

# THE BANYAN TREE PARADOX

Culture and human rights activism

International Human Rights Internship Program

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International Human Rights Internship Program (IHRIP)

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Cover designed by Nnenna Ozobia. Graphic image derived from a photograph of Ta Prohm temple, Cambodia, by Alfred Molon of Alfred Molon Photo Galleries, Unterhaching, Germany.

## Preface

In 1998, when the International Human Rights Internship Program (IHRIP) and Forum-Asia were in the early stages of a process to produce what, in the end, became *Circle of Rights—Economic, Social and Cultural Rights Activism: A Training Resource*, we faced the central question of what topics to include. We initially decided to omit cultural rights, because we considered the topic too difficult and fraught with controversy. However, at the first consultation meeting with manual authors and other activists, held on Phi Phi Island, Thailand, in February 1999, we were told that our position was not acceptable, that we had to include cultural rights! We had asked a range of activists to write different modules for *Circle of Rights*, but because we had left the topic of cultural rights for so long, in the end we had to write the module ourselves. Thankfully, we had significant help from some of the Phi Phi Island participants as well as participants at our second workshop, held in Yogyakarta, Indonesia a year later.

In the process of putting the cultural rights module together, we became convinced that the issue of culture in human rights work was (and is) fundamental, while at the same time being very complex, intriguing and relatively unexplored. We ourselves, however, were unable to pursue the topic further until, in August 2004, IHRIP received a grant from the Ford Foundation to do just that. From mid-2004 until August 2005, IHRIP staff spoke with a large number of human rights activists and others about culture and human rights, and about human rights activism around issues where culture figures prominently. We read a lot of the literature on relevant topics, although, undoubtedly, there is always more to read, just as there are more people with experience and wisdom from whom we could learn much. We are very grateful to the many activists and others who shared their experiences, analyses and insights with us.

From August 22 to 25, 2005, we hosted a workshop in Siem Reap, Cambodia on the topic "Culture and Rights: Challenges and Opportunities for Human Rights Work." The workshop was intended to focus on particularly problematical areas for activism on culture and rights issues that we had identified in our discussions and research. Workshop participants, who came from different regions of the world, brought to the discussions an unusual breadth and depth of experiences and understandings.\* We addressed a few relatively broad questions about culture and human rights, and then focused the discussion on five case studies (summarized in Appendix 1), which illustrate how various of the broader questions have been addressed in practice by different organizations and activists.

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\* Appendix 5 is a list of participants.

## THE BANYAN TREE PARADOX

We are enormously grateful for the time and attention participants—very busy activists and scholars—devoted to the workshop. Discussions on culture and rights issues are seldom easy, and our conversations in Siem Reap were no exception. However, participants remained focused throughout, and the conversations were very productive in enabling us to think through some of the more difficult challenges presented by culture issues for human rights work, and understand better how, in practice, they can be met.

The Office of the UN High Commissioner for Human Rights in Phnom Penh graciously invited us to have our workshop in Cambodia, and assisted us with local logistics. Without their warm welcome and tireless help, we simply could not have had the meeting there, and would have been much poorer as a result. In particular, we would like to thank Margo Picken, Keat Bophal and Phan Kunthak Botum. Our thanks go as well to Boua Chanthou of Partnership for Development in Kampuchea (Padek), who provided participants with very helpful insights into the current situation in Cambodia. Pen Raingsey and Te Sokkhoeun of the Fisheries Action Coalition Team (FACT) arranged for and escorted us on a visit to the fishing village of Peak Kantel on Tonle Sap lake, and we are very grateful for their help. We were deeply touched by the willingness of people in Peak Kantel to talk with us about the threats they are experiencing to their way of life, to their culture.

We are also, of course, deeply grateful to the Ford Foundation for its support of this important project, but beyond that, for its long-standing commitment to human rights and human rights work around the world. Natalia Kanem was instrumental in the initiation of this project, and Sara Rios, head of the Human Rights Unit, and Larry Cox, Sr. Program Officer for Human Rights, were two of the participants at the workshop.

Danny Laurent and Nnenna Ozobia of IHRIP's staff have contributed their thoughts, suggestions and help throughout, and Nnenna, her artistic talent, in producing the cover. We have also benefited from the generous and informed assistance of three interns, Marley Crutcher, Kendra Swick and Christopher Wong. Drawing on traditional designs from different regions and societies, Jonah Lobe produced the illustrations in this book. We also extend our special thanks to Daria Caliguire, Janet Chernela, Larry Cox, Eva Kalny, Nabil Morcos, Uma Narayan, Usha Ramanathan and David Weissbrodt for taking the time to read through and provide us with very helpful comments on drafts of the publication.

As D.J. Ravindran, Chair of IHRIP's Advisory Board, said in his opening comments at the workshop, it felt very appropriate to have a meeting on culture and human rights in Cambodia and, in particular, in Siem Reap. Cambodia has such a remarkable history and rich culture, which the Khmer Rouge were ruthless in seeking to destroy. In addition to the living cultures, such as those in Peak Kantel, near to Siem Reap are the

ruins of an extraordinary complex of temples, built over centuries (the most well-known of which is Angkor Wat), which reflect a rich mix of Buddhist and Hindu influences.

One of the most memorable images that visitors to the temples take away is of enormous banyan and silk trees that over long years have grown up around and through some of the temple structures. While it would be tempting to kill off those trees whose roots are dislodging large stones in the temples, at the same time other roots of the same trees surround the stones, so that they seem to be holding the stones together, where weather and human activity might otherwise dislodge or damage them. This image, which is memorable in any circumstance, seems particularly fitting in the context of a workshop that considered the very fundamental role that culture plays in constructing and maintaining human societies at the same time that various cultural institutions and practices can deeply harm, even kill, human beings. The banyan and silk trees in the Angkor temple complex are remarkable representations of this central, lived paradox of culture and human rights.

Ann Blyberg, Executive Director  
D.J. Ravindran, Chair, Advisory Board  
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## Introduction

For more than a decade now, there has been a significant growth in NGO work on “ESC rights”—economic, social and cultural rights. That work has become increasingly informed, sophisticated and effective. At the same time, it has generally been acknowledged that the “C” in ESC rights has received little of the explicit attention by NGOs that has been accorded to rights that are considered “economic and social rights.” The exceptions to this general neglect have, of course, been work related to the rights of indigenous peoples, where the right to culture is typically centrally featured;<sup>1</sup> the rights of minorities, where groups have sought to have certain cultural traditions and practices (language use, religious practices and so on) respected; and situations where literature and the arts are under threat.

In recent years, however, a few NGOs have started focusing significant attention on the right to culture (or cultural rights), and there is now an increasing interest on the part of others to look more at these rights. There are several reasons for this shift. The principal ones seem to be:

- As work on economic and social rights has grown, the neglect of cultural rights within “ESC rights” has become increasingly apparent. As the human rights movement becomes clearer about and versed in addressing ESC rights—rights which previously had seemed so unfamiliar and overwhelming—tackling the complexities around cultural rights seems more feasible;
- Conflicts and killings in the name of “culture” have occurred in the past two decades on a horrifying scale in Rwanda, Bosnia, Croatia and Serbia, and elsewhere. The destruction wrought serves as a challenge to learn more about culture and the complexities surrounding “right to culture” claims;
- Work to protect women’s human rights regularly encounters challenges in certain cultural institutions or practices, often to the extent that it can seem that “culture” is fundamentally at odds with women’s human rights. What does this reality mean for the work of the human rights movement as a whole?; and
- “Globalization” is regularly cited as a source of concern in regard to a number of human rights issues. The impact of neo-liberal economics on traditional economies and societies, on the enjoyment and use of traditional knowledge, and on other cultural aspects of life are among the issues regularly mentioned as a source of deep concern. This impact has motivated a number of organizations and activists to look more closely at culture and human rights issues.

## THE BANYAN TREE PARADOX

### The Banyan Tree Paradox—*its purpose and assumptions underlying it*

The foremost assumption underlying *The Banyan Tree Paradox* is that culture is fundamental to human life, and thus rights related to culture are centrally important human rights.

This assumption has provided the purpose of this publication: to make available to activists information about culture and human rights, and about culture and human rights activism, which seems to be particularly relevant and useful, in order to encourage more human rights groups to address issues where culture is a significant factor.

On the basis of conversations with a large number of activists, it seems that issues of culture are elusive for many and/or difficult for them to work with. As one activist (paraphrasing another) said to me: “Why is culture the closet that governments like to put everything in that they don’t want to talk about—and we as human rights advocates don’t know how to hold them accountable?”<sup>2</sup> Indeed, many activists often fail to see culture and rights issues in situations they address, or shy away from working on them because they feel unready to handle many of the difficulties and controversies they anticipate encountering. At the same time, there are other human rights activists who have considerable experience working with culture and rights issues from whom the field as a whole can learn a lot.

The International Human Rights Internship Program (IHRIP) seeks ways that it can support the work of human rights NGOs, particularly through facilitating the exchange of knowledge and experience among human rights groups as well as between human rights groups and activists in other fields. In light of the growing interest in the right to culture (or cultural rights) among human rights NGOs, IHRIP decided to try to pull together some of the best experiences, analyses and reflections of human rights activists on issues around culture and rights, as well as some useful experiences, analyses and reflections by individuals and institutions in other fields, and share this with other activists.

In addition to the growing interest in culture and rights issues, two other developments led us to believe that the time was ripe for this initiative:

- Taking on ESC rights issues has moved many organizations to think about human rights in a new light. In response to the charge that has frequently been made—ESC rights are “vague”—activists have reflected anew on how rights come to be recognized and how our understanding of them develops. One outcome of these reflections has been a greater appreciation of the central role that victims of human rights abuse play in this process, how their claims help activists and others identify elements that are important to include in human rights laws and standards. This greater sensitivity to the central role of the

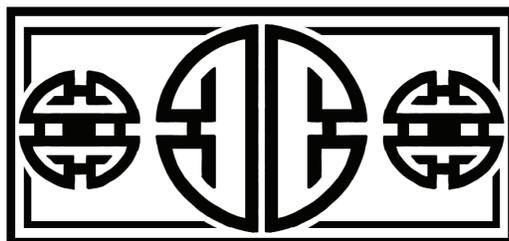
victims—and with regard to ESC rights, these are typically the poor and marginalized—has important ramifications for work on culture and rights issues. Over the years commentators concerned with culture have often argued that human rights seem to be uniform standards applied to everyone regardless of the specifics of the many different situations people face around the world. ESC rights work has been helpful in reinforcing the importance of being aware of these specificities, and working to integrate them into the process of developing human rights standards.

- Anthropologists and sociologists often feel greater comfort in addressing issues of culture and rights than do many human rights activists. However, a common perception among activists has been that, when anthropologists have argued against the application of “universal” standards to the specificities of different cultures, they were siding with the “cultural relativists” of the world—thereby undermining support for human rights. While the field of anthropology was never as monolithic as this statement would imply, perceptions and understandings of anthropologists about culture have also been changing in the past few decades.

Earlier anthropological descriptions of particular cultures often presented pictures of societies that had well-defined, timeless qualities that held true across the society. In situations where human rights standards seemed or were at odds with those qualities, a clash appeared inevitable. Over the past few decades, however, the majority view of anthropologists has evolved, and is more in line with the following description of culture:

Culture is now understood as historically produced rather than static; unbounded rather than bounded and integrated; contested rather than consensual; incorporated within structures of power such as the construction of hegemony; rooted in practices, symbols, habits, patterns of practical mastery and practical rationality within cultural categories of meaning rather than any simple dichotomy between ideas and behaviour; and negotiated and constructed through human action rather than superorganic forces.<sup>3</sup>

These various factors, taken together, make this a particularly promising time to engage in explorations into issues of culture and rights.



The Banyan Tree Paradox—*what it does and does not seek to do*

One of the participants in the Siem Reap workshop (which is described in the Preface) said: “We should give culture the complexity it is due, then learn to deal with it.” Our hope is that *The Banyan Tree Paradox* is a step in the direction of doing both.

Human rights work on issues where culture plays an important role typically presents activists with substantial challenges. The work can be complicated and difficult, often even forcing us to confront and examine some of our own most deeply held beliefs and assumptions. While not wanting to downplay these difficulties, at the same time IHRIP is convinced that a greater understanding of some of the conceptual, strategic and practical challenges posed by the work will help facilitate our dealing with these challenges.

- The chapters in this book look at two different dimensions of “culture and human rights.” We address the importance of protecting cultures and the challenges for human rights activism in doing so. We also look at “culture as a problem”—in other words, situations where specific cultural institutions and practices appear to or do violate human rights standards. In the discussions in the following chapters, we normally slip from treating one to addressing the other without flagging our move. We trust the text will be clear enough that readers will not become confused.
- In the process of working on this project, we found that in order to reach a helpful vantage point, we needed to take one step, and then a second step, back away from the topic of “the right to culture” or “cultural rights.” The first step back took us to “culture and human rights.” In *The Banyan Tree Paradox* we look at “culture and human rights,” rather than at “cultural rights” or the “right to culture,” for two, related reasons:
  - Firstly, the relationship of culture to rights is multi-faceted and more complex than what is normally understood as falling under the rubric of “cultural rights.” Human rights activists who often work in this broader, more complex, arena may not consider their work to be “cultural rights” work, and yet struggle with how culture relates to and affects what they do.
  - Secondly, when we talk about “cultural rights,” we normally assume as a starting point the provisions related to culture and cultural life incorporated in the Universal Declaration of Human Rights and other international human rights documents and treaties. These provisions, taken together, however, do not articulate a coherent whole, and this, in turn, generates problems and difficulties in discussions held within the framework of the

provisions. Such discussions seem to highlight issues and follow lines of reasoning that are often not productive, but which flow naturally from an incomplete framework.

What then to do? It seemed wise to return to some basics and take a fresh look. Claims for rights are rooted in ordinary people's day-to-day experiences and evolve as people's experiences change. In the past 50-60 years, not only has our understanding of the concept of "culture" broadened significantly, but people's experiences are different, and a broad range of human rights claims are being made nowadays that would not have been familiar several decades ago. Given the frequent confusion around discussions of "cultural rights," it seemed wise, in looking at culture and human rights work, to return to these fundamental experiences and claims: How do these experiences and claims relate to people's culture, and what are people articulating through their claims that is essential to protect? Looking at "culture and rights" rather than "cultural rights" seemed to provide greater room to take such a look.

Thus, in the following chapters, we avoid, where possible (but not always successfully), using the phrases "the right to culture" or "cultural rights." As we hope we have already made clear, we believe that culture is fundamental to human life, and human rights that protect culture and members of cultures are basic. However, we have concluded that, at this point in time, one way to clear our own heads of a number of unhelpful assumptions and lines of reasoning is to avoid using these terms to the extent that we can.

*The Banyan Tree Paradox* thus, while acknowledging their importance, does not extensively consider existing international laws and standards related to the right to culture (or cultural rights).<sup>4</sup> We do not propose a specific definition for (or content of) the right to culture or cultural rights, and those interested in definitions that have been proposed should refer to materials developed by others.<sup>5</sup> We also do not directly involve ourselves in the many debates about particular cultural beliefs, institution or practices and how those comport with human rights standards. There are large numbers of publications that address a range of such issues, and we do not want to duplicate them.

- We said we had to take two steps backwards. While taking the first step—back to "culture and human rights"—was helpful, once there things still looked quite jumbled and blurred, so we took yet another step back, to look at "culture and human rights activism." We found it necessary to take this second step, because we concluded that our understanding of culture and human rights issues, and often indeed our *ability* to understand them, depends in significant part on *how* we do our work.

## THE BANYAN TREE PARADOX

*The Banyan Tree Paradox* looks at some of the *common challenges to and opportunities for human rights work* inherent in many or all of the various controversial issues just mentioned. It is an exploration of a number of conceptual, strategic and practical issues related to culture and rights that seem to be of particular relevance, concern and importance to human rights activism

It is also an exploration of that activism itself. One of the central challenges to activism on these issues is being able to hold in our minds and hearts the paradox that culture is essential to human life and, at the same time, certain cultural institutions and practices can be harmful to this same human life—sometimes fatally so. It is exceptionally difficult to think, live and work with such a deep and fundamental paradox.

