Journal for Juridical Science 27(2):159-169

Kronieke / Chronicles

The fundamental rights to equality, religion and custom — disaggregating the contest, in the context of domestic abuse

1. Introduction

"Why is it that when sexual discrimination, a system that discriminates against half of the world's population is fought with equal militancy as apartheid, women are branded as sexually frustrated, divisive, unhappy, spinsters, and the like? Why is it that, even though many if not all domestic, regional and international human rights instruments entrench equality and have non-discrimination clauses, little has been done to actually promote and protect these entrenched rights? Why is the struggle against sexual discrimination more difficult than the struggle against racism?", asked the South African Deputy Minister of Justice, Ms Tshabalala-Msimang.[1] The United Nations High Commissioner, Jose Ayala Lasso continues this line of questioning and wrote, "[It is trite that] violating human rights cannot contribute to the maintenance of public order and security, but can only exacerbate their deterioration. Why then, do the old myths continue to survive in some law enforcement circles?"[2]

To this the Deputy Minister responds, "One of the reasons, amongst others, is that equality with women means that men must give up their own centrality and power base. This will not be easily relinquished, forming as it does the bedrock of all political, technological and social institutions. In short, equality with women means that men must give up their privileges".[3]

Over time this oppression has been justified using a variety of crafts and today, in many countries, the power to control women is embedded, maybe not in the national laws, but certainly in many of the social structures, alleged religious practices, and cultural activities.

The disenfranchisement of women can take a variety of forms. However, this article focuses specifically on the issue of control through violence. This control manifests in many ways: sexual abuse, domestic violence, battering, rape, and often murder.

1 Tshabalala-Msimang 1996:8.
2 Lasso 1997:v-vi.
3 Tshabalala-Msimang 1996:8.

D Singh, Executive Director: Police Practice, Technikon SA.

2. South African human rights law

Section 9 of the *Constitution of the Republic of South Africa Act* 108 of 1996 entrenches the individual right to equality, specifically equal treatment before the law and equal protection and benefit of the law. In keeping with the spirit of the *Constitution*, section 10 reinforces the right of everyone to have their dignity respected and protected. A further relevant section to note (for the purposes of this article) is section 12(1)(c) which entrenches security of person, which includes the right to be free from all forms of violence.

However, juxtaposed to these provisions, one must balance sections 15 and 30 which permit everyone "the right to freedom of … religion" and "the right to … participate in the cultural life of their choice" respectively. Section 31 takes the recognition of cultural and religious freedom further. In terms of this section "persons belonging to a cultural [or] religious community may not be denied the right, with other members of the community to enjoy their culture [and] practise their religion ….".

The South African experience during the process of drafting the *Domestic Violence Act* 116 of 1998 was a real tug-of-war between aligning the right to equality for women with the recognition of culture, customary law and traditional religious practice.[4] The acknowledged prize would be to create a balanced set of rules that did not undermine any one of them. For the South African legal drafters, their task was ameliorated by the fact that sections 15(3)(b), 30, and 31 of the *Constitution* all contain further express constraints on the exercise of the rights insofar as they may not be applied "in a manner inconsistent with any provision of the Bill of Rights." As if this were not sufficient guidance, section 39(3) states further: "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by … customary law …, *to the extent that they are consistent with the Bill* ".[5]

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4 After the 4th World Women's Conference in Beijing, South Africa adopted all 12 critical areas of concern stated in the Beijing Platform for Action — one of which is the creation of national machinery for the advancement of women. On 27 February 1994, the South African Women's National Coalition adopted the Women's Charter for Effective Equality (which states *inter alia* "Custom, culture and religion, insofar as these impact on the status of women in marriage, in law, and in public life, shall be subject to the equality clause in the Bill of Rights". — Article 9). On 15 December 1995, South Africa ratified the Convention on the Elimination of Discrimination Against Women (CEDAW), without reservation, and on 15 July 1996, the African Charter on Human and People's Rights. (It must be noted that having accepted the CEDAW in its entirety, South Africa had opened herself up to public scrutiny in all areas covered by the Convention and was obliged, without wasting time, to begin to put in place laws in conformity with the principles of the Convention, where these were not present.). The *Commission on Gender Equality Act* 36 of 1996 which came into effect on 8 August 1996 was intended to ensure and oversee the promise of specific and practical guidelines for attaining gender equality and empowerment. The *Domestic Violence Act* 116 of 1998 was one of the cogs in the wheel of this mighty piece of machinery.

