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THE PROTECTION OF CULTURAL IDENTITY IN THE CONSTITUTION AND THE CREATION OF NATIONAL UNITY IN SOUTH AFRICA: A CONTRADICTION IN TERMS?

*Yvonne Mokgoro**

I. INTRODUCTION

THIS paper will cover two apparently contradictory topics: cultural identity and national unity. The discussion will revert to a single source: the South African Constitution. The angle taken on both of the topics, and the focus of the paper, is on the instruments of protection that the Constitution provides.

The apparent contradiction centers on the aspiration embodied in the two topics when presented with a pluralist society. When dealing with a homogenous nation which shares the same cultural, historical, and social experience, forging national unity without compromising that experience will be relatively easy. However, the point of departure is a pluralist society consisting of a diverse and loosely interdependent multi-cultural experience. In such a pluralist society, the following questions present themselves: Is it possible to replace the heterogeneity with a unitary societal structure and value system without some real cost to the disparate cultural experiences? Will national unity only come at the expense of cultural identity, or will a substantive protection of cultural identity lead to fragmentation of the national consensus?

II. WHAT IS MEANT BY CULTURAL IDENTITY?

Cultural identity, for purposes of this paper, is constituted by that way of life that can be associated with the expression of a collective identity. Culture, as used here, is broadly referring to a way of life or a system of socializing. It includes, but is not limited to, cultural artifacts,¹ forms of

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1. Socially constructed and sanctioned features of the group experience and identity; traditions and customs.

expression,² systems of knowing,³ a world view, historical understanding⁴ and religious experience.⁵ On the face of it, rights protecting culture purport to protect these aspects of socialized experience. It is quite clear that culture is constituted by far more than music and dress and forms of artistic expression.⁶

At an international level, and as an attribute of minorities, cultural identity is protected by Article 27 of the International Covenant on Civil and Political Rights, which requires that "persons belonging to . . . minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."⁷

There are a number of provisions in South Africa's Bill of Rights that may implicate cultural identity: Section 9, equality,⁸ in particular the equal protection and benefit of the law⁹ provision, and a prohibition against discrimination on the grounds of culture;¹⁰ Section 10, human dignity;¹¹ Section 15, Freedom of religion, belief and opinion;¹² Section 16,

2. Whether through language medium, ritual, song, dance, art, affection, or other abstract emotional expression and so forth.

3. Including epistemology. This may be western empiricism, superstition, experience, and so forth.

4. Legend, idiom, fable, etc.

5. Including the spiritual as opposed to the material realm; the religious as opposed to the secular.

6. These are sometimes referred to as "high" culture. See F. Kaganas and C. Murray, *The Contest Between Culture and Gender Equality Under South Africa's Interim Constitution*, J.L. & Soc. 409-33 (1994).

7. International Covenant on Civil and Political Rights, *opened for signature* December 19, 1966, pt. 3, art. 27, 999 U.N.T.S. 172, 179, 6 I.L.M. 368, 375-76. South Africa is a signatory to this Covenant.

8. Section 9(2) provides: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." S. AFR. CONST., § 9(2).

9. Section 9(1): "Everyone is equal before the law and has the right to equal protection and benefit of the law." S. AFR. CONST., § 9(1).

10. Section 9(3): "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth." S. AFR. CONST., § 9(3).

11. Section 10: "Everyone has inherent dignity and the right to have their dignity respected and protected." S. AFR. CONST., § 10. To an extent that human dignity is coloured by identity; and identity, in turn, is formed through culture. Human dignity is also respected at Section 1(a) and Section 7(1) of the constitution. See S. AFR. CONST., §§ 1(a), 7(1).

12. Section 15:

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions provided that—

(a) those observances follow rules made by the appropriate public authorities;

(b) they are conducted on an equitable basis; and

(c) attendance at them is free and voluntary.

(3) (a) This section does not prevent legislation recognising—

freedom of expression;¹³ Section 18, freedom of association;¹⁴ Section 19, political rights;¹⁵ Section 29, education;¹⁶ Section 30, language and culture;¹⁷ Section 31, cultural, religious and linguistic communities;¹⁸ and

(i) marriages concluded under any tradition, or a system of religious, personal or family law; or

(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

S. AFR. CONST., § 15.

13. Section 16:

(1) Everyone has the right to freedom of expression, which includes—

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to—

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

S. AFR. CONST., § 16.

14. Section 18 provides: “Everyone has the right to freedom of association.” S. AFR. CONST., § 18.

15. Section 19:

(1) Every citizen is free to make political choices, which includes the right—

- (a) to form a political party;
- (b) to participate in the activities of, or recruit members for, a political party; and
- (c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right—

- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
- (b) to stand for public office and, if elected, to hold office.