In learning about and reflecting on the human rights work that has and has not been done in this area, it also became apparent that effective activism related to culture and human rights requires well-developed skills in cross-cultural understanding and communication. While these can be important in other areas of human rights work, culture is such a potent force that addressing issues involving culture requires particular awareness and sensitivity. We allude repeatedly throughout this book to various elements of activism that we consider to be related to this cross-cultural understanding and communication.

These two points then, “culture and human rights” and “culture and human rights activism,” serve as the focuses of *The Banyan Tree Paradox*.

### *The Content of The Banyan Tree Paradox*

*The Banyan Tree Paradox* has the following chapters:

Chapter 1: What is culture? : This chapter starts right at the beginning, with culture. It contains reflections on “culture”—who it belongs to, how we feel about it, and how we, as activists, might usefully think about it. This sounds a bit philosophical or theoretical, and we try to ground the discussion through concrete illustrations. We hope that, by the end of the chapter, readers will feel more comfortable with and adept at using the elusive term “culture.”

Chapter 2: Culture and power: Power is an implicit issue in all human rights work, but it is not often explicitly discussed as such in the broad human rights field. It is, however, impossible to understand how “culture” functions, is talked about, and often manipulated, without analyzing power issues in culture and rights situations.

Chapter 3: Culture and gender: Anyone who follows “culture and rights” issues in even a somewhat systematic way could not fail to notice how frequently questions of gender are centrally involved. There are reasons for this. This chapter talks about a few of the most important ones for human rights activism.

Chapter 4: Culture and human rights: Analysis of and discussions about culture and human rights issues can easily become confused and confusing in part because of the complexity of the relationship between culture and human rights. This chapter explores four key relationships between the two concepts that are important to identify and untangle in any analysis of a “culture and rights” situation.

Chapter 5: Culture and human rights activism: Most human rights work is challenging, both substantively and strategically. However, when issues of culture play a prominent role in a situation, particular difficulties and challenges arise for that work. This chapter talks about a few of those.

Chapter 6: Fact-finding and documentation on culture and human rights issues: Fundamental to human rights work are the facts. What happened and why? Do situations where culture is a significant factor present special challenges in this regard? It seems they do, and those challenges are the subject of this chapter.

Chapter 7: Developing strategies around culture and human rights issues: Because of the elusiveness and complexity of culture and the often controversial nature of culture and rights issues, developing strategies that are effective in forwarding human rights understanding and protection in situations where culture features prominently can be especially difficult. This chapter in particular draws on the work of some organizations that have significant experience in developing effective strategies.

*The Banyan Tree Paradox* includes five appendices:

Appendix 1 contains the case studies that served as the focal point for much of the discussion at the August 2005 workshop in Siem Reap (described in the Preface). These case studies are rich in what they have to teach us about culture and rights issues, and about how NGOs might address them.

Appendix 2: While there is little mention in the publication itself about international and regional standards on the right to culture (or cultural rights), it is useful to have some of the principal ones at our fingertips, so we include them here.

Appendix 3: Much time and effort by many people has gone into defining culture. This appendix acknowledges that by providing a few examples of definitions arrived at.

Appendix 4: There are many, many articles and books “out there” on culture and rights issues. Appendix 4 lists a few of them, ones that IHRIP found particularly useful in informing itself and developing this publication.

Appendix 5: This appendix is a list of participants at IHRIP’s workshop on culture and human rights held in Siem Reap, Cambodia, August 22-25, 2005.

### Notes

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1. Indeed, concerns of indigenous peoples extend well beyond what might be understood as “cultural rights” and involve a range of civil, political, economic and social rights.
2. Priti Darooka of the Programme on Women's Economic, Social and Cultural Rights, drawing on a statement by Manisha Gupte, cited in *Crossing Boundaries: Women and Economic, Social and Cultural Rights*, Report of a meeting in Goa, India, October 28-31, 2004 (New Delhi: PWESCR, 2005), 22.
3. Sally Engle Merry, “Changing rights, changing culture,” in *Culture and Rights: Anthropological Perspectives*, eds. Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson (Cambridge: Cambridge University Press, 2001), 41-42.
4. For a fuller consideration of these standards, see, for example, Stephen A. Hansen, “The Right to Take Part in Cultural Life: Toward Defining Minimum Core Obligations Related To Article 15 (1)(a) of the International Covenant on Economic, Social and Cultural Rights,” in *Core Obligations: Building A Framework for Economic, Social and Cultural Rights*, eds. A. Chapman and S. Russell (Antwerp: Intersentia, 2002).
5. See, for example, Elsa Stamatopoulou, “Why Cultural Rights Now?” Edited transcript of remarks at “The Case for Cultural Rights” Workshop, sponsored by the Carnegie Council for Ethics and International Affairs, New York, September 23, 2004. Remarks available at <http://www.carnegiecouncil.org/printerfriendlymedia.php/prmID/5006>

## Chapter 1 What is culture?

*"Culture is one of the two or three most complicated words in the English language."*

– Raymond Williams<sup>1</sup>

One of the stumbling blocks for activists in developing effective analyses and strategies around culture and human rights issues is the complex, and at times seemingly elusive, concept of "culture." Thus, a key "step back" in being able to address issues of culture and rights more fully and effectively is to develop a deeper understanding of "culture" and a correspondingly greater capacity to work with and talk about the concept.

Appendix 3 contains a short discussion of varying definitions of "culture." For the purposes of *The Banyan Tree Paradox*, however, UNESCO's broad definition of culture is quite adequate:

*[C]ulture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and ... it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.<sup>2</sup>*

The following sections address a number of key points about culture that are important to human rights activism:

- Culture does not belong just to "them"
- Culture is basic to human constructs of reality
- We do not belong to only one culture, but many cultures, and our identity is multi-faceted
- A culture is not clearly definable
- Culture is not static or monolithic

*Culture does not belong just to "them"*

Culture belongs to all of us. This fundamental fact can often get lost in human rights work.

Because so much about culture is intangible, it can often seem invisible. Because it is so fundamental to how we understand ourselves and our lives, it can, paradoxically, be very elusive.

## THE BANYAN TREE PARADOX

How culture has shaped a situation or our understanding of it is often difficult to see, particularly when we try looking at our own culture. It is sometimes said that being in our own culture is like being a fish in water. A fish has been swimming in water all its life, so it doesn't even know what water is. It just is and has always been there. Because our culture seems to be what "just is," truly seeing it and analyzing it is very challenging.

We understand more about the specificities of the culture we belong to when we notice differences between what "we" believe and how "we" do things, and what another group of people believes or how "they" do things. In fact, the presence of this difference is essential to our developing self-awareness about our own culture.

At the same time, when we see unfamiliar institutions and practices in other societies and particularly when we do not have a close familiarity with that society, we often readily consider the institutions and practices to be "culturally-based," and attribute what happens in that context to be the result of that society's cultural beliefs. In other words, culture becomes an easy explanation for what is happening when that other society is somehow "exotic" to us.

### ***Dowry deaths in India and domestic violence***

"When the issue of dowry-murders 'crosses national borders' and becomes 'known' in Western national contexts as an 'issue affecting Indian women,' it becomes known 'out of context' because many Westerners lack ... 'contextual information.' In traveling across national borders unaccompanied by such contextual information, 'dowry-murder' loses its links to the category of 'domestic violence' and becomes transmuted into some sort of bizarre 'Indian ritual,' a form of violence against women that surely must be 'caused by Indian culture.' The category 'Indian culture' then becomes the diffuse culprit responsible for 'women being burned to death everyday in India,' producing the effect that I call 'death by culture.'"<sup>3</sup>

If our focus is limited to our own country, the situation is not necessarily easier. For example, if we belong to the culturally dominant group in our society, we can find ourselves in a paradoxical situation. On the one hand we may be very aware of what certain of the dominant cultural values are, because they are typically held out as the values the society as a whole should emulate. However, others of those values, particularly those that are less desirable, may be invisible to us—either because we may unconsciously not want to see them or because they are so perva-

sive and unspoken that we may think of them just as “how things are.” We may, in that case, have a difficult time seeing and/or acknowledging that many of our own beliefs and practices are culturally-rooted and culturally-specific.<sup>4</sup>

### ***Implications for human rights activists***

We often tend to think that the right to culture (or cultural rights) refers principally to indigenous peoples or minority groups, perhaps because those groups have specific beliefs or practices (including language) that are patently different from those of the dominant society, or because they live in clearly designated geographical areas in our country. Everyone, however, belongs to a culture or cultures, so the right to culture is of personal relevance to each of us.

### *Culture is basic to human constructs of reality*

Each of us grows up in a certain culture or cultures. We learn about our culture through conversations and interactions with, or simply watching, our parents, other family members, friends, our religious leaders, teachers and so on. Our culture teaches us a way of looking at the world, tells us what to do and how to relate to others. It gives us answers to some of the questions that are central puzzles in human life: Who are we? Why are we here? What is our purpose in life? What happens when we die?

The “framework” that we develop through our culture is essential to our sense of security, of dignity, and our ability to navigate through life.

### ***Migration and culture***

*“We come from a talking culture. ...it has a meaning. Because when you talk you are making your mind busy. And making your mind busy means making your mind healthy. You are not worrying, you are not bothered, you are not depressed, you are not stressed, you are not ... you are having coffee, chatting, laughing and all that sort of thing. And that is the easiest way of keeping mentally healthy than employing psychologists or psychiatrists... and all of a sudden this social network and everything is gone. And what does the mind do? The mind turns into monologue and the monologue is an endless monologue.... We lose sleep. We lose appetite.”<sup>5</sup>*

While we may find our culture constraining in various respects, it nonetheless provides us with these essentials. Being deprived of that framework or of the community with which we share our culture can threaten our sense of stability and security. We can easily become disoriented, or feel lost and fearful.

It is, in fact, because our culture provides us with these essentials—and losing or questioning the essentials may leave us feeling fragile and at a loss as to how to understand ourselves and our world—that we will often defend our culture or elements of our culture even when they may, in certain respects, be hurtful to us.

***Female "Circumcision" in Kono society (Sierra Leone)<sup>6</sup>***

"Societal coercion and pressure to conform ... do not explain the eagerness and excitement felt by vast numbers of participants ... in initiation ceremonies.... It is difficult for me—considering the number of these ceremonies I have observed, including my own—to accept that what appear to be expressions of joy and ecstatic celebrations of womanhood in actuality disguise hidden experiences of coercion and subjugation. Instead, I offer that most Kono women who uphold these rituals do so because they want to—they relish the supernatural powers of their ritual leaders over against men in society, and they embrace the legitimacy of female authority and, particularly, the authority of their mothers and grandmothers. Also, they maintain their cultural superiority over uninitiated/uncircumcised women."

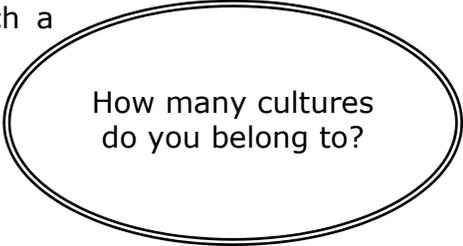
***Implications for human rights activists***

Many activists encounter cultural differences on a regular basis—if, for example, I am from an urban area, but am working in a rural area, or if I am from one ethnic or racial group and work with another. An awareness of the cultural beliefs and practices that I carry with me—which may appear "different" to the people with whom I work—can enhance my ability to communicate with and relate to them. If you're interested in exploring this further, you could do the "Your culture" exercise at the end of this chapter.

*We do not belong to only one culture, but many cultures,  
and our identity is multi-faceted*

People typically are members not just of one culture, but of a number of cultures. For example, a young woman who is Coptic Christian living in Aswan, Egypt belongs not only to Egyptian culture, but also the Coptic Christian culture. Because she is young and living in a large town, she probably watches television shows that appeal to youth, and thus shares a culture with other youth that is different from her parent's culture. Because she lives in a town, she is part of an urban, rather than rural, culture. And so on.

Each of the different cultures within which a person lives, or which she experiences, contributes to her sense of identity, so that each person has a multi-faceted and quite complex identity.\* Certain aspects of that identity come to her by reason of birth (e.g., female), others as a result of where she lives (e.g., Egypt), the family into which she is born (e.g., Coptic Christian, perhaps middle class), and so on.



A person also has certain aspects of her identity "imposed" on her, in that our identity is also shaped by how others perceive us. Societies have certain expectations, for example, about what a woman can or should be or do. These expectations may be quite different from those a young woman has experienced within her family, or what she may wish for herself, but they are, nonetheless, expectations that she has to cope with and ones that will thus shape her identity.

In addition to these "situational" and "imposed" identities, a person may *choose* additional identities. If a person decides to move from a rural area to a large city, for example, he is choosing to live in an urban culture. Other examples of chosen identities would include becoming a musician, choosing to get married, or converting to a specific religion.



Being a human rights activist is also a chosen identity.

A person's ability to choose an identity has, in part, to do with how much power the person has. Someone with more power has greater

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\* Sometimes this is described as someone's having multiple identities. Some aspects of a person's identity are directly related to culture, others not.

### ***The Garífuna and imposed identities***

The Garífuna are an Afro-Indigenous people living in approximately 60 villages along the Central American coast. They are said to be descendants of shipwrecked slaves from West Africa who escaped to the island of St. Vincent and intermingled with the Carib and Arawak Indians. They were later forced off St. Vincent by British colonists and, after several battles, were exiled to Roatán Island off the coast of Honduras. Over a period of time, groups of Garífuna traveled up and down the Central American coast and established settlements in Honduras, Belize, Guatemala and Nicaragua. Many have also migrated to the United States.

Gregoria Flores, Director of Organización Fraternal Negra Hondureña (OFRANEH), describes a bit about the formation of Garífuna identities:

*We identify ourselves as people, similar to others in the world, but with our own rights, with particular rights. There are things that differentiate us from other people. Part of our culture, for instance, is our pigmentation. As a black person, this identifies us as a distinct culture. From there, as an Afro-descendant, others also identify you. From the moment someone identifies you as a black, they are identifying you as someone different, who has customs and a way of life different from them.<sup>7</sup>*

freedom to reject “imposed” identities and choose others. Questions of power and culture are addressed at greater length in Chapter 2.

A person’s identity is a result of *ongoing* interactions and discussions within himself and with his environment, and thus is always changing. In the process of experiencing a new situation, for example, the person will decide how he thinks and will react to that situation. In the process of taking a position on that situation, particularly if that position is new to him, his own sense of identity may well shift.

A person’s identity is typically not only changing on a regular basis, but certain aspects of that identity may not be fully compatible with other aspects. In fact, in specific situations a person may find that certain aspects are in conflict with other aspects. This is evidenced, for example, in the different roles a person may play in her society, or through debates she may have within herself about how to behave in specific situations.

***Simultaneous struggle for  
and with one's culture***

In the "Final Declaration of the First National Women's Encounter of ANIPA" in San Cristobal de Las Casas, Mexico, 270 women of different indigenous groups developed the following statement:

"We, the Yaqui, Mixe, Nahuatl, Tojobal, and Tlapaneca women, each and every one of us, come from afar to speak our word in this land of Chiapas.... We have talked about the violence we live in our communities, by our husbands, by the caciques, by the military; of the discrimination we are subjected to as both women and Indians; of how our right to own land is denied us and about how we want women's opinions to be taken into account.... We want an autonomy with a woman's voice, face and consciousness, so we may thus reconstruct the forgotten feminine half of our community."<sup>8</sup>



***Implications for human rights activists***

- The communities in which human rights activists work will comprise people with multi-faceted identities. How they see themselves—and how they see the activists—will, as a result, be complex. It is thus helpful to enter the community without stereotyped ideas of its identity or identities.
- Human rights activists may find that their identity as activists—with the beliefs and practices that go along with that identity put them in conflict with other cultures of which they are a part. An activist working for women's human rights, for example, may find herself at odds with her parents and other relatives, because the culture in which she grew up subordinates women in many ways that are incompatible with women's human rights. This type of "antagonistic" position can create complicated and painful dilemmas for activists.