5 My emphasis. See also the *Law of Evidence Amendment Act* 45 of 1988, section 1(1), which states that: "Any court of law may take judicial notice of …

So, in South Africa we can say that we have achieved legal equality (and it appears as if competing rights like dignity and equality will prevail over rights to religion, culture, and customary law) — but what of material equality? Only recently has it been recognised that gender *neutrality*, which failed to take cognisance of women's dependence on men, will not achieve equality and is, in fact, a perpetuation of the injustices. This marked an important step in the realisation that the attainment of formal equality in the law is only the initial stage in achieving the goal of real equality. Women began to stress the need for statutory procedures and their implementations to be viewed as they operate in *practice* for women.

In this context, the competing claims are:

- Groups are entitled to live by their cultural, religious, and traditional practices.
- In terms of the culture, religion, and tradition women are not equal to men.
- Unlimited equality threatens these standards, which have, historically, been and currently remain vulnerable and, therefore, entitled to protection.
- External forces should not be allowed to subvert the practices of culture, religion, and tradition and impose themselves upon the group.

In South Africa the issue becomes more complex for "the content that the judiciary will give to competing rights and their possible limitations remains malleable. This is especially true as the Constitutional Court has insisted that equality claims must be firmly situated and understood in their social context".[6]

3. A historical perspective on domestic abuse

To obtain a broader picture of domestic control and abuse, one must understand the fundamental injustices affecting women as a group that has made violence against women acceptable, and in many instances, legal, for so long. Violence and aggression have been pervasive throughout human history and have been conspicuously detailed from religious scriptures to the popular presses. To find a time when wife batterers did not enjoy the advantage of having custom and law on their side, would require one to traverse history back to pre-Biblical times.[7] Over time and as man recognised his role in the act of procreation, his "religious status gradually changed as woman's status gradually became debased. As man became the patriarch, society committed an about turn toward a repressive mode of living"[8] and with the transition to the pairing relationship, the "father right" became

indigenous law …:Provided that indigenous law shall not be opposed to the principles of public policy or natural justice".

6 Bronstein 1998:389 referring to the decision of *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708:paragraph 41.

7 Davidson 1977:2; Martin 1987:3-4.

8 Davidson 1977:2.

entrenched.[9] The wife was relegated to certain parts of the home, isolated, guarded, and her activities carefully monitored to protect her husband's honour.[10] Brownmiller explains women's acceptance of this role as follows: "Female fear of an open season on rape, and not a natural inclination toward monogamy, motherhood, and love, was probably the single causative factor in the original subjugation of women by men, and the most important key to her historic dependence, her domestication by protective mating".[11] As Martin notes: "Thus began the 'protection racket', the greatest hoax to be perpetrated on women".[12]

And so, over time, intimate disenfranchisement became tolerated by women and continued by men as the "custom" of the social order. Soon it became entrenched, taking on the protective mantle of religious rite.

It is patent that culture, religion and customary practices tend to create a complex network of laws which effectively guarantee the continued subordination of women, based primarily on grounds of sex and race, making virtually impossible their attainment of substantive equality or the realisation of their inherent human dignity. The coming together of diverse traditions and customary/cultural practices (European, African, Indian) contributed to the fact that violence within the home was recognised, universally, as a family matter. In these countries (and elsewhere) the power structure clearly extends beyond the state: it includes a variety of religious and cultural doctrines that have been appropriated to justify domestic violence and intimate abuse. The cultural premises underpinning the entire marital relationship becomes most overt in the form of violence against wives.[13] Anachronistic laws need to be revitalised. Reform must be seen as the pursuit of a society in which all people, including women, are able to realise their dignity and self-worth to the fullest potential.

Many will argue that from time immemorial, the husband has had the marital power over his wife and it has been his role to protect her and discipline her. To now debate the introduction of laws that constrain (and eliminate) this role of authority has been rejected by many traditional leaders as an attempt to impose western values. However, the mere assertion that something is, or more accurately, once was a reflection of a proud and just system of law and tradition cannot be used as a basis for repudiating any and all reform.

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9 Martin 1987:4.

10 Martin 1987:4.

11 Brownmiller 1975:16.

12 Martin 1987:5. Against this backdrop, it is interesting to note that the word "family" comes from the Latin word *familia* which signifies the totality of slaves belonging to a man. The slave owner had absolute power of life and death over his wife and serfs, who *belonged* to him. *Frontiero v Richardson* 411 U.S. 677 (1973) just so aptly summed up the historical attitude to women and wives: "There can be no doubt that there has [been] a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage".

