

Draft paper on 'EQUALITY [AND CULTURE]' for Constitutional Court Review Conference, 10-11 December 2009.*

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I INTRODUCTION

The Constitutional Court handed down four equality related judgments in 2008, one on section 9(1)¹ and three on issues broadly relating to culture. *MEC for Education, Kwazulu Natal v Pillay*² was the first time that the Court had considered the application of equality legislation, the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000, (the Equality Act) as well as the issue of discrimination on the basis of culture. *Gumede v President of the RSA*³ and *Shilubana v Nwamitwa*⁴ both concerned aspects of gender equality within customary law and practice, and thus raise interesting questions about how to negotiate the relationship between equality and culture in situations of 'intra-group' (gender) discrimination.

Gumede concerned a claim of unfair gender discrimination against the Recognition of Customary Marriages Act, 120 of 1998, a law passed by the democratic Parliament to address the inequality faced by women in customary marriage. Although s 7(1) stipulates that customary marriages entered into after the commencement of the Act are in community of property⁵ (thus guaranteeing each spouse one half of the estate upon divorce), it also states that 'the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law'.⁶ In this case, the codified 'Zulu law'⁷ entrenched male ownership and control of

* As work in progress, I look forward to improving it through questions, comments, agreement and disagreement! Complete references will be provided in the final version.

¹ The case of *Nyathi*, although based on a violation of s 9(1) and thus an example of how the rationality test is applied under s 9(1), is far more interesting for the nature of its remedy – a declaration of invalidity, together with a suspension of invalidity and structural interdict.

² 2008 (CC).

³ 2008 (CC).

⁴ 2008 (CC)..

⁵ Section 6.

⁶ Section 7(1) of the Act.

⁷ Kwazulu Act on the Code of Zulu Law 16 of 1985; Natal Code of Zulu Law R 151 of 1987, GG No. 10966.

matrimonial property during marriage and upon divorce, leaving women with no rights to property upon divorce. The Court found little difficulty in concluding that the provision discriminated unfairly on the basis of gender.

Shilubana addressed the issue of male primogeniture in contexts such as traditional leadership and status.⁸ Although it did not directly assert the ‘unconstitutionality’ of male succession, it affirmed the Valoyi community’s decision to appoint a woman chief as a development of customary law that complied with the values of the Constitution, including equality.

Both judgments are significant in their recognition of women’s equal status within customary law and the communities that it regulates. *Gumede* offers significant practical relief to women married under customary law before the commencement of the Recognition Act, providing them the protection of an ‘in community of property regime’ and removing the deeply patriarchal marital property provisions of the Zulu code. *Shilubana* is a small, but significant, step towards the conclusion that male primogeniture, as the determinant of accession to chieftainship, violates the constitutional guarantee of gender equality.

Despite their positive conclusions, neither are particularly good examples of equality jurisprudence.⁹ *Gumede*’s analysis is welcome for its avoidance of the formulaic step-by-step reasoning that sometimes accompanies the application of the *Harksen* test, however the reasoning is disappointingly scant. Given that *Gumede* implicated what is by now is a relatively easy customary issue (women’s equal status and rights in the family), one might have hoped for more guidance on how to deal with more intractable or controversial questions involving customary practices such as virginity testing or lobola. *Shilubana* raises but does not apply equality jurisprudence to male succession, leaving open the question of whether it is fair discrimination (as claimed by CONTRALESA). After *Shilubana*, we know that female chiefs are permitted, but to what extent and under what circumstances can we conclude that they are they constitutionally required? This

⁸ Paras 88-94.

⁹ Other issues raised by *Gumede* not addressed in this paper are the failure to distinguish between indirect application (which deals with questions of interpretation of legislative provisions) and direct application; and between internal (fairness under s 9) and external (reasonableness and proportionality under s 36) justification.

might be a strategic decision by the Court, but it leaves open the issue of what (whether and when) equality principles govern male succession.

Finally, the cases address but leave open a 'bigger' question of the nature of legal pluralism within our constitutional democracy - identified by Moseneke DCJ in the unanimous *Gumede* judgment:

At one level, the case underlines the stubborn persistence of patriarchy and conversely, the vulnerability of many women during and upon termination of a customary marriage. At another level, the case poses intricate questions about the relative space occupied by pluralist legal systems under the umbrella of one supreme law, which lays down a common normative platform.¹⁰

In this paper, I address two related issues concerning the often troubled relationship between claims to custom and culture, on the one hand, and the constitutional commitment to gender equality, on the other. Firstly, how can we justify and make sense of the relationship between culture and gender equality under a supreme Constitution that mandates legal pluralism? Secondly, how can we develop equality jurisprudence in a manner that gives us effective tools for testing claims of unfair gender discrimination against different cultural rules and practices?

The first issue involves a consideration of the relationship between claims to culture and claims to equality. The Constitution has often been used to assert claims of tradition and culture without reference to the constitutional constraints that are explicit in the text. In this context, the assertion of the right to culture or religion, and the constitutional commitment to diversity, becomes a self-fulfilling justification for particular norms and practices, insulating them from evaluation against other constitutional values and principles (often defined as 'foreign' or 'western'). In some forms, this approach locates the definition and adjudication of culture solely in the hands of traditional leaders, rather than courts.¹¹ This is neither a correct reading of the Constitution, nor an accurate depiction of cultural life. Part II of this paper considers how we should

¹⁰ Para 1.

