

Bonny Ibhawoh

## V. CULTURAL TRADITION AND NATIONAL HUMAN RIGHTS STANDARDS IN CONFLICT

There has been a significant shift in the tone of the debate over the universality or cultural relativity of human rights. In the past few years, a broad consensus seems to have emerged among most writers that there is indeed a set of core human rights values to which all humanity aspire. The discourse has gradually moved away from whether human rights are truly universal and cross-culturally applicable or whether they are, as proponents of cultural relativism argue, merely the product of Western individualism. One reality which has strengthened the need for the universalization of human rights is the current trend towards rapid globalization in almost every sphere of human endeavour. The effects of economic globalization and interdependence, the advances in communication and the role of transnational forces have all been crucial in this regard. The spread of the Western model of the state to Asia and Africa and other parts of the developing world has given rise to the need for constitutional guarantees of human rights along the so-called Western model. Thus, the modern concept of human rights, admittedly a product of the West, has become equally relevant in other parts of the world.

The universalization of human rights, however, has not precluded attempts to temper the modern content of 'universal' rights with the specific cultural experience of various societies and particularly in new nations. In fact, Inoguchi and Newman have argued in their recent study, *Asian Values and Democracy in Asia*, that the global trends in education, democracy and development only represent a kind of 'superficial Westernization' which may lead to a rediscovery of indigenous values and even 'a cultural backlash' (Inoguchi and Newman 1997: 8-9). In their modification of the globalization thesis, they argue that there is not a broad deculturization or sweeping away of culture. The reality is that certain values win through. There is, to use their words, a process of 'cultural Darwinism', not between but within cultures (*ibid*: 10). This is indeed the reality of change in many societies.

In many new nations, one of the aims of national constitutions and applicable human rights laws has been to establish minimum acceptable standards of rights

while taking into consideration the diverse cultural and religious orientations of the people. This raises once again the old arguments for 'Asian values' or 'non-Western values' in human rights discourse. This time though, it is raised not necessarily in contrast or opposition to so-called Western notions of rights but more as a complement to the universalization of rights. This time, the argument is not to pit one culture against the other but to explore areas of complementarities. This is not the old argument of the West versus the rest.

The challenge for many new nations has been how to strike the delicate balance between the individual human rights standards guaranteed by the state, and group claims to cultural rights. Implicit in this is the tension and sometimes contradiction between the national human rights standards of state law and policies on one hand, and the objective socio-cultural orientations of peoples on the other. One instance of this is the apparent conflict between the guarantees of gender equality and non-discrimination in national constitutions and the traditional status of women in many cultures. Another is the conflict between the constitutional guarantees of the right to freedom of choice and association and the pervasive cultural attitudes which encourage child betrothals, forced marriages and child labour ostensibly as part of the socialization process. Yet, a complementarity if not an absolute congruence of state laws and cultural norms is required if national human rights regimes are to gain grassroots acceptance.

There is a consensus that insofar as national human rights standards, as enshrined in national constitutions, reflect the collective national conscience, they present a higher order of human aspirations, with a more effective mechanism for promotion and enforcement. They also provide a higher set of standards by which the various cultural traditions within each society can be judged. For this reason, it is clear that national human rights laws take precedence over customary or cultural practices, at least in principle. The challenge therefore is how to uphold national human rights standards in practice, while resolving the apparent conflict between these standards and the dominant cultural traditions of the constituent communities within the state.

This chapter focuses on this conflict and explores ways in which culture, through adaptation and modification, can serve as a complement rather than a constraint on specific state human rights aspirations. I focus on the new states of Africa and Asia. In doing this, I intend to raise more questions than I provide answers to, setting an agenda for debate and possibly stimulating further discussion on this theme. I seek to explore the possibilities and problems of using the process of cultural dynamics and change in support of state and universal standards of human rights. The questions I address are: How can the process of internal cultural dynamics be used to reconcile and resolve any conflicts and



tensions that may exist between cultural values in new nations and national human rights standards? What reasonable limits can be placed on claims of cultural rights as a basis for the limitation of universally acceptable human rights standards? How can the state maintain basic uniform human rights standards without jeopardizing cultural expression and existing cultural diversity?