13 Mama 1989:37.

4. The current South African law

Perhaps the clearest test of a state's attitude to intimate abuse is its position on marital rape. In South Africa, section 5 of the *Prevention of Family Violence Act*, Number 103 has made marital rape a crime since 1994. To date, the country has seen too few cases and even fewer convictions. Why? Because despite the law, there is a very strong belief that the purpose of marriage remains procreation. When a spouse attempts to deny her husband his "right" to sexual satisfaction, she is violating one of the most fundamental rights of the marriage and the husband. A South African woman described her experience to *Human Rights Watch* in 1995. "I was beaten by my boyfriend, who is unemployed. One day in February [1995] he beat me so badly and raped me that I couldn't walk. My face was swollen from all the beating and I had to have eight stitches on the back of my head. I went to the police, and told them where to find him. The police told me that they will have nothing to do with the case because he is my boyfriend".[14]

South Africa takes a very strong view towards the criminalisation of domestic abuse. The first step in any case of intimate violence is to seek to effect prevention and protection and the victim/survivor applies for a protection order. However, as soon as the order is violated, it immediately becomes a criminal offence. There are several critics who question this approach as being one seeking to regulate family relationships. "It amounts to a blunt instrument that may not be legally or culturally appropriate".[15] The biggest argument against the criminal sanction is that the effect is punishing not only to the offender, but to the victim and the family as well. (It is trite that fines are often paid out of the joint or family income and imprisonment can lead to job loss with obvious concomitant repercussions for the home.) Furthermore, the courts cannot guarantee the victim's safety and the act of imprisonment or even the call to appear before a court can act as a catalyst for further assault. "In addition, the victim may be punished by her family and/or her husband's kin who may revenge themselves on her for betraying her husband to the police".[16] Thus, mediation, as a process of domestic conflict resolution, is often argued to be more acceptable and more respected in traditional communities. However, Klein correctly (it is submitted) points out the one fundamental flaw with the mediation process: it falsely assumes equality by failing to place the interaction into the social context of overt — or covert, but present — gender domination.[17]

5. The role of culture and religious and customary laws

In South Africa, the ideal of equality and human rights is well known but in more recent times, its practice has seen many a clash between the cultural rights of the historically disadvantaged communities on the one hand and

14 Green 2000:111.
15 Green 2000:114.
16 Green 2000:114
17 Klein 1984:83-107.

the equality rights of women (a disadvantaged group within these disadvantaged communities), on the other — and I do not for a moment believe that South Africa is unique in this respect. "In fact," argues Bronstein, "one of the major inadequacies of modern democratic theory is that too often its proponents assume a homogeneous nation state and do not engage with the consequences of ethnic diversity".[18] This discussion will revisit the questions of "What is culture and custom?", "Is it synonymous with customary law?" and "Where does it fit in the equality debate?"

There is no gainsaying that traditional personal and customary laws often unfairly play the game of favourites — being patriarchal and, consequently, discriminatory of women in form and effect. Whether this was always intended to be the purpose of the ruling norms or whether this has been a convenient development during the evolution process remains contentious and is still argued amongst eminent scholars, writes Singh.[19] Sharing these views, Bennet notes that in assessing customary law, "'official' customary law, the *corpus* of rules used by the legal profession, must be treated with circumspection, for it may have no genuine social status".[20] Citing the African experience he states that customary law often describes less what people were actually doing and more what the chiefly rulers thought they ought to be doing; there was a tendency to represent only the interests of the senior males; those responsible for collecting data on the traditions were themselves blinkered by their own patriarchal culture … thus resulting in subtle and patent distortions.[21]

There can, however, be no gainsaying that there will be particular rules of customary law that do reflect the culture and religious practices of the community. Must these then always be accepted, without more? The writer would argue that the simple fact that the customary rules at issue are part of the culture or religion of the group is not, of itself, a reason for finding them *intra vires* the Bill of Rights. Nor can this fact make these rules immune from development pursuant to the needs of the society that they purport to regulate.

6. Cultural relativism and universality of human rights

The debate on the precedence of cultural relativism over universality of human rights remains unresolved. The writer takes the view that the two issues do not have to be read as being mutually exclusive of each other. The Preamble to the *Universal Declaration of Human Rights* states that "the recognition of *inherent dignity* and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Espiell thus explains that "[t]he human objective of the Declaration is to unite all individuals over and above their differences, to

18 Bronstein 1998:388.
19 Singh 1998:13.
20 Bennett 1991:60.
21 Bennett 1991:83-4.

combine unity and diversity in the name of equal dignity in regard to differences of identity".[22]

When one looks at cultural relativism, Titus states that it is most simply defined as the situation whereby each culture decides what is legal and morally right and wrong.[23] *Prima facie* there is nothing wrong in asserting the right to live by one's cultural standards, for it is a critical part of the *lived reality* of our lives (but one must still question who sets the norms).

Cultural relativists argue that *international* human rights standards, as espoused in the documents of the ilk of the *Universal Declaration of Human Rights*, are premised upon a western code of morality deriving from christo-judaic dogma. It is, therefore, insensitive to many non-western cultural standards and should be either radically reformulated or abolished in its entirety.[24] Whilst the first part of this comment is true, one has to agree that culture is in no sense monolithic and the people within the culture have individual identities. Accordingly, whilst the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the primary duty of states to protect certain fundamental rights, such as the right to equal treatment and the right to dignity. Donnelly takes a similar stance, recognising the presence of certain "core rights" that may not be violated. These would be those rights that relate to the "integrity of the human person".[25] They are and will always remain rights that are inalienable, non-derogable and absolute.