¹¹ See eg Zizi Kodwa 'Hands off Ukeshwama' *The Times* 3 December 2009 suggesting that it is 'absurd' to approach the courts to test the cultural practice of ukeshwama or ritual animal sacrifice, rather it is traditional leaders or kings who are the 'ultimate voice of reason' on cultural issues.

understand the relationship between culture and equality under our Constitution.

Part III turns to equality jurisprudence and considers how the current jurisprudence, based on the test established in *Harksen v Lane NO*,¹² may be developed to address claims of unfair sex and gender discrimination in cultural rules and practices, and indeed all equality claims.

II GENDER EQUALITY AND CULTURE

The apparent conflict between ‘culture’ and ‘equality’ was the subject of heated disputes in the constitutional negotiations of the early 1990s when traditional leaders asked that customary law and male primogeniture in accession to chieftainship be excluded from the operation of the new Bill of Rights, especially the equality clause.¹³ The rejection of this claim in the interim and final Constitutions clearly established women and men as citizens of the new democracy and not merely as subjects of traditional law. The 1996 Constitution recognised the importance of cultural identity and cultural diversity,¹⁴ and embraced legal pluralism,¹⁵ but rendered this subject to the values and rights expressed in the Constitution. These include a strong commitment to (gender) equality as one of the foundational values of the Constitution.

This raises two related questions, firstly, how do we understand the commitment to cultural diversity and legal pluralism within our democracy, and secondly, how do address the diversity of values generated within a system of legal pluralism and diversity.

The first question has generated at least two different answers within legal and political discourse in South Africa. The first is generally expressed by traditional leaders and defenders of particular cultural and religious practices. In this, priority is given to the right to culture over other rights – resulting in the claims that the recognition of cultural rights and the constitutional commitment to cultural diversity by themselves justify cultural practices. No further

¹² 1998 (1) SA 300 (CC); 1997 (11) BCLR 257 (CC).

¹³ See C Albertyn ‘Women and the Transition to Democracy in South Arica’ (1994) *Acta Juridica* 39; F Kaganas & C Murray.

¹⁴ Section 30 and 31.

¹⁵ Section 211.

interrogation is required. To give but one of an increasing number of examples: chairperson of the Congress of Traditional Leaders of South Africa (CONTRALESA) and member of Parliament, Patekile Holomisa, has challenged the idea of equality for women, calling for the preservation of traditions and traditional gender roles, claiming that they are designed to 'protect' vulnerable women and children and not to discriminate against them.¹⁶ Sibongile Ndashe suggests that such arguments create a 'deliberate confusion',¹⁷ emphasising the importance of retaining cultural values, often on the basis of a right to culture, but ignoring the patriarchal and discriminatory aspects of those values and the equality rights that challenge them.

In democratic terms, such arguments establish a strong liberty-based idea of cultural and legal pluralism. Members of cultural and religious groups are able to associate freely, and promote norms and engage in practices that are significant to their identity and (collective) well-being. In addition, an equality argument affirms the idea of equal concern and respect across group differences.¹⁸ A strong cultural relativist position calls for minimal limits to be placed on cultural norms and practices, and the claim is for the 'cultural domain' to be given a significant degree of autonomy from 'external' influence. [The strongest form of this argument is that even 'supreme' constitutional values may constitute such influence. A weaker' form might suggest that the constitutional commitment to culture should always 'trump' other values.]

Strong legal/cultural pluralism also tends to prioritise the value of abstract, private choice, envisaging a private sphere that is more or less closed to public scrutiny and to constitutional values.¹⁹ It thus masks or denies the gender and other power relations that pervade the private, and tends to promote a monolithic idea of culture. Finally, 'outsiders' are seen to have little or no legitimacy/basis for criticism of 'internal' practices. While the strong liberty-based approach is a powerful defender of diversity, if combined with a strong

¹⁶ P Holomisa 'A Traditional Leadership perspective of gender, rights, culture and the law' in Kristina Bentley & Heather Brookes ' *Agenda Special Focus* (2005) pages??

¹⁷ S Ndashe 'Human Rights, gender and Culture – a deliberate confusion?' in Kristina Bentley & Heather Brookes ' *Agenda Special Focus* (2005) 37, 37.

¹⁸ For discussion of the liberal approach to diversity, see P Lenta 'Religious Liberty and Cultural Accommodation' (2005) 122 *SALJ* 352, 352-354. See also Lenta 'Muslim headscarves in the workplace and in schools' (2007) 124 *SALJ* 296, 296-9.

¹⁹ B Winter 'Women, the Law and Cultural Relativism in France'

cultural relativism it amounts to a call for non-interference. Such 'non-interference' enables the use of cultural defences for inequality and fails to protect members of the community against discriminatory norms and practices. Gender inequality, for example, is excluded, redefined or ignored.

An alternative 'egalitarian'²⁰ approach to cultural/legal pluralism enables diversity, but not at the expense of vulnerable, excluded or marginalised members of a community. It recognises that the private sphere is a place of multiple power relations in which individual choices are shaped by one's place in the community, as well as the surrounding political, social and economic conditions. To achieve justice, the cultural domain must be open to the kind of (constitutional) scrutiny that enables the interrogation of norms and practices with reference to important (constitutional) norms, including equality. However, the process of achieving this must, itself, recognise that these norms, while set by the Constitution and ultimately interpreted by the Court, are given meaning by and within all communities. This approach thus requires participation by many voices (and not just the powerful within and across groups) in the determination of a claim of unfair discrimination against a cultural rule or practice.

