the nephew to the appellant was at liberty to redeem the land by paying back the purchase price to the buyer". This ruling was again contested at the high court. The high court upheld the district court's decision that the sale of the land by the woman was legal and went further to find as discriminatory the customary law provision that barred females from selling clan land. Justice Mwalusanya found this to be contrary to the constitutional provision that prohibits discrimination on the basis of sex.

The judge cited the provision of the Constitution of Tanzania,[17] which allows the interpretation of existing laws, including customary laws, "with such modifications, adoptions, qualifications and exceptions as may be necessary to bring it into conformity with the provisions of the fifth Constitutional amendment Act No 15/1984 – the Bill of Rights". He also made reference to relevant supportive international human rights instruments that Tanzania had signed or ratified.[18]

The judgement was seen as a victory for females all over Tanzania. Beyond the celebration of the judgment, however, not very many women's lives are likely to change as a result. It is also important to take note of the influence of culture on the decisions of the lower courts in this matter. Both courts chose to uphold the status quo in relation to the role and authority of the Haya tribe – to which the parties to the suit belonged – in accordance with the customary law of this tribe. This is of great importance because these are the courts that are usually approached first. Had the appeal not been lodged the positive ruling would not have been passed.

Many women in Africa value their cultural backgrounds and agree with some of the customary arrangements but are afraid to speak up on this because it is not politically correct in the world of human rights. Most would like a balance between culture and rights to enable then to identify with their communities and their role within it, but to enjoy rights within that community.

Sharia Law

Sharia law, which is closely linked with the Islamic religion and culture, is another example related to the subject of human rights and relativism. The sharing in succession property by women under Islam is determined by Sharia law, which stipulates the portions of entitlement. The division of property allocates women lesser portions than men. This is seen by some as discriminatory. Many Moslems disagree with this view and have defended the retention of this in the laws. They argue that those who see discrimination in the different portions have no appreciation of Islamic traditions and the way in which duties and responsibilities are allocated between men and women, i.e. the woman is allocated a lesser portion but is not given any responsibility in terms of provision for the family and herself. Looked at from the common understanding of the term 'equality', Sharia law is discriminatory, but when other issues relating to the practice are considered, then one may not make the judgement so rapidly. Moslems try to protect this law within the legal systems in the various States. In Kenya, for example, Moslems have included a clause in the draft constitution excepting Moslem women from the provision on equality when comes to matters such as succession rights.

Should the Islamic Sharia conceptualisation of the principle of gender equality in the context of property inheritance matters be considered as a violation of human rights? Does it necessarily show a conflict between human rights and culture/religion or could it be another acceptable variation of right to equal enjoyment of property? Should the practice of human rights be concerned with the transformation of different cultures into one universal culture or should it operate in the context of different cultures?

Other Cultural Practices

There is a danger in defining the 'do's' and 'don'ts' of human rights out of the cultural context and attempting to implement them outside cultural structures. It is likely to make implementation of the rights more difficult.

This is well demonstrated by the continuation of cultural practices such as female circumcision despite the laws and

... culturally-based issues on human rights need to be addressed with more than legislation and judicial precedents.

huge campaigns against the practice. In Kenya, as in some other countries, the practice of female circumcision on children is prohibited by law.[19] This law is difficult to implement by way of carrying out prosecutions against the parents of children involved and the circumcisers because jailing them would disrupt families socially and economically, and penalising by fining is not a deterrent. In Kenya, a Magistrate's Court recently sentenced three women to two years probation for circumcising 26 girls (as reported in *The Nation* in December 2003). The complaint was brought by the parents of one of the girls. Although the magistrate found the women guilty, he considered their plea in mitigation and sentenced them to two years probation. The mitigation was that "the girl was not forced into the ritual but joined her peers who she found being circumcised at a relative's house".

Attempts to introduce educational programmes with a focus on alternative symbolic rights to female circumcision are also increasingly meeting resistance, with some families opting to get their children circumcised even after the education. Some parents have interpreted the argument that the surgery is harmful to health to mean that it can be done in hospitals (*The Nation*, 2003). There is definite hesitation within the communities about recognising this law and there is clear defiance in complying with the law by communities, and a reluctance by the law enforcement mechanisms to seriously enforce it. This supports the argument that culturally-based issues on human rights need to be addressed with more than legislation and judicial precedents.

HIV/AIDS and Gender

HIV/AIDS, which has reached disastrous proportions in Africa, has made the impact of culture on women more visible. It is now acknowledged that gender considerations have substantially contributed to the spread of the epidemic. The gender disparity between men and women, together with the consequent economic marginalisation and gender-based violence, has clearly manifested itself through the different effects of this scourge on men and women. The vulnerability of women and girls has made them suffer more in terms of infection rates and,

although they have limited access to economic and social opportunities, they are still expected to continue to undertake their various social tasks as assigned by the cultural orders within their communities, including the bulk of the care of the infected.