*A culture is not clearly definable*

We typically speak of a culture as if it were a discrete *thing*—"the Indian culture," "the Mayan culture," "an urban culture"—as if we could draw lines around it and describe what is inside the lines. However, we are reminded by the UNESCO definition—the set of distinctive *spiritual, material, intellectual and emotional features* of society or a social group; it encompasses, in addition to art and literature, *lifestyles, ways of living together, value systems, traditions and beliefs*—that culture is no easily defined "thing."

It is more like set of social processes. Culture lives through and is the product of stories we hear as children, things we learn in school, skills we develop at work, debates we have in public life, and so on. These conversations, bodies of knowledge, skills and attitudes shape our ideas of what our culture consists of, the values and practices that are central to it.

Culture is also, of course, integral to and can be understood in many ways through quite concrete dimensions of life—through the food we eat, the homes we live in, the work we do, the health care we have access to, and so on, throughout our lives. Culture can also be experienced in how we speak and what we say, with whom we associate and how we relate, etc. These things embody the beliefs, lifestyles and value systems UNESCO speaks about in its definition of culture.

***Implications for human rights activists***

It is difficult not to talk about culture as a thing; indeed, in this publication we often seem to talk in just that way. However, it is easier to understand how cultures work and how they change—and avoid falling into traps in conversations about culture—if we keep reminding ourselves that a culture is not a discrete "thing," but ongoing social and political processes.

*Culture is not static and it is not monolithic*

People often talk of a culture as if it has always been a certain way. Often they will use the word "tradition" or "traditional" to emphasize what they consider to be the unchanging nature of a culture.

### ***Cultures as monolithic and static***

In his now famous essay, "The Clash of Civilizations?", Samuel Huntington says "A civilization is a cultural entity ... the highest cultural grouping of people and the broadest level of cultural identity people have short of that which distinguishes them from other species." A bit further on in the same essay he maintains:

[D]ifferences among civilizations are not only real; they are basic. Civilizations are differentiated from each other by history, languages, culture, tradition and, most important, religion. The people of different civilizations have different views on the relations between God and man, the individual and the group, the citizen and the state, parents and children, husband and wife, as well as differing views of the relative importance of rights and responsibilities, liberty and authority, equality and hierarchy. These differences are the product of centuries. They will not soon disappear....<sup>9</sup>

In fact, because cultures are the product of social and political processes, they are always changing. If we consider almost any culture, whether close to us or far away, we can see evidence of large changes in that culture over the past year, decades or centuries, the result of very substantial social and political processes. For example,

Groups are constantly forming and dissolving in response to political and institutional circumstances.... Ethnic identity is not static; it changes with the environment.... For example, in the former Indian state of Madras, cleavages within the Telugu population were not very important. Yet as soon as a separate Telugu-speaking state was carved out of Madras, Telugu subgroups quickly emerged as political entities....<sup>10</sup>

This type of identity formation has been repeated in countless locations. (See the Darfur box on the next page).

Another of the reasons that cultures change is that they are not monolithic. Cultures are made up of people, and each person within a culture has his specific experience and understanding of the culture. No two of those experiences and understandings are exactly alike.

There are thus always "competing voices" within a culture. A culture is shaped through and changes largely as a result of the conversations and debates between and among these "competing voices."

***Cultural identity in Darfur in flux***

“The complex history of identity formation in Darfur [Sudan] provides rich material for the creation of new ethnic identities.... It is a commonplace of ethnographic history that communal violence powerfully helps constitute identity. In times of fear and insecurity, people’s ambit of trust and reciprocity contracts, and identity markers that emphasize difference between warring groups are emphasized. Where sexual violence is widespread, markers of race and lineage are salient. Much anecdotal evidence indicates that this is happening today, and that the civilian communities most exposed to the conflict are insisting on the ‘African’ label. We can speculate that it serves as a marker of difference from the government and its militia, an expression of hope for solidarity from outside, and perhaps most significant in the context of forced displacement and threats of further dispossession, a claim to indigeneity and residence rights. For whatever reason, identity markers that had little salience in the past are extremely powerful today, and the overwhelming reason for this is the appalling violence inflicted on people.”<sup>11</sup>

It is essential to recognize, however, that not all of the competing voices in a culture are heard.

Some of the voices, such as those of government officials, speak loudly with readily-recognized authority. Others, such as those of wealthy businessmen, also have easy access to the media or other institutions where their views can be widely disseminated. Many voices, however, have a very difficult time being heard. Some of these voices belong to women, some to dissidents, to minority groups, and to the poor in the society. When a culture is being described to outsiders, the description tends to be that put forth by those with the more powerful voices. The next chapter, “Culture and Power,” elaborates further on this issue of competing voices.



### ***Competing voices bring about change***

In September 2002 an Ethiopian couple married. At the wedding the bride, Genet Girma, wore a placard around her neck that said, "I am not circumcised, learn from me." Her husband, Adissie Abossie, also wore a placard: "I am proud to marry an uncircumcised woman." This couple's actions were ground-breaking in a country where female genital mutilation is a widespread practice, affecting about 90% of the female population in the country. Although Girma's parents refused to attend the wedding, 2,000 other people did, and the wedding was broadcast on Ethiopian television news. Girma's parents have since come around.

Girma had taken part in a training program on FGM hosted by the Kembata Women's Self-Help Centre, which had at that point been doing quiet community education for five years. She credits the Centre's workshop for her willingness and ability to avoid FGM.

Since 2002 more than a dozen other couples have taken part in similar anti-FGM weddings.<sup>12</sup>

### ***Implications for human rights activists***

- Because cultures are not monolithic and are continually in flux, there is typically no definitive "checklist" for what constitutes a particular culture. Thus, for example, if a government official says that specific human rights standards are contrary to the society's culture, how can you respond when there is no widely agreed-upon description of the culture against which to evaluate the official's assertion? Remembering that the culture is fluid, and there are different understandings of the culture *within* the culture, will facilitate an informed response.
- One of the principal challenges facing human rights work in the area of culture is to ensure that these "unheard" voices within a culture have greater access to audiences and fuller opportunities to be heard in conversations about what constitutes the culture.
- A human rights organization can be seen as one of the "competing voices" within a culture. The input of that voice can help shape and change a culture—and also, of course, itself be shaped and changed.

**Exercise: Your culture**

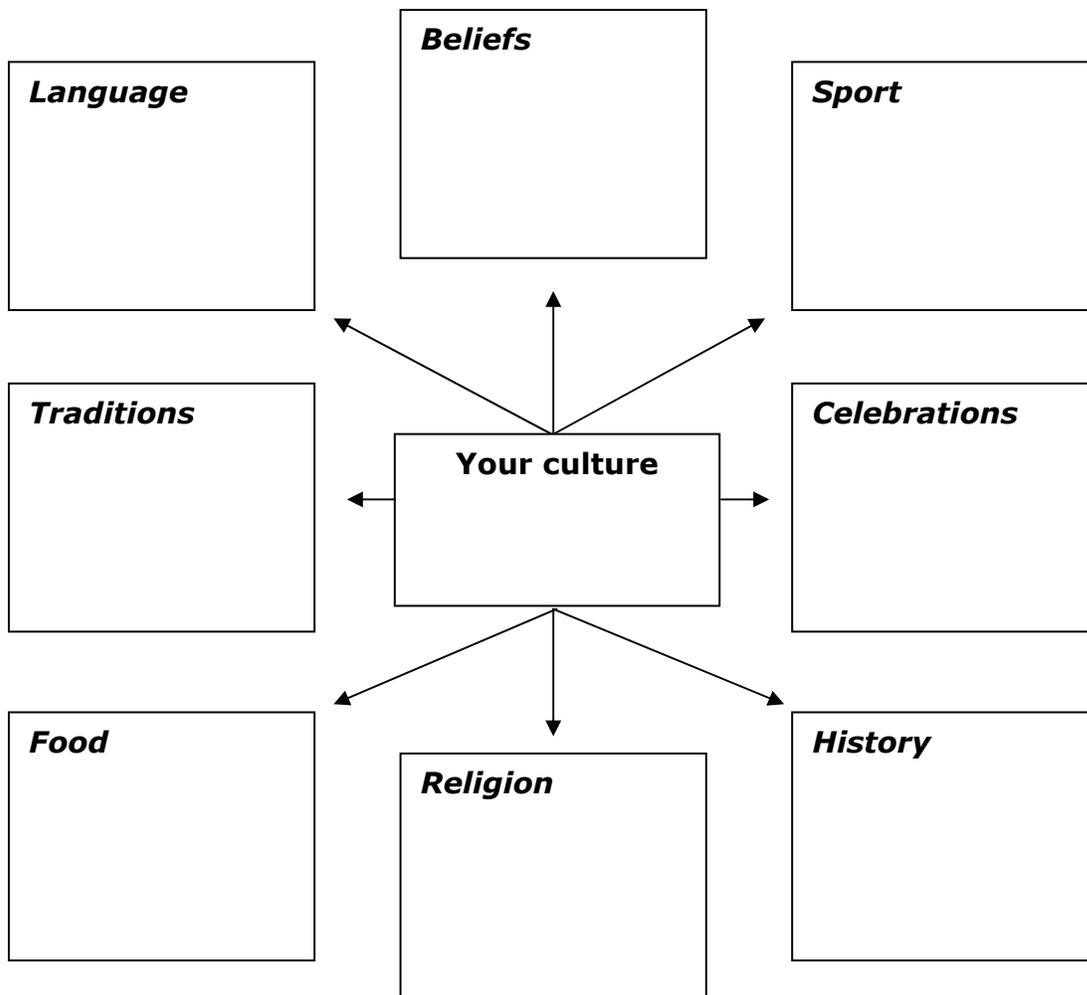
When describing their culture, people often discuss their ethnic origin, language, food, traditions, beliefs, customs, celebrations and so forth.

To which cultural group (or groups) do you belong?

Write the name of one cultural group to which you belong below.

Then write a word, or a few words, about the language, traditions, food and so forth, used by you and others in your cultural group.

Describing your own culture may be more difficult than you think.



Adapted from:  
<http://www.premiers.qld.gov.au/apps/assi/docs/your-culture.doc>

### **WLUML and monolithic cultures**

The international network, Women Living under Muslim Laws, challenges the notion of monolithic cultures through its name, elaborated upon in the following self-description:

Our name challenges the myth of one, homogenous "Muslim world". This deliberately created myth fails to reflect that: a) laws said to be Muslim vary from one context to another and, b) the laws that determine our lives are from diverse sources: religious, customary, colonial and secular. We are governed simultaneously by many different laws: laws recognised by the state (codified and uncodified) and informal laws such as customary practices which vary according to the cultural, social and political context. <sup>13</sup>

### **Notes**

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1. Raymond Williams, *Keywords: A vocabulary of culture and society*, rev. ed. (New York: Oxford University Press, 1983), 87.
2. UNESCO, Universal Declaration on Cultural Diversity, 2001.
3. Uma Narayan, *Dislocating Cultures: Identities, Traditions, and Third-World Feminism* (New York: Routledge, 1997), 103.
4. For example, for an interesting reflection on "white privilege" within the US domestic context, see <http://seamonkey.ed.asu.edu/~mcisaac/emc598ge/Unpacking.html>
5. [http://www.mmha.org.au/MMHAPublications/Synergy/2004\\_No2/Listeningtodiversevoices](http://www.mmha.org.au/MMHAPublications/Synergy/2004_No2/Listeningtodiversevoices)
6. The term "female circumcision" is also known, in other contexts, as female genital mutilation (FGM) or female genital cutting. Each of these terms has its users, and each is controversial. Throughout most of the publication we use "female genital mutilation" (FGM), but in this one context we speak of female circumcision, because that is the term used in the article from which this quote is derived: Fuambai Ahmadu, "Rites and Wrongs: An Insider/Outsider Reflects on Power and Excision," in *Female "Circumcision" in Africa: Culture, Controversy and Change*, eds. Bettina Shell-Duncan and Ylva Hernlund (Boulder: Lynne Rienner Publishers, 2000), 301. See case study on FGM in Appendix 1.
7. Interview of Gregoria Flores, Director of OFRANEH (Honduras), by Nnenna Ozobia of IHRIP staff on October 18, 2005. Translation from Spanish by Ms. Ozobia.
8. R. Aída Hernández, "Indigenous Law and identity Politics in Mexico: Indigenous Men's and Women's Struggles for a Multicultural Nation," *PoLAR: Political and Legal Anthropology Review* 25, no. 1 (2002), 103.
9. Samuel P. Huntington's *The Clash of Civilizations?: The Debate* (New York: Foreign Affairs, 1996), 4.

## THE BANYAN TREE PARADOX

10. Chandran Kukathas, "Are there any cultural rights?", *Political Theory* 20, no. 1 (February 1992), 110-111.
11. Alex de Waal, "Who are the Darfurians? Arab and African Identities, Violence and External Engagement." (London: Justice Africa, 2004), 14, at [http://www.justiceafrica.org/the\\_darfurians.htm](http://www.justiceafrica.org/the_darfurians.htm)
12. Based on <http://www.panos.org.uk/newsfeatures/featureprintable.asp?id=1112>
13. From the web site of Women Living Under Muslim Laws, <http://www.wluml.org/english/about.shtml>

## **Chapter 2**

### **Culture and power**

To adequately grasp how culture and human rights inter-relate and interact, it is necessary to explore the relationship and dynamic between power and culture. There are multiple layers here.

The essential starting point is recognizing that human rights are fundamentally about power. Human rights can be viewed as protecting individuals from the overwhelming power of the State, or they can be seen more fundamentally as maintaining that each person should have enough power to be able to express himself freely, associate with whom he wishes, put a roof over his head and food on the table.

One of the core human rights obligations, of course, is that of ensuring equality and non-discrimination. Basic power shifts are also implicit in each of the other human rights guarantees. One of the central goals of human rights work is a more equal balance of power among individuals and among groups.

How does this relate to culture? This chapter addresses this question and includes the following sections:

- Globalization and culture
- The power of "culture" or "tradition"
- Culture reproduces hierarchies
- Who has the power to speak on behalf of a culture?
- Power, culture and history

#### *Globalization and culture*

As was mentioned in the Introduction, one of the principal reasons that the right to culture or cultural rights are now receiving increased attention seems to be the impact that "globalization"\* has had on local cultures around the world. From the perspective of culture and human rights, that impact has been both positive and negative. Positive impacts include, for example, a greater ability to communicate across cultures and a greater ease in bringing the art and music of previously unknown cultures to audiences around the world.

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\* The term "globalization" is, of course, complex, and the phenomenon has many dimensions (economic, political, social, etc.). Without going into its many complexities here, we believe it is still possible to make some accurate and relevant statements about globalization and culture.

Negative impacts on local cultures have arisen in large part as a result of imbalances of economic, political and military power. Because of such imbalances, people, for example, often have little ability to control the nature and extent of foreign investment in their communities; their traditional knowledge is taken and turned into profitable products without their involvement or consent; their political life is heavily influenced by powers beyond their control; and images of their culture in international media do not, from their perspective, accurately reflect their realities. Because of imbalances of power—whether in the hands of local or national governments, other governments, national or multinational corporations and other institutions—communities often have a very difficult time protecting their cultures. People’s rights to food, housing, health and work, among other rights, suffer along with their cultures.

At the same time, local and national political leaders often manipulate for their own gain people’s feelings of fear and alienation, using “culture” as a rallying cry to garner support.