As described in the work of Bronstein and others, this 'egalitarian' approach is based on an idea of culture as contested and fluid,²¹ shaped by contact with other cultures, and lived through 'complex and multi-faceted' cultural identities.²² It is an idea that rejects a strong cultural relativism²³ (that permeates some of the strong liberty approach to pluralism), and recognises that we live within and across multi-faceted identities, influenced by different local and global, social and cultural norms.²⁴ Culture is neither monolithic, nor hermetically sealed, it is almost always shaped by 'external' influences – whether Christianity or capitalism, hip hop or human rights.²⁵

²⁰ This does not yet seem to be the correct name for this approach, hopefully I will identify a better one.

²¹ As proposed by writers such as Raymond Williams in the 1980s [references].

²² V Bronstein 'Reconceptualising the Customary Law Debate in South Africa' 1998 (14) *SAJHR* 388, 394.

²³ 400-401.

²⁴ [References].

²⁵ This is by now much evidence of the globalisation of human rights and their deployment in traditional and cultural struggles. See J & J Comaraoff [cite and page ref]. In addition, by drawing on the Constitution to assert the right to culture, traditional leaders bring rights within the cultural domain. The question then becomes one of interpretation.

Those who work within this flexible, responsive and permeable idea of culture are able to show how cultural norms and practices are challenged, subverted and amended. For example, Bronstein uses historical evidence²⁶ to show how women have challenged and resisted subordination in traditional communities, by moving in and out of their traditional cultural setting, and by demonstrating resourcefulness and independence in building lives that retained valued parts of their cultural identities (as respectable woman) but enabled a degree of freedom from its (negative) patriarchal constraints.²⁷ The evidence also suggests that it is changing social and economic conditions that enable these movements (in, out and amongst) and that shape changing practices, behaviours and norms. Change and mobility, as well as alternative modes of access to economic resources (such as wages from urban jobs or income from informal businesses), assist in dislodging, if not removing, patriarchal cultural norms based on older conditions.

The ability of cultural norms and practices to change in response to changing social and economic circumstances is also behind the idea of the 'living law'; the notion of customary law as flexible and responsive, as opposed to the 'official' customary law that was left 'unreformed and stonewalled by static rules and judicial precedent that had little or nothing to do with the lived experience of spouses and children within customary marriages'.²⁸

At the same time, the flexible and responsive nature of custom and culture does not – on its own – produce egalitarian ends. While it demonstrates contestation and change, this remains implicated by power and by political and economic interests. Culture cannot be seen outside of 'the material conditions that shape people's lives and underpin cultural justifications for women's subordination'.²⁹ Research on cultural and customary change in Uganda, for example, has suggested that the mode and pace of cultural change is shaped by the political and economic interests of the powerful:

²⁶ Especially work of Belinda Bozzoli *Women of Phokeng*. For another study of women subverting and changing social and sexual roles, see Anne Kelk Mager *Gender and the Making of a South African Bantustan* (David Phillip, 1999).

²⁷ 394-398.

²⁸ *Gumede* para 20.

²⁹ Ali Mari Tripp 'The Politics of Women's Rights and Cultural Diversity in Uganda' in M Moyneux & S Razavi *Gender Justice, Development and Rights* (2002) chapter 13, 413.

[T]hose who defend practices that are harmful to women in the name of preserving their religious, cultural or ethnic identity are also often seeking to protect certain political and/or economic interests. They have a vested interest in maintaining the status quo and a set of power relations that are tied to certain practices.³⁰

Particularly important about this approach to culture is the place of so-called 'external' norms. It is recognised that no set of values is hermeneutically sealed, that community members have regularly drawn on 'external' ideas and values to make certain claims. Much evidence exists, for example, of women constantly negotiating civil and customary legal systems to improve their rights and access to benefits within marriage (or, put another way, to secure equality).³¹ Aninka Claassens and Sizani Ngubane have found that the use of the principles of democracy and equality has enhanced women's ability to negotiate rural power struggles and gain access to customary land and resources.³² Thus, single mothers and women trying to access or retain land in the absence of a male relative have made successful claims based on a combination of equality and custom:

In many instances, arguments about the values underlying customary systems (in particular the primacy of claims of need) and entitlements of birthright and belonging are woven together with the right to equality and democracy in the claims made.³³

In addition, the case of *Shilubana* provides an example of a customary community drawing, inter alia, on the constitutional value of gender equality to justify and defend its choice of a woman chief.

The 'egalitarian' approach thus envisages a form of cultural/legal pluralism in which cultural domains intersect and overlap (without losing a degree of specificity), and where the existence of a 'common normative

³⁰ Tripp 414.

³¹ Likhapha Mbatha's work on marriage showed women moving between the two systems to seek forms that offered most protection – often seeking both customary and civil marriages. Writing about the kinds of claims that women in a Bakwena village in Botswana are able to make of their male partners, Anne Griffiths reveals how women seek to negotiate the civil and customary systems to achieve results. A Griffiths *In the Shadow of Marriage: Gender and Justice in an African Community* Univ of Chicago Press (1997)

³² Aninka Claassens & Sizani Ngubane 'Women, land and power: the impact of the Communal Land Rights Act' in Aninka Claassens & Ben Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) chapter 7. UCT Press. Cape Town.