In addressing these questions one realizes that it is not enough to identify the cultural barriers and limitations to modern domestic and international human rights standards. It is even more important to understand the social basis of these cultural traditions, where they conflict with national and international human rights standards and how they may be adapted to complement rather than limit national human rights aspirations. I argue that while it is desirable to seek cultural change in areas of conflict, to conform with national human rights standards, such adaptation and integration must be done in a way that does not compromise the cultural integrity of people. The ultimate objective is for new nations to develop national human rights regimes that derive their legitimacy not only from state authority but also from the force and appeal of cultural traditions.

#### DEFINING CULTURE

Although this may seem an elementary point to make, I find it necessary to begin my discussion by revisiting the concept of culture because it is central to our discourse. What precisely is culture? Is not culture simply the way we choose to go about our daily lives? For instance, I have the quaint habit of eating rye bread with plenty of curry soup. It may not be the ideal way, but that seems to improve the taste to me. Now, if I am able to convince two or three more African colleagues here in Denmark about the desirability of eating rye bread with plenty of curry soup, can it then not be said that it is the culture of maladjusted Africans living in Nordic countries to eat rye bread with curry soup?

On a more serious note, I am of the opinion that the concept of 'culture' or 'cultural traditions' needs some contextual clarification, especially when we employ it in relation to issues as contentious as human rights. Although the term culture is itself very elusive, it has developed into one of the abstract terms whose impact on human behaviour cannot be ignored. Culture affects the perception of human behaviour and the norms which guide it, and since human rights deal primarily with human conduct, it is only natural that culture plays a vital role both in enacting and in implementing these rights (El Obaid 1998: 1). The term 'culture' has been defined in different ways. But for the purpose of this discussion, we will consider only the two most widely used. According to Edward Taylor, culture or civilization, taken in its widest ethnographic sense, is

that complex whole which includes knowledge, belief, art, morals, law, custom and any other capabilities or habits by man as a member of society; Edward Reuter expresses a similar view when he asserts that culture is 'the sum total of human creation, the organizational result of group experience' (qtd. in Stocking 1971: 72-3). Culture is the source of individual and communal world views. It stipulates the norms and values that contribute to people's perception of their self-interest. As a result, culture is the primary force in the socialization of individuals and a major determinant of the consciousness and experience of the community. (An'Naim 1992: 23).

While some writers have argued for a universal hierarchy of cultural values, most see culture from a relativist point of view. Rather than representing a universal hierarchy of values, it is assumed that every society through experience seeks and, in some measure, finds values that are adequate and acceptable to it. Franz Boas contends that individual societies each have their own body of beliefs, customs and social institutions, instead of different societies being located at different levels in a universal scale of civilization. Our understanding of what culture is may thus be advanced by the realization that it is a reflection of the standards of a particular epoch in any society.

Because of the diversity of its uses, the concept of culture has also been caught in a considerable amount of confusion particularly within the context of human rights studies. Many works on the cultural dimension of human rights studies, particularly in their references to non-Western societies, have tended to present cultural traditions as static and unchanging. References to 'traditional African culture' or a 'traditional Asian culture' often convey the idea of a constant and unchanging pre-modern state of affairs, to be contrasted with modern Western traditions. This assumption distorts the historical reality. So-called traditional societies, whether in Asia, Africa or Europe, were not culturally static, but were eclectic, dynamic and subject to significant alteration over time. Traditional cultural beliefs were also neither monolithic nor unchanging. In fact, they could be, and were, changed in response to different pressures. The point here is that culture, being a process rather than an end, is continually challenged, adapted and modified.

Cultural change can result from individuals being exposed to and adopting new ideas. Individuals are actors who can influence their own fate, even if their range of choice is circumscribed by the prevalent social structure or culture. In doing so, those who choose to adopt new ideas, though influenced by their own interest, initiate a process of change which may influence dominant cultural traditions. For example, Singapore has been described as having a culture that is a curious amalgam of many bits of traditions – aspects of imported Chinese



culture, Malayan culture and indigenous cultural traditions all held together by an elite Confucian national ideology. The same is true of many other societies.

Culture is thus inherently dynamic and responsive to conflict between individuals and social groups (Howard 1986: 19). But what precisely is the significance of all this theorizing about culture to the human rights discourse? One obvious significance is that we proceed from the assumption that certain cultural traditions which appear inherently in conflict with national and universal human rights standards may, in fact, also have the potential to be influenced through a process of adaptation to meet new human rights standards.

