

**DRAFT PAPER – NOT FOR CITATION**

**REFLECTIONS ON PERCEIVED CONFLICTS BETWEEN CULTURE AND  
DEMOCRACY IN AFRICA: THE SOUTH AFRICAN CASE**  
*Democracy and Domestic Politics: Perspectives from Africa, Asia and Latin  
America*

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## **1) Introduction**

There is a widely held perception that democracy – at least some notion of “western” style democracy - is inappropriate for Africa as it is antithetical to African values and culture. It is this perception that underlies the idea of a “clash of cultures” (the theme of this panel discussion) and sets up democracy and culture in binary opposition to one another. To be sure, there are many examples in Africa where this very notion is successfully deployed to explain state failure, dictatorship and discrimination. And there is no denying that the road to democracy in Africa has been, on the balance, a rather rocky one.

However, the idea that democracy is somehow fundamentally unsuitable as a form of governance in Africa, owing to its inherently western cultural bias, and that preference should be given to alternative indigenous arrangements, that perhaps do not hold states and societies to the same standards of governance and human rights, is a dangerous one. It is also one that is, I believe, conceptually flawed, and masks a whole range of *strategic* interests, which are not necessarily rooted in culture but rather deploy the discourse of culture and tradition in order to reinforce those interests.

This paper aims to explore these arguments from the perspective of the South African example, although it is hoped that some of the discussion presented here will be relevant to other examples in Africa. The much lauded South African Constitution recognises both individual rights, in particular the right to equal treatment, and communal rights to cultural recognition. This dispensation is therefore itself one which harbours potential conflicts between different categories

of rights, and this ambiguity is often exploited to protect various strategic interests of non-elected holders of power. Some recent developments shoring up the powers of traditional leaders in South Africa will be outlined, and the political dynamics driving these explored. These will then be considered in light of the inherently discriminatory effect that they are likely to have on women's rights, and the implications of this for rural development.

## 2) A “Clash of Cultures”?

The UNDP 2004 World Human Development Report, entitled *Cultural Liberty in a Diverse World*, identifies the intersection of cultural diversity and human rights in the context of economic globalisation and the imperatives of development. This poses a series of challenging questions, such as how human rights are to be honoured in diverse societies, how we are to make sense of the potentially negative impacts of globalisation on equality and human rights, and whether or not standards of human rights and well-being can be universalised in a way that respects all cultures equally.

These questions are of pressing relevance in South Africa where multiculturalism is deep, and economic inequalities are large and growing. As South Africa finds itself inexorably drawn into the global economy and security regime, so assertions of cultural and religious identity in contradistinction to the global regime of human rights and democracy arise. These contradictions are not unique to South Africa but rather constitute an instance of a broader African and global phenomenon – that of the tension between globalisation as an economic force, and the increasing “retreat into the inner citadel”<sup>1</sup> of cultural specificity that this seems to provoke.

Is democracy the problem here? It is a problem to those whose interests it may challenge. Democracy itself poses no inherent threat to cultural self-determination at either a communal or an individual level. It does however pose a threat to those who have traditionally enjoyed a measure of power and authority, whether this is vested through customary or religious institutions. Democracy of course insists that all have an equal say in how they are governed and, to a degree, how resources are to be used and distributed. As Kofi Annan observes, responding to the claim that “Africans are ‘not ready’ for democracy,”

In reality, African communities from the village upwards have traditionally decided their course through free discussion, carefully weighing different points of view until consensus

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<sup>1</sup> Barry, 2001 citing Berlin

is reached. So Africans have much to learn from their own traditions, and something to teach others, about the true meaning and spirit of democracy.’’<sup>2</sup> While it is important not to romanticise pre-colonial African society, this point is important to emphasise. It is precisely less, not more, consultation at community level that has come to exemplify some of the failures of democracy in Africa. Far from precluding community level debate and deliberation, a robust account of democracy requires it.

The problem is therefore not that democracy, or rather the values underlying democracy are anathema to African society and culture, but rather that the post-colonial environment has presented a set of struggles over scarce resources in a climate of stark inequality. And in a climate such as this, democracy is a challenge to those whose power relies on their ability to control these resources. And culture is a useful hook on which to hang such claims, and to argue that the rights that democracy seeks to guarantee are a foreign luxury,

especially in a country that has just emerged from conflict, or one whose people are desperately poor and hungry, [p]eople in such conditions are easily manipulated by those who use force to seize power, arguing that constitutional rights are a luxury which a poor country cannot afford.<sup>3</sup>

This is an entirely different matter from the conflicts of rights that occur as a matter of course in a Constitutional democracy. The following section outlines the Constitutional dispensation in South Africa which recognises both individual and communal rights, and seeks to explain how these may generate certain conflicts of rights that require mediation through deliberative methods.