³³ Ibid.

platform', defined by a 'supreme law', is less an external imposition than an opportunity to draw upon, engage and interpret these norms in the development of the community and its members.³⁴ By engaging such norms, communities also participate in defining them – infusing ideas of equality, for example, with a richer meaning. This approach is thus linked to a particular idea of democracy and democratic participation in the formulation of common values.

Making a similar point about democratic participation, but emphasising the need to overcome inequalities in the process of interpreting and shaping public norms, Anne Phillips writes that

[s]ince principles of justice are always potentially skewed by the conditions of their formulation, and the understanding of social practices is always open to reinterpretation in the light of new knowledge and experience, ... principles and policies should always be worked out with the fullest possible involvement of all relevant groups'³⁵

Vicky Bronstein argues that when a woman brings an equality claim to court concerning a particular cultural rule of practice, this should not be viewed as an 'external' claim:

When a woman comes to court to argue her status, she does not dislodge herself from her culture. She does not transcend her culture and find herself in the realm of Western values. Her identity is not suddenly transformed. ... The fight is not between culture and equality. Rather it is between two different interest groups battling to retain/change power relations within their very culture – a culture which is constantly evolving.³⁶

When an equality claim is brought to court about cultural rules or practices concerning marriage, inheritance, land, virginity testing or *uhkotwala*,³⁷ these are neither irresolvable nor impermissible manifestations of some sort of culture/equality dilemma, but are rather (in Bronstein's words) "intra-cultural" conflicts between "internal" women and other members of the group'.³⁸ The way

³⁴ Anne Phillips - 'principles of justice are formed in a particular historic context and often reflect the preoccupations of more powerful groups. This does not prevent such principles from having universal application, but it does mean that they must always be regarded as open to contestation, reformulation and change' (130).

³⁵ A Phillips 'Multiculturalism, Universalism and the Claims of Democracy' in M Molyneux & S Razavi *Gender Justice, Development and Rights* (2002) chapter 4 OUP 130

³⁶ 403.

³⁷ The practice of abduction.

³⁸ V Bronstein 'Reconceptualising the Customary Law Debate in South Africa' 1998 (14) *SAJHR* 388, 389.

in which the dispute plays out will represent divergent and conflicting interests within the group. For example, CONTRALESA's interest in a particular case might be to preserve and even extend the (patriarchal) power of traditional leaders,³⁹ whereas women and other community members might be seeking to lessen this power and assert their own (economic, political or social) interests.⁴⁰

Here the role of courts is to enable debate and, especially in our constitutional democracy, to consider and address the rights claims of the vulnerable, disadvantaged and marginalised within the group. Courts in a constitutional democracy are legitimate fora for this and require that each side be treated with equal concern and respect.⁴¹ In doing so – courts constitute one of the 'discursive spaces' in which cultural disputes are made public, interrogated and resolved, at the same time as they may constitute an 'internal' site of struggle over the meaning of culture. [Courts are not disqualified as interpreters of culture]

As a constitutional democracy, therefore, South Africa has adopted a plural legal system subject to the Constitution and its overall normative value system.⁴² The Constitution rejects the previously hierarchical legal pluralism, in which customary and religious law were judged according to the common law, to embrace a system of diversity based on equality. In the words of the Constitutional Court:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution.⁴³

The Constitution sets the standards in the values, rights and principles found in its text. Customary law,⁴⁴ cultural and religious practices are all subject to

³⁹ J & J Comaroff *Ethnicity, Inc* (2009) 6.

⁴⁰ An example of this would be the recent challenge against the CLRA. Also their position in *Shilubana*.

⁴¹ 404.

⁴² Sections 2 (supremacy of the Constitution); 8 (1) (Constitution applies to all law); 15(3) (religious and customary law may be recognised in law subject to the Constitution); 39(2) (customary law may be developed to promote the spirit, purport and objects of the Constitution); 211 (customary law recognised subject to the Constitution) of the Constitution. See also *Bhe* paras 40-44.

⁴³ *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) para 51.

⁴⁴ Section 211.

these.⁴⁵ Equality claims about cultural rules and practices may end up in court through a variety of legal avenues. Where the complaint is of unfair discrimination, it will be made in terms of s 9 of the Constitution or the Equality Act. The next section considers the extent to which the jurisprudence of s 9 (and the Equality Act) enables a clear, reasoned and democratic debate about the meaning of equality 'within' culture, as well as fair decisions.

III EQUALITY JURISPRUDENCE AND CULTURE

In this section, I suggest that – with some development - equality jurisprudence is well able to negotiate the difficult terrain generated by claims of 'intra-group' discrimination within cultural and religious communities. In addition, I argue that the principles and criteria that apply to claims of 'intra-group' discrimination should apply to all equality claims. The consideration of equality claims against cultural rules and practices this becomes a vehicle for an interrogation of equality jurisprudence as a whole.

Equality jurisprudence, as far as s 9(3) is concerned, is distilled by the *Harksen v Lane*⁴⁶ test that – in its fullest form - entails a contextual assessment of the impact of an impugned rule or conduct with due regard to the degree of disadvantage suffered by the complainant and his or her group, the purpose of the act/conduct and the extent to which the complainant's rights and interests are impaired. These factors are weighed up within an overall assessment of the impairment of human dignity, generally defined as a failure to be treated with equal concern and respect.⁴⁷

Although the *Harksen* test has been criticised as being somewhat formulaic, if it is engaged in a process of substantive rather than formal reasoning, it enables positive results. Ironically, this point is well illustrated by 'bad' cases in which the Constitutional Court has split, with a majority that ignores or misapplies the jurisprudence and a minority that demonstrates the effectiveness of a proper legal approach to equality and an emphasis on context,

⁴⁵ Sections 30, 31.

