DRAFT PAPER – NOT FOR CITATION

UNDERSTANDING CULTURE AND RIGHTS IN SOUTH AFRICA TODAY: MOVING BEYOND RACIAL HEGEMONY IN NATIONAL IDENTITY[1]

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1. Introduction

The African National Congress's (ANC) 2005 National General Council was presented with a discussion document entitled "The National Question."[2] This document sought to "examine whether we can triumphantly proclaim that the new, and long sought after, South African nation has emerged." What this document is concerned with therefore, is *national identity*, which its author proclaims to be "the central political question of our time." The document then goes on to argue, however, that the National Question in South Africa is "principally about liberation of the African people." What it is not about is the "rights of minorities or ethnically motivated grievances." At its most basic level, this document therefore conflates race with culture, and foregrounds the interests of the demographic majority.

I think that this approach is mistaken. Undoubtedly race in South Africa is the primary vector of inequality, especially economic inequality. Furthermore, racial tensions continue to manifest themselves in various ways, in particular when scarce resources are in contest. However this is not indistinguishable from inter-cultural conflict and tension. And while economic inequality and the attendant poor servicing of rights that it entails is indeed an important factor that can undermine national identity, it is not consonant with it. And so the policy document is mistaken in passing off pressing questions about race and inequality, as questions about rights and multiculturalism.

What this paper seeks to do is to examine what cultural rights are by reflecting on the rights of cultural, religious and linguistic communities. This raises a different set of issues around rights and identity than the ANC policy document does, and what I want to argue for is that we take the debate a step forward, while still acknowledging the crucial role that race has to play in identity formation. Race is not culture, and therefore no special cultural rights or exemptions should stem from one's belonging to a particular "population group." I do not mean to say that I think that BEE and legislation aimed at employment equity are mistaken, but rather that these are a different matter to protection under the heading of culture.

The paper outlines some of the legal instruments and theoretical concepts underlying the notion of the communal rights of cultural, religious and linguistic communities in South Africa, and situates them within the global debate on multiculturalism and conflicts of rights. It then seeks to identify some of the possible areas of conflict related to these rights, and to question whether our response to them, to date, has been adequate.

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[1] This paper draws in part on a Concept Paper: *Awards to Recognise those Contributing to the Rights of Cultural, Religious and Linguistic Communities*, commissioned from the author by the Commission for the Rights of Cultural, Religious and Linguistic Communities in 2004.

[2] Available at http://www.anc.org.za/ancdocs/ngcouncils/2005/nationalquestion.html

2. Background to the Cultural, Religious and Linguistic Rights of Communities

The rights of peoples or communities in respect of the exercise of their culture (or ethnicity as it is more commonly referred to in international law),[3] religion and language are sometimes seen to constitute a "neglected and forgotten category of human rights … they are treated as the 'poor relatives' of other human rights."[4] Indeed, while cultural rights are enumerated with Economic and Social Rights in the 1966 *Covenant on Economic, Social and Cultural Rights* (see Appendix 1), they are quite frequently referred to either only cursorily, or not at all when the rights in that covenant, and other related instruments, are under scrutiny.

It is worth noting however, that the cultural, linguistic and religious rights of peoples or communities are quite distinct from social and economic rights, both in their genesis and their content. These rights fall into a separate category sometimes referred to as "Third Generation Rights"[5] (as distinct from "First Generation" Civil and Political Rights, and "Second Generation" Economic and Social Rights) owing to their collective nature, as well as their association with the "Third (Non-Aligned) World."[6]

This does not mean that these rights are of a lesser sort - their collective nature and their later arrival in the human rights family does not mean that they deserve less protection, nor that they are of lesser importance to their holders. There are two important considerations to be taken into account: a *moral* one, and a *contextual* one. The moral consideration is that these rights, like all human rights, are always and everywhere the same, and so in the same way that other fundamental human rights, such as the right not to be tortured, *ought* to be honoured equally in all circumstances (even where they are not, constituting human rights violations), so too the rights of communities to freely exercise and enjoy their culture, practice their religion and speak their language *ought* to be equally respected and supported in all countries and societies. The contextual consideration is that differences of culture, religion and language exist to *differing degrees* and have different *significance* attached to them in different countries and societies, and so the *extent* to which these rights *require* protection will vary from place to place.

However, the notion of the collective rights of cultural, religious and linguistic communities is a frequently contested one, precisely because of the varying resonance that it has in different parts of the world. But it is not a category of human rights that is only applicable to a limited number of countries in the developing world, with minority or indigenous communities, as is sometimes supposed. Indeed, as Bryan Barry notes, with the possible exception of Iceland "all countries are

[3] In most of the literature, and the international instruments that deal with the topic of these rights, "culture" is used as an umbrella term, covering communal or group rights of ethnicity, religion and language (see Symonides, 2000). However, there appears to be no discernable material difference between the use of this as an umbrella term, or as an interchangeable one with ethnicity, as culture is broad enough to encompass both meanings. As far as possible, the convention of using culture as an umbrella term will be followed here, with "ethnicity", "religion" and "language" being used to denote more specific rights.

[4] Symonides, 2000: 175

[5] Steiner and Alston, 2000: 355

[6] Third Generation Rights are therefore consonant with ideas articulated by the Non-Aligned Movement (NAM) that asserted a "Third World" of countries in addition to those which comprised the rival "First" (NATO) and "Second" (Communist) World blocs of countries during the Cold War. The term "Third World" was coined by French economist Alfred Sauvy in an article in the French magazine *The Observer* of 14 August 1952. The idea of Third, Non-Aligned World was articulated at the Bandung Conference in Indonesia in 1955, and was followed by the first meeting of the NAM in Belgrade in 1961. See http://en.wikipedia.org and http://newsvote.bbc.co.uk

ethnically mixed"[7] to some extent. So this category of human rights is as universally relevant as any other.