#### THE QUEST FOR CONGRUENCE: CULTURE VS NATIONAL HUMAN RIGHTS STANDARDS

The quest for congruence or a common meeting point between culture and modern national and international legal standards is a theme of growing scholarly interest. In his discourse on the quest for congruence between culture and the legal systems in recently liberated societies, C.G. Weeramantry draws attention to the fact that upon the attainment of independence, newly emerged nations often need to take a considered decision whether and to what extent they wish to preserve their traditional values and cultural systems (Weeramantry 1997: 36). The opportunity to make that decision has been presented to more than a hundred nations released from the bondage of colonialism since the beginning of the 20th century who have been faced with the challenge of maintaining cultural values while forging new institutions of nationhood. The decision they make is often translated into legal terms, whether constitutional or otherwise. In any event, it becomes part of the ongoing national discussion on the questions of cultural values and nation building.

Inherent in this discussion is whether new nations should uphold cultural values above universal social and legal standards. Some of the dominant arguments have been for more cultural consideration in the choices which new nations make. In his inaugural address at the Ninth World Congress on Contemporary Conceptions of Law in 1979, Gray Dorsey observed that:

Peoples that have recently regained political independence have a special opportunity with respect to organizing and maintaining societies and legal systems. It would be a tragedy if they should choose a philosophy of society and law because of a claim to universal validity, or in order to avoid being called backward or underdeveloped.

(qtd. in Weeramantry 1997: 36)

There is indeed a basis for the apprehensions that Dorsey expresses. Many of the problems which post-colonial states face might have been partially avoided if due attention was paid to this problem. However, with specific regard to human rights, there are some limitations to the arguments for cultural relativism as opposed to universality. Cultural relativism has been charged with neutralizing moral judgement and thereby impairing action against injustice. Some writers are suspicious of a notion of cultural relativism that denies individuals the moral right to make comparisons and to insist on universal standards of right and wrong (Hatch 1983: 12). This is highlighted by the trend in the contemporary discourse on human rights where the heavily polarized debate over the universality or cultural relativity of human rights has given way in recent years to a broad consensus that there are indeed a set of core universal human rights values to which all humanity aspire.

As indicated earlier, the discourse has gradually moved away from whether human rights are truly universal and cross-culturally applicable or whether they are merely the product of Western individualism. As C.G. Weeramantry puts it:

Today, internationalism is a potent factor. While countries would like to retain as large part as possible of the traditional, the fact that we are one world community makes this difficult when those traditions are inconsistent with prevailing international concepts and attitudes.

(Weeramantry 1997: 41)

However, even with the increasing universalization of human rights, there is a contending call for some level of cultural relativism in the application of universal rights. As A.A. An’Naim has pointed out, the merits of a reasonable degree of cultural relativism are obvious, especially when compared to claims of universalism that are in fact based on the claimant’s ethnocentricity. In an age of self-determination, sensitivity to cultural legitimacy is vital for the international protection of human rights. This does not necessarily preclude cross-cultural and moral judgement and action, but it provides a direction for the best ways of formulating and expressing judgement and undertaking action (An’Naim 1992: 26). In the case of Africa, this has been interpreted to mean that the content of human rights, though founded on universal principles, has to bear what Makau Wa Mutua describes as the ‘African cultural fingerprint’, which emphasizes the group, duties, social cohesion and communal solidarity as opposed to rigid individualism (Mutua 1995: 339). This situation has led to calls for a regime of human rights founded on the basic universal human rights standards but also enriched by the African or Asian or other cultural experiences. The larger



question is how precisely this marriage of universal rights (as expressed in national constitutions) and those cultural traditions that conflict with these rights can be achieved.

#### CONFLICT BETWEEN CULTURES AND STATE HUMAN RIGHTS PROVISIONS

That many new states are faced with the challenge of how to strike a balance between the dominant cultural orientations of people within the state and the promotion of a national human rights agenda is a problem that arises from the circumstances which gave rise to these states.