### ***Globalization and cultural identity***

“A widespread counter-reaction against the perceived threat of boundary dissolution through globalization consists in ideological emphases on ‘cultural uniqueness.’ In this sense, cultural homogenization and ethnic fragmentation take place simultaneously; they are consequences of each other and feed on each other in dynamic interplay....”<sup>1</sup>

### ***Implications for human rights activism***

- ❑ Considerable documentation has been done on the impact of global economic policies on indigenous or traditional knowledge. This work has been very important. Of equal importance would be documenting the many other ways that economic and political policies and activities related to globalization affect other, very specific, dimensions of the cultures of communities.
- ❑ The importance of participation by affected communities is mentioned later in this chapter and in various other places throughout this publication. Bringing “real-life” stories of the impact of globalization on local cultures, as told by communities themselves, is essential to enabling people everywhere to understand the human impact of the large, amorphous, processes of “globalization.”

*The power of "culture" or "tradition"—  
use and misuse of the terms*

The words "culture" or, alternatively, "tradition,"\* in themselves have enormous power, particularly for people who feel vulnerable to rapid changes occurring in their environment and in their lives. The words convey a sense of stability and timelessness.

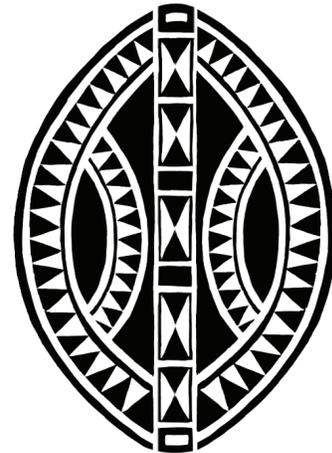
Because of the emotional weight of these words, the capacity or authority to say what fits or does not fit within them—what is part of the culture, what is part of the tradition—is in itself a source of power. In this context, a few things are important to note:

***National liberation struggles  
and culture***

Amilcar Cabral, a Guinean and leader of the liberation struggle against the Portuguese in Guinea and Cape Verde, spoke eloquently about the role of culture in national liberation:

*Study of the history of liberation struggles shows that they have generally been preceded by an upsurge of cultural manifestations, which progressively harden into an attempt, successful or not, to assert the cultural personality of the dominated people by an act of denial of the culture of the oppressor. Whatever the conditions of subjection of a people to foreign domination and the influence of economic, political and social factors in the exercise of this domination, it is generally within the cultural factor that we find the germ of challenge which leads to the structuring and development of the liberation movement.<sup>2</sup>*

- Appealing to cultural solidarity is one way of defining "us" against "them." "Culture" claims have been and can be used to mobilize people to become involved in struggles that are essentially about human rights.



\* Culture as we use the term in this publication is not synonymous with tradition, although people often use the words interchangeably.

While many examples of this type of use of culture are inspiring, others are more of a “double-edged sword.” While useful in one respect or at one point in time in mobilizing people to a valued end, in other respects or at other points in time the culture claims can have problematical impacts in human rights terms.

***Mobilizing for positive and negative purposes***

The Ganesh-Visarjan is a Hindu religious ceremony that was originally celebrated in India only in homes and temples. During the struggle for independence from British rule, however, those calling for independence converted it into a public celebration—a political message calling for freedom—which, as a religious ceremony, was hard for the British to stop. Following independence, it has continued to be public.

The festival procession, which often winds through Muslim neighborhoods, has over the years been used by religious extremists to provoke communal violence. Muslim religious processions have, in turn, been similarly used, with marches through Hindu neighborhoods, also leading to violence.<sup>3</sup>

- “Culture” claims are often used by politicians and others as a means of maintaining or extending their power or the power of their compatriots. We need hardly be reminded of the enormous damage these “culture” claims have wrought in places like East Timor, Rwanda and Bosnia. Other culture claims, even if less extreme in rhetoric and intent, happen on a regular basis with significant, negative human rights consequences. (See box on next page).

***Implications for human rights activism***

A solid analysis of a situation relating culture and rights should include an accurate assessment of who is using “culture” or “tradition” terms, what their power is, and what their interests are. Are their concerns fundamentally about human rights? Even if they are, what are the possible risks in their using the terms?

### ***Culture and white supremacy in the United States***

The civil rights movement in the United States in the 1960s and 1970s provoked strong reactions among politicians and ordinary people throughout the United States. While the movement sought to undermine white supremacy in all parts of the country, because of its specific history of discriminatory laws and practices, the southern region was a particular focus.

The [deployment of culture by the South in defence of white supremacy] was ultimately unsuccessful because the weight of public opinion outside the South and among blacks within the South rejected it. Of course, to the extent that culture is defined in terms of common practices, meanings, and customs, it would be hard to reject the notion that there was a cultural dimension to white supremacy. Yet activists and liberal intelligentsia understood the "culture" of the South to reflect the reification of dynamics of power in law and in custom. To the extent that there was always resistance within that culture, the South could lay no claim that its side of the "debate" should be privileged over the historical pockets of resistance internal to it. Moreover, critics rejected the idea that Southern "culture" could lay claim to an unmediated historical practice. To the extent that national power, which resided in the North, permitted Southern practices to proceed through a regulatory posture that included both action and inaction, Southern culture could be seen as the product of an interaction between Northern regulatory schemes (self-determination while policing the "excesses") and white Southern power. Thus, the claim that enforcement of civil rights constituted an invasion of the South by the North denied the extent to which the North was "already there." Through its acts and omissions, the Northern political elite shared some responsibility for the practices that survived. Another feature of this analysis is the manner in which Northern permissiveness in the South served Northern interests, particularly among the political bosses of the Democratic Party. There was thus no hermetically sealed Southern culture in the South, and no "clean hands" in the North.<sup>4</sup>



*Cultures reproduce hierarchies*

Part of the function of a community's culture is to define or reproduce the hierarchies within the culture—to define or reproduce who has power and for what purposes, and who has none.

Cultures do this in part by explicitly identifying who should be the authorities—religious, political, economic, social, etc.—within the society. They also do this by defining what is valued and what is not. If money is valued in a culture, then those with money will have greater power; if generosity, then those who share most will have more power. If manual labor is valued, then those who work with their hands will be given greater deference. If formal education is valued, those with lengthier schooling will achieve positions of power more easily, but if accumulated wisdom is valued, the wise will be listened to more.

Common sources of power and powerlessness in virtually all societies are gender and race. In virtually all cultures, women have less power than do men in most spheres of a society's life. This is one of the reasons that gender issues keep appearing when we look at questions of culture and rights. Gender and culture are addressed more fully in Chapter 3.

Racial categories are also constructed, and in virtually all societies, value is assigned to those with certain racial characteristics. Similarly, in multi-ethnic societies, specific ethnic identities may be accorded greater value—and corresponding power—than others. Indeed, in order to arrive at a better understanding of culture, what it is and how it functions, it is important to understand race and ethnicity—what they are in a given society, the realities of people of different racial and ethnic groups, the relationship of those groups among themselves and to the dominant group, as well as their power or lack thereof.

***Race, culture and exclusion in Chile***

"Discrimination on the basis of ethnicity is without a doubt one of the most powerful in Latin America.... In...Chile ... a close relationship exists between ethnicity, exclusion and poverty. Such discrimination is the result of a culture of deeply-rooted racism that results in the violation of human rights of a significant part of the population (10% in the case of Chile). It perpetuates itself in time through family, formal education, and informal education. It also perpetuates itself through the media, through which it transmits messages of discrimination, the valuation of what is European, and the negation of our indigenous roots, of the original cultures..."<sup>5</sup>

### ***Implications for human rights activists***

- If human rights work is, at least in part, about shifting power to those with less, then it is essential to be aware of how power has been defined—explicitly and implicitly—in the culture(s) within which we work.<sup>6</sup>
- While it is essential that human rights help protect cultures, it is also important that we take care not to reinforce cultural institutions and practices that are designed to maintain significantly unequal power relationships in a society.

### *Who has the power to speak on behalf of a culture?*

As was already mentioned, figures in authority or those with recognized power within a culture are typically the people who are looked to to define what fits and does not fit within a culture. Putting aside for the moment the question of “competing voices” within a culture, it may be acceptable for a democratically selected leader of a society to speak on this issue. That is not, however, what more often happens. More frequently, individuals or interest groups who feel their power is threatened (for example, by a human rights claim) take it upon themselves to define what is acceptable or not acceptable to the particular culture. They may not even believe what they are claiming, but, for political advantage, claim it nonetheless.

It is also important to recognize that the power to speak on behalf of a culture is not only claimed by those in the dominant culture of a society. Authority figures in minority cultures also make such claims. This reality can create a dilemma for activists, particularly where the minority community is oppressed by the dominant culture, but the leaders of that community make claims about their culture that

### ***Tribal law and tribal authorities***

While strongly supporting the role of tribal jurisprudence in settling disputes in tribal areas, Indian lawyer Nandita Haksar recognizes the complexity of her position:

It is also true that there are powerful vested interests within [tribal] societies who do not want custom to change or misinterpret it in order to serve their narrow personal interests. For instance the Chief Minister of Nagaland who said that reservation for women would be against the traditional society.<sup>7</sup>

threaten the enjoyment of human rights by some members of the community. This is a concrete example of the way in which the paradox of culture (mentioned in the Introduction) can play out in day-to-day work. There is no single solution to this dilemma. Activists in such situations have adopted different approaches—some being silent about it, concerned that the situation could be used against the claims of the minority community; others speaking out, believing that failing to do so would be inconsistent with human rights principles; and still others taking a position somewhere in between.

### ***Implications for human rights activists***

- ❑ Given the potential multiplicity of voices in a culture and the human rights goal of greater equalizing of power within a culture, important questions are: Who has the right to speak on behalf of the culture? Who, in practice, takes it upon himself to do so?
- ❑ A central challenge is to create space for large numbers of individuals and communities in society to have their voice heard in discussions about what does and does not constitute the culture. Without such broad participation, not only will that culture be inadequately represented and portrayed, but the right to culture of a society will not be properly respected.

### *Power, culture and history*

Three principal points should be made with regard to the role of history in the culture and human rights issue:

- First: There is a well-known saying: “History is written by the victors.” In other words, our understanding of what happened in the past and, in the case of culture, where various cultural institutions or practices have come from and why, has been shaped by the stories told by those who had and have the power. The story is typically one that reinforces their claims to power and their interests.

Because culture changes all the time and because there have been and are competing voices in any culture and underlying any cultural change, the history behind the adoption, development or use of specific cultural institutions or practices is often quite complex—and, in fact, can be quite different from the popular understanding of the same. More discussion on this point is included in Chapter 6.

### **Communal Land Rights Act –South Africa**

In public discussion and debate around the Communal Land Rights Act (CLRA) in South Africa (see Appendix 1), the issues were frequently framed as “tradition or custom” vs. equality, or “tradition or custom” vs. democracy. The greater legal powers with regard to land given under the Act to tribal authorities was presented by CLRA supporters as a means of reinforcing traditional leadership. The South African Constitution, which calls for gender equality and greater democracy and accountability, was presented as opposed to tradition. However, research undertaken by the Legal Resources Centre uncovered some important historical information: Prior to British colonial rule in South Africa, tribal leaders had no legal authority over land; whatever authority they had derived from the support of the community. Similarly, women had greater inheritance rights to land than they were provided under British colonial law. The *apartheid* government continued the colonial policies in this regard. Thus, in the public debate around the CLRA, what was presented as support for tradition was, in reality, support for a legal structure inherited from British colonial and *apartheid* times, one that had replaced earlier practices.

- Second: When political leaders seek to dismiss human rights concerns by charging that human rights are Western and were imposed on other societies following World War II, they simplify history. It is, of course, essential to acknowledge that colonialism was still a strong force at the time of the drafting of the Universal Declaration of Human Rights. Western governments held the preponderance of power in the newly-created United Nations, and some were in the forefront of the effort to draft and adopt the UDHR and related documents. It is also true that the UDHR and other documents drew heavily on Western traditions. This is one part of the story, and we should hold onto it.

At the same time, the committees charged with researching and drafting the UDHR were international in their composition, and there was broad inquiry into values important to a large number of cultures around the world.

The problem of universality loomed large from the moment the idea of an “international bill of rights” was conceived. In 1946, UNESCO appointed a committee composed of many of the leading thinkers of the day to study the feasibility of framing a charter of rights for all peoples and all nations. The committee began by sending a detailed questionnaire to statesmen and scholars in

every part of the world. To their surprise, they found that the lists of basic rights and values they received from their far-flung sources were essentially similar.<sup>8</sup>

In addition, some Western powers sought to block or weaken certain proposed provisions of the Declaration, while other, non-Western, governments pushed, despite some Western resistance, for guarantees related, for example, to non-discrimination.<sup>9</sup>

- Third: Over the past several decades our understanding of various rights has been shaped by cases, debates and decisions made in countries around the world—and in many cases is quite a bit more complex, and different, from what was originally envisioned by the drafters of the UDHR. Recently, for example, the UN Committee on Economic, Social and Cultural Rights, which has responsibility for overseeing the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), has issued a General Comment on the right to water. It has recognized this right, which is not explicitly mentioned in the ICESCR. As water becomes increasingly scarce, its central place in guaranteeing an adequate standard of living (art. 11 of the ICESCR) has become more and more apparent, and so access to water is taking the shape of a right.

In other words, as the result of a number of significant developments (e.g., independence of colonized countries, huge changes in communication technologies, the growth of human rights NGOs), in the 60 years since the UDHR was drafted, the realities of people in every corner of the globe have shaped and helped define understandings of different human rights, not only in their own countries, but in regional and international forums, declarations and treaties.

### ***Implications for human rights activists***

When politicians and others use “culture” claims in a way that abuses human rights, it is important to inform ourselves of the history and evolution of the cultural institution or practice to which the politician is referring. It may be that historically the practice or institution was quite different from what the politicians is describing it to be, and that difference could be important in influencing public understanding and sentiment.

## Notes

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1. Thomas Hylland Eriksen, "Multiculturalism, Individualism and Human Rights: Romanticism, the Enlightenment and Lessons from Mauritius," in *Human Rights, Culture and Context: Anthropological Perspectives*, ed. Richard Wilson (London: Pluto Press, 1997), 52.
2. Amilcar Cabral, *Unity and Struggle: Speeches and Writings*, trans. Michael Wolfers (London: Heinemann, 1980), 142-143.
3. [http://www.maharashtratourism.gov.in/mtdc/Default.aspx?strpage=festivals\\_Ganesh.html](http://www.maharashtratourism.gov.in/mtdc/Default.aspx?strpage=festivals_Ganesh.html); Kumudini Salvankar, "62 Hurt in India Religious Violence," at [http://www.beliefnet.com/story/42/story\\_4238\\_1.html](http://www.beliefnet.com/story/42/story_4238_1.html)
4. Kimberle Crenshaw, "Were the critics right about rights? Reassessing the American debate about rights in the post-reform era," in *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture*, ed. Mahmood Mamdani (New York: St. Martin's Press, 2000), 72.
5. José Aylwin, unpublished comments prepared for the Siem Reap workshop, July 2005.
6. A very useful resource for undertaking a power analysis is Lisa VeneKlaasen and Valerie Miller, *A New Weave of Power, People and Politics: The Action Guide for Advocacy and Citizen Participation* (Oklahoma: World Neighbors, 2002), 39-52.
7. Nandita Haksar, "Human Rights Lawyering: A Feminist Perspective," in *Engendering Law: Essays in Honour of Lotika Sarkar*, eds. Amita Khanda and Archana Parshar (Lucknow: Eastern Book Company, 1999), 84.
8. Mary Ann Glendon, "Reflections on the UDHR," *First Things* 82 (April 1998), 23-25.
9. See, for example, Susan Waltz, "Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights," *Human Rights Quarterly* 23 (2001), 43-72; Carol Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955* (Cambridge: Cambridge University Press, 2003).