South Africa is a paradigm case of diversity, and therefore the relevance of the rights of distinct cultural, linguistic and religious communities here is especially pressing. It is axiomatic that the assertion of distinct claims of culture, and the possible conflicts of value that these entail, has the potential to be divisive. However, it is increasingly being recognised, that, depending on *how* diversity is dealt with in any given state, difference need not translate into division. As Janusz Symonides remarks, "culture and respect for cultural rights have also been recognised as an essential element in the resolution of conflicts."[8]

3. The Recognition of Cultural, Linguistic and Religious Rights in South Africa

In South Africa we are privileged to enjoy a rich multiculturalism that is both wide and deep. It is wide in the sense that the range of diversity of South Africans – in terms of race, culture, religion and language – is vast; and deep in the sense that our diversity as South Africans is not a superficial matter, but rather many of these elements constitute essential aspects of people's identity, and therefore may require protection and recognition.

It would be impossible to compile an inventory of the cultural, religious and linguistic elements that would cover all aspects of every South African's idea of what these should include. Part of the importance of recognising and respecting people's (as individuals and as collectives) rights to the various aspects of these is recognising their freedom to decide, and debate, what the elements of their culture, religion, and languages are.[9] What constitutes them? Which elements are essential and static, and which are fluid and subject to change over time? No attempt is made here to embark on such an exercise, as it is taken as given that the existence of a diversity of languages, cultures and religions in South Africa is sufficiently well known for these not to need to be inventoried.

The recognition of the breadth and depth of this diversity, as well as the need to safeguard it, are woven into the fabric of South Africa's human rights dispensation. The main features of the law protecting these rights are outlined here. These are backed up by a number of international instruments, some of which have been received into South African law, which are also briefly outlined in Appendix 1.

3.1 The Constitution and the National Action Plan

The *Constitution of the Republic of South Africa*, 1996, is frequently hailed as one of the most progressive and comprehensive in the world, especially in respect of the human rights that it enshrines in the Bill of Rights in Chapter 2. The most important of these for the purposes of the rights of cultural, linguistic and religious communities are sections 9, 15, 30 and 31.

Section 9 of the Constitution contains the equality clause, which guarantees the right to be treated equally before the law, and prohibits discrimination on the grounds of, *inter alia*, "ethnic or social origin … religion, conscience, belief, culture, [or] language." Section 15 guarantees the (individual) right to freedom of religion, belief and opinion, while section 30 does the same for

[7] Barry, 2001: 78
[8] Symonides, 2000: 176
[9] Indeed Leslie Green points out that "[m]any cultures incorporate as part of their fabric disputes about what their ways really are" (Green, 1995: 270).

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.[10]

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. The second right is that to "form, join and maintain cultural, religious and linguistic associations and other organs of civil society." 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 right 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"[11] or outweigh those of communities when they come into conflict.

Other important, *supporting* rights – supporting in the sense that they provide the necessary conditions for the free enjoyment, practice or exercise of the rights outlined in section 31 - are enshrined in sections 16, 17, 18. Section 16 enshrines freedom of expression, including that of the press, information and ideas. Most importantly for the rights under discussion here, section 16 protects the freedoms of artistic creativity, and those of academic freedom and scientific research, both of which are regarded as integral to the exercise of cultural rights. Section 17 enshrines the freedom of assembly, and section 18 the freedom of association.

There are also *related* rights – those which *may* impact on the free exercise of the rights in section 31 in certain circumstances – in sections 14, 21, 22, 24 and 29. Section 14 enshrines the right to privacy, section 21 the freedom of movement and residence, and section 22 the freedom of trade, occupation and profession. Section 24, which enshrines the right to a healthy and protected environment, has enormous resonance for some cultural communities, and may therefore be critical for the exercise of their communal rights. Similarly, section 29, which enshrines the right to education, and in particular the right to establish one's own institutions to this end, is deemed to be of importance to the practices of some cultural, linguistic and religious communities.

Chapter 9 of the Constitution establishes the State Institutions Supporting Constitutional Democracy, one of which is the *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.* The functions of the Commission, as outlined in section 185, are to promote respect for these communal rights; to promote peace, tolerance and national unity among communities; and to make recommendations on the establishment of community councils. The Commission has the necessary powers that it requires to "monitor, investigate, research, educate, lobby, advise and report on issues" concerning the rights of these communities; and to carry out its functions. The Commission also has the power to report on any matter within its area of competence to the Human Rights Commission (HRC). The Commission's composition must be representative of the cultural, religious, linguistic and gender composition of South Africa. The Constitution also makes provision for more detailed national legislation in this regard (see Appendix 2).

Section 235 of the Constitution refers to self-determination in its national sense, but also makes provision for the recognition of the right of self-determination of linguistic and cultural communities within South Africa. This right is subject to limitations, for example such communities do not have the right to secede, nor to violate the laws of the country.

[10] This means that this right is limited by section 9, the equality clause

[11] 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

The *National Action Plan for the Promotion and Protection of Human Rights* (NAP), of 1998 is South Africa's response to the *Vienna Declaration and Programme of Action* adopted at the 1993 World Conference on Human Rights. The Vienna Declaration recommends that states draw up a national action plan to identify the steps that need to be taken to promote and protect human rights. This is necessary because, as (then) President Nelson Mandela says in the Foreword to the NAP,

> The experience of South Africans and of all peoples everywhere has taught that in order for the rights and freedoms embodied in constitutions to be realised, they must become part of the everyday reality of citizens lives, and the institutions protecting them must be deeply entrenched.

One of these institutions is the *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities*, as laid down by the Constitution (see Appendix 2).

The NAP makes specific reference to the freedom of culture, religion and language. Two of the challenges identified by the NAP that are relevant to this paper are:

- Affirming diversity while at the same time building a common nation
- Promoting tolerance and respect

The NAP goes on to identify the establishment of the Commission as one of the ways to address these challenges.