Many of the new states in Asia, Africa and Latin America are the result of the accident of colonialism and imperialism. In most cases national frontiers were arbitrarily drawn to suit colonial administrative convenience. Thus, diverse peoples who shared little in common were brought together under single colonies and nations. New national institutions were established in an attempt to forge diverse ethnic nationalities into single modern nations. Various levels of success were achieved in this attempt at nation building. In most cases, however, attempts at building new nations were met with resistance from groups who still identified with their ethnic nationality or cultural community more than with the new state structures, which they considered artificial. In many nations this problem has continued even after independence. Ethnic and tribal loyalties still prevail over national loyalties.

One framework for understanding the nature of the influence of culture on human rights in many new nations is by locating it within the context of the relationship between the formal and non-formal sectors of society. For more than a decade, numerous observers have characterized the post-colonial states of Asia, Africa and Latin America as consisting of two 'publics' – a formal state sector and ethnically and culturally delineated non-formal sector (cf. Ekeh 1975: 91). While the formal state sector commands considerable political power and authority, it is the informal sector, cut along ethnic/linguistic and cultural lines, that commands more loyalty. Peter Ekeh, one of the foremost proponents of this thesis argues that:

there are two public realms in post-colonial Africa, with different types of moral linkages to the private realm. At one level is the public realm at which the primordial groupings, ties and sentiments influence and determine the individual's public behaviour. [This is] the primordial public because it is closely identified with the primordial groupings, sentiment and activities which, nevertheless, impinge on the public interest. On the other hand, there is a public realm which is historically associated with the

colonial administration and which has become identified with popular politics in colonial Africa. It is based on civil structure: the military, the civil service, the police, etc. [This is] the civic public. The civic public is amoral and lacks the generalized moral imperatives in the private realm and in the primordial public.

(Ekeh 1975: 91-2)

There are of course, obvious empirical limitations to this type of binary delineation of any society along perceived social or ethical lines. For this reason, other writers represent the African reality more in terms of plural societies with loyalties cut along linguistic, regional and ethnic boundaries (Joseph 1987: 45). However, Ekeh's contentions remain useful tools for analysis, which may help us to better understand the peculiarities of social relations and human rights conditions at different levels in the society. Although Ekeh's analysis was based on his study of post-colonial nations in Africa, it also applies to many new nations in Asia and Latin America. Chee Soon Juan opens his 1994 political manifesto "Dare to Change: An Alternative Vision for Singapore" with a chapter exposing the gap between the official rhetoric of communitarianism and the individualistic reality in Singapore. What is useful in Ekeh and Juan's analysis is that both point out that two distinct national realities exist within the state, one at the formal state level and the other at the informal private level.

Human rights studies in most developing societies have tended to concentrate on the public/formal sector which Ekeh describes as the 'civic public', emphasizing (often from legalistic standpoints) how state power and exploitation affect civil liberties and human rights. However, power and exploitation, though located in the state, are by no means exclusively located there. Power relations are also to be found within the 'informal primordial public' and the 'cultural community'. Such power and authority derive their legitimacy from the sheer force of culture and tradition. My larger argument, which I will come to later, is that the support and loyalty that people attach to the cultural community or the informal sector can be creatively harnessed to serve the end of promoting human rights. The power of the chiefs or elders in the community, of the heads of households, or of religious leaders could be as authoritarian as that of the state. The sanctions which are wielded by these authorities within non-formal sectors to command conformity and loyalty are often as effective and authoritarian as those employed by the state.

For most part, the potential threat of exclusion from the land and social ostracism accompanies the exercise of such non-formal authoritarianism. Indeed, the point has been made that exploitation and human rights violations are found



in far more severe forms in the informal sector than in the formal, if only because the informal sector is, by definition, unregulated. This explains the persistence of such cultural practices as female genital mutilation and other cultural and religious prejudices against women in spite of comprehensive state legislation against such practices. What this demonstrates is that national human rights laws, guaranteed as they are by the constitution, have not found full acceptance and compliance within the informal realm of civil society.

National human rights provisions have not had full effect on the society because cultural practices persist which have great limitations on constitutional human rights guarantees. In other words, constitutional and legal forms for recognizing and protecting human rights have shortcomings that result from the continuing conflicts with 'traditional' cultural definitions and practices. This is so because national human rights standards have often not been grounded on cultural tradition.

This conflict between ethnic and group loyalty on one hand and national aspirations on the other is not limited to the realm of law or human rights. It is at the core of many of the nation-building challenges that many new nations face. It manifests in politics where interests are centred on ethnic or regional groups rather than on the nation. It also partly explains the prevalence of state bureaucratic corruption where the illegal appropriation of national resources is considered justified if it serves to promote group interest within the state.