Garkawe, despite being an ardent proponent of cultural relativism, proposes a *via media*. He does not advocate that the cultural and traditional rules prevail in all cases but "[a] preferable and more culturally sensitive approach would be to weigh up the level and long term effects of the particular physical violence or coercion against the benefits of preserving the practice for the maintenance of the culture in question".[26] Given the recognised physical, psychological, and social trauma concomitant with domestic violence, there can be no argument for the preservation of any standard that perpetuates such abuse.

The South African *Constitution* echoes similar sentiment. Section 36 (1) provides specifically for the limitation of all rights in the Bill of Rights "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom …".

22 Espiell 1998:526.

23 Titus 2000:8.

24 Pollis and Schwab 1980:172; Baehr 1995:14 also argues strongly against the notion of a universal morality for the reason that "the world has been characterised by a plurality of cultures".

25 Donnelly 1989:15.

26 Garkawe 1995:40. This is the spirit of section 39 of the South African *Constitution* and was the approach adopted by the court in the South African case of *Mebena v Letsoalo* (unreported). The court specifically described customary law as an evolving entity. Despite finding itself unable to support the customary rule, the judgment did not purport to abolish the law but modified it in a culturally sensitive way.

7. Conclusion

It may be argued that in a constitutional democracy, the litmus test of the relationship between legal norms and the status of women resides in the family law and status of women in the country.[27] "As a rule, states are rarely willing to deal with the knotty relationships among sexual behaviours, moral rectitude and criminal law when it is perceived as threatening male prerogatives".[28] However, domestic abuse and intimate violence strip the recipient of the most fundamental rights to equal treatment, dignity and respect. No country can claim to be truly free when such acts are not proscribed and sanctioned. (Women may be from Venus, but they are human too!)

Societies must jettison the very idea that the struggle by women for equality and equal treatment is a process of systematic westernisation. When a woman challenges traditional cultural values using the right to equality, she does not dislodge herself from her culture. What she is doing is arguing against the maintenance and continuity of a particular cultural value. One needs to recognise that one of the manifest characteristics of religious and customary law is that it can be systematically discriminatory. The dispute, then, is not simply one of pitting tradition against equality: the debate should rather be viewed as being between two different interest groups (within the same cultural group) battling to change power relations within their very culture (which, by the precedent of practice, is not shown to be immutable).[29] The court is called upon to adjudicate and support the woman's claims to equal concern and respect and her right to participate fully in public life. Any other contention "destroys the coherence of a democratic state … . In such cases it is misguided to see a judicial decision to remove a woman's legal disabilities as an attack on culture".[30] Reform must be thought of as the pursuit of a society in which all people, including the women, are able to realise their dignity and self-worth to the fullest potential. This means that women should not have to choose between culture and equality, "for otherwise both rights will be rendered nugatory".[31]

There is no role for the artificial propping up of cultures by claiming that they will become endangered or dissolve in the face of egalitarian influences. Those traditional practices that continue to be valued by their adherents will survive, whilst those aspects that call for change must be reviewed.[32] The democratic constitutional state provides the environment that enables this cultural evolution to take place. Legislation and social constructs for the reform of patriarchal bondage are a clear sign of a country

27 Coomaraswamy 1994:57. Jurisprudence of personal law reflects the particular standards and constructions of how the country sees women conducting their personal and social lives.
28 Green 2000:105.
29 Bronstein 1998:403.
30 Bronstein 1998:404.
31 Van der Meide 1999:111.
32 Habermas 1994:130.

recognising and *practising* the meaning of equality. However, again, it must be stressed that this is only the first step — to derive material advantage from the new dispensation. The second and more important one is to get the women to *use* it.[33]

33 It is trite that when interfering with traditional practice, one is often faced with the bogey of making "paper" laws — laws that would be most strongly resisted by the very communities they claim to assist. In South Africa, counsellors in domestic abuse are often frustrated by the fact that despite the law, many women are hesitant to have their husbands charged because of *inter alia* religious beliefs that urge tolerance for the sake of family unity, socialisation, and the financial repercussions. The first can be managed with education and training programmes and an injection of progressive thinking, the latter two are parallel to this topic and will not be discussed. Under the pressures many women face, to pursue a separation as a means of escape from domestic abuse is a truly heroic exercise. Many women will often take the soft option and "learn to live with the problem". To ensure success, the lawmakers must perform a needs assessment and balance the demand to preserve custom in its antique form (as a mark of cultural identity) against fundamental demands of the people for the guarantee of basic rights and values.

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