In addition to the domestically enacted legislation, South Africa also has a number of obligations under international law pertaining to the rights of cultural, religious and linguistic communities. These are outlined in Appendix 1 of this paper.

4. Celebrating Diversity: Nation Building and Development

4.1 Diversity and Identity: Race and Ethnicity

Identity in South Africa is a complicated matter. The most obvious vector of identity in any country or society is race, but this has of course taken on added significance in South Africa because of the recent history of racism and discrimination. Related to race – and indeed largely commensurate with it in South Africa – is economic and social class, which can prove equally divisive, as "people on opposite sides of the socio-economic divide [are often] incapable of understanding and empathizing with one another."[12] However, neither of these aspects of identity capture what it is that is understood by the notion of "culture" or "ethnicity" (although these are of course frequently inaccurately conflated with race[13]). Furthermore, while race *may* still constitute a ground for discrimination where this is deemed to be fair (as in the case of affirmative action measures which are aimed at redressing past inequalities), no such discrimination is permissible on the grounds of class. As Bryan Barry remarks (paraphrasing Ernest Hemingway):

> [If] indeed 'the very rich are different from you and me' … it is very different from the kind of thing that is usually thought to be worth protecting under that head … [I]t is not a legitimate objection to redistribution to claim (even it is true) that your 'culture' depends on the possession of great wealth, any more than it would be a legitimate objection to the abolition of slavery to claim that your 'culture' depends on the ownership of slaves.[14]

[12] Raz cited in Barry, 2001: 79
[13] Carrim, 1999: 259
[14] Barry, 2001: 79

This is an important point to note, as it discounts cultural claims that rely on discrimination based on imbalances in power and resources, and so presumably claims of gender discrimination as an aspect of culture would also be questionable in this regard. Gender is an important aspect of identity, and one that has been the source of much discrimination. This is not just the biological difference between men and women, but of course the social and cultural significance that is attached to the fact of being male or female, or indeed homo- or heterosexual. The complex interplay between gender and culture is not one that can be ignored, although it may not, on its own, constitute an aspect of identity that creates a community.

Culture and ethnicity are difficult to define, let alone enumerate, and furthermore there is a distinctly *subjective* aspect to the notion of culture. Is not one's culture what one believes it to be? However there is the external ascription of culture to people, for example beliefs about people's ways based on their religion or language. Furthermore, the notion that culture is to be *protected*, and that it is therefore exempt from outside interference is a powerful one, and one which is sometimes mobilised to defend certain practices that are thought to discriminate against members of a group, or others who are not members of the group, in the name of "tradition." These claims have to be carefully weighed, as the rights of communities in this regard do not entail the waiving of the rights of others – to put it another way, no right amounts to a right to do wrong. However, outside of the world of abstract principles, things are not so simple, as it is precisely in the course of everyday moral and political life that conflicts between people arise, and many of those conflicts entail claims of rights. How does one resolve such claims when they constitute a conflict between the rights of a community and those of an individual? Should the one outweigh the other?

There are a number of approaches that a state can adopt in this regard. On the one hand, there is the approach that holds that the state should not interfere at all in the group's practices, even if they do threaten the rights and equality of members of the group. This is a *libertarian* approach, as it is characterised by freedom constituted by non-interference. On the other end of the scale, there is the more *communitarian* approach, which regards uniformity as a good to be pursued, and so this approach holds that the state should insist that the ways and practices of all communities should conform to a shared national ideal and set of principles. On this approach, the state has the power, and indeed the duty, to intervene in cultural practices to ensure that all individuals are treated equally, and to insist upon uniformity.[15] However between these two extremes are a range of alternatives, and South Africa's approach – which regards the rights of individuals and groups as being worthy of equal consideration – is one example.

The idea that tolerance for traditional practices, and understanding about the equal rights of individuals, can be promoted through dialogue is a promising and potentially unifying one. However it is by definition an approach that has to grapple with difficult issues of conflicts of rights that fall between the ideal of non-interference in communal practices on the one hand, and respect for the equal rights of individuals on the other. So this refers back to the point that there is a sliding scale of options, with total non-interference on the one end, and forced uniformity on the other, but that an approach in the middle of this scale which promotes dialogue and understanding as a way to address these is perhaps the most constructive approach, even though it is more demanding.[16]

In South Africa, where these claims are articulated daily by those with powerful and passionate interests in seeing their practices continue without interference, the matter is one which is both

[15] An example of this approach in practice is the recent decision by the French government to ban all religious symbols in state schools including the wearing of head scarves by female Muslim learners.

[16] It is of course much easier for the state to waive responsibility for the internal affairs of communities (one extreme of the scale); or to insist on total uniformity without regard to the differences between communities (the other end of the scale).

sensitive, and almost impossible to resolve to everyone's complete satisfaction. For example, the claims of traditional leaders in this regard, cannot simply be neutralised with reference to political theory, no matter how influential its proponents are. Rather, ways have to be found for these types of issues to be aired, discussed and debated. The aim here is not nation-building via consensus and uniformity, but rather via deliberation.

However it must be noted that dialogue and understanding are themselves sometimes products of the demands of particular structural contexts. It is important not to "romanticise" negotiations and dialogue, as the contexts in which they occur can harbour unequal power relations that ultimately lead to biased outcomes. The framework in which dialogue occurs must be premised on equality, but not just formal equality, which regards everyone as equally able to articulate their own views, interests and rights. Rather efforts must be made to empower those who may perhaps be marginalized by a pre-existing imbalance in power and authority, and so concessions need to be made in order to promote a more substantive, inclusive notion of equality to ensure that all who have a stake in the outcome of the negotiations are heard.