S. AFR. CONST., § 19.

16. Section 29(2):

Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—

- (a) equity;
- (b) practicability; and
- (c) the need to redress the results of past racially discriminatory law and practise.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

S. AFR. CONST., § 29(2).

17. Section 30 provides: “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.” S. AFR. CONST., § 30.

18. Section 31:

Section 38, enforcement.”¹⁹ In addition, the Preamble²⁰ and Section 6, recognition and protection of official languages,²¹ offer protection for fur-

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community,

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

S. AFR. CONST., § 31.

19. Section 38:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

The persons who may approach a court are:

(a) Anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or a class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interests of its members.

S. AFR. CONST., § 38.

20. The Preamble:

We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person;

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afrika. Hosi atekis Afrika.

S. AFR. CONST., Preamble.

21. Section 6:

(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

(3) (a) The national and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in [respective provinces];

ther aspects of cultural identity. Section 181(1)(c) identifies The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CPPRCRLC) as a state institution that will strengthen democracy.²² Several of the other state institutions might provide vehicles for the protection of cultural rights.²³

(provided that no national or provincial government may use only one official language)]. (b) Municipalities must take into [consideration] the language usage and preferences of their residents.

(4) The national and provincial governments, by legislative and other measures, must regulate and monitor [the use by those governments of official languages]. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

(5) A Pan South African Language Board established by national legislation must—

- (a) promote and create conditions for the development and use of
 - (i) all official languages;
 - (ii) the Khoi, Nama and San languages; and
 - (iii) sign language;
- (b) promote and ensure respect for—
 - (i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telugu and Urdu, and
 - (ii) Arabic, Hebrew, Sanskrit and others used for religious purposes in South Africa.

S. AFR. CONST., § 6.

22. The functions and composition of the Commission are set out in Sections 185 to 186 respectively:

(1) The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are—

- (a) to promote respect for the rights of cultural, religious and linguistic communities;
- (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
- (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

(2) The Commission has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.

(3) The Commission may report any matter which falls within its powers and functions to the Human Rights Commission for investigation.

(4) The Commission has the additional powers and functions prescribed by national legislation.

S. AFR. CONST., § 185.

Section 186:

(1) The number of members of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and their appointment and terms of office must be prescribed by national legislation.

(2) The composition of the Commission must—

- (a) be broadly representative of the main cultural, religious and linguistic communities in South Africa; and
- (b) broadly reflect the gender composition of South Africa.

S. AFR. CONST., § 186.

23. These might include the Public Protector and the Human Rights Commission.

Of the rights mentioned above, the most important ones may be Sections 30 and 31, language and culture:

30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Cultural, religious and linguistic communities:

31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of their community—

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.²⁴

This sets the stage for two debates. The first debate is whether such rights are individually enforceable, or whether they represent collective rights that can be exercised on behalf of the collective to trump the individual expression of a deviance from the collective norm. The second debate relates to the meaning given to “culture” anticipated earlier. It attempts to settle the contention about the reach of justiciable protection that is given to cultural expression.

An analysis of the text of the South African Bill of Rights takes on the polemic between the collective assertion of these rights versus the individualist protections that rights are generally perceived as offering. Section 30 captures the tension in that “everyone” is ambivalently qualified by the pronoun “their” as opposed to “his” or “her,”²⁵ while the prohibition against the exercise of these rights in a manner inconsistent with the Constitution is directed at “no one.” Section 31 is perhaps the strongest argument for the vesting of a collective right. The plural “persons” together “with other members of that community” are not to be denied rights in “their” culture, religion, language, and organs of civil society.²⁶ Again, as with Section 30, there is an internal limitation to the right requiring conformity with the Constitution. To the extent that other rights involve the protection of individual liberties, the tension is once again manifest.

This tension is only partly resolved by requiring an element of free choice. The difficulty will be acute when it comes to opting in to some aspects of the culture, while rejecting other dimensions of the package-deal that embracing a culture may involve. Also, the notion of a completely free choice is problematic when dealing with socialising dynamics

24. S. AFR. CONST., §§ 30-31.

25. However, elsewhere in the Bill of Rights, the plural pronoun is sometimes also used in place of the more cumbersome “his” or “her.” This may weaken an argument mooted for the collective right.

26. S. AFR. CONST., § 31.

like culture; many choices are made with incomplete knowledge (this is true whether one is opting in or out), or involve freezing a social relationship that will constrain the individual who later wishes to grow outside such a culturally institutionalized social relationship.²⁷ Opting out may be the focal point of the clashes between the individualist morality of the Bill of Rights and the collective morality of cultural identity.