⁴⁶ Note x above.

⁴⁷ See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 43; *Harksen v Lane NO* 1998 (1) SA 1300 (CC) para 51 and *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) 1 SA 6 (CC) para 19.

impact and values.⁴⁸ However, the test remains inadequate, in that it unduly prioritises and limits the values and principles that underlie equality.

The complex and multiple forms of inequality found in South Africa require a flexible test as the Court needs to respond to different forms of disadvantage, stigma and vulnerability, and to differing claims of recognition and redistribution.⁴⁹ While the contextual approach is inherently flexible and appropriately specific, allowing a court to concentrate on the details of the particular type of claim before it, the singular use of dignity undermines both that flexibility and the range of equality-related principles that need to be brought into play in relation to any particular claim. Although dignity is an abstract and malleable concept, it is not necessarily a positive feature of the jurisprudence that dignity is given different meanings in relation to different claims and rights.⁵⁰ Rather, as previously argued, one should give substantive meaning to other constitutional values in defining the equality right. Both Goldblatt and I have emphasised the place of the value of substantive equality (with its focus on remedying group based disadvantage – should inform the adjudication of unfair discrimination (and not just s 9(2) where it is currently addressed).⁵¹ Sandra Fredman has pointed to the principles of dignity, identity, redistribution and participation that underlie equality,⁵² while Henk Botha suggests that dignity, equality, difference and democracy should be deployed in understanding s 9.⁵³

It is in identifying and giving meaning to such values, and the manner in which they relate to one another, that the real work of equality jurisprudence still lies. In this article, I suggest that the focus should be on developing the three

⁴⁸ *Volks NO v Robinson* 2005 (5) BCLR 446 (CC); *The State v Jordan* 2002 (6) SA 642 (CC) and *Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority cite*. A proper application of the test requires courts to recognise that the adjudication of context, impact and values are closely bound up with each other. Failure to engage context disables the court from engaging values in a substantive manner, resulting, for example, in statements about dignity that amount to mere assertion rather than a concern with the actual effects of the discrimination. For a detailed discussion of the application of the jurisprudence in these cases, see C Albertyn 'Constitutional Equality' in C Gerbers & O Duppert *Equality and Labour Law: Reflections from South Africa and Elsewhere* (2009) forthcoming.

⁴⁹ Albertyn 2004, Albertyn & Goldblatt 2008, Botha 2009.

⁵⁰ Equal concern and respect for equality – poverty for SER

⁵¹ Albertyn & Goldblatt 1998 *SAJHR*.

⁵² S Fredman 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 *SAJHR* 214.

⁵³ H Botha (2009) 25 *SAJHR*

foundational values of the Constitution – dignity, equality and freedom – as well as the value of participation/democracy (underlying the Constitution). This builds on some academic consensus that dignity cannot be the sole determinant, even as its role remains significant,⁵⁴ and that other values should be given effective meaning. To give substance to my argument, I aim to elucidate these values and principle as they might apply to equality claims by women concerning gender discrimination in cultural rules and practices, but I also suggest that these apply equally to other types of equality claims. I now turn to examine the principles in more detail: These are dignity as equal concern and respect; remedying of disadvantage and redistribution (difference should not be a basis for disadvantage); an affirmation of difference and diversity (positive differences should be recognised and developed); freedom as the establishment and nurturing of conditions for substantive choice, as well as the idea of (equal) participation. Other than the assertion of freedom, and equality as participation, these principles are already captured within our jurisprudence, although not necessarily with sufficient emphasis or to the degree that they should be.

Dignity as equal concern and respect

In an important legal and political sense, equality is about sameness, the abstract idea that all of us are equally important and equally valued. This idea was captured by the South African Constitutional Court in *Hugo v President RSA*:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal *dignity* and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked. In *Egan v Canada* L'Heureux-Dube J analysed the purpose of (the Canadian right to equality) as follows:

Equality, as that concept is enshrined as a fundamental right...means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human *dignity*.⁵⁵

⁵⁴ Fredman, Botha etc. Also in Canada (Fudge etc.).

⁵⁵ Cite para 41 (footnotes omitted)

Equality in this important sense is measured by dignity – the Kantian idea that we are all of equal moral worth, entitled to be treated as ends in ourselves, to the care and compassion of our community,⁵⁶ equally deserving of equal concern and respect. It is a necessarily abstract concept, however. While it is an important principle of assessing equality, it is by no means sufficient.

Nevertheless, dignity imputes tolerance and respect, a non-hierarchical approach to groups and individuals that should condemn unequal power relations, and their manifestations in unequal status and recognition. It prevents stereotype and stigma, requiring us to see the value of people’s identities and personal choices.

It is correct that we need to treat everyone with equal concern and respect – but that is the starting point of equality and not its end – point. We need much more to enable us to assess inequality.

Difference and diversity (equality)

The positive nature of difference and the affirmation of diversity are particularly important aspects of equality. Cultural and religious identities and differences are important affirmations of diversity. This is recognised in the text of the Constitution and has been repeatedly affirmed by the Constitutional Court.⁵⁷ Equality based on diversity is a significant move away from a past in which majority and minority cultures and religions were marginalised and denigrated.