### **3) Democracy and Human Rights in South Africa: Some Potential Conflicts**

South Africa’s constitution has been hailed as one of the most progressive in the world, and developed out of a process of negotiations in the aftermath of apartheid and the progression towards democracy. As a result, it contains many provisions that reflect the spirit of compromise of the negotiation process, as well as an extensive set of rights. It is worthwhile to reflect briefly on the specific clauses in the Constitution pertaining to the equal status of individuals, as well as its recognition of communal (cultural) rights and traditional leadership, as the Constitution is intended to inform all other law and policy in the country.

Chapter 2 of *The Constitution of the Republic of South Africa* (Act 108 of 1996) contains the Bill of Rights which applies to all laws, as well as binding all the branches of government and organs

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<sup>2</sup> Annan, 2000

<sup>3</sup> Annan, 2000

of the state. The intention is clearly to give human rights overriding importance as a matter of policy and law – what Ronald Dworkin refers to as “Rights as Trumps.”<sup>4</sup> This reinforces section 7(1), the introductory clause to the Bill of Rights which states that “This Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

Section 9 of the Constitution contains the all-important equality clause, which establishes equality before the law in section 9(1) and full and equal enjoyment of rights and freedoms including mandating the promotion of equality by legislation in 9(2). Section 9(3) prohibits unfair discrimination on the basis of, *inter alia*, but most importantly in the context of this discussion, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, and culture. This is followed by section 10 which establishes the right to be treated with equal dignity, and section 11 the right to life.

Section 12 deals with the freedom and security of the person, and in particular section 12(1)(c) establishes the right “to be free from all forms of violence from either public or private sources.” This is significant as it would seem to indicate that the traditional domain of the home and family, which are largely regarded as private in liberal theory, and therefore beyond the reach of the law, are for the purposes of this right a matter for public enquiry and policy. However, it is interesting to note further though that this particular section is *not* included in the table of non-derogable rights included in the constitution, and it is therefore implicit that this right is subject to limitations.

One such limitation would be the right to privacy, in particular within the home, which is enshrined in section 14; as well as possibly section 15 which establishes freedom of religion, and the potential legislative recognition of “systems of religious, personal or family law” although this would be subject to the limitations of section 9.

Sections 30 and 31 linguistic, cultural and religious rights of individuals and communities. Section 15 guarantees the (individual) right to freedom of religion, belief and opinion, while section 30 does the same for the use of the language of one’s choice and participation in the cultural life of one’s choice, in so far as these are consistent with the other provisions of the Bill of Rights.

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<sup>4</sup> See Dworkin, 1984.

The rights of “Cultural, Linguistic and Religious Communities” (collectively) are enshrined in section 31. There are two distinct rights recognised by this section: The first is the right of communities to actively enjoy, practice, and use their culture, religion, or language – a *negative* right, as it consists in the duty of non-interference on the part of others, both the state and other people. The second right is that to “form, join and maintain cultural, religious and linguistic associations and other organs of civil society” and again this is a negative right, as it requires the duty of non-interference on the part of others. Section 31(2) stipulates that both of these rights are subject to the other provisions of the Bill of Rights, which precludes communities from collectively exercising their rights in a way that interferes with the rights of others, either individuals or collectives. The problem of conflicts of rights is referred to below, but it is important to note that this limitation on communal rights of cultural, linguistic and religious communities implies that the rights of individuals will often “trump”<sup>5</sup> or outweigh those of communities when they come into conflict. It is this limitation that potentially causes a conflict for those who wish cultural norms and practices to take precedence.

Chapter 9 of the constitution establishes the State Institutions Supporting Constitutional Democracy. Sections 181 (1) (b) – (d) establish the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Linguistic and Religious Communities, and the Commission for Gender Equality. The Commissions are independent, and are charged with promoting respect for the relevant rights (outlined above), as well as having a monitoring role. In addition they have the power (but not always the capacity!) to carry out research and make recommendations on such things as legislation and the establishment of other bodies they regard as useful to the task of protecting and promoting the rights in question. In terms of section 181 (1) (5), “These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.”

The constitutional establishment of these Chapter 9 institutions is therefore intended to give the declared rights in Chapter 2 “teeth that can bite” to use Hoebel’s phrase.<sup>6</sup> By providing for mechanisms to monitor and evaluate, as well as make recommendations on the enforcement of these rights, the intention is clearly to carry them out actively, rather than merely declare them passively. However the Constitution contains other provisions that may be seen as a challenge to the enforcement of the declared rights, most importantly the equality clause.