The idea of what is known as "deliberative democracy"[17] – which emphasises dialogue and understanding, rather than the attempt to reach consensus - provides a way to achieve a notion of national identity that does not require uniformity. The following section explores this idea.

4.2 Nation- Building and Civic Nationality

Diversity in South Africa is, as has been noted, both wide and deep. Andrea Baumeister makes the useful distinction between *first* and *second level diversity* which is applicable to the South African case. First level diversity acknowledges differences in culture, belief and background, but nevertheless regards all citizens as having the same relationship to the state. This level of diversity does not seek to assimilate different groups, but rather allows for a degree of diversity in terms of language and culture.

South Africa however may be described as having *second level diversity.* While all citizens have equal rights under the Constitution, in South Africa we also afford special rights, rights that alter the relationship to the state, to certain groups of people, on the basis of their culture, language or religion. As Baumeister describes this relationship, "[s]uch deep diversity is associated with demands for distinct institutional and legal frameworks and typically entails claims for corporate cultural rights."[18] So for example the *Recognition of Customary Marriages Act* 1998, the *Traditional Leadership and Governance Framework Act* 2003*, Communal Land Rights Act* 2004, and *Pan South African Language Board Act* 1995 contribute to this separate legal framework, and the Chapter 9 Commissions form part of the "distinct institutional framework" to support the "claims for corporate cultural rights."

So how then is it possible to have some kind of unified national identity – to embark on an exercise of nation-building – in a situation of such deep diversity? The United Nations Educational, Scientific and Cultural Organisation's (UNESCO) *Universal Declaration on Cultural Diversity,* 2001, may provide an answer. The Declaration begins with the statement that "the cultural wealth of the world is its diversity in dialogue." The introduction, by Koichiro Matsuura, the Director-General of UNESCO, notes that the Declaration was adopted unanimously in the wake of the events of 11 September 2001. It continues:

> It was an opportunity for states to reaffirm their conviction that intercultural dialogue is the best guarantee of peace and to reject outright the theory of the inevitable clash of cultures

[17] The primary exponent of this approach is German political theorist, Jürgen Habermas, but his ideas, and the debates that they have stirred up, have generated a huge body of literature on the subject over the past decade.
[18] Baumeister, 2003: 742

> and civilisations. Such a wide-ranging instrument is a first for the international community. It raises cultural diversity to the level of 'the common heritage of humanity', 'as necessary for humankind as biodiversity is for nature' and makes its defence an ethical imperative indissociable [sic] from respect for the dignity of the individual … The Declaration can be an outstanding tool for development … [and] it lays down not instructions, but general guidelines to be turned into ground-breaking policies by Member States in their specific contexts.

The Declaration therefore emphasises two main points: Firstly, that diversity can be managed and celebrated through dialogue, and that such dialogue provides the key to ensuring that diverse people need not be divided people. Secondly, the Declaration emphasises the connection between the recognition and celebration of cultural diversity and the goal of development. As article 3 of the Declaration describes this connection, "[c]ultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence." This point is worth noting as it is analogous to the contemporary discourse on the connection between gender mainstreaming and development, which recognises that without the full and active participation of all members of society, economic development and therefore rights and well-being, are necessarily stunted.

So how can the recognition of cultural diversity contribute to nation-building? The answer lies in considering what concept of a *national* identity, if any, people hold. Bryan Barry, in considering the problem of ethnic divisions and discrimination, argues that a formal (legal) conception of nationality is insufficient to generate the level of "equal concern and respect" for other citizens with whom one does not identify in any other way. [19]

Yet Barry is not arguing that homogeneity, or attempts to create a homogeneous national identity, is the solution. On the contrary, what is required is a more *inclusive* notion of national identity, which would entail empathy for the fate of others and an ability to identify with them. And the way to achieve this and realise a sense of solidarity, is by the sharing of institutions and a reduction of material inequalities. He makes the point that what is frequently seen as a cultural difference is in fact one of material circumstance. While it is true that the very rich and the very poor may have difficulty in empathising and identifying with one another, this is not a matter of cultural diversity, [20] as is noted in section 4.1 above.

So the success of a liberal democracy, Barry argues, depends on citizens having certain attitudes towards one another, most importantly that they regard everyone's interests as counting equally, and that they are able to identify a common good and are prepared to make certain sacrifices for that common good. Barry labels this *civic nationality*, in contrast to *formal nationality* (as embodied in a passport) and *ethnic nationality* that can prove so divisive, because of its demonising of "the other."[21] Barry in fact insists that his definition of *civic nationality* does not explicitly include reference to culture, but nor does it exclude it. Rather culture on this account of nationality is one facet among many that make up the complex identities of every individual. The idea here is that identity is not a "constant sum game" that requires one identity be supplanted by another. Rather identity has an "additive" quality to it, which is analogous to the ability to learn to speak more than one language.[22] So while there must be a certain degree of overlap in people's identities in order for the required level of "mutual recognition" and empathy with one another to exist, this does not entail expunging differences. The important point to note

[19] Barry, 2001
[20] Barry, 2001: 79
[21] A notion of ethnic nationality is what was mobilised with such tragic results in Rwanda the former Yugoslavia
[22] Barry, 2001: 81

is that what democracy requires in order for it to succeed, is for this mutual recognition to exist. So to paraphrase Barry, "being an Indian-South African or a Jewish-South African is a way of being a South African, not an alternative to it."[23]

Such mutual recognition can only come about through dialogue and debate, not only between citizens of different cultures; but also between citizens who share aspects of identity, such as race, class, ethnicity, language, or religion; about what their ways really are. The importance of this dialogue is two-fold. Firstly, it is important for establishing the principle that no one group or person has a monopoly on the truth about culture and identity, but rather that this is a constantly moving picture in which any number of diverse peoples may play a part. Secondly dialogue among and between diverse peoples is certainly the most effective (and probably the only) way to promote the sort of tolerance and understanding that Barry labels as mutual recognition, that civic nationality requires.