Attention to difference thus affirms group identities, and insists on their recognition. It also affirms the individual as a member of his or her group, rather than an abstract individual divorced from his or her group membership. In relation to cultural identity, for example, this secures women’s cultural membership even as she challenges some of its rule or practices. Attention to difference requires a detailed understanding of the multiple and shifting identities of an individual (see above).

One cannot celebrate difference without also interrogating its relationship to inequality both *amongst* and *within* groups. As Kymlicka argues, cultural groups require external protections that secure their rights of vis-a-vis

⁵⁶ See *Khosa v Min of Social Development*

⁵⁷ See for example *Christian Education; Prince*.

others. These include the kind of group-based language and cultural rights that are secured in ss 30 and 31 of the Constitution, as well as equality. In relation to inter-group equality, an affirmation of group difference must comprehend the linkages between group membership and material inequality, unequal power and systemic relations of dominance and subordination.⁵⁸ 'Remedying disadvantage' thus remains a critical aspect of equality, and is discussed further below.

At the same time, an affirmation of group based cultural diversity needs to avoid an uncritical acceptance of (cultural) difference that imposes impermissible 'internal' restrictions on individuals within the group. Kymlicka thus distinguishes between external protection and the need to prohibit discrimination within the group,⁵⁹ (protected by s 9 of the Constitution).

Remedying disadvantage (equality)

In the Constitutional Court's first case on equality, O'Regan J wrote that the equality clause in the interim Constitution was adopted

in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society.... The need to prohibit such patterns of discrimination and remedy their results are the primary purposes of section 8.⁶⁰

Equality in South Africa has a strong remedial and redistributive aspect, with s 9(2) asserting the equal enjoyment of rights and positive measures to address past discrimination. The Court acknowledges in its s 9 (2) and 9(3) jurisprudence that remedial aspects and removal of past disadvantage are central to equality. However, they are currently subsumed by the dignity standard, an important development of equality jurisprudence is to acknowledge that remedying disadvantage (as a manifestation of the value of equality) should

⁵⁸ N Fraser 'Equality, Difference and Democracy: Recent Feminist Debates in the United States' in Jodi Dean (ed) *Feminism and the New Democracy* Sage (1997) Chapter 6, 106. Fraser considers the need to reconcile anti-essentialism with multiculturalism in relation to gender.

⁵⁹ W Kymlicka *Multicultural Citizenship* (1995) OUP. Kymlicka argues that claims for minority culture are justified with reference to idea of universal rights, access to same rights, although we should separate claims to self-determination from claims for recognition for language, etc.

⁶⁰ *Brink v Kitshoff* op cit.

be an equally strong principle to be addressed in adjudicating unfair discrimination

The relationship between group membership, power and material inequality is well documented and understood. One of the purposes of equality is thus to address social and economic marginalisation and the mal-distribution of social goods within and between groups. While cultural identity remains important to women, most different cultural groupings have witnessed past and present forms of exclusion and marginalisation on the basis of gender. If a claim to culture fosters social relations of inequality and domination, it is likely that it cannot be sustained.

Freedom, choice and participation

Freedom is one of the least developed values in South African jurisprudence, and it has played no role thus far in understanding equality. Yet the presence or absence of choice, and of the conditions that enable choice, are arguably important considerations in deciding whether a particular rule, conduct or practice excludes, subordinates or (further) disadvantages an individual or group. Choice or agency is important in at least two ways. Firstly, the impugned rule or practice may negate or substantially erode the ability of the claimant to make choices. An example of this is the marital power that denies women the ability to make choices about marital property. Secondly, the conditions of the claimants' lives might limit their ability to challenge/reject a particular practice. For example, poverty or abuse might prevent women challenging a particular practice giving the impression that it has their 'consent'.⁶¹

Freedom as the idea that people should enjoy substantive conditions of choice seems to be an important element of adjudicating equality claims. In the cultural domain, for example, it can be argued that gender discrimination is more likely to be unfair when it limits freedom/choice. Put another way, overcoming the patriarchal aspects of culture entails an expansion of women's agency and choices, and thus of their social and economic equality.

⁶¹ Phillips at 136. Anne Phillips has argued that one of the ways in determining whether a particular cultural practice violates equality is to interrogate the substantive conditions of choice that enable people to choose to engage in such a practice or not (at 107).

Freedom also entails the freedom to participate in political, social and economic life. An important question to be asked is whether a cultural rule or practice fosters freedom in the sense of enhancing women's capacity to participate.

Freedom as a principle or value informing equality thus requires that women are free to make choices that improve their well-being and are able to participate within their community and beyond.

A test based on dignity or a set of principles?

The substance of the *Harksen* test is the assessment of fair or unfair discrimination. It is here that a court considers the nature of the violation, the purpose of the act or conduct, the invasion of the claimants' rights and interests and the impact of this in relation to disadvantage and dignity. Although, the test has resulted in significant equality victories, it has also had disappointing outcomes. Some of the reasons for this are a reliance on formal rather than substantive legal reasoning and a superficial definition and application of the idea of dignity as 'equal concern and respect'. The failure to engage values and principles – either by developing their content or by engaging them in substantive reasoning – is, of course, a wider issue in constitutional jurisprudence. The antidote suggested here is a rigorous focus on context and a much more explicit naming, describing and engaging the full set of values and principles that underlie the equality right. In doing this, courts should see equality as less of a formulaic test measured by a single value than a reasoned exercise of weighing the various principles implicated by equality (and thus also describing its purpose) within a contextual understanding of the impact on the claimant and the stated purposes of the rule, conduct or practice. In this sense it is important to distinguish the balancing exercise of fairness in s 9 - which focuses on the values and interests served by the right to equality – against the justification enquiry of s 36 – which then balances state social goals and other rights against the right to equality.