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<sup>5</sup> This term is that of Ronald Dworkin, drawing an analogy with a deck of cards, where some suits have greater weight than others, which makes them “trumps.” See Dworkin, 1984

<sup>6</sup> Cited in Riddall, 1999: 17

One of the compromises that was agreed to in the negotiation process leading up to the drafting of the constitution was the recognition of traditional leaders. South Africa has a dual system of law, which recognises alongside the ordinary “western” law (which is a combination of Roman Dutch common law, with Anglo American law superimposed, all subject to constitutional modification) traditional African Customary Law. The origins and development of this parallel system of law is beyond the scope of this paper, but it applies only to Black South Africans and only in certain instances, and only applies in respect of civil matters, primarily those in the domain of family law.<sup>7</sup>

To a large degree, the sustenance of customary law was a product of the apartheid system, as it was maintained and shaped to fit the complex discriminatory laws intended to separate the races. As a result, there was an appeal to traditional authorities to assist in maintaining the parallel system of law, and it is these – unelected, (predominantly) male, senior members of cultural or linguistic groups - that today make the claim to retain their “traditional” powers and authority.<sup>8</sup> And that claim is rooted in the right to cultural determination.

Chapter 12 of the Constitution deals with the recognition of traditional leaders and outlines their role, but most importantly it allocates to them the power to deal with matters pertaining to African Customary Law and the communities which observe this law. However, for nearly the whole of the first decade of South Africa’s democracy, these powers were not clearly defined. Recent events, outlined below, show how traditional leaders have, since 2000, strategically deployed their political power, under the mantle of traditional authority, to have their vested interests protected. And this has come at a potentially very high price for the members of traditional communities, in particular women.

#### **4) The Re-Emergence of Traditional Leadership**

Chapter 2 of the Constitution, as has been noted above, recognizes of the equal human rights of all, and it also recognizes the rights of cultural, religious and linguistic communities. Furthermore, the Constitution makes provision for the recognition of the role of traditional leaders. The Constitution therefore recognizes rights and institutions that may potentially be in conflict with one another, and in particular, as far as cultural rights and the powers of traditional leadership are concerned, this is of particular concern for the declared equal rights of women.

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<sup>7</sup> See Bennet, 1991

<sup>8</sup> See Nhlapo, 1991: 112-113

Great strides have been made since 1994 in recognizing of the equal rights of South African women. A range of legislation aimed at equalizing the position of women has come into effect, combined with the presence of unprecedented numbers of women in politics, the economy, and the academy, which means that the position of women in South Africa is “more equal” now than at any other time. However, these changes have not permeated the lives of all in South Africa. Rural women remain among the poorest and most marginalized, with the least access to resources, education and power.<sup>9</sup>

However new legislation entrenching the powers of traditional leaders in the form of the *Traditional Leadership and Governance Framework Act* 2003 (TLGFA), and the *Communal Land Rights Act*, 2004 (CLRA), has been passed and will impact directly on rural citizens and disproportionately on women. There are two main areas of concern: the equal rights of political representation and participation at local government level (which is a significant area of overlap in power between elected local government authorities and traditional authorities); and equal rights of access to, and ownership of land. The government and the drafters of this legislation insist that its effects on rural communities will be positive and that it finally lays to rest colonial and apartheid forms of oppression, disenfranchisement and land administration. However, objections have been raised to both pieces of legislation in terms of the political implications that they have for democracy (and the equality that democracy necessarily entails); and the economic and power implications for the distribution of resources, most importantly land.

Lungisile Ntsebeza, who argues that this legislation compromises democracy in South Africa, points out that it came about “[a]fter years of ambivalence and prevarication.”<sup>10</sup> Serious questions for democracy arise in that after more than a decade of democratic reform, these concessions to the demands for power of traditional leaders could have been acceded to, effectively restoring the power they enjoyed under apartheid in terms of the 1951 *Bantu Authorities Act*. Furthermore, it is feared that this legislation once more creates a divide between rural and urban dwellers, abridging the citizenship rights of the latter.