The ANC policy document that I cited at the beginning is mistaken precisely because it fails to engage with these nuances of national identity. By conflating race with culture, and by confusing economic inequality with cultural recognition, it comes dangerously close to promoting ethnic nationality rather than civic nationality. It misses the point of a deliberative approach to the formation of national identity. Again I must reiterate that I am not arguing that material justice is not important and to deny its pressing importance for overcoming racial discrimination. Nor am I denying the very pressing nature of racial tension and inequality in South Africa. What I am saying is that these pose a different (although related) set of questions and are not primarily about culture or even national identity.

5. Moving Beyond Race: Areas of Potential Conflict

This section briefly outlines some of the areas of potential conflict that are generated by a lack of civic nationality. These arise out of difficult questions that the communal rights of culture, language and religion raise, but that demand consideration with a view to understanding how they may be overcome.

5.1 "Unpacking" the Concepts: Culture, Language, Religion, Community and Human Rights

The concepts of culture, language and religion are multidimensional and quite open-ended, in the sense that the need to be inclusive (in order to give effect to equality in this regard) means that an endless succession of each of these may be asserted for consideration. There are also racial and class dimensions to these issues that cannot be overlooked, and so a deeper reflection of what these categories comprise in the South African context is neccessary. However this should not be just an inventory of all the cultures, religions and languages currently being asserted in South Africa, but rather provide an analysis of what ought to be considered, and how they ought to be protected and promoted. Furthermore, the intersection of the communal rights of culture, language and religion pose difficult problems for the individual rights of members of those communities. What about members of a religion, or language who wish to opt out of all or some of the community's practices? Or what about people who qualify to be members on one of the grounds of a culture, but not another?

The concept of "community" is similarly difficult. What should count as a community? Are all communities equal? What about the gay community? What about those communities whose values conflict with other communities? Incidentally, there is no constitutional reason why the

[23] Barry, 2001: 82. Barry makes this comment with reference to Irish- and Italian- Americans

gay community should not be recognised and included in the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (see Appendix 2) in terms of the demand of gender representivity. Indeed how would the Commission counter a claim of discrimination on the part of the gay community in South Africa in terms of section 9(3) of the Constitution? A further problem is who should speak for communities? Community leaders? Or should community members be consulted? Many would claim that community leaders should represent them, but this is in conflict with the demands of equality, and it seems to project onto communities an existing set of values upon which they are all assumed to agree. Why should dissenting voices be silenced in this way?

Again it seems as if deliberation may be the only constructive answer. While these issues are not unique to South Africa, they are nevertheless ones with which we must engage with the ultimate goal of national unity. We must also avoid the temptation of falling into lazy categories of racial classification as a substitute for other qualitative questions about rights and identity.

5.2 Education, Language and Identity

Education constitutes an important area of self-determination for distinct cultural, religious, or linguistic communities. However, education administered by the state can also have an important role to play in nation-building by ensuring that children from diverse backgrounds learn about one another and one another's ways and traditions in a way that promotes respect, tolerance and understanding. In post-apartheid South Africa this has proven to be a difficult path to tread. There have been numerous instances of conflict in schools and universities that ostensibly have language or culture as their cause, but which in fact appear to be racially motivated. In particular, language has been used as a criterion for excluding children of a certain "cultural" or "linguistic" (read racial) background from attending a particular school that has traditionally been dominated by a different "cultural" or "linguistic (but in reality racial) group. This illustrates again how a conflation of race and culture both muddies the debate, but also displaces rights (in this case the right to education) with other interests that are couched in the powerful *language* of rights. As has been argued in this paper, while cultural rights are not a lightweight matter, and deserve equal protection, a proper analytical understanding of what they entail would preclude their being deployed to violate the rights of others.

These are difficult and perplexing problems but they are ones that need to be grappled with at the earliest opportunity. The potentially damaging nature of these conflicts in their effect on the youth, and the potential for these prejudices based on difference to be carried forward to future generations cannot be ignored. And here again, a deliberative approach that deliberately puts aside a racialised script may prove to be the most helpful way to promote a sense of civic nationality which foregrounds all people's interests equally.

5.3 Different Values and Conflicts of Rights: Women and Children's Rights

Another difficult area for communal rights of culture and religion in particular, but possibly language too, is reconciling the practices of the community with the individual rights of group members when they are in conflict. Given the tension in South Africa between, in particular, the rights of women and certain traditional practices, this is an especially pressing area. The newly enacted legislation affecting the powers of traditional leaders (the *Traditional Leadership and Governance Framework Act,* 2003 and the *Communal Land Rights Act*, 2004) will have to be monitored and evaluated over time, especially in so far as the equal rights of women members of these communities are concerned.

Furthermore, different communities may hold different ideas and have different practices regarding the treatment of children,[24] some of which may be in conflict with South Africa's obligations in terms of the *United Nations Convention on the Rights of the Child*, 1989 (see Appendix 1). The types of conflicts that may arise are restrictions on educational content, the withholding of vital medical treatment, or even notions about the appropriateness of certain types of work for children. The ongoing debate about virginity testing on girls, and circumcision rites for boys practised in certain communities are poignant examples of this issue. Again the approach to be taken here is to facilitate dialogue and understanding with a view to reconciling the rights of (individual) children with communal cultural practices.