This article suggests that the values and interests underpinning the equality right should be identified by reference to the constitutional text and its

emphasis on the trio of democratic values of dignity, equality and freedom. Each – as stated above – has important and distinct, if overlapping, importance in understanding the purpose and interests served by equality, and us the determination of when the right has been violated.

Importantly this combination of principles enables a robust and varied understanding of inequality, and tempers an egalitarian vision that seeks to overcome social marginalisation and an unequal distribution of resources with a recognition of the importance of cultural identity. Put another way, it enables the achievement of equal participation and fair distribution as well as social recognition – based on importance of both recognition and redistribution as intimately connected and important to understanding inequality.⁶²

Applying these principle to equality disputes within culture/religion

How might these principles be applied to questions of unfair gender discrimination in culture and custom? To start with the 2008 equality cases of *Gumede* and *Shilubana*: Although the enquiry into unfair discrimination in *Gumede* is short, it captures all of the above principles. In finding unfair discrimination, the Court concludes that the impact of the law means that

affected wives in customary marriages are considered incapable or unfit to hold or manage property [and] ... are expressly excluded from meaningful economic activity in the face of an active redefinition of gender roles in relation to income and property.⁶³

In doing so, the Court is acknowledging a stereotypical reliance on traditional gender roles that fails to respect women as capable of managing property (a stereotype that is a failure of dignity, and of equal concern and respect), as well as the erasure of women's agency in engaging in economic activity and active participation in social and economic life (a denial of the principle of freedom). The Court also finds that the provisions reinforce material disadvantage: 'That marital property regime renders women extremely vulnerable by not only denuding them of their dignity but also of rendering them poor and dependent'.⁶⁴ [The Court does not assess this against any stated purpose of the law, perhaps because any justification of male dominance in the household is

⁶² Nancy Fraser, cite.

⁶³ Para 35.

⁶⁴ Para 36.

patently unconstitutional. This is perhaps unfortunate as the continuing defence of traditional gender roles across all cultures in South Africa means that a discussion by the Court could have played an important norm-setting role.^{65]}

Similar arguments fortified the conclusion in *Bhe v Magistrate, Khayalitsha*⁶⁶ that the rule of primogeniture in customary inheritance was unfair gender discrimination. The Court noted the manner in which the official customary law continued to stereotype women, and subject them to 'old notions of patriarchy and male domination'⁶⁷ (the dignity principle), resulting in a denial of access to property and economic opportunities (equality as disadvantage),⁶⁸ and limited their ability to assert control over their lives (freedom).⁶⁹ In *Bhe*, however, the Court did assess the rule against its customary or cultural purpose, namely a 'basic social need to sustain the family unit'.⁷⁰ The Court concluded that while the maintenance of the family remained an important communitarian purpose, the responsibility for this could not be limited elder males to the exclusion of women.⁷¹ It was able to reach this conclusion because it was prepared to consider the actual impact of the rule in practice (women and children tended to be left destitute) and to measure this impact against the principles of dignity, equality and freedom.⁷² This result can be compared with the conclusion in the earlier SCA case of *Mthembu v Letselle*⁷³ - in which the Supreme Court of Appeal found the rule of primogeniture to be fair discrimination against women as customary law imposed obligations upon the male heir to maintain the widow and children.⁷⁴ The failure of this court was that it did not interrogate the impact to see how the rule that provided theoretical rather than actual protection to vulnerable groups.

⁶⁵ See *Van der Merwe v RAF* for a discussion on the 'obsolete'

⁶⁶ *Bhe v Magistrate, Khayalitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

⁶⁷ Paras 90-91.

⁶⁸ Para 90.

⁶⁹ Para 90-91.

⁷⁰ Para 84, 89-91.

⁷¹ And younger married and unmarried sons.

⁷² Paras 75-94.

⁷³ 2000 (3) SA 687 (SCA).

⁷⁴ Para 11.

The Court has thus firmly set its face against forms of gender discrimination and patriarchy that stigmatise women as dependents, reliant on men for access to resources, and deprived of individual agency. Rules and practices that unfairly discriminate against women by relegating them to positions of subservience, dependence and lack of choice should/will not survive constitutional scrutiny.

It remains important to note that these assertions of gender equality contrast with ideas of women across many cultural discourses. The example of CONTRALESA chair, Patekile Holomisa, calling for the preservation of traditions and traditional gender roles, to 'protect' vulnerable women and children has been mentioned above.⁷⁵ While such arguments have not passed constitutional muster as a reason for discriminating against women in the family, they nevertheless persist (directly and indirectly) in justifying other cultural and religious practices and, it seems, in policy and legislative frameworks relating to customary tenure and traditional leadership and courts. Indeed, the current picture is that government has been strong on gender equality in relation to issues of family, children and family property (the private domain), but it has faltered on issues of public power and resources, especially traditional leadership, traditional courts and land.⁷⁶ Underlying this are issues of political and economic power, and the continuing exclusion and subordination of women, often justified on cultural grounds. [Also, the reinforcement of public power in traditional communities as the domain of men].