Initially, post-1994, there had been a move away from support for the powers of traditional leaders with the advent of reformed developmental local government, with elected local leadership. Furthermore, an ambitious programme of democratic land reform and administration. In particular, it was recognized that rural women would need to be included in the structures of

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<sup>9</sup> See Kehler, 2001b

<sup>10</sup> Ntsebeza, 2005: 59

land administration.<sup>11</sup> The ANC, in order to live up to its non-racial, non-sexist struggle credentials was obliged in effect to play down the role of traditional leaders, many of whom had been complicit in the apartheid system, and indeed many of whom were ciphers of that system. While an account of the history of traditional leadership in South Africa exceeds the scope of this paper, it is worth noting that while many traditional leaders seek to portray themselves as benevolent patriarchs and guardians of the threatened traditions of their people, these credentials are in many instances highly questionable.<sup>12</sup> Indeed many high ranking traditional leaders are also quite comfortable wearing a liberal democratic hat too, and simultaneously hold elected positions as members of parliament, or in provincial or local government. Far from democracy being anathema to their dearly held traditions, it merely expands their area of authority.

And herein lies the rationale for the ANC's *volte-face* on the issue of traditional leadership and the right of rural people to enjoy equal citizenship. It is precisely to retain the loyalty of rural constituencies, largely controlled by traditional leaders, that the ANC was prepared to push through last-minute, ill-conceived, undemocratic legislation on the eve of the election in 2004.

During the 1990's, in the immediate post transition period, various attempts were made to both reduce the role of traditional leaders, as well as make them more accountable to their communities. Indeed the *Local Government Act* of 1993 reduces traditional leaders to the status of an "interest group" and plays down the role that they should play in local government. However, the attempt to democratise the system of rural local government in South Africa met with fierce resistance from traditional leaders, and united old enemies as new allies against a common enemy: democratic local government. As Ntsebeza remarks:

While the initial [post-1994] collaboration was around local government, it is quite clear that the main issue that brings traditional authorities together is their opposition to the notion of introducing new democratic structures. They would be happy to be the only primary structure in rural areas and insist on preserving the concentration of functions they enjoyed under apartheid, in particular land administration.<sup>13</sup>

In 2000, in the run up to the second democratic election, traditional leadership was again on the agenda. Traditional leaders, unhappy with draft legislation on municipal structures that rejected their demand that rural municipalities be disbanded in favour of tribal authorities, threatened violence in their areas and to boycott the elections. The Bill was quietly withdrawn and the President himself seems to have placated traditional leaders with certain undertakings in order to

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<sup>11</sup> Ntsebeza, 2005: 58-59

<sup>12</sup> For a full account of this history, as well as compliance with the apartheid and homelands system of many traditional leaders, see Ntsebeza, 2005 and Sparks, 2004. Note also their account of the fate of those traditional leaders who did not comply with the apartheid state.

<sup>13</sup> Ntsebeza, 2005: 68-69



secure their compliance. But by the time of the 2004 elections, the demands of traditional leaders could no longer be ignored. In particular, the contested province of KwaZulu-Natal, in which the traditionalist Inkatha Freedom Party (IFP) had prevailed under the leadership of (Chief) Mangosuthu Buthelezi, was deemed to be ripe for the picking by the ANC, but this could not be secured without the co-operation and support of the traditional leaders aligned with the opposing Congress of Traditional Leaders of South Africa (CONTRALESA).<sup>14</sup>

## **5) The Implications for Democracy and Gender Equality**

A detailed discussion of the content of the two pieces of legislation noted above, the TLGFA and the CLRA, cannot be outlined here, it is worth noting the salient features of each as they impact on democracy in rural areas. The TLGFA makes provision for traditional councils (TC), which essentially legitimize the apartheid-constituted tribal authorities. The majority of these councils will not be elected: 60% representation goes to traditional authorities and those they appoint, with the remaining 40% being elected by the community. Furthermore, the Act makes provision for 30% representation of women on the TC, but as these can be included in the 60% appointed by traditional leaders, they are likely to be neutralized.

The Act is also of particular concern because it puts traditional leaders in rural areas on a collision course with elected local government representatives, as their areas of authority overlap, and the Act does not specify how this is to be resolved. This has the potential to lead to explosive confrontations in areas where party allegiance is contested, in particular in KwaZulu-Natal, and a major test for this Act and its effect on rural communities will be the upcoming local government elections in 2006.

Of even more concern is the CLRA. Over a period of 9 years, this Act went through multiple drafts and generated a groundswell of opposition from civil society, land rights groups, and women's rights NGO's. There is currently an outstanding Constitutional challenge to the Act, which is one of the reasons why it is in limbo, and not yet being implemented.

The CLRA gives traditional leaders in communal areas (for the now the Traditional Councils) the powers to allocate and administer land in communal areas. While this Act is likely to remain tied up in red tape for quite some time, this is a matter of especial concern for rural women. Traditional leaders have frequently argued that women cannot legitimately have title to land, and

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<sup>14</sup> It is important to note that CONTRALESA had collaborated with the ANC prior to 1994, and so traditional leaders in this camp held out the expectation that the ANC would accede to their demands.

while the Act does make some provision for women to own land, their entry point remains marriage. Furthermore, given the complex links of patronage in rural areas, the Act creates the potential to further disenfranchise those who are already the most poor and vulnerable.