5.4 The Rights of Indigenous Communities

According to Nigel Crawhall, in considering the threat to the identity of Khoe[25] and San people as a result of threats to their languages,

> South Africa, which has taken a leading role in setting a standard for democracy and human rights in Africa and around the world, may find itself facing some difficult challenges from a people whom it forced dangerously close to the edge of extinction. Dealing with aboriginality means dealing with other aspects of the apartheid-generated framework by which we understand identity in South Africa. Racial concepts of "coloured", "white" and "African", and the labels we use for ethnic and language groups all become tinged with doubt when Khoe and San people are allowed to tell their story.[26]

Crawhall is particularly concerned that the debate around rights and culture in South Africa has been displaced, as its focus is primarily on "cultures" that are part of a ruling (Black) elite. Therefore land restitution "primarily affects land expropriated from people classified as 'native' or later as 'Bantu' or 'African.' This leaves most Khoe and San people without legal recourse for their losses despite the similarities of their experience."[27] Crawhall argues that in order to prevent the demise of these indigenous languages, claims over resources, in particular land, need to be taken seriously, which is in keeping with ILO Convention 169 dealing with the rights of indigenous people in independent countries (see Appendix 1). The details and merits of this argument cannot be explored here, but it is an important area to note.

5.5 Immigration and Xenophobia

South Africa has a long history of immigration from many parts of the world. Since the demise of apartheid, South Africa has become a destination for many immigrants from other parts of Africa where there are ongoing violent conflicts, such as the Great Lakes region. Other immigrants to this country are economic refugees (a category not usually recognised as being eligible for refugee status, but important to note none the less) from Zimbabwe and Malawi for example. While an influx of refugees is not a problem that is unique to South Africa, it is one that inevitably creates tensions, even in situations where jobs and resources are not scarce, as they are in South Africa.

An increasingly worrying trend is rising xenophobia among South Africans towards immigrants who have fled war and poverty in their own countries. It is necessary to take note of recent Constitutional Court judgements upholding the equal rights of immigrants[28] and to consider the

[24] See Bentley, 2005
[25] The spelling of this word follows that used by Crawhall, 1999
[26] Crawhall, 1999: 34
[27] Crawhall, 1999: 43
[28] *In Khosa and others v Minister of Social Development and others CCT13/03*, the equal entitlement of permanent residents to receive social grants was upheld; while in *Lawyers for Human Rights and another v Minister of Home Affairs and another CCT18/03*, the detention of illegal immigrants at ports of entry in terms of the Immgration Act

threat to South Africa's nascent national identity if discrimination of this kind is not confronted in respect of immigrant communities.

Conclusion

I began this paper by identifying what I thought was a mistaken emphasis in the ANC discussion document on "The National Question." I have argued that while the salience of race in questions about justice and national identity in South Africa should, quite correctly, be emphasised, national identity cannot be based on the idea that one race has more cultural legitimacy than others, particularly by virtue of its majority status. To follow this route is to stray down the dangerous path of ethnic nationality. What is really required are robust deliberative mechanisms to encourage a sense of civic nationality, wherein South Africans feel a sense of shared fates and interests. This must be coupled with, but not conflated with, efforts to address the material inequalities between races in South Africa that stem from our past, and that fuel division and enmity.

And this brings me to the point in the document that I think correctly emphasises precisely this goal. The document identifies as one of the elements of national identity to be pursued "[a] sense of community. There should be a kindred spirit among all South Africans – a sense of 'I am my sister's and my brother's keeper.'"[29] This is precisely the content of civic nationality, but it cannot be achieved in a climate that emphasises the racial and cultural identity of one group, and which conflates the economic with the political, the racial with the cultural, and rights with interests.

was held to be in contravention of their human rights to freedom and security of the person, and the rights of detained persons.

[29] http://www.anc.org.za/ancdocs/ngcouncils/2005/nationalquestion.html

Appendix 1: International Instruments

The aim of this paper is not to give a detailed inventory of every international instrument as it relates to communal rights, but rather to indicate, and briefly explain, those that have relevance in South African law. Section 39(1)(b) of the Constitution creates the obligation to take account of international law in the interpretation of human rights, and in addition South Africa has some specific obligations under international law relating to the rights of cultural, religious and linguistic communities. South Africa is undoubtedly a leading democracy in terms of its recognition of these rights in the Constitution and in South African law (see section 3 above). However it is important to understand the global context in which such rights are asserted, as many of the difficulties presented by deep multiculturalism in South Africa, are ones which are experienced in other countries, and so the international experience is one which contains important lessons.

In the post-1994 era since South Africa's first democratic elections, there has been a concerted move towards accession to the major human rights treaties and conventions in keeping with the avowed priorities of the government in promoting and protecting the human rights of all.

The provisions of the *Universal Declaration of Human Rights* (UDHR), are so widely accepted that they are regarded as forming part of customary international law.[30] The UDHR has as its core the belief that human rights are informed by the norms of *equality* and *universality*. The former rests on the belief that human rights are normatively those of all people, and all people are normatively regarded as being of equal worth and dignity; and the latter rests on the assertion of a "common standard of achievement for all people's and all nations." The UDHR recognises cultural diversity, but it does not conceive of this as being in conflict with basic human rights norms. The articles of the UDHR that relate specifically to cultural rights are articles 1 and 2, which establish the equal worth of all people in terms of their rights and human dignity, article 18 which asserts the freedom of religion, and article 27 which establishes cultural rights, and makes specific reference to the arts and sciences.

South Africa is also a party to the two 1966 *International Covenants on Civil and Political Rights* (ICCPR), and *Economic Social and Cultural Rights* (ICESCR). It is interesting to note that the former is more relevant to the communal rights under consideration here in two ways. Firstly it contains a greater number of relevant provisions (despite what their names might indicate) and secondly, while both have been signed by South Africa, only the ICCPR has been formally ratified, which makes it a legally binding part of South African law. The ICCPR recognises the right of (national) self-determination (article 1.1), as well as equal worth (article 2.1). Article 18 guarantees the freedom of religion, while article 22 guarantees freedom of association. Article 27 is particularly worth noting as it guarantees the *communal* rights of ethnic, religious and linguistic communities. While South Africa has not ratified the ICESCR, article 15 of this covenant reiterates article 27 of the UDHR which recognises cultural rights. It is curious that these rights receive so little attention in this particular instrument. As Symonides notes, while they are "enumerated together with economic and social rights, they receive much less attention and quite often are completely forgotten."[31] This relates back the point about these rights being regarded as the "poor relatives" of the human rights family, but it also highlights South Africa's notable commitment to these as a specific category of human rights in the ways described in section 3 of this paper.