The challenge for new nations, therefore, is how to resolve the conflict between ethnic cultural and national interest, the disparities between national human rights standards and the dominant cultural orientations of the people. This tension is self-evident. On the one hand, many new states have national human rights standards comprehensively articulated in national constitutions, sometimes in exactly the same words as the United Nations' human rights covenants. These provisions often reflect the growing consensus within the state on the desirability and relevance of universal human rights. On the other hand, these states are confronted with peculiar cultural practices and notions of rights that reflect the local world views and aspirations of communities within the state. In some cases, these notions and practices do not conform to national human rights standards.

One approach that many new nations have adopted is to make express provisions guaranteeing cultural rights alongside the basic individual rights in their national constitutions. This is the case with the post-apartheid South African constitution and the African Charter on Human and Peoples' Rights. In Singapore, Indonesia and Bangladesh similar legislation exists aimed at promoting cultural values. Another approach has been to introduce legislation

prohibiting cultural practices that clearly violate national or universal human rights standards. This is precisely where the conflict arises.

In India, Pakistan, Bangladesh and many African countries, this conflict manifests in the incidents of forced and arranged marriages that occur in spite of extensive state legislation that guarantee the freedom of choice and association. In Sri Lanka, it manifests in the dominant cultural belief that at the instance of marriage, a woman relinquishes her rights to negotiate the moment, type and safety of sexual activity, a notion that has led to increasing incidents of marital rape and sexual abuse. In short, it manifests in the different forms of cultural prejudices against women in spite of national constitutional guarantees of gender equality, the provisions of the UN Convention on the Elimination of all Forms of Discrimination Against Women and those of the UN Declaration on the Rights of Minorities.

I have chosen to look closely at the status of women in some new nations because women and children are the groups often caught in the middle of this conflict. For empirical purposes, I will focus on the practice of female genital mutilation (FGM), or female circumcision, which is quite prevalent in many new nations in Africa and has been widely acclaimed as a violation of women's rights. Attention will also be paid to the issue of women's sexual rights in some Asian countries. I have chosen to look at FGM in particular because it is a human rights issue in which the Danish International Development Aid (DANIDA) has been actively involved. Danida's 'Women in Development Policy Towards the Year 2000' and its health policy have been quite forceful in putting FGM on the international human rights agenda.

#### THE CASE OF FEMALE GENITAL MUTILATION

In her introductory speech at the Danida-sponsored seminar on FGM in 1995, Ellen Margrethe Løj, the Undersecretary Ambassador at the Danish Ministry of Foreign Affairs, opened the seminar with the following words:

[An] important issue which I would like us to focus upon when we discuss female genital mutilation is the human rights perspective. It has been internationally agreed that this traditional custom is a form of violence against women. It is connected with intensive pain and considerable health risks for the girl child and serious implications for the sexual and reproductive health of women. As such, the act is a violation of the human rights of women and girl children.

(qtd. in Danish Ministry of Foreign Affairs 1995: 5)



Although many would agree with the views expressed by the Undersecretary Ambassador, they are not shared by everyone. Even the use of the term 'female genital mutilation' has been a subject of heated debates.

Although the term 'female genital mutilation' is taken for granted in human rights discourse generally, there exists an increasingly vocal group of scholars, mostly from developing countries, opposed to this description. They argue that the term 'female genital mutilation' implies a value judgement and biases the discussion in favour of those opposed to the practice of traditional forms of 'genital surgery'. They argue that the term 'female circumcision' is more appropriate because the intention of its practitioners is often not to mutilate but to circumcise. Parents do not set out to mutilate their daughters; rightly or wrongly, they simply want to circumcise them.

The discourse on FGM has been a convenient battlefield for both universalist and cultural relativist arguments. Some writers have even suggested that the concerted international action against FGM stems from a lack of understanding and sensitivity towards non-Western cultures where female circumcision is practised and that this amounts to a neo-imperialist attack on these cultures. Significant questions have also been raised about the neglect of salient cultural issues in international discourse and programs of action on FGM. Ifeyinwa Iweriebor argues for example that

what is bothersome is not so much that people have a negative opinion of the practice, but that the issue is misrepresented as a form of child abuse or a tool of gender oppression. The language and the tone of the outcry in most cases reflect a total lack of respect for the culture of other peoples. Even more bothersome is the false portrayal: the falsification of statistics and a successful demonization of the practitioners.