It is worth noting here why such emphasis is given to the negative gender implications of this Act. The majority of rural dwellers in South Africa are women, particularly in the former homelands areas. This is as a result of apartheid forced migration, and has been compounded by the ravages of HIV/AIDS. Frequently traditional leaders preside over communities that consist predominantly of the elderly and very young, and are largely female. Furthermore, the largest burden of subsistence agriculture is performed by rural women, which makes their access to land a matter of life and death.

This is compounded by the particularly marginalized economic circumstances of rural women. Of the overall population who live in poverty in South Africa, 72% live in rural areas. As many as 60% of female-headed rural households are below the poverty threshold, measured in terms of the Human Development Index.

Johanna Kehler emphasises that women's inferior economic status is a reflection of "prevailing cultural and social norms which regard women as less 'valuable' members of society" and this not only affects the way they are treated, but also fuels the belief that women's contribution to sustaining the family is less valuable work than men's (Kehler, 2001).

African<sup>15</sup> rural women's lack of access to resources and basic services are combined with unequal rights in family structures, as well as unequal access to family resources, such as land and livestock. This explains further why African rural women are not only poorer in society as a whole but also in their own families, and defines why their level and kind of poverty is experienced differently and more intensely than that of men. This translates into reality where African rural women are not only burdened with multiple roles concerning productive and reproductive responsibilities, but also subjected to discrimination and subjugation both in and out of their homes (Kehler, 2001).

The conclusion to Kehler's study, which focuses on women farm labourers in South Africa, is that while the laws in South Africa to protect women are adequate and in place (she refers in particular to the laws on employment standards and equity), the problem is with their enforcement in the face of deep, culturally embedded resistance to the "right" treatment of women. She concludes that:

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<sup>15</sup> Kehler here is using "African" to denote Black South African women, as opposed to women of any of the other races.

For the majority of women in South Africa, existing socio-economic rights, as guaranteed in the constitution, remain inaccessible resulting in the perpetuation and increase, as well as the feminisation of poverty. Furthermore, especially for rural women and women on farms the constitutional guarantees of equality and non-discrimination remain merely theoretical rights that lack practical implementation. What remains is women's day-to-day realities marked by the struggle for pure survival that is additionally determined by deteriorating socio-economic conditions and lack of development (Kehler, 2001).

The potential for traditional leaders to perpetuate this inequality cannot be underestimated. While there are, of course, traditional leaders that subscribe to the Constitutional values of gender equality, it is clear that most do not. Furthermore, according to the CGE, traditional leaders frequently do not even realise the extent to which their attitudes and practices are discriminatory. The CGE points to examples from their research to support this. In one case they were assured by a traditional leader of his commitment to gender equality, and that women played a "full and vital role" in the traditional court. In practice this translated into women being seated at the rear of traditional courts and participating only as witnesses. Another example was a headman who regarded women participating to "their full potential" in the traditional court as being consistent with their being excluded from the caucus in which all major decisions affecting the village were made.<sup>16</sup> They also point out that non-regulation will serve to replicate and entrench existing inequalities: "One of the problems in suggesting that administering the affairs of the traditional community in accordance with custom and tradition is that these have been male-centric, hierarchical and exclusive."<sup>17</sup>

## **Conclusion**

Does this legislation affirming the powers of traditional leaders in South Africa represent a "clash" between democracy and culture? Certainly the legislation potentially conflicts with the Constitutional rights of rural citizens, but the extent to which the legislation represents culture, rather than just a strategic allocation of power to gain electoral advantage, is unclear. Certainly the institution of traditional leadership cannot logically *require* legal recognition and financial support to sustain it, otherwise its claim to be deeply culturally embedded would be questionable.

By what other means can culture and democracy be reconciled? It seems to this author that traditional leaders ought to be held more accountable and required to be more consultative of their communities. Without deviating into a discussion on political theory, a suggestion of some kind of

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<sup>16</sup> CGE, 2003: 8-9

<sup>17</sup> CGE, 2003: 6

deliberative solution is raised here. Conflicts between different categories of rights are not necessarily a problem for either human rights or democracy. Rather, they pose the opportunity to debate, deliberate and discuss critical issues that affect society. By holding traditional leaders to a standard whereby their power and authority, and the actions stemming therefrom require the support and sanction of their communities (which the current legislation does not) both the demands of culture and democracy can be satisfied.

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