As far as regional human rights instruments are concerned, South Africa is bound by the *African "Banjul" Charter on Human and People's Rights* of 1985. The Banjul Charter retains all the

[30] This means that a state does not have to be a party to an instrument for it to be deemed to be binding
[31] Symonides, 2000: 175

standard basic human rights clauses, but it also has a distinctly "liberationist" flavour in that it emphasises the struggle against colonialism and apartheid in its preamble. It is also mindful of the more collective conception of rights that is often associated with non-western cultural traditions in that it includes the rights of "peoples" (as collectives) as well as the rights of "humans" (as individuals). Article 17 formulates the right of every individual to freely take part in the cultural life of their community. Article 18 of the Banjul Charter also emphasises the family as "the natural unit and basis of society" as the family is regarded as "the custodian of morals and traditional values recognised by the community" (sections 1 and 2). However article 18(3) goes on to indicate that the state also has a duty to ensure that discrimination against women is eliminated, and to protect their rights. The Banjul Charter also differs from other human rights instruments in that it contains a chapter on the duties of the individual, including a duty of tolerance in article 28 - this is "the duty of individuals to preserve and strengthen positive African cultural values in their relations with other members of the society, in the spirit of tolerance, dialogue and consultation."[32] The Charter also includes particular duties towards the family, and in the case of children, to respect their parents. There is thus implicit within the Banjul charter the idea of the retention of "traditional" norms, including some hierarchical ones.

Also of significance, although not binding under international law as a ratified treaty or convention, is the *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* of 1992. The Declaration was "[i]nspired by the provisions of article 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious and linguistic minorities" and considers that "the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of states in which they live." Article 1 of the Declaration creates the responsibility on the part of the state to "protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and [to] encourage conditions for the promotion of that identity" and to "adopt appropriate legislative and other measures to achieve these ends." Other articles worth noting for the purposes of this paper are article 4(4) which creates the duty on the part of the state to "take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory"; and article 6 which stipulates that "states should cooperate on questions relating to persons belonging to minorities, *inter alia*, exchanging information and experiences, in order to promote mutual understanding and confidence."

UNESCO has adopted "a number of impressive standard-setting instruments concerning cultural rights" as "by its constitution, [it] is obliged to give fresh impetus to the spread of culture."[33] It is not possible to outline here the more than 30 instruments in this regard that have been developed in the last 50 years, however, it is important to note that these

> [c]onventions, declarations, and recommendations adopted by UNESCO protect and develop the rights to education, to cultural identity, to information, to participation in cultural life, to creativity, to benefits from scientific progress, to the protection of material and moral interests of authors, and to international cultural cooperation.[34]

Most importantly for the purposes of this paper, it is necessary to note the *Universal Declaration on Cultural Diversity* of 2001. This was developed in the aftermath of 11 September 2001, as a response to the potentially divisive nature of cultural, religious and linguistic diversity, to propose a model of "intercultural dialogue [as] the best guarantee for peace." This idea is explored as a means to further the rights of cultural, religious and linguistic communities in

[32] Symonides, 2000: 184
[33] Symonides, 2000: 184
[34] Symonides, 2000: 185

South Africa from the perspective of promoting a broader national culture of tolerance and understanding through dialogue in section 4 of the paper.

International Law that is aimed specifically at protecting the rights of potentially vulnerable categories or people, such as women, children, and indigenous communities, is also worth noting. The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) of 1979 was intended to overcome the ongoing "extensive discrimination that continue[d] to exist"[35] in spite of the numerous human rights instruments that preceded it that held the equality of women to be an implicit facet of human rights. Article 3 asserts women's normative equality in all areas of life, including culture. Article 5 places on state parties the responsibility of taking measures to "modify 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." Article 16 places a duty on the state to act against discrimination against women within marriage and the family, and to ensure that men and women have equal rights within marriage and the family.

South Africa signed and ratified CEDAW without reservations in 1995, and since then efforts have been made to equalise the position of women in law. However, the role of the family, and the customary inequalities therein remain a complicated matter, and which has not been entirely resolved. As Tomasevski notes:

> [CEDAW], as much as any other human rights treaty, lays down human rights norms which are necessarily worded in abstract terms. Human rights treaties are negotiated during protracted and sometimes conflictual intergovernmental meetings. In the case of the Women's Convention, 'the drafters had to face the difficult task of preparing a text applicable to societies of different cultural characteristics and traditions. The ways in which discrimination against women manifested itself varied from one culture another. The Convention therefore represents a constructive compromise.'[36]

South Africa reported for the first time to CEDAW in 1998. The report noted the establishment of the Office on the Empowerment of Women in the Office of President, the Office on the Status of Women located in the Office of the Deputy President and the Commission for Gender Equality, all of which are aimed at gender mainstreaming in South Africa and giving force to the equality of women. However, South Africa's representative also noted "that continuing deep entrenchment of patriarchy and customary, cultural and religious practices contributed to widespread discrimination against women in South Africa."[37] The problem of conflicts of rights, in particular in so far as these are constituted by a conflict between the rights of individuals and communities, is beyond the scope of this paper, but it is important to note here that very often these conflicts of rights are generated by different conceptions of gender, and different views about women's equality. This is inevitably a matter of grave concern in the South African context.

Also worth noting here is the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* 2003. Article 5 commits state parties to eliminating "harmful practices" against women, and article 17 asserts the right to a positive cultural context, which also creates the duty on the part of the state to promote women's participation in this regard.