(Iweriebor 1996: 3)

Another writer contends that the dominant perception in the West that female circumcision represents a violation of human rights of children and women are conclusions that are affected by two major factors: first, the use of Western cultural perspectives in assessing an African cultural experience; and second, the discussion of the experience in isolation of its full cultural context. Assessing cultural values of people through different cultural frameworks have often led to distortions, misinterpretations and misrepresentations. This, it is argued, has been the case of female circumcision and the African woman (cf. Apena 1996: 5).

I have no intention of getting myself entangled in this debate. I need only add that indeed, FGM cannot be adequately discussed outside of its cultural context. It is important, even in examining the human rights implications of FGM, to

locate the discussion firmly within the broad framework of the cultural dynamics that inform and affect the practice. However, there can be no shying away from the hard facts that FGM is a practice that has been medically proven to constitute a hazard to women's health and has been widely condemned as representing the violation of the human rights of children and women. FGM has been recognized as a form of violence against women in the UN Declaration on the Elimination of Violence Against Women and in the UN Beijing Declaration and Platform for Action on Women's Rights. These documents, and indeed the general trend of human rights discourse on the issue, set FGM in a broader continuum of the violence against women which occurs in all societies in different forms. FGM is seen as one of the manifestations of gender-based human rights violations which aim to control women's sexuality and autonomy.

The interesting thing about FGM is that few in official or academic circles are really arguing in support of it. The argument of most proponents of cultural relativism in this regard is that the ways of addressing the issue be more culturally sensitive. In many countries where it is practised, FGM conflicts with existing national legislation against the practice. In Senegal, Egypt, Ghana and Burkina Faso the practice is not only a violation of constitutionally guaranteed rights against torture and degrading treatment, it is also a criminal offence under the applicable penal laws. Yet, the practice remains prevalent. According to one report on FGM in Senegal, if article 299A of the Senegalese penal code, which prohibits FGM, were enforced, two million Senegalese would go to jail. The World Health Organisation reports that a staggering 137 million women in developing countries have undergone the ordeal of FGM and despite concerted international action, the practice continues in many countries.

The irony of the situation is that although many states have legislated to uphold universal human rights above cultural traditions on the issue of FGM, on some other equally sensitive cultural issues, states have clearly decided to uphold perceived cultural traditions even when they obviously conflict with universal human rights standards. A good example of this is Section 55 of the Nigerian penal code, which exempts from criminal prosecution any corporal punishment of a child, pupil, servant or wife in accordance with cultural traditions. In the words of this law:

Nothing is an offence which does not amount to the infliction of grievous hurt upon any person and which is done by a husband for the purpose of correcting his wife, such husband or wife being subject to any native law or custom in which such correction is recognized as lawful.

Penal Code [Northern States] Federal Provisions Act: 1990)



One Nigerian judge has described this provision as a licence for wife-battering and domestic violence. It implies that once any native law or custom allows a husband to correct his wife by beating her, he may conveniently do so with no fear of committing an offence punishable under the law, as long as the battering he inflicts on her does not amount to grievous bodily harm or cause her severe bodily harm for up to 20 days (Effah et al. 1995: 3).

This kind of attempt at compromise is evident in other countries. In a study of women's sexual rights in South Asia, Yasmin Tambiah observes that the UN Convention on the Elimination of Discrimination Against Women has the dishonour of being the convention with the greatest number of reservations by state signatories. In the South Asian context, Tambiah observes that the reservations are intimately linked with compromises and accommodation made by the state regarding its ethnic minorities on the one hand, and women's sexual rights on the other. Tambiah points out that recent examples from Sri Lanka, particularly the 1995 parliamentary debates on the revision of the penal code, bear ample testimony to the reluctance of law makers to tread on the 'religious and cultural sensibilities' of different ethnic groups in the enactment of legal changes that would have had positive consequences for women's rights (Tambiah 1998: 99).