In this context, the case of *Shilubana v Nwamitwa* is especially interesting. The case concerned a dispute over chieftainship of the Valoyi traditional community in Limpopo between a female and male candidate. [In *Bhe*, the Court had not decided the constitutionality of male primogeniture in contexts such as traditional leadership and status.⁷⁷] One of the major points of dispute was gender as both the respondent and CONTRALESA sought to argue that the

⁷⁵ P Holomisa 'A Traditional Leadership perspective of gender, rights, culture and the law' pages??

⁷⁶ In these instances, legislative processes have apparently deferred to the claims of traditional leaders, often at the expense of women. See C Walker (2005); A Claassen (2008); C Albertyn 'Rights At Work – The Transition To Constitutional Democracy And Women In South Africa' in C Jenkins, K Govender & M du Plessis (eds) *Law, Nationbuilding & Transformation* (forthcoming 2010)

⁷⁷ Paras 88-94.

exclusion of women from chieftainship was fair discrimination, involving not only women, but also excluding younger sons and sons born out of wedlock from the right to succeed.⁷⁸ The Court avoided a direct answer to the question by finding, instead, that the appointment of a woman chief was a constitutionally compliant development of customary law to

bring an important aspect of their customs and traditions into line with the values and rights of the Constitution. Several provisions of the Constitution require the application of the common law and customary law, as well as the practice of culture or religion, to comply with the Constitution.⁷⁹

Perhaps this was a case of 'strategic pragmatism',⁸⁰ avoiding a contentious issue while not fully compromising on principle (women *can* be traditional leaders). However the issue of gender equality and public traditional power remains partly unresolved. [If one was to apply directly to traditional leadership, one would have to consider the arguments that this stigmatised women as incapable of public power, reinforces patriarchal interests, denies women choice and participation in community decisions against the purpose of male primogeniture, bloodline and ability to evoke ancestral power, as well as ideas of the place of traditional leaders in relation to community.]

The case of Virginity Testing

Although allegedly harmful cultural practices would be tested under the Equality Act rather than s 9 (unless authorised by law), it is instructive to test one of these against the principles of unfair discrimination and the ideas of cultural/legal pluralism expressed in part 2.

In considering whether 'virginity testing' constitutes unfair gender discrimination one would weigh the manner in which the practice reinforces gendered stereotypes (women are to blame, women must conform to particular sexual stereotypes), exacerbates disadvantage (girls more vulnerable to violence and abuse) and denies choice (being labelled affects choices in community) against any alleged equality-related purpose (aimed at protecting girls against

⁷⁸ Paras 3x and 40.

⁷⁹ Sections 1 (supremacy of Constitution), 30, 31, (recognition of cultural rights subject to Constitution) 39(2), (develop customary law in line with the Constitution), 211 (apply customary law where applicable).

⁸⁰ Roux (2008).

sexual abuse and HIV versus purpose of coercive social control). The full exposition of these principles and reasons should allow a detailed discussion of the nature, impact and justification of virginity testing.

The importance of remedies

Remedies can provide an important antidote to findings of unconstitutionality. Allowing the development of customary law to retain positive features of the practice is a remedy that has been insufficiently addressed. For example, forms of social and sexual education divorced from public virginity testing can be encouraged to meet the concern that has underpinned the resurgence/reinvention of virginity testing as a cultural practice.

IV CONCLUSION (some preliminary concluding thoughts)

In 1994, the Constitution recognised women as citizens of that democracy, rather than subjects of traditional law. The focus in this article has been how equality should be understood so as to respect the plural nature of our law and society, whilst retaining the strong constitutional guarantee of equality.

Part II argued that cultural and legal pluralism needs to be understood as a series of intersecting and overlapping cultural/legal domains that are permeated by unequal gender and other power relations. [Pluralism as a web of legal and social rules]. While the constitutional commitment to pluralism and diversity must enable these cultural domains to flourish and co-exist, the ultimate supremacy of the Constitution means that they cannot do so at the expense of more vulnerable members of their communities. Equality is a 'non-negotiable' constitutional value, but the way in which it is understood is contested and open to interpretation by different groups, largely though the engagement of the meaning and purpose of equality and its underlying principles (in courts and in politics⁸¹). Women who bring equality claims to court are engaging in this process of debate and interpretation and, by virtue of their community membership, remain insiders engaged in an 'intra-group/intra-cultural' dispute in which they draw on the Constitution and constitutional

⁸¹ Tripp correctly states that ultimately, the 'embeddedness' of culture within political and economic interest means that 'ultimately ... practices that hurt women have also to be addressed as a political problem primarily by actors within that society itself' 414.

values to effect change in status and in the distribution of power and resources. [In addition, by drawing on the Constitution to assert the right to culture, traditional leaders bring rights within the cultural domain. The question then becomes one of interpretation.]

Although law and courts are limited in that they can provide only a partial solution to what is often a political and cultural problem,⁸² they provide important fora for securing rights, airing debate and setting the appropriate normative standards for rules, conduct and practices. Claims and debates about equality should interrogate and give content to the range of principle and values that underpin the right, whilst having a clear understanding of both the impact and purpose of the impugned practice, rule or conduct. Instead of applying a test subject to the single value of dignity, the equally important values of equality and freedom add substance to the investigation, allowing a fuller exposition of the relevant issues and requiring claimants and courts to explore the wide ramifications of a particular claim of unfair discrimination.

Wide-ranging and detailed explorations of equality remain important, both to secure rights but also to establish and defend normative standards of gender equality that remain vulnerable to powerful counter arguments based on culture.

⁸² Winter 338; Tripp 414.