III. SOUTH AFRICAN PLURALISM AND CULTURAL DIVERSITY

A. PRE-CONSTITUTIONAL ERA

In order to grasp the various cultural identities of South Africa, one has to look back to the colonial period where, in the nineteenth century, a segregationist administrative policy based on tribal membership was introduced. Shepstone, then the lieutenant-general of Natal, is known to have devised this thinly disguised policy of divide and rule, and by acting as paramount chief over all black races in Natal, divided the indigenous people in terms of ethnic affiliation.²⁸ Through this system the differences, as opposed to the commonalities, between the ethnic groups were emphasised. This ideology was reinforced under apartheid with the Bantu Authorities Act of 1951, which was used to control and manipulate traditional leadership in South Africa.²⁹ The same strategy was followed with the introduction of self-government for black peoples and the homeland system. The homeland system was created to build tiny "independent" states within South Africa. Each homeland was intended to accommodate a particular ethnic group, which would then become an independent nation (i.e., Transkei for AmaXhosa's, Bophutatswana for the Batswana's). Through these homelands and self-governing territories, the promotion of ethnicity was furthered by the policy of apartheid.

The combined actions of colonialism and apartheid, therefore, resulted in a weak unitary South African identity.³⁰ The cultural identity among South Africans is often not to be found on a national level, but on a more fragmented ethnic level such as Tswana, Zulu, Xhosa, English or Afrikaans.

27. Marriage is a prime example.

28. See D. MARAIS, *SOUTH AFRICA: CONSTITUTIONAL DEVELOPMENT, A MULTI-DISCIPLINARY APPROACH* 234-35 (Johannesburg: Southern Book Publishers, 1st ed. 1989).

29. See *id.*

30. Albert Venter, in an article *Questions of National Identity in Post-Apartheid South Africa*, argues that South Africa has strong and opposing civilisational paradigms in the Western and African influences that exist in the country. In his view, the inevitable civilizational clash will fuel ethnic nationalism resulting in the destruction of the nation. An attempt to forge "[a] South African Nation . . . in terms of a nationalistic paradigm would inevitably be hegemonic of some dominant group." As an alternative, he proposes the creation of an identity linked to the constitution. He advocates a "constitutional patriotism" that would see our first allegiance being to the document born out of "a process of mutual accommodation" that ensures to us the pluralism captured in the metaphor of a "rainbow nation."

B. POST-CONSTITUTIONAL ERA

The provisions of the Bill of Rights entrenched in the new Constitution,³¹ recognises that people belonging to a cultural and religious community may not be denied the right to enjoy their culture, practise their religion or form, join, and maintain cultural and religious associations provided they do so in a manner that is consistent with the other provisions of the Bill of Rights.³² Sections 211³³ and 212³⁴ of the new Constitution, which take their cue from the interim Constitution, further recognise the institution, status, and role of traditional leadership, subject to the Constitution.³⁵ The new Constitution also recognises the fact that custom is not static and envisages its evolution.³⁶ Divergent cultural norms have been elevated from subordination and obscurity to a status of equality with the previously hegemonic western cultural norms.

T. W. Bennett observed that: "The heterogeneity of South Africa's population, one divided by language, religion and culture/ethnicity, is notorious. Under the circumstances it is understandable that groups observ-

31. Constitution of the Republic of South Africa Act 108 of 1996.

32. *See supra* text accompanying note 24.

33. Section 211:

(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

S. AFR. CONST., § 211.

34. Section 212:

(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law—

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders.

S. AFR. CONST., § 212.

35. Furthermore, a traditional authority that observes a system of African customary law must function subject to any legislation and custom, and this includes amendments to, or repeal of, that legislation or those customs.

36. Section 39 of the Constitution provides:

(1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

S. AFR. CONST., § 39.

ing distinctive cultural traditions should demand respect for their particular lifestyles and systems of a law."³⁷

It may be argued that individuals and communities have rights to maintain their own cultural uniqueness. This is in accordance with an individual's freedom to organize his or her life in ways that diverge from the national standard.³⁸ The cultural diversity of South Africans cannot be denied; in fact, it is often celebrated. From the provisions of the new Constitution, it becomes clear that South Africa is now bound to respect the cultural tradition of those of its people who choose to live according to a way of life or culture of their choice, subject, of course, to the standards set in the Constitution. For example, with reference to African custom, one of the many diverse cultural ways of life in South Africa, the courts must now recognise, apply, and develop African customary law, the legal regime associated with African culture. And it seems that the new Constitution seeks to bring to an end the marginal development of African customary law. It also seeks to promote the need to address the application of outdated and distorted African customary law notions and institutions by requiring that they be developed in line with the spirit, purport, and objects of the Bill of Rights and the values of the Constitution.