### Chapter 3 Culture and gender

As was mentioned in the Introduction, one of principal reasons cultural rights or the right to culture have started to garner more attention is because of the complex, often problematical, relationship between the right to culture and women's rights. Gender features so frequently in culture and human rights situations that the relationship of culture and gender warrants a closer look.<sup>1</sup> This chapter has the following sections:

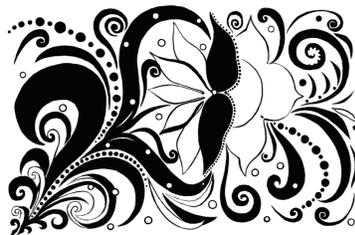
- Gender is socially constructed
- Cultures reproduce hierarchies
- *Seeing* the gender issue
- Recognizing the complexity of culture issues for women
- Where is the woman's voice?
- Women as bearers of culture

#### *Gender is socially constructed*

Central to understanding the relationship between culture and gender is the fact that gender is not innate, but is socially constructed:

Differentiation based on gender (male-female) forms the core of gender ideology. Biological differences are real ... Through gender ideology, however, these differences are extended to the social milieu and are taken for granted in establishing social position and hierarchy, providing access to resources and participation in society, and creating stereotyped roles for men and women.<sup>2</sup>

A dominant stereotype, for example, is that women are better "nurturers" than men and thus the care of children is best left to them. This stereotype has been used to keep women in the home, with the frequent, positive effect of enabling women to develop a closeness to their children fathers often do not have. It has also, however, typically been used to prohibit outside employment opportunities to women and limit their participation in politics or public life. It is also, ironically, used in divorce situations in certain cultures to take children away from the mother after a certain age, on the assumption that from that age on, it is more important for the child to be educated (which the father is presumed to be better able to provide for) than receive further nurturing.



### *Cultures reproduce hierarchies*

As was mentioned in Chapter 2, cultures reproduce hierarchies and, in that process and as a central function, define gender roles and gender relations. The problematical relationship of culture to human rights in this context arises principally from the fact that virtually all cultures place women in a subordinate power position in most spheres of life.

Social institutions such as the family, religious groups or caste systems; political and legal structures; economic and educational institutions; and the mass media—all are permeated with norms and values that discriminate against women and legitimize and institutionalize social placements on the basis of gender.<sup>3</sup>

At the same time that culture dictates inequality between men and women in most spheres, human rights seek to bring greater equality to unequal power relationships. Thus, the potential for conflict.

#### ***Implications for human rights activism***

If you do not already work on women's issues and are committed to work on culture and human rights, it would be useful to take some time to reflect on ways in which gender is socially constructed in your own culture.

- What are some of the most common stereotypes of men and women in your culture? How are these stereotypes perpetuated? What does this say about how cultures can best be influenced?
- In what ways does your culture place women in subordinate positions? To what extent do women accept this placement? To the extent they do accept it, why do they? What does this say about how cultural change can come about?

#### *Seeing the gender issue*

One of the principal challenges facing human rights activists in this context is one of simply *seeing* the gender and rights issue. This may sound simple, but because so many aspects of our culture can be invisible to us (because they are so "natural" or "normal"), it can often be quite difficult to see how culturally-defined gender roles and practices are problematical from a rights perspective. Violence against women, for example, has only recently been recognized as a human rights issue. It took women's organizations years to move the broader human rights movement to see that limiting human rights concerns to government actions, at the same time that cultures virtually everywhere severely limit

women's access to the public sphere, meant that most abuses against women went unrecognized as human rights abuses. Thus, they argued, and it is now accepted, human rights protections needed to be extended to the private sphere.

*Recognizing the complexity of culture issues for women*

The influence of culture in shaping her worldview and her understanding of herself is as powerful for a woman as it is for a man. As a result, women who suffer harm from a cultural institution or practice may feel very conflicted in trying to think about what has happened or in determining what to do about it. A practice may be important socially in the woman's community, and she may desire the social approval and status (within her family and within the community at large) that goes along with taking part in the practice. She may love and/or respect her family and friends very much and not want to hurt them. Or the institution or practice may be closely connected to the woman's ability to support herself and her family, and she is thus unwilling to give it up.

In other words, from a woman's perspective, cultural practices that harm a woman may often be a "double-edged sword," providing essential social and possibly financial support and/or approval to her, while, at the same time, hurting her.

***Human dignity and culture***

"...[T]here may be conceptions of human dignity that are distinctly African; ...where a woman tells us that she feels 'valued' by having her husband's family negotiate *lobolo* with her father, we should be reluctant to substitute our own beliefs about her situation, dismissing hers."<sup>4</sup>

***Implications for human rights activism***

This "double-edged sword" is another concrete example of how the paradox of culture plays out in day-to-day life. It is thus a situation where activists are challenged to learn how to work sensitively and effectively with the paradox. How is it possible to be a committed advocate for human rights, while at the same time respecting the choices women make within specific cultural contexts?

*Where is the woman's voice?*

As was mentioned in Chapter 2, those with little power in a society have little say in the formulation and representation of a culture. To the extent that women have less power in a society, their voices are heard less on matters of culture, and their interests are defined in terms that make sense or are comfortable to those with power rather than to the women themselves. Effective advocacy around issues of culture and rights necessitates our actively seeking out women's experiences and perspectives with regard to the culture and rights issues in question. When women's voices are silent, issues are misunderstood and inappropriate strategies developed.

***The popular image and the reality of sati***

A debate about *sati*—the burning of widows on the funeral pyre of their husbands—took place in India in the early 1800s, and included the British colonial authorities, Hindu religious authorities, pro- and anti-*sati* forces within India, as well as missionaries. The outcome of that debate has shaped popular perceptions of *sati* up until today. The practice was widely represented as being based in Hindu religious texts and the widows' willingness to take part as being motivated by religious convictions. The voices of the women who were the victims or potential victims of *sati*—many of whom subsequent historical research has told us were not willing participants—were not heard.

Women's testimonials ... call into question colonial insistence on the religious basis of *sati*. The concerns of widows were explicitly material and social.... For their part, widows nowhere drew on a scripturally derived rationale for *sati*, such as the presumed spiritual rewards insisted upon by the pro-*sati* indigenous lobby. Rather, the testimonials of widows repeatedly addressed the material hardship and social dimensions of widowhood. However, the colonial conception of religion as the structuring principle of indigenous society meant that, though acknowledged early in the debate on widow burning, the evidence for the material basis of *sati* was unable to displace insistence on its fundamentally "religious" character. This insistence intersected with the ambivalence toward *sati* (discernible even in those opposed to the practice) and delayed its prohibition....<sup>5</sup>

*Women as bearers of culture*

Women are often expected to conform themselves to cultural practices in a way that men are not, because they are very often seen as the bearers of the society's culture. While such a role may well bring social approbation and some degree of power to the woman, she is often, at the same time, not free to accept or reject the role.

***Who bears the culture?***

"In conservative religious discourses women come to be seen as custodians of community identity and authenticity, as bearers of tradition. Possibly this is because of their role in bearing and rearing children. Hence, defining and controlling women comes to be seen as central to a revivalist religious agenda. Along with this comes a host of burdens that are sought to be placed on women as bearers of the normative communitarian ideal. Let me cite an instance to substantiate this argument. One sight in Lahore that never ceased to amaze me was men wearing baseball caps and T-shirts displaying the US flag, riding motorcycles with their wives or sisters, heavily draped in black *burqas*, sitting behind them. No one ever seemed to question the men's identity as Muslims, but I presume if the women sitting behind them refused to veil up they would be damned as bad Muslims or even worse."<sup>6</sup>

***Implications for human rights activists***

If you do not already work on women's human rights and have not previously focused on this question, it would be both interesting and useful to consider in what ways, in your culture, women are expected to represent or "personify" their culture.

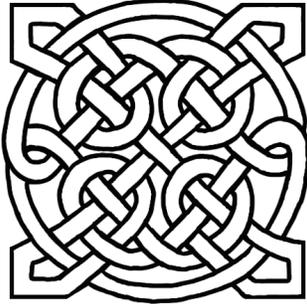


## Notes

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1. Whole books have been written on this topic, and it is not the intent of this chapter to summarize all that has been written. The chapter simply touches upon a few points that seem particularly relevant to human rights activism on culture-related issues.
2. *Circle of Rights—Economic, Social and Cultural Rights Activism: A Training Resource* (Washington, D.C.: Forum-Asia and the International Human Rights Internship Program, 2000), 73.
3. *Circle of Rights*, 73.
4. Thandabantu Nhlapo, "The African customary law of marriage and the rights conundrum," in *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture*, ed. Mahmood Mamdani (New York: St. Martin's Press, 2000), 147.
5. Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (California: University of California Press, 1998), 190.
6. Interview of Cassandra Balchin of Women Living Under Muslim Laws by Yoginder Sikand, February 7, 2005, at <http://www.zmag.org/content/showarticle.cfm?ItemID=7190>

## Chapter 4 Culture and human rights



The relationship of human rights to culture is not simple, but is, in fact, multi-faceted and complex. Culture can be seen as being within human rights or human rights can be seen as being within culture. The two can be at odds with or complement each other. To make this state of affairs more complicated, each of these relationships occurs simultaneously. As a result, the process of seeing and analyzing issues of culture and rights is quite difficult—and, needless to say, often confusing.

To elaborate:

*Human rights within culture:* We experience and thus understand human rights within specific cultural contexts. For example, a young woman living in a rural area of Angola expects and/or wants to be involved in certain groups or activities, and thereby experiences guarantees to freedom of association quite differently from the way a young man living in Shanghai would. Different cultural contexts guarantee that human experiences of and understandings of rights will be quite varied.

*Culture within human rights:* Human culture is embodied in the food we eat, the types of dwellings we live in, the work we do, how we express ourselves, the people we associate with, and so on. Thus, culture is implicit in the right to food, the right to housing, to work, in freedom of expression, association and so on.

*Human rights and culture can be at odds with each other:* Human rights express ideals, and no society fully lives up to all of its ideals. In addition, many situations have been cited where human rights and culture are seen as being opposed to each other at a philosophical or a systemic level, and sometimes simply in individual cases.

*Human rights and culture can complement each other:* A cultural framework provides a human being with a sense of meaning, and this meaning is essential to a person's sense of dignity. When human rights protect a person's culture, they are supporting this sense of dignity. In this very fundamental way, culture and human rights complement one another. In addition, specific cultural institutions and practices may be essential to the enjoyment of human rights.

In the face of these seemingly paradoxical, yet simultaneously occurring relationships, activists are challenged with the task of untangling the often-knotted strands of relationship between culture and human rights.

*Human rights within culture*

People's experiences and understandings of human rights varies depending on a range of economic, social, political and other, including cultural, factors. For example, a person who has had little formal education and is quite poor may not know much about international human rights standards, and would be more concerned about food and shelter than arbitrary arrest or freedom of the press. Or, someone living in a highly repressive society may be aware of something called "human rights," but have little faith in their efficacy, because she sees no protection against the government's arbitrary actions.

Similarly, different cultural contexts will result in different understandings of and relationships to human rights. For example,

- If a person is a member of an ethnic minority, living in an urban environment where there is generally a high level of education, he may have a solid understanding of human rights law, feel that human rights are important, but that as a minority, he does not fully enjoy his human rights.
- If a woman lives in a small town where the large majority of people belong to one religion, and that religion, as practiced by most people in the town, has strict rules about the role of women in private and public life, she may feel uneasy with human rights as she understands them. They somehow feel as if they are alien to the society she has lived in all her life.
- The leader of an indigenous group is concerned about the way his people are marginalized within their country. He knows about human rights, and understands that they can be useful in dealings with the government, but the language and concepts of human rights feel somewhat strange and out of step with the values and priorities of his people.
- A man in a society where "honor killings" take place has heard about human rights through the radio. Some things he hears he likes, such as freedom of expression, but he disagrees with other things he understands to be part of human rights, such as equality for women. Those types of human rights seem alien to him, threatening the way of life he is used to.

Human rights are fundamentally about human dignity. They express human dignity and serve to protect it. A human being's sense of dignity is generally considered to be universal, but the concept of dignity itself is elusive. It is sometimes said that we may not be able to define clearly what "dignity" is, but we know it when we feel it, and we can also feel when our dignity has been violated.

Human dignity is embodied, expressed and protected in different ways in different cultures. The specificities of a culture will, to some extent,

shape what one needs and what one looks for to protect one's dignity. This point is discussed further later in this chapter.

Even though it is accepted that human rights are about human dignity, certain cultural understandings or expressions of dignity can be problematical from a human rights perspective. One frequently-cited example is "honor killings," in which a woman is murdered by her father or brother in order to restore the family's sense of honor, which has allegedly been tarnished by something the victim has done. The victim may, for example, have sought a divorce from her abusive husband, been accused of adultery, or, if not married, done something as simple as holding her boyfriend's hand in public.

In other words, while human dignity needs to be understood within different cultural contexts, certain cultural understandings of dignity may not be compatible with human rights. This is one of the many complexities around culture and human rights that needs to be untangled. Sections further on in this chapter and later chapters go into some detail about activism in contexts where there is or appears to be an incompatibility between a cultural practice and human rights.

### ***Implications for human rights activists***

- ❑ Identifying the ways in which the culture in a community affects people's perceptions of and experiences with human rights is an important first step in working with the community.
- ❑ One of the complexities of doing human rights work where culture features prominently is being attuned to the different ways in which human dignity is embodied and expresses itself in a community or society.

### *Culture within human rights*

The right to culture is recognized in international law through such provisions as article 27 of the Universal Declaration of Human Rights and article 15 of the International Covenant on Economic, Social and Cultural Rights.<sup>1</sup> This recognition, among the full range of rights, is critical, because it constitutes a strong international endorsement both of the centrality of culture to human life and the importance of allowing for cultural diversity within a society.

It is often said that international standards related to economic, social and cultural rights are vague. While this is becoming less true for economic and social rights in general, it unfortunately is still quite true for

cultural rights, because of the widespread neglect over the years of cultural issues in human rights work.

Vague is perhaps not the right word; incomplete would be more accurate. Article 27(1) of the UDHR, for example, says:

*Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and share in scientific advancements and its benefits.*

This article seems to speak to only part of the UNESCO definition of culture, particularly literature, art and other intellectual endeavors. Other international standards similarly address only certain of the numerous elements included in the UNESCO definition.<sup>2</sup>

Since the UDHR was adopted in 1948, the common understanding of culture and usage of the term has evolved, broadened and deepened. It makes sense for human rights activists working today to use and build on this current, broader understanding, which, happily, is reflected in the UNESCO definition.

One important way to do this is to recognize that culture is implicit in all human rights. Our culture is embodied in the many concrete and less concrete elements of our lives—the food we eat and the work we do, the way we express ourselves, whom we associate with, and so on. It is impossible to understand our culture without looking at the cultural dimensions of these elements of our lives.

Thus, as a means of moving towards a fuller understanding of what “cultural rights” should mean, it is important to look at the cultural dimensions of the rights associated with these different elements of life. For example:

- The right to food: The cultural dimensions of the right to food would be reflected, for example, in how we grow and harvest the food we eat, which food is familiar or acceptable and which is not, how we cook our food and how we eat it, with whom we eat the food and with whom we will not eat it, and so on. In some cultures, for example, the women in the family eat last, which means they eat whatever is left over, even if that is insufficient in terms of calories or nutrition;
- The right to education: Cultural dimensions can be seen in whether the education is religious or secular, the representation of minorities in the school, the number of girls in school relative to the number of boys, the content of the curriculum, the proportion of schools that focus on technical training, etc. Minorities, for example, often have to challenge prevailing practices in order to ensure that their children can study in their own language.

### ***The Garífuna and the right to food***

The Garífuna, an Afro-Indigenous people living in Central America, depend on both farming and fishing to feed themselves:

When someone who is a member of an organization comes to our communities, our people air their grievances. Our community may not have a technical way to be able to say, contextually, that something is a certain way, but they air their grievances and say— “Look, we no longer have anywhere to sow our crops, we no longer have a place to produce food to eat.” Because in our communities a mechanism exists that enables one to produce for survival. A local market exists.