As far as children's rights are concerned, the most important international law stems from the *United Nations Convention on the Rights of the Child* (CRC) of 1989. South Africa signed and

[35] See the preamble to CEDAW
[36] Tomasevski, 2000: 234, citing U.N. Doc. RS/CEDAW/1992/WP.1 24 March 1992
[37] See the *Report of the Committee on the Elimination of Discrimination Against Women,* Nineteenth Session: 59

ratified this convention in 1995, and so it is also binding in South African law. As far as communal rights of culture, language and religion are concerned, the CRC establishes the principle of non-discrimination in article 2, and article 14 recognises freedom of religion. Article 24(3) creates the duty on the part of state parties to abolish traditional practices that may be harmful to the health of the child. Article 30 establishes the communal rights of culture, language and religion in respect of children. Article 31 relates to more specific rights in this regard, as it states that "states parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts" and "states parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity."

Another increasingly acknowledged area of communal rights is that of indigenous people or "first" peoples. The most important instrument in this regard is the International Labour Organisation (ILO) *Convention (No. 169) Concerning Indigenous and Tribal People's in Independent Countries,* which was adopted in 1989. The Convention revises ILO Convention 107 of 1957, and applies to

> tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations, and to those peoples of independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographic region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[38]

The Convention is based on the basic tenets of *respect* for the identity of indigenous peoples, and their *participation* in decision-making about their rights and well-being, as well as in the elective and administrative bodies of their country. The state therefore has duties in this regard, as well as the duty to consult with indigenous peoples on legislative or administrative measures that may affect them. Indigenous peoples also have the right to determine their own developmental priorities and have control over their own economic, social and cultural development. The Convention is especially concerned with the land rights of indigenous peoples, and their access to land that is of cultural significance to them. The Convention also provides for the right of equal educational access for indigenous peoples, including their right to be taught in, and use, their own language where possible. Similarly with health care, indigenous peoples have rights of access, but also the right to have their own traditional methods of healing recognised, preserved and developed.

Importantly for the purposes of this paper, the Convention obliges states to "promote … respect, tolerance and understanding of indigenous peoples, through educational measures providing and accurate and non-biased depiction of the past and values of these people." This has particular resonance in the South African context, given that the history of the Khoe and San communities, especially in so far as their identity under apartheid is concerned, is a highly contested matter. However, South Africa is not yet a party to this Convention,[39] but given its importance in the South African context, this may constitute an area of advocacy, as the cultural and linguistic identities of these communities have not received the attention they deserve, both during the apartheid era, and in the post-apartheid era since 1994.

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[38] Introduction to ILO Convention No. 169

[39] Only 14 countries – Argentina, Bolivia, Columbia, Costa Rica, Denmark, Ecuador, Fiji, Guatamala, Honduras, Mexico, Netherlands, Norway, Paraguay and Peru – are at present parties to this Convention, but the increasing recognition of its importance means that its potential as an international human rights instrument is yet to be developed.

Appendix 2: *The* Commission for the Promotion and Protection of the Rights of Cultural Religious and Linguistic Communities Act, 2002

The *Commission for the Promotion and Protection of the Rights of Cultural Religious and Linguistic Communities Act* was passed on 30 July 2002 in order to give effect to the sections of the Constitution outlined in section 3 of the paper. In particular, the Act's purpose is to provide for the composition of the Commission, and to provide for the convening of a National Consultative Conference. The Act, in recognising the diverse nature of South Africa and the "divisions of the past," also states that "the Commission, in fulfilling its constitutional task should play a key role in assisting with the building of a truly united South African nation bound by a common loyalty to our country and all our people."

More specifically, some of the duties of the Commission, laid down in section 4, are:

- Promoting respect for and protecting the rights of cultural, religious and linguistic communities
- Promoting and developing peace, friendship, humanity, tolerance and national unity among and within these communities on a free and equal basis
- Fostering mutual respect among such communities

The term of the Commission is 5 years, and in terms of section 24 of the Act, the Commission is obliged to convene two National Consultative Conferences during each term, the first one within 12 months of a new term. The current Commission was appointed at the end of 2003, and the first of these conferences took place from 29 November – 3 December 2004.

Yunus Carrim remarks that the Commission "is the outcome of two imperatives." Firstly, it was a response to the need to include the minority White, right wing in a sustainable transition; and secondly, it is necessary to reconcile the diversity of "ethnic and racial identities in South Africa" through a process of nation building.[40] The Commission is therefore, at its inception, charged with developing strategies to reconcile and encourage participation in a broader debate about national identity, citizenship, and the scope and limits of toleration. This is an onerous responsibility, especially in light of the fact that it is to be done in a way that accords equal recognition to the rights of all communities with distinct cultural, linguistic or religious identities.

But as Carrim goes on to note, the Commission does not bear this responsibility alone. The Commission's work is supported by, and presumably must be in support of, the Human Rights Commission (HRC), and the Commission for Gender Equality (CGE), as these bodies have overlapping jurisdiction on questions of human rights. This is in keeping with the constitutionally defined system of co-operative government in South Africa, but also the greater imperative of "the expression of diversity as part of national unity, which is at the heart of the constitution."[41] Carrim points out that the Commission will also have to establish and clarify its relationship with the National House of Traditional leaders, in so far as this body "also deals with cultural questions and is made up of different language groups"; and the Pan South African Language Board.[42]

The other supporting legislation in South Africa relating to these communal identities cannot be discussed in any detail here, but it is also aimed at reinforcing the rights of distinct communities. These include the *Pan South African Language Board Act*, 1995 and the *Traditional Leadership and Governance Framework Act,* 2003.

[40] Carrim, 1999: 258
[41] Carrim, 1999: 262-262
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