#### FINDING COMMON MEETING GROUND: BETWEEN CULTURE AND NATIONAL HUMAN RIGHTS STANDARDS

What has become clear from the experiences of many new nations is that formal legislative enactments alone cannot change pervasive cultural attitudes. States cannot decree conformity with its human rights provisions by legislative fiat. Neither can formal legislation alone resolve the conflict between culture and constitutional rights. In the case of FGM for example, legislation has proved effective only where it has been integrated into other aspects of a comprehensive eradication strategy. In Kenya and Sudan, for example, legislative efforts have been undermined where they have been identified with earlier interventions under the former colonial administration.

Early attempts to enforce legislation against FGM in Sudan caused such popular outcries that enforcement was subsequently abandoned. In several other African countries where legislation against FGM exists, it is not enforced for fear of alienating certain power bases or exacerbating tensions between practising and non-practising communities. In Burkina Faso, where practitioners have been prosecuted in connection with the deaths of young girls during FGM ceremonies, it has become clear that criminalizing practitioners and families has only

succeeded in driving the practice underground and creating an obstacle to outreach and education. These experiences and others elsewhere have shown that, in order for legislation to be effective, it must be accompanied by a broad and inclusive strategy for community-based education and awareness-raising.

Conflicts between cultural traditions and national human rights standards as exemplified in the case of FGM need to be addressed from a holistic and coherent standpoint which locates the problem within both cultural contexts and human rights frameworks. To be effective, such programs must necessarily involve local communities, as changes in cultural attitudes and orientations can only be meaningful and sustainable if they come from within local communities.

This approach to the problem of FGM would appear to have worked quite well in Kenya, where some local communities have successfully introduced 'alternative circumcision rites' to replace old traditions. Through communal dialogue and consensus, the people within these communities agreed to do away with the physical mutilation of the woman's body during the traditional female circumcision rites, while retaining other harmless aspects of the circumcision rites.

This new direction was the result of meetings among some Kenyan mothers seeking alternative ways to usher their daughters into womanhood without subjecting them to the ordeal and hazards of 'facing the knife'. The new rite of passage is known as *Ntanira na Mugambo* or 'circumcision through words'. It uses a week-long program of counselling, capped by community celebration and affirmation, in place of the former practice. During the celebrations, which still include the traditional period of seclusion, the adolescent girls are taught the basic concepts of sexual and reproductive health and are counselled on gender issues and other customary norms. As a way of legitimizing the new procedure, the girls receive certificates certifying that they have undergone the traditional rites into womanhood.<sup>1</sup> These innovations have produced remarkable results where previous efforts have failed. In one of the communities where the alternative circumcision rites were introduced and where about 95 per cent of the

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<sup>1</sup> The idea of 'circumcision through words' as an alternative to the practice of FGM grew out of collaborations between rural families and the Kenyan national women's group, Maendeleo ya Wanawake (MYWO), which is committed to ending FGM in Kenya. It follows years of research and discussion with villagers by MYWO field workers with the close cooperation of some NGOs that have served as technical facilitators to the MYWO program. The important thing about this development in Kenya is that the initiative came from members of the community. See Malik Stan Reaves, 'Alternative Rite to Female Circumcision Spreading in Kenya' in *Africa News Online*, November 19, 1997.



girls previously had to undergo circumcision, the rate of FGM is estimated to have gone down by as much as 70 percent (Achieng 1998).

A similar procedure, by which the girl is declared a woman in accordance with cultural traditions but is not subjected to the ordeal of mutilation, is being carried out in parts of Uganda. What makes the case of Uganda particularly interesting is that it was promoted by male elders in the clan who formed an elders' association for the purpose of discussing changes to this and other cultural traditions (Chelala 1998). In this way, the social and cultural essence of the circumcision rites have been retained while eliminating those aspects that threaten the health of women and violate their rights. This process of community involvement in advocacy, information, education, legislation and policy formulation which has been successfully adopted in some countries offers the best prospects for a culturally sensitive solution to the conflict between national human rights and cultural traditions.

The point here is that legal systems cannot regulate societies unless the laws are supported by cultural norms. This congruence of laws and cultural norms is required if national human rights regimes are to gain grassroots acceptance.

#### CONCLUSION

In addressing the conflicts between national human rights standards and dominant cultural orientations, it is significant to bear in mind that national constitutional and other legal human rights provisions are not meant to regulate every aspect of social interaction within individual cultural communities. They do not mandate specific social attitudes. Rather, they represent broad standards, arrived at by consensus about what rights are considered fundamental within a state. Thus, national human rights provisions should ideally still provide room for cultural expression, and in some cases cultural communities within the state should still retain some latitude over how to put these rights into practice.