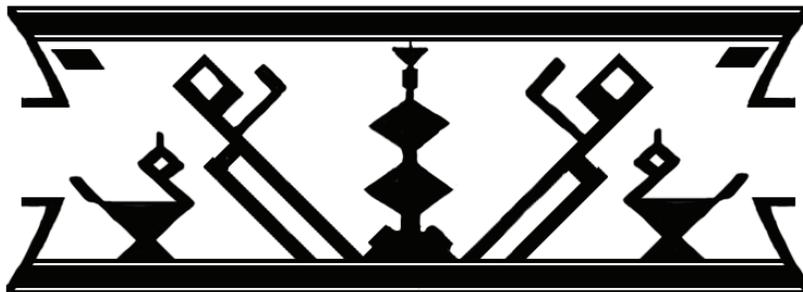
What do I mean by this? I produce in order to provide for my family, in order to share with my community, and also to sell commercially in my community. In other words, let us say there is a parcel of land on which I have rice, corn, yucca and yam ... basically a lot of tuberous plants. If I produce these things, I know that I will produce [from section A of the plot] for my family, my nuclear family; I will share [from section B] with my extended family (cousins, nieces and nephews, etc.); and, I will cultivate [section C] for commercial use in order to trade within my community. Why? Well, I may sell a portion and buy fish, because I do not produce fish. I may sell another portion and obtain meat, because I do not produce meat. Consequently, a market is formed within our communities from which we all survive.

What happens, then, if something affects this land, due to the actions of the government, or companies, for example? They essentially are not allowing me to comply with my familial responsibilities, my community responsibilities. I now have less to share. Suddenly, I have less for my family [from section A minus the appropriated land], my extended family [from section B minus appropriated land], and my community [from section C minus appropriated land] and I even have to sell to them and trade economically with them now in order to survive. How does this affect a culture when, day-by-day, the community that existed before is deteriorating? Before, I shared with you. Now, I sell to you. And it is not because I do not want to... it is because I am being obligated to stop. So, we are becoming more and more individualist every day. And this affects the economy of the community as well as the harmony that existed between us. This begins to generate a sense of discomfort. It generates disagreement.<sup>3</sup>

- Land rights: Different societies think about, use and relate to land in different ways. The prevailing neo-liberal economic model treats land as a commodity that can be bought and sold, whereas numerous societies around the world find the notion of individual “ownership” of land to be an alien concept. Some consider that the land belongs only to communities, and some believe that no one “owns” land; we are only given the opportunity to use it. Cultures shape laws regarding inheritance of land, and different cultures define individuals’ roles in relationship to the land differently.

### ***The right to work and culture***

[People in the Tum Ring commune in Cambodia, who have traditionally relied on rice farming, resin tree tapping and gathering of forest products for their livelihoods] say that they used to live in harmony with their environment, collecting forest products only when needed, and choosing freely their hours of work. They are not accustomed to the constraints of rubber tree plantation work [for the Chup State Rubber Plantation, established on forest land given by the State to the company] and are hesitant to pursue it: *I am used to going to the forest whenever I want or I need. I am free to decide which day I go. The company will force me to work when it wants. I am a free man. If I need to buy or exchange something, I go to the forest and collect resin. If one morning, I want to stay at home, I stay. I can do it. I am free. I do not want to become a slave of the company.* (See Appendix 1, Concessions in Cambodia case study, for more information on the Tum Ring situation.)



- Freedom of expression: What is acceptable to talk about publicly, the type of discussion that is acceptable or normal (e.g., whether a debate involves all participants or one person speaks for a whole group), how one expresses oneself in those contexts, the acceptable role of women in discussions on public affairs and their level of comfort in discussions where men are present, etc.—these are all shaped by culture;

- Freedom of association: With whom one regularly meets and socializes, the way people organize to address issues or problems, the acceptability of both men and women being together in a place of worship, the composition of village councils responsible for making decisions regarding village life, etc., are all formed in part by culture.

### ***The Garífuna, spirituality and culture***

"The Garífuna do not exist without their land, because the Garífuna do not exist without their spirituality. To conduct the traditional Garífuna ceremonies, the Dugü ceremonies, they need to be in the communities. You need the mountains. The ancestors reveal themselves there.... So what happens now? You go there and now, in some cases, you can't get in. Because some 'Miguel so-and-so' now 'owns' the land and is one of the richest men in the country and the uncle of the President of the Republic. He says 'no' and prevents you from getting in.... Then the people have to devise a way to get in and when they do, they are accused of being thieves, usurpers ... and, for this, many of our people are imprisoned."<sup>4</sup>

Some of the General Comments issued by the Committee on Economic, Social and Cultural Rights with respect to certain rights have begun to reflect the implicit cultural content of all rights. For example:

- In General Comment 13 on the right to education, the Committee indicates that one of the obligations related to the right to education is that "the form and substance of education, including curricula and teaching methods, has to be acceptable (e.g., culturally appropriate....)" (para. 6(c)).
- Similarly, General Comment 14 on the right to health says that "All health facilities, goods and services must be ... culturally appropriate, i.e., respectful of the culture of individuals, minorities, peoples and communities..." (para. 12(c))

### ***Implications for human rights activism***

In-depth consideration of the cultural dimensions of various aspects of life—and the cultural dimensions of the corresponding rights—is not currently the "norm" in human rights analysis. However, given the integral and deep relationship between culture and all aspects of life, if we are to develop a fuller understanding of the "right to culture" or "cultural rights," we are challenged to do this.

*Culture and human rights in conflict*

Much attention has been paid to the points at which human rights and culture conflict or appear to conflict. These conflicts have sometimes occurred at the philosophical or conceptual level; other times at what might be called the systemic level; and sometimes they have related simply to specific cultural institutions or practices.

- Conflicts arising at the philosophical/conceptual level: Over the years various assertions have been made that human rights are Western in their conception, and thus incompatible with a number of different cultures around the world. (See box on the "Asian values" debate, next page). In addressing these assertions, it is essential to analyze the source of the assertions and the interests of the parties in making them. This does not necessarily mean that a particular assertion can be dismissed, but such an analysis will help determine useful ways for thinking about, integrating and/or responding to it.

Some of these assertions are less grounded in their concern for human dignity than are others, and while some may present a political/strategic challenge, they may not be substantively very strong. Others, however, are raised by people acting from deeply humanistic motivations, and thus warrant serious substantive consideration.

Some indigenous peoples, for instance, have articulated a different way of looking at the world and find the formulation of international human rights law somewhat alien to their way of thinking.<sup>5</sup> A number of other commentators have maintained that the human rights "discourse" provides only "one window on the world, i.e., one vision, one way of trying to install justice,"<sup>6</sup> and that human rights can best meet the needs of people everywhere if it develops in dialogue with these other visions. See, for example, the challenge posed by Raimundo Panikkar, a Catholic priest who actively seeks out grounds for dialogue among various religious traditions, in the box on p. 49.



### ***The "Asian Values" debate***

One of the most highly-charged "culture vs. human rights" debates at the political/"philosophical" level took place in the 1990s. The governments of Indonesia, China and Singapore, in particular, maintained that the individual freedoms guaranteed in international human rights documents were Western in their genesis and inconsistent with "Asian values," which place more importance on order and discipline.

The discussions in Chapters 1 and 2 help us address this assertion. For example:

- Cultures are no longer considered to be monolithic. It is undoubtedly this reality that has led commentators to ask, for example, what "Asia" is referred to in "Asian values." Amartya Sen maintains that the authors of "Asian values" seem to be referring principally to East Asia.<sup>7</sup> Even within East Asia, however, there is a diversity of value systems—of "competing voices." Buddhism, for example, places great importance on freedom. At the same time, Sen reminds us that the Western tradition contains elements of thought more supportive of order and discipline than of freedom, so the "West" itself is not a monolith.
- Chapter 2 talks about the importance of identifying the actors involved in such a situation, their power and interests. "Ironically, the elites in states most vocal in defence of 'Asian values'—Indonesia and Singapore—are highly westernized. In the economic sphere, elites have welcomed industrialization and its consequences, at least until the market crash of 1998 sent their economies spiraling downwards. The inconsistent attitude towards westernization makes their rejection of the human rights discourse in the name of 'Asian values' highly suspicious. The rejection may be more accurately read as a political tactic used to bolster state sovereignty and resist international denunciation of internal repression of political dissent"<sup>8</sup>
- It is important in such discussions also to recall that, not only do cultures change—the "Asia" of Confucius is not the Asia of today—but that our understanding of human rights also changes. In the almost 60 years since 1948, human rights have been embraced by societies in every country around the world,<sup>9</sup> and our understanding of human rights has been shaped and has evolved in response to the experiences of those societies.

### ***A challenge to explore and to dialogue***

"Thus we are not seeking merely to transliterate Human Rights into other cultural languages, nor should we be looking for mere analogies; we try instead to find the homeomorphic equivalent. If, for instance, Human Rights are considered to be the basis for the exercise of and respect for human dignity, we should investigate how another culture satisfies the equivalent need ....

"Is the concept of Human Rights a Western conception? Yes. Should the world then renounce declaring or enforcing Human Rights? No. Three qualifications, however, are necessary.

1. For an authentic human life to be possible within the *megamachine* of the modern technological world, Human Rights are imperative.... [I]n the contemporary political arena as defined by current socio-economic and ideological trends, the defense of Human Rights is a sacred duty....
2. Room should be made for other traditions to develop and formulate their own homeomorphic views corresponding to or opposing Western 'rights.' Or rather, these other world traditions should make room for themselves, since no one else is likely to make it for them. This is an urgent task; otherwise it will be impossible for non-Western cultures to survive, let alone to offer viable alternatives or even a sensible complement....
3. An intermediary space should be found for mutual criticism that strives for mutual ... enrichment..."<sup>10</sup>

### **Implications for human rights activism**

Our understanding of human rights (and corresponding standards) has evolved in response to situations of oppression and abuse of people in countries around the world. Thus, while the positions taken by Panikkar and others present a critical challenge to the human rights movement, most groups working on ESC rights have already committed themselves to responding to the needs of people as articulated by the people themselves. The challenge is thus to re-commit ourselves to this goal, if perhaps in a more fundamental way, and initiate or maintain a dialogue with commentators raising such concerns, to better understand them and search for articulations of rights that resonate with all those working for social justice.

## THE BANYAN TREE PARADOX

- Beyond such broad philosophical challenges to human rights made in the name of culture, other situations regularly arise in which human rights and culture stand in opposing positions, or seem to. These could be considered more “systemic” in their nature, in that there seems to be an inherent conflict between the way cultures structure themselves and some fundamental human rights principles.
  - Many of these cases involve gender, which has been addressed in Chapter 3.
  - Critics sometimes maintain that the human rights claim of universality is incompatible with the specificities of the many different cultures in the world: You can’t have one standard that applies equally to all situations, when the situations are so diverse.

This argument conflates two different things: human rights on the one hand, and, on the other, the national or international laws that have been adopted to protect these rights.

When we say human rights are universal, we mean simply that each and every human being has rights by the fact of their being human. This is a statement that can be made across cultures, independent of any laws that may exist. Mahmood Mamdani states this a slightly different way:

Without the experience of sickness, there can be no idea of health. And without the fact of oppression, there can be no practice of resistance and of notion of rights.... Wherever there was (and is) oppression—and Europe has no monopoly over oppression in history—there must come into being a conception of rights.<sup>11</sup>

On the other hand, laws that have been adopted to protect human rights—whether in national constitutions, in regional documents or international declarations and treaties—are agreed-upon legal formulations. They are the best possible formulation of our understanding of what is needed to protect human dignity that can be agreed upon by those making the laws in that particular place and at that particular moment in time. They are thus time-bound, certainly not perfect, nor are they exhaustive or final.

To say that all situations do not fit neatly within a single legal framework is a statement of fact that would be pointless to dispute. This is true of all laws, human rights-related or otherwise. When a human rights claim is made within a legal framework, the fit may not be good, and advocates and decision-makers need to struggle with that reality on a case-by-case basis. Hopefully, over time,

laws are amended to respond more appropriately to a range of situations, but the fit will never be perfect.

This state of affairs may lead one to conclude, on the one hand, that the laws are inadequate (which would imply, while working with what we have, law reform), or on the other, that a legal framework is not the best way to understand a particular human rights claim (which would lead one to a non-legal strategy).

Saying that laws are inadequate, however, is quite different from saying that human rights cannot be universal. A statement that encapsulates the current best understanding of this dilemma is:

[H]uman rights are both universal and particular: universal because the experience of resistance to oppression is shared among subjugated groups the world over, but also particular because resistance is shaped in response to the peculiarities of the relevant social context.<sup>12</sup>

- Another “culture and rights conflict” is perhaps, in reality, more a conflict between or among different rights—that is, the rights of an individual within a culture “vs.” the right of a community to impose specific cultural institutions or practices on all members of the community. Much has been written on this issue, which is often phrased as the rights of groups vs. individuals.<sup>13</sup> For some further elaboration on legal arguments related to this issue, see the box on the next page.

While this issue continues to be a matter of dispute, it is, in practice, treated on a case-by-case basis. In fact, some commentators maintain that, in practice, a stark dichotomy between the rights of the individual and the rights of the community often do not exist. An example is discussed in the box on p. 53.

- Other situations of conflict or seeming conflict between cultural institutions or practices and human rights are more specific to the particular institution or practice. Examples of such conflicts are set out in various case studies throughout this publication.



***Exercising the right to culture as long as...***

A statement often made is that the right to culture should be recognized to the extent that doing so does not permit the violation of other rights. One authority cited is article 30 of the UDHR, which says "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." In other words, if the cultural institutions and practices of a community violate people's rights, the community's right to its own culture should not be recognized as a defense against the abuses. (In the absence of recognition of that right to culture, the institutions and practices of the dominant community would presumably prevail.)

This argument is not, however, universally accepted, even within the human rights community. A principal concern is that conditioning respect for the right to culture on the absence of human rights violations committed by cultural institutions or practices within the society would seem to imply that among all the rights in the UDHR and other international documents, the right to culture takes the lowest priority. In many other human rights situations, however, the enjoyment of one right takes second place to the enjoyment of another right, and one person's enjoyment of a right takes priority over another person's enjoyment. The banning of hate speech, for example, gives priority to the obligation of non-discrimination over the right to freedom of expression. In the *Soobramoney* case in South Africa (*Soobramoney v. Minister of Health [Kwazulu-Natal]*), which addressed questions of access to kidney dialysis facilities, the right to health of one person had to give way to the right to health of a large number of other persons.

These realities have led to the development of more modulated alternatives to the sweeping, initial statement. One says, for example, that violation of certain rights, already recognized in the International Covenant on Civil and Political Rights (ICCPR, art. 4) as having a special status under international law in that they cannot be derogated from even in a state of emergency—for example, non-discrimination, the right to life, and freedom from torture—should never be justified in the name of the right to culture.<sup>14</sup>

However, until such an alternative position or some other position is widely accepted, developing an appropriate balance between respect for the right to culture and respect for other rights is being and will have to be worked out on a case-by-case basis.

### ***The lived complexity of group and individual***

“Contrary to the dominant tendency in liberal human rights discourse, which is to present state-citizen relations in abstracted individualistic terms, people are constantly negotiating between an internal moral system (shaped by factors such as culture and religion, and represented by institutions such as kinship) and the formal legal regime of the liberal state.... Far from subsuming individual concerns under community interests, ‘situated analyses of rights’ point to people’s own experience of these concerns and interests as overlapping and intertwined, sometimes in harmony and sometimes in tension....

“One example is [from the experience of] ‘untouchable’ women in a Lucknow neighbourhood in India.... These women’s perception of primary or fundamental rights integrated a vision for the individual and the community. They spoke of the most important right as the ‘right to survive,’ which consists of access to ‘food clothing, housing, education and secure life, but not at the expense of [their] personal and community honour’.... Concern about personal insult went hand in hand with concern about humiliation of their parents and husbands, as did concern for physical violence, including violence committed by those same parents and husbands.... This latter concern points to the reality of simultaneous harmony and tension between individual and group rights. This is the lived reality....”<sup>15</sup>

### ***Implications for human rights activists***

Human rights standards represent the best current understanding internationally of what is needed to protect human dignity. However, as has been said elsewhere, our understanding of human rights evolves over time in response to situations that arise and cases that are brought to public attention. It may be that cases that appear to represent a conflict between culture and rights may, over time, lead to an evolution in our thinking about rights. For example, a culture may stress complementarity, rather than equality, between people and their roles in society. Is it possible that in certain cultures such an approach would protect human dignity as well as or better than an equality approach would? If so, what does that mean for human rights work?