Contrary to popular belief, the spirit, purport, and objectives of the Bill of Rights is not foreign to African custom and tradition. African culture has its own indigenous doctrine of rights, one which European colonists overlooked because they were too blinkered by a sense of superiority to realize that Africans too could evolve ethical systems.³⁹ It is often said that the Bill of Rights in a heterogenous society like South Africa aims to forge a common value system for a national consensus. One shared value and ideal that runs like a golden thread across cultural lines, is the value of *ubuntu*.⁴⁰

In an attempt to define it, *ubuntu* as a concept has generally been described as a world-view of African societies and a determining factor in the formation of perceptions which influence social conduct. It has also been described as a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness, and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources. It is a fundamental belief that *Umuntu ngumuntu ngabantu/motho ke motho ka batho bangwe*, which, literally translated means "a human being is a human being because of other human beings," and represents a philosophy of life which views the individual's existence and well-being relative

37. T. W. BENNETT HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW 1 (Juta & Co. 1998).

38. See National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (12) BCLR 1517(cc), 1998 SA CLR LEXIS 36.

39. See S. AFR. CONST., § 212.

40. See my observations in *S v Makwanyane and Another*, 1995 (3) SA 391, 500-01(CC).

to that group of which he or she is a part.⁴¹ Hence, a community based on *ubuntu* places strong emphasis on, for example, family obligations. Family members are obliged to look out for each other; loyalty and commitment to the group and its interests are paramount.

Although South Africa is a multi-cultural society, it would not be true to say that dignity, humaneness, conformity, respect, etc. are foreign to any of South Africa's cultural systems. These are the values which the Bill of Rights aims to respect, protect, and promote; values which may form the basis of a national consensus in South Africa.

IV. FORGING NATIONAL UNITY IN SOUTH AFRICA

However, while national unity generally includes the ideas of national identity, social solidarity, and territorial integrity, in South Africa currently, it is sometimes argued that national unity may be less an expression of a "South Africanism" than it is an affirmation of territorial integrity and social solidarity. The enactment of the Constitution did not automatically erase the consciousness of separateness, otherness, and division between ethnic, cultural, and racial communities within the broader South Africa which had been nurtured by colonialism and apartheid. Some communities still aspire to cultural self actualisation, and resist the efforts to unite with the remaining body. The country inherited colonial political boundaries and continues to be divided economically,⁴² racially, and to greater or lesser extent, ethnically. For some, national unity is therefore, principally a rejection of secession and an aspiration to societal unity within the territorial boundaries of the national state. The challenge, however, is to forge a new national consensus.

The following provisions in the Constitution have national unity as their pre-occupation: the Preamble;⁴³ Chapter 3, co-operative government, in particular Section 41(1)(a),⁴⁴ stating that all "spheres of government" and "organs of the state" must preserve the peace, national unity and the indivisibility of the Republic;⁴⁵ powers conferred upon one branch or level of government to intervene with the functional areas, duties, or competencies of another branch or level of government;⁴⁶ the par-

41. See *Ubuntu and the Law in South Africa*, May 1997, Konrad-Adenauer-Stiftung, at 49. In relation to western discourse, there are loose parallels between *ubuntu* and the communitarian world view.

42. Along several nexa, including class, and urban versus rural.

43. See S. AFR. CONST., Preamble.

44. S. AFR. CONST., § 41.

45. *Id.*

46. See S. AFR. CONST., § 44(2).

Parliament may intervene by passing legislation, in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

(a) to maintain national security;

(b) to maintain economic unity;

(c) to maintain essential national standards;

(d) to establish minimum standards required for the rendering of services; or

ticular office of the president in Section 83(c) which states, "The president promotes the unity of the nation and that which will advance the Republic."⁴⁷ This is a guiding principle relating to the functions of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Committees.⁴⁸ In addition, notwithstanding the repeal of the interim Constitution, and bearing in mind that they only have a limited lifespan, the National Unity and Reconciliation Act,⁴⁹ and its instruments, are permitted to survive during the transitional period,⁵⁰ as well as the principle of the government of National Unity.⁵¹

The strongest constitutional tool wielded on behalf of national unity, however, could be a covert one. It is the totalizing strategy of a liberal interpretation of the Bill of Rights.⁵² This may elevate liberal constructions of texts found in the Constitution to forge a national consensus or unity of values to the exclusion of detrimental cultural norms that might be supported by "illiberal" or alternative constructions of the text. National unity thus becomes the battleground upon which a conflict of far reaching dimension is fought.