Much of the development planning and the planning for HIV/AIDS management focuses on working with the formal or government-recognised care systems and spending most of the available resources here (even though they are taking care of less than 40 per cent of their populations), while giving token support to the rural women who are taking care of more than 60 per cent of those infected and affected by HIV/AIDS. The management of the AIDS pandemic in Africa has largely and unfairly been left in the hands of women without the necessary structural support. It further fails to recognise that the women need extra care because they are more vulnerable to infection; statistics show that more of them are infected than men, and yet they are expected to continue providing care for all in the society, particularly children. Africa is burying many of its citizens daily partly because the women are 'collapsing' under the weight of HIV/AIDS-related burdens.

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The failure to plan with the cultural structures and the communities means that the support needs of these women are not properly factored into the different interventions. Since HIV/AIDS strikes at the economic, social and cultural aspects of life, the planning for HIV management needs to be done in the context of all these aspects.

Government Planning

The scale for measuring 'progressive achievement' of economic, social and cultural rights is not very well developed. As a result of this, most government economic policies and planning processes hardly factor in human rights perspectives. It has taken a deliberate effort by UNIFEM, for example, to persuade governments to mainstream gender in their policies and programmes. Human rights treaty monitoring bodies need to specifically require governments to come up with pro-rights policies.

Resource allocation and use should target structures that

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can enhance the enjoyment of economic, social and cultural rights. States must facilitate community participation in policy formulation and implementation. National human rights institutions, together with civil society, should develop tools to track pro-rights components in policy and public expenditure documents. The tools should deliberately help to track gender and cultural issues. These will help to give attention to the needs of men, women, boys and girls, factoring in the needs of the more vulnerable, such as people with disabilities.

Conclusion

The true enjoyment of human rights by all the people/s of the world requires, in the view of this paper, the recognition that there is no universal or standard formula on how to implement and enforce the practice of human rights. Human rights are not just about the individual. The individual lives in an economic, social and cultural context. The individual's rights can either be recognised in isolation or in the context of the individual's group or community (Mutua, 1995).

Some of the solutions to the human rights problems that are linked to culture can only be derived from the internal cultural structures in the communities concerned. The international and national structures for monitoring and implementing human rights should therefore shift from emphasising the protection of the individual's rights to looking at the context in which the individual is living. Unless they do this, the opportunity to enhance individuals' enjoyment of human rights in their environment will be lost. The right to retain culture and the right of individuals to free themselves from culture or some cultural practices is in fact a conflict between competing rights. The resolution of this conflict must therefore look at both the individual and her or his community.

The tendency to design human rights education and advocacy programmes that concentrate on the empowerment of the individual or the possible 'victims of abuse' also helps a smaller number of individuals and misses the opportunity to hasten the pace on a wider practice of human rights. There is a need for the concept of human rights to be injected into culture, and for cultural perspectives to be incorporated in the processes of

monitoring the implementation of human rights. The acceptance of cultural perspectives in addressing human rights will necessarily mean that broadened definitions of some human rights principles be accepted. The meaning of gender equality may, for instance, include the Sharia law definition in the context of succession law. The term 'dignity' may include the kind of dignity that derives from the collective rather than the individual.

There is a need for the international efforts and processes for the enforcement of human rights standards to acknowledge that human rights are about day-to-day activities and practices. Culture and socialisation largely determine the enjoyment or violation of rights. Any standards set need to take note of this.

Notes

1 In the Convention on the Elimination of All Forms of Discrimination against Women.
2 In the Convention on the Rights of the Child.
3 Set up under a Protocol of the Charter that came into force in February 2004.
4 As has been the case in the arguments for 'the right to development'.
5 Articles 6, 10 and 15.
6 Articles 17 and 18.
7 Articles 2, 5, 9, 11, 14 and 16.
8 Articles 2, 20 and 24.
9 Articles 1, 11,12,18, 21 and 31.
10 Articles 2, 4, 17, 18, 20, 21, 22 and 26.
11 The operative law in most rural areas is customary law. Issues of concern usually arise when a family member elects to register and sell some family land without due regard to the needs of the other family members.
12 To seek redress in the courts is a costly exercise for many people, particularly women. Many give up before they are able to get a remedy.
13 Supreme Court of Zimbabwe 1999 Judgement No. SC 210/98 (1999) 3LRC 35.
14 As was stated by the presiding magistrate.
15 It is customary in most African cultures for a son-in-law to be expected to display the highest level of respect before his parents-in-law. Interaction between men and their in-laws is often

restricted to formal scheduled visits that ensure that both parties are on their best behaviour. Impromptu visits are usually limited to emergency situations, such as where a married daughter needs medical care and the sons in the home are not able to take on the responsibility. To expect a daughter to inherit ancestral land and use it in a way similar to that of a son, including settling in with her husband, is likely to cause a lot of social disharmony in most African communities.

16 Tanzania High Court, 1990, 87 ht. L Rep. 156 91992.

17 Section 5 (1).

18 The UDHR, CEDAW, ICCPR and ACHPR.

19 Under the Children Act.

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