*Culture and human rights complementing each another*

- The principal international human rights guarantees related to culture—article 27 of the UDHR, article 15 of the ICESCR, and article 27 of the ICCPR—provide critical support to individuals’ and groups’ right to culture. Other international standards (including non-discrimination) as well as international resolutions and declarations help protect the space within which cultures can flourish. See Appendix 2 for further detailing of the principal standards.
- Culture can also be an important support to human rights. As we said at the beginning of this chapter, a person’s cultural framework provides her with essential meaning in her life, and this meaning is basic to her sense of dignity.

***The Garífuna culture and human rights***

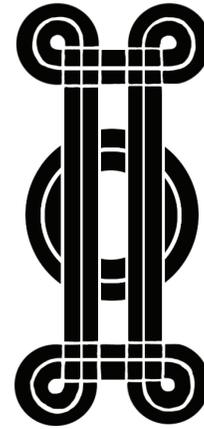
“Spirituality is our strength. It is a great strength that we have—in the sense that it permits us to not only envision ourselves, but also provides an avenue through which our ancestors, our spiritual guides, direct our actions. What does this mean? It means that we do not do things solely based on the capacity we have as an individual and a person. We implement them on three levels: 1) the level of personal knowledge; 2) the level of what our people, our assemblies, mandate; and 3) through the strategic and ancestral vision of our guides, our leaders, our ancestors. This makes it so that, although we may not have the economic power to reach the levels of influence that many companies have, our cultural strength, our spiritual strength, permits us in some way to influence and defend our rights.”<sup>16</sup>

In addition:

1. In all cultures, it is possible to find values and arguments in favor of what we might see as falling within human rights. For example, the emphasis in rural African culture on mutual support in times of crisis, the prioritization given to meeting basic needs of those in trouble, and concern for the welfare of the group, all provide essential support for human dignity.

### **Ubuntu**

*Ubuntu* is a South African term that defines the individual in terms of their relationships with others: "A person is a person through other persons." Archbishop Desmond Tutu suggests: "A person with *ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed."<sup>17</sup>



In fact, some commentators have suggested that the way human rights are sometimes discussed nowadays would lead one to believe that the concern for human rights is a relatively new, ground-breaking development in human history. These commentators maintain, however, that "human rights" are, in reality, just the latest incarnation and formulation of a yearning for justice that has been evidenced throughout human history.<sup>18</sup>

### **Historical support for religious tolerance**

Indian emperor Ashoka described his concepts of good governance on stone inscriptions throughout the country. Edict XII said "...a man must not do reverence to his own sect or disparage that of another man without reason. Depreciation should be for specific reason only, because the sects of other people all deserve reverence for one reason or another."<sup>19</sup>

2. Culture can be a source of empowerment in a range of situations. A young Muslim woman in Western Europe, for example, can draw on different cultures of which she is a part by demanding her rights as a Muslim vis-à-vis the majority population, while insisting on her rights as a woman vis-à-vis her parents, drawing on the Koran, for example, to resist an arranged marriage.

3. Many indigenous groups around the world, when struggling to have their rights recognized—whether to land, recognition of their own dispute resolution systems, health care systems, or other rights—have spoken about their culture’s belief systems and world views in support of these specific claims.



#### ***A view from Mexico***

*"We are indigenous people; we have suffered centuries of rejection, of persecution, of abandonment, of death. Many times the oppressor has had white skin, but other times death and treason has had dark skin and our same language. The good path also takes on the word of men and women of white skin and of a different language. In the world that the Zapatistas want, all skin colors fit, all the languages and all the paths. The good world has many ways and many paths. And in those paths there is respect and dignity."*<sup>20</sup>

4. In the literature about traditional dispute resolutions systems, attention is paid to the way some of these systems violate people’s rights. People’s dignity, however, can sometimes be more fully respected in situations of disputes and conflicts when the dispute is resolved in culturally familiar ways. Some of these modes of

#### ***Land Disputes in Tanzania***

"In this case, the [Presidential Commission of Enquiry into Land Matters] found that the traditional bodies such as elders (*wazee*) still commanded respect and legitimacy as mediators and arbitrators of disputes. In recommending the machinery of dispute settlement, the Commission was guided explicitly by the principle that people should have faith in the legitimacy of the dispute settlement machinery; that the organs of justice should be accessible, approachable and comprehensible; and that they should be open, transparent and institutionally impartial and independent. In a word, the Commission was both conscious of, and deliberately tried to move away from, the Western positivist bias towards professional dispensers of justice...."<sup>21</sup>

dispute resolution may be innovative, or they may be traditional. They can, however, arrive at a resolution that feels more respectful to a person's sense of self and place in the community.

5. The art—music, literature, theatre, painting—of a culture is often used in support of human rights. For example, in 2004 Senegalese filmmaker Ousmane Sembene produced *Moolade*, about conflicts in a village in Senegal. The film pits a group of women working to stop FGM against others in the community, including the elders, who want the practice to continue. Popular films like *Moolade* encourage broad public discussion of topics, such as FGM, which are otherwise difficult for many people to broach.

***Protecting the rights of Afro-Brazilians through culture***

*Olodum*, an internationally acclaimed Afro-Brazilian cultural group, highlights African heritage and black pride through music, dance, theater, and art. From its home city of Salvador da Bahia in Northeast Brazil (often described as the most African city in the Americas), Olodum has dedicated itself to cultural activism in the struggle against racial discrimination and socioeconomic inequality.

***Implications for activists***

A challenge for activists is finding those values in our own culture that are the functional equivalent of human rights, and those historical and contemporary cultural voices that perhaps speak in different words—words perhaps more familiar to many people—about the same concern, human dignity.

**Notes**

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1. A fuller detailing of international human rights provisions related to culture is included in Appendix 2.
2. For ease of reference, here again is the UNESCO definition: “[C]ulture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and ... it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”

## THE BANYAN TREE PARADOX

3. Interview with Gregoria Flores, Director of OFRANEH, by Nnenna Ozobia of the IHRIP staff, October 18, 2005. Translation from Spanish by Ms. Ozobia.
4. Interview with Gregoria Flores.
5. See, for example, Colin Samson, "Rights as the reward for simulated cultural sameness: the Innu in the Canadian colonial context," in *Culture and Rights: Anthropological Perspective*, eds. Jane K. Cowan, Marie-Bénédict Dembour and Richard A. Wilson (Cambridge, U.K.: Cambridge University Press, 2001), 226-248.
6. Raimundo Panikkar, "Is Human Rights a Western Concept? A Hindu/Jain/Buddhist Reflection," *Breakthrough* 10, nos. 2-3 (Winter/Spring 1989), 78.
7. Amartya Sen, "Human Rights and Asian Values," *The New Republic* (July 14-21, 1997), 33-40.
8. Jane K. Cowan, Marie-Bénédict Dembour and Richard A. Wilson, "Introduction," in *Culture and Rights: Anthropological Perspectives*, 6-7.
9. See, for example, the goals of the Council for a Parliament of the World's Religions, listed at <http://www.cpwr.org/how/how.htm>
10. Raimundo Panikkar, "Is the Notion of Human Rights a Western Concept?" *Diogenes* 120 (Winter/Spring 1982), 100-101.
11. Mahmood Mamdani, "Social movements and constitutionalism in the African context," *Centre for Basic Research Working Paper 2* (Kampala, Uganda: 1989), 1-2, cited in Celestine Nyamu-Musembi, "An Actor-oriented Approach to Rights in Development," *IDS Bulletin* 36, no. 1 (January 2005), 43.
12. Ibid.
13. See, for example, Chandran Kukathas, "Are There Any Cultural Rights?" *Political Theory* 20, no.1 (February 1992), 105-139; Will Kymlicka, "The Rights of Minority Cultures: Reply to Kukathas," *Political Theory* 20, no. 1 (February 1992), 140-146; Chandran Kukathas, "Cultural Rights Again: A Rejoinder to Kymlicka," *Political Theory* 20, no. 4 (November 1992), 674-680.
14. For example, the Constitutional Court of Colombia in Sentencia T-523/97 (Magistrado Ponente: Carlos Gaviria Díaz), ruled:

To impose on indigenous communities sanctions or punishments conceived by Western tradition is not compatible with the principle of ethnic and cultural diversity. To interpret things otherwise ... would be saying: "The Constitution tends to recover [the indigenous communities'] culture, but only with regard to those practices that are compatible with the worldview of the majority culture." It is clear that this type of reasoning would amount to a cultural hegemony incompatible with the axiomatic pillar of pluralism, which ... allows indigenous communities the materialization of their customs, provided they do not violate a core nucleus of [rights], which "is truly intolerable because it violates the most precious human goods."

The decision identified that core nucleus as comprising the right to life, the prohibition of slavery and of torture, and due process. (Translation from Spanish by IHRIP staff).
15. Nyamu-Musembi, 45.
16. Interview with Gregoria Flores.
17. <http://en.wikipedia.org/wiki/Ubuntu>; See also JY Mokgoro, "Ubuntu and the Law in South Africa," at <http://www.puk.ac.za/lawper/1998-1/mokgoro-2.html>
18. Thandabantu Nhlapo, "The African customary law of marriage and the rights conundrum," in *Beyond Rights Talk and Culture Talk: Comparative Essays on*

- the Politics of Rights and Culture*, ed. Mahmood Mamdani (New York: St. Martin's Press, 2000), 138.
19. Amartya Sen, 5.
  20. Speech signed with the names of Zapatista Subcomandante Marcos, David and Tacho, January 3, 1996, *American Anthropologist* 99, no. 2 (June 1997), 261-274.
  21. Issa G. Shivji, "Contradictory perspectives on rights and justice in the context of land tenure reform in Tanzania," in *Beyond Rights Talk and Culture Talk*, 51.

## **Chapter 5**

### **Culture and human rights activism**

In the first four chapters of *The Banyan Tree Paradox*, we have presented a number of challenges activists face in addressing human rights issues in which culture plays a significant role. These include:

- Developing a fuller understanding of “culture”
- Assessing the relationship of power to culture
- Analyzing the impact of culture on gender relations
- Understanding “human rights in culture”— how culture shapes people’s experiences of human rights
- Fleshing out the many cultural dimensions of various economic and social as well as civil and political rights (“culture in human rights”)
- Appreciating the ways human rights and culture conflict—and support each other

These challenges, as well as various others posed in those chapters, make activism on human rights issues in which culture plays a significant role particularly complex. We have, however, tried in the same chapters to provide information to aid activism, and have included gray boxes that mention some “Implications for human rights activism” related to specific topics discussed. This chapter supplements those gray boxes by addressing broader issues that are relevant to many, if not all, of the previous chapters in *The Banyan Tree Paradox*. Here we talk about:

- The challenge of seeing
- Analyzing and handling emotion
- Activists’ relationship to their own culture and other cultures
- Commitment and responsibility
- Multiple definitions and understandings of culture
- The need for a larger umbrella

After this chapter, the following, and last, two chapters explore two other topics specifically related to activism—Fact-finding and documentation (Chapter 6), and Developing strategies (Chapter 7).

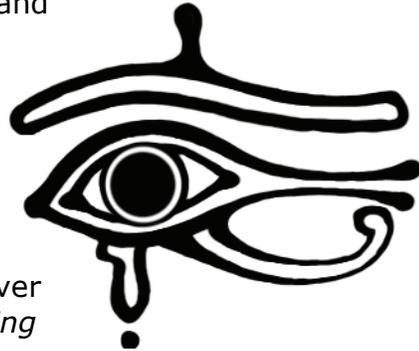
#### *The challenge of seeing*

One of the principal challenges for activists often is simply one of *seeing* the cultural dimensions of a situation as relevant to their human rights work or as related to the “right to culture.” An organization working on a right to housing case may, for example, focus on the issue of participation—was the community consulted properly prior to the eviction?—or the existence or adequacy of the alternative housing available. While members of the community may voice feelings of disorientation or talk about how they are losing a way of life, these

feelings are not generally themselves treated as a focus for human rights fact-finding, for further exploration and documentation, or the securing of a specific remedy.

These feelings, however, may be integrally relevant to the community's rights related to culture. Why then do we not, as human rights activists, devote specific attention to them? The reasons are not clear:

- If we are working with a narrow definition of culture (focused more on language or the arts), we may not see dimensions of other rights as having a direct bearing on—indeed, as being part and parcel of—the right to culture.
- It may be that many of the traditional remedies sought in human rights cases may not seem relevant or useful to certain cultural dimensions of a situation. What remedy do you seek for disorientation or other psycho-social problems that often follow on cultural disruption? In the absence of a familiar or apparent remedy, what would be the purpose of such an exploration? What should an organization do with regard to its findings if it does pursue discussions further?
- Human rights organizations may not have within their staff personnel trained in and knowledgeable about the psycho-social dimensions of abuses. They may thus not have in-house capacity to recognize some of the effects of cultural disorientation or knowledge of how to deal with them.



There may well be other reasons. Whatever the reasons, the challenge of *seeing* remains.

### *Analyzing and handling emotion*

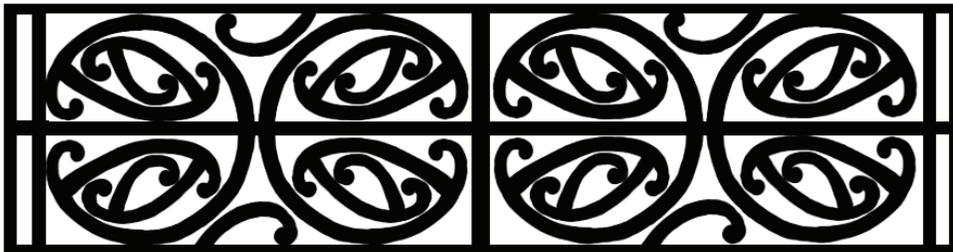
Points where culture and human rights intersect—for example, when young women are banned from wearing headscarves in France, when families are evicted from land they have farmed through generations in the name of “development,” when fathers or brothers carry out “honor killings” in Pakistan and elsewhere, or when large numbers of people insist on the right to carry a gun in the United States—are often points of great controversy, generating emotional interactions and debates. Activists at times shy away from addressing such issues out of a reluctance to get involved in such highly-charged situations, perhaps from a concern that they will not be able to handle the emotions in an appropriate fashion. If they do, however, decide to address such issues,

## THE BANYAN TREE PARADOX

a key element in being effective is understanding where the emotions come from.

There are various sources of emotions that accompany these issues, and some are unique to specific situations. Two, however, seem common to many of them. One is the very central and highly personal role that culture plays in the life of an individual, as was discussed in Chapter 1. Because we derive a large part of our sense of self from our cultural roots, when our relationship to our culture is threatened (when, for example, we have been evicted from traditional lands or are forced to become a refugee), we may suddenly feel quite fragile and vulnerable—and we may react with fear, anger and other strong emotions. Appreciating that people’s emotions are often rooted in a deep sense of vulnerability requires sensitivity, and working with the emotions requires respect and care.

Another source of emotion is the fact, discussed in Chapter 2, that one of the functions of a culture is to define and reproduce hierarchies—who has authority, who has power and who is powerless in a society. One of the principal goals of human rights activism is equality, a greater leveling of power. In the face of such activism, those with power in a culture feel their power threatened—and they react. “Honor killings,” for example, are considered by many to be expressions of men’s power over women, and challenges to “honor killings” constitute challenges to that power. In these and other such cases, activism on issues where culture plays a large role requires a careful assessment of power and how this relates to the highly emotional character of many of these issues.