It is a battleground where the prudent will not enter clumsily, as the rationale for the territorial state weakens in the post-industrialised world,⁵³ and the calls and justifications for self determination on ethnic and cultural grounds strengthen. In post-colonial Africa, the fault-lines

(e) to prevent unreasonable action taken by a province which is prejudicial to the interest of another province, or to the country as a whole.

S. AFR. CONST., § 44(2).

Section 100(1)(b) is to the same effect, and relates to the power of a national executive to supervise a provincial executive. Section 139, relating to the provincial supervision of local government is similar. Sections 146 to 150 deal with conflicts between different levels and spheres of government. The principle used for resolving the conflict is subordination to the national imperative or policy. *See* S. AFR. CONST., §§ 100(1)(b), 139, 146-50.

47. S. AFR. CONST., § 83(c).

48. *See* S. AFR. CONST., § 185(1)(b).

49. *See* National Unity and Reconciliation Act 34 of 1995. This Act created the institutions involved in the work of the Truth and Reconciliation Commission whose principal function is to promote national unity and reconciliation.

50. Schedule 6:

(1) Notwithstanding any other provision of the new Constitution and despite the repeal of the previous Constitution—

(a) all the provisions relating to amnesty contained in the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution; and

(b) the provisions of the Promotion of the National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended by the Promotion of National Unity and Reconciliation Amendment Act, 1995 (Act 87 of 1995), are valid.

(2) Subitem (1)(b) does not prevent any further amendments to the Promotion of the National Unity and Reconciliation Act, 1995.

See S. AFR. CONST., Schedule 6, § 27.

51. *See* S. AFR. CONST., Schedule 6, Annexure A.

52. In the context of religion, but possibly no less true of culture, see Graeme R. McLean, *Freedom of Religion and State Neutrality: A Philosophical Problem* 114 S. AFR. L.J. 174 (1997).

53. *See* Joseph E. Magnet, *Collective Rights, Cultural Autonomy and the Canadian State*, 32 MCGILL L.J. 170 (1996).

imposed by the artificial and forced national boundaries lie lurking not too far from the surface.⁵⁴ Insensitivity in regard to respect for cultural practises, beliefs and institutions might easily fuel fragmentation, where, at the same time, enforcement of the Constitution and its basic values is also crucial to achieve a consensus of national values. Achieving a national consensus about the nature of the good life, therefore, might be more successfully the domain of politics.

This defensive tone, of course, may only be warranted in respect of those aspects of socialised experience which depart from the standards captured in the Bill of Rights. Programmes directed toward national unity need not erode, compromise or even nullify positive aspects of any value system in South Africa. And of that there is much. In drawing out and preferring those values like dignity, compassion, respect, forgiveness, restoration and humanity, many cultural phenomena may find themselves adjusting from internal pressures, in the same way that these values may have become suppressed in the past under the combined influences of political ambitions and other socio-economic forces. On its own, the conscious celebration of cultural diversity could enhance mutual understanding and mutual respect—values which could become central to a new South Africanism.

V. CONCLUSION

Section 1 of the Constitution declares boldly and perhaps even bravely:

1. The Republic of South Africa is one sovereign democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the Constitution and the rule of law.
- (d) Universal adult suffrage, a national common voter's roll, regular elections, and a multi-party system of democratic government to ensure accountability, responsiveness and openness.

But the Constitution is not a self-executing instrument, and the question is asked: who is best able to give substance to these values? Is it the courts of law, civil society generally, state agencies through specialized programs, or institutions like the Truth and Reconciliation Commission?

It would appear, however, that the Bill of Rights exerts a superceding effect on cultural norms, practises, and institutions, severing those features of a culture that are in conflict with the Constitution from the body of the culture and engrafting in their place the values which the Constitution upholds. This is particularly true in respect of cultural values and practises which operate oppressively on individuals or classes of individuals, such as women, children, the disabled, etc. Those cultural values which coincide with the basic values espoused in the Constitution will act

54. See El-Obaid Ahmet El-Obaid and Kwadwo Appiagyei-Atua, *Human Rights in Africa—A New Perspective on Linking the Past to the Present* 41 MCGILL L.J. 819 (1996)

as a reinforcement of the required national consensus. In view of this, the argument that cultural rights are an empty shell—a token offered in the cut and thrust of constitutional negotiations to obtain political consensus from interest groups—may be weakened.