For example, the constitutional right to freedom from discrimination on the grounds of gender may be fundamental, but there remains a margin of cultural interpretation of what may in fact constitute gender discrimination. The tradition in many non-Western societies which stipulates that a woman may not hold certain traditional titles and offices or chieftaincy positions is in my view no more an expression of gender discrimination than the Canon rule among catholic Christians which bars women from becoming priests. To be effective, national human rights guarantees must allow for some form of cultural expression and initiative. Indeed, the same analogy can be made between national human rights provisions and international agreements. International human rights agreements

are not meant to resolve controversial clashes of rights within individual societies, nor do they mandate specific policies. They are merely widespread agreements about what rights are fundamental, and countries retain great latitude over how to put these rights into practice. Rather than seeking to prescribe new rules for social relations among cultural communities, national human rights laws should aim more at seeking how best human rights may be promoted within the prevailing cultural attitudes and institutions (as with women and inheritance rules).

Problems arise, however, when cultural traditions patently and fundamentally conflict with national human rights standards, as in cases of torture resulting from trials by ordeals or other violations to the right to life and human dignity. On these, there can be no compromises. In such cases, it must be reiterated that insofar as national human rights standards, as enshrined in national constitutions, reflect the collective national conscience, they present a higher set of standards by which the various cultural traditions can be judged.

The resolution of the conflict between culture and national human rights standards must begin with a full understanding of the nature of this conflict. The challenge is to seek ways in which culture, through change, adaptation and modification, can be made to serve as a complement rather than a constraint to specific national human rights aspirations. In doing this, it is not enough to identify the cultural barriers and limitations to modern domestic and international human rights standards and reject them wholesale. Nor is it enough to attempt to uphold national human rights standards over these cultural traditions merely by legislative or executive fiat. It is more important to adopt a holistic and sensitive approach that seeks to understand the social and political basis of these cultural traditions and how cultural attitudes may be changed and adapted to complement human rights. Such change and adaptation must be done with local initiative and involvement, in a way that does not compromise the cultural integrity of the people. Local people and cultural communities must feel a sense of ownership of, and control over, the process of change and adaptation.

Unfortunately, such processes of cultural change through local initiatives have not been common. In many new nations, human rights have merely been decreed from above to the people through constitutional and other legal provisions, and cultural orientations and attitudes have been expected to conform by legislative fiat with these new human rights standards. But culture evolves rather than transforms, and the process of evolution is painstakingly gradual and complex. Culture is a reflection of collective social strength and acts as a framework within which self interest is defined and realized within a community. The cultural legitimacy of rights can therefore not be deduced or assumed from the mere fact



of official recognition of the claim as a human right in existing formal documents.

The promotion of national human rights standards against the background of the dominant cultural and social traditions in the state should be done with due respect to meritorious cultural values and traditions of local communities. This process need not be a 'one-way street'. Just as some cultural traditions need to be adapted to conform to state human rights standards, state human rights regimes also have much to borrow from traditional values such as those pertaining to conflict resolution and reciprocity between individual rights and communal duties. State human rights aspirations can be strengthened and reinforced by these diverse standards. The interplay between national human rights standards on one hand and local cultural orientations on the other should be a dynamic process of give and take, ideally through persuasion and dialogue, with legislation introduced only to complement this process.

Every cultural tradition contains some norms and institutions that are supportive of some human rights as well as norms and institutions that are antithetical or problematic in relation to other human rights. Since respect for human rights is fostered by reason as well as by experience, a constructive approach to promoting human rights is to seek ways of enhancing the supportive elements of culture while redressing the antithetical or problematic elements in ways that are consistent with the cultural integrity of the tradition in question. It would be self-defeating and counterproductive to attempt to enhance the awareness of human rights within any culture in ways that are unlikely to be accepted as legitimate by that culture ( An'Naim 1990).

What is advocated here, therefore, is a two-way system of cross-fertilization in which cultural systems continually fertilize, and are fertilized by, national and universal social and legal standards. In this way, the gap between national human rights provisions and cultural orientations can be bridged, and constitutional rights can derive their legitimacy not only from state authority but also from the force of cultural traditions.

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