*Activists’ relationship to their own culture—  
and other cultures*

If someone is going to be involved in activism concerning culture and rights issues, it would be valuable for her to examine and clarify her relationship to her own culture and to the other cultures with which she works.

In regard to relationships with other cultures:

- We carry our own culture(s) around with us in fundamental ways—in how we think, speak and dress, in what we think is acceptable or normal, in how we relate to others and how we expect them to relate to us, and so on. All of these cultural features convey “messages” to people from other cultures about who we are, what we believe, and how we act. These “messages” may not accurately reflect who we really are—and, in fact, probably do not—but they will shape most peoples’ interactions with us, at least until they know us better. In order to enhance our communication with people from another culture with whom we are working, it can thus be helpful if we become more self-aware of our “cultural baggage,” trying to understand more about the cultural “messages” we are likely “sending” others and how those messages affect our interactions with them.
- Similarly, the “messages” we *receive* from others are shaped not only by their culture(s), but our own. In a real sense, we “filter” what others say and do through our own cultural lens. This is inevitable, but our understanding of others and our abilities to communicate with them can nonetheless be enhanced by a greater awareness of what those lenses are, and how they are coloring what we are seeing and understanding. If we are working with ethnic or racial minorities, we need, in particular, to be aware of racial or ethnic biases we carry with us from our own culture; no culture is free of such biases.
- Human rights activists believe in non-discrimination. However, working with communities or individuals from other cultures—often ethnic minorities or indigenous peoples—forces us to deepen our understanding of non-discrimination. Non-discrimination means more than simply equal treatment despite differences. We need to develop our own understanding of these other cultures—of their historic and current experiences, of their religions and way of life. We need to foster others’ understandings of these cultures, and of the differences between those cultures and dominant cultures in our society. We need to work towards ways of living—modes of thinking, development of practices and institutions—that accommodate those differences, and to reach a point where we not only accommodate those differences, but value them. As one human rights worker has put it: “The best way to promote equality and be consistent with human rights principles is to be open to giving and to receiving, to considering one’s own culture as fluid and incomplete, and to be open to ‘being infected’ by other cultures.” He suggests that the stronger societies set the example for doing this.<sup>1</sup> This is a long road, but an essential one if we are to be truly able to work with and provide assistance to people from other cultures.

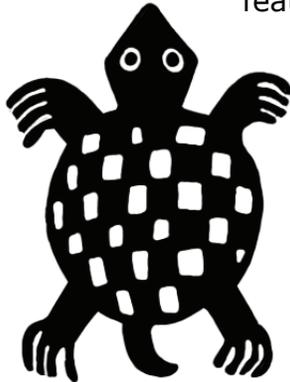
No culture can live if it attempts to be exclusive.

– Mahatma Gandhi

With regard to our relationship to our own culture:

- Since human rights are intended to be a bulwark protecting people from abuses by the State, human rights work often places an activist in a wary, if not critical, position vis-à-vis her own government. This can be uncomfortable and is not one that most human rights activists welcome. When human rights work addresses issues of culture, however, the situation becomes yet more troubling. An activist is rooted in and dependent on her culture just as any person is. Placing ourselves in a critical position vis-à-vis our own culture necessarily means questioning, perhaps even discarding, some of the foundation stones of our self-definition. We may be alienated to varying degrees from our government and get along just fine. Being alienated to any significant degree from our own culture, however, risks not only our sense of self, but our most intimate family relationships and friendships. In such situations, alternative support structures can be very important to continuing, effective activism.

- As was discussed in Chapter 1, no culture is monolithic. Each culture has a mix of features, some more positive, others more negative. When working on culture and rights issues within their own countries, activists may find themselves frequently addressing the more negative features. It is important while doing this that we look



for, identify and articulate the positive values in our culture. This is important for us as people, so that we are better able to maintain strong connections with our society and culture. It is important for our effectiveness as activists, because others will generally listen more attentively if they feel someone is not simply out to criticize their culture, but, in fact, understands it and sees positive things in it.

*Commitment and responsibility*

Because culture is such an essential part of a person's life, involvement in human rights issues where culture features prominently can present activists with particular challenges to commitment and responsibility. For example:

- Efforts to protect and promote his human rights can, at the same time, cause ruptures in a person's connections to his community and culture. Where a person's connection with his culture is disrupted, he can suffer emotionally and psychologically, he can lose relationships, sources of income, etc. What is our responsibility as human rights activists to an individual in such a situation? Many organizations, for example, work on issues of bonded labor, which is a clear violation of

human rights. Some individuals have been bonded laborers for essentially their whole lives; their lives are integrally related to this practice. If a human rights organization helps a person gain his freedom, there remains the critical question of the person's future: What work can he do, where will he live and with whom? These are very difficult questions. Despite the very oppressive nature of bonded labor, it typically does, at least, provide a person with a predictable place to live and work to do. Activism concerned about human rights has also to be concerned with helping answer these questions.

- It can be difficult to interest people in an issue that does not directly touch their lives. As human rights and other organizations have discovered, it is much easier to do this if we can put an individual face on an otherwise abstract issue, if we can tell one person's story. This type of reasoning was, for example, behind Amnesty International's technique of adoption of individual prisoners of conscience. The same logic holds true for concerns related to specific cultural institutions or practices: If we can tell the story of one person suffering from a particular institution or practice, we can interest more people in doing something about it than we could if we just talk about the issue in a

### ***The price for standing up***

In 1992 Bhanwari Devi, a village development worker in Bhatari village, Rajasthan, India was raped by five men of a higher caste, as apparent punishment for challenging certain accepted cultural norms and a particular child marriage. The police at first refused to investigate her charges (although, after some delay, they did). The five men she accused were finally brought to trial in October 1994. In a November 1995 the Court issued its verdict of innocent, commenting that the incident could not have taken place because upper caste men would not rape a woman of lower caste.

Bhanwari Devi has been ostracized by the village community since the incident in 1992. Her brothers, feeling she should have settled the case, broke all ties with her. Her older son and daughter-in-law, as well as her in-laws, did likewise. The alleged rapists have constantly threatened her. One of her sons, unable to bear the humiliation, left home to work elsewhere. Another stopped attending school, because of harassment by fellow students. In 2001 a film was made based on her story, but that has only made her life more difficult, as villagers accuse her of bringing disrepute to the village. Only her husband has supported her. She would like to leave her village, but cannot afford to.<sup>2</sup>

broader, more impersonal way. A problem in highlighting one person's situation, however, is that the person's relationship with her community can be radically altered as a result of the attention given to her situation. The person's family and/or community may be upset and angry at the negative attention the person is bringing to it. The attention in itself may shift the power relationships between the person and others in the community, to the severe discomfort of all parties. And so on. If her family rejects her, to whom does she turn? If she cannot return to her community, then what? If she loses her job, where else will she work? If an organization decides it is necessary to highlight one individual to draw attention to a broader problem, it is essential to think through the implications of doing so for their long-term responsibility to that person.

*Multiple definitions and understandings of culture*

There is considerable confusion in most discussions around culture and rights. Some of that confusion is likely the result of the distorting effect of the emotions and tensions mentioned. Additional confusion is likely rooted in the fact that the term "culture" has many meanings. In a discussion on culture, or on culture and human rights, a participant will speak bearing in mind one definition or understanding of the term, while often being heard by others who are assuming a different definition or understanding—leading to instant miscommunication and confusion.

For the purposes of this publication, as stated above (p. 9), we have accepted the UNESCO definition of culture. However, in common usage there are several different meanings that people have in mind when they talk about "culture." These are discussed a bit more in Appendix 2.

However, even if people have clarified with each other what definition they are working with, significant confusion and miscommunication can nevertheless occur because the discussants bring with them different *understandings* of or *feelings* related to the concept. This is because people talking about "culture" attach different associations to that word, depending upon their own experiences and the historical, political and other contexts within which they know it. For example:

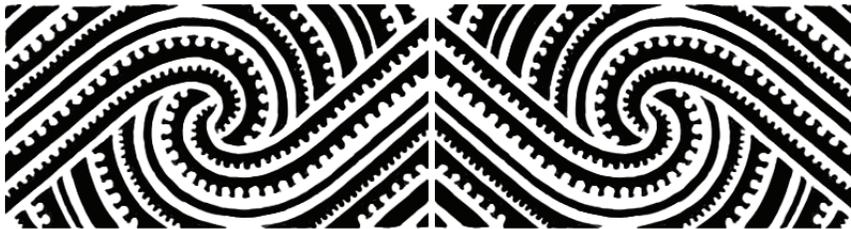
- Imagine you are a member of an indigenous community whose language and other cultural practices are not adequately respected by the government in your country. NGOs representing your community are challenging the government in court, citing your community's "right to culture" as the basis for their efforts to get your language recognized as an official language in the country. In a context such as this, when members of the community talk about "culture" or hear someone use the word, they are likely to have very positive

associations with it, as representing something that is precious to them and which they are struggling hard to maintain.

- Imagine you are a woman involved in a women's organization that has worked for years on public education campaigns to change a range of traditional beliefs and practices, occurring both in the home and in public life, that limit women's ability to participate equally and that essentially condone various forms of abuse. Those opposed to the proposed changes talk about the inevitable societal breakdown that will be precipitated by such changes, and about how precious the society's "tradition" and "culture" are, and how they are not something to be tampered with. In a context like this, the woman could well feel suspicious or angry when a conversation turns to "culture."
- Imagine that tensions between your ethnic minority group and the majority population of your country have increased in recent years as the population of your group has grown as a result of immigration. There is a right-wing party whose popularity has been growing through feeding on dissatisfaction many people in the country feel at the high unemployment rate, blaming immigrants for the lack of adequate jobs. The party does not talk overtly about its anti-immigrant positions, but instead constantly stresses the need to maintain "traditional values" and the "historic national culture"—in this context, code words for a mono-cultural state. As a member of an ethnic minority whose culture is not recognized by the government, you understand the importance of "culture," yet enter conversations about "culture" with members of the majority population with considerable skepticism.

While these descriptions as set out may make it easy to recognize where different understandings come from, people do not normally provide such tidy summaries of influences on their understandings of culture. These "hidden" understandings, however, can create a situation where seemingly simple conversations become highly charged.

Determining what understandings and feelings people bring to a discussion on culture, and how these affect their interactions, is an important challenge for activists.



*The need for a larger umbrella*

How do we think about, document and seek remedies for a situation where harm has been done to a culture, when culture encompasses so many aspects of life? Consider the following:

The Kisan [a tribe in eastern India] who experienced the uprooting of 1957 are testimony of the state of mental health of displaced peoples and illustrate another one of the main risks of impoverishment through displacement: the risk of increased morbidity and mortality. The severance of the Kisan bonds from their traditional lands and environment is a fundamental factor in their acute depression and possibly in increased mortality rates, including infant mortality. A continuous pining for lost land characterizes the elderly. Anxiety, grieving, various neuropsychiatric illness and post-traumatic stress disorders feature among the Kisan. In essence, they suffer from profound cultural and landscape bereavement for their lost origins.<sup>3</sup>

Activists concerned about the right to health might focus on the mental illness and infant mortality in the Kisan community, while activists on the right to land would focus on reclaiming land. What about the right to food, which was gathered from the land where the Kisan lived, or the right to work, because the new land provided was not farmable? When the cultural fabric of a society is torn, all aspects of life are deeply affected. Activists concerned about rights related to culture need to address this tearing of the social fabric, which was arguably the central harm done in this situation. Doing so requires a holistic approach—understanding the cultural dimensions in the right to land, in the right to food, work and so on, and considering that the psychological and health impacts of dislocation are part of the central violation.

Remedies that address just one of these issues—whether health, food, work or another issue—while important, fail to get to the core matter of the social fabric. How does one reconstruct, weave together, a social fabric that has been torn? A holistic approach that addresses the complex inter-relationship of these issues and treats the issues as one piece is a challenge for the many human rights groups who have focused on one or another right to think together on the relationship of these issues to each other.



It is also a challenge to bring “under the human rights umbrella” disciplines that have until now not been central to most

human rights work. These include anthropologists and sociologists who are knowledgeable about how societies work and sensitive to the complexities involved, and psychologists who are trained to discern and work with the emotional impacts of cultural destruction, deprivation and disorientation. Committed individuals from these and similar disciplines would not only bring needed knowledge and skills, but can help us develop appropriate ways of carrying out of work to deal more effectively with issues where culture features prominently.

## Notes

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1. Excerpts from a paper prepared for the Siem Reap workshop by Carlos Iván Degregori. Translation from Spanish by IHRIP staff.
2. Based on a compilation of the following reports:  
<http://www.amnesty.org.uk/action/nw/hpn/newslet/india.shtml>;  
<http://www.hrw.org/reports/1999/india/India994-11.htm>;  
<http://www.indianexpress.com/ie20011125/top3.html>
3. Ranjit Nayak, "Risks associated with landlessness: an exploration towards socially friendly displacement and resettlement," in *Risks and Reconstruction: Experiences of Resettlers and Refugee*, eds. Michael M. Cernea and Christopher McDowell (Washington, D.C.: World Bank, 2000), 95-96.

## **Chapter 6**

### **Fact-finding and documentation on culture and human rights issues**

There is, undoubtedly, much in common between fact-finding and documentation undertaken on a range of human rights concerns and that undertaken on human rights issues where culture is a significant factor. Indeed, some cultural rights issues that have been the focus of work for decades (such as a minority group's right to use its own language) rely on quite familiar approaches to fact-finding. There are, however, some particular challenges related to fact-finding and documentation in specific culture and rights situations that should be highlighted. This chapter tries to do this, and includes the following sections:

- The importance of participation and listening
- What culture issue are you concerned about?
- Researching history to understand the issues and frame the debate
- Understanding the institution, practice and context is critical
- A way of life, the social fabric and fact-finding

#### *The importance of participation and listening*

Because human dignity is central to human rights work, participation by victims of abuse and respectful listening on the part of activists are always essential to human rights fact-finding. In light of the intimate relationship of culture to human dignity, nowhere is such an approach more important and appropriate than in culture and rights situations.

- The participation of victims is essential if we are to understand what the victims themselves perceive to be the harm done—which may not fit neatly into more traditional “categories” of human rights abuses. Victims also have a central role to play in identifying strategies that make sense to them and remedies they feel would be appropriate to their situation. Because culture is so personal, unique and elusive, strategies and remedies different from the more usual or traditional ones may be more effective in redressing the harm experienced. Participation and listening enable activists to provide the most useful assistance to victims—while enhancing their own understanding of the culture in question.

Learning to understand a culture is, of course, a challenging task, and both the participation and listening processes, as well as the fact-finding, may need to take innovative forms, ones that fit more easily with the victims' way of perceiving and relating experiences. Community mapping, which is used by organizations working on

indigenous peoples' rights, is one example. It is an approach that could potentially be employed in other situations and cases.

### **Community mapping: An innovative form of fact-finding**

Indigenous communities in a number of countries have documented their relationship to a specific locale through a process called "community mapping," which generally refers to community-based visual representations, through mapping technologies, of local knowledge. Depending on the goals of the project, the maps may include the use of simple sketches, aerial imaging or technologically more complex devices.

Community mapping is best known for its use in indigenous land claims. Indigenous approaches to land ownership often are not aligned with national land laws and policies of private titling. Community maps translate indigenous people's concepts into a medium understandable by government officials and lend validity to indigenous land claims. They serve as evidence of the cultural importance of land to the groups, focusing not only on territorial boundaries and demarcations, but also cultural representations, such as land use patterns and sites of cultural significance. Community mapping has also been used in natural resource management of traditional lands and resources, and in projects of cultural revitalization.

Community mapping can help explain clearly somewhat intangible relationships to land, and thus can be seen as a medium for intercultural communication. If the community is fully engaged in the process of developing the map, such projects can also be empowering. Meetings where the whole community provides feedback on draft maps help ensure participation and constitute a collaborative assertion of cultural identity.

While community mapping carries with it some risks, it is an approach to fact-finding and documentation that could potentially be very useful in a range of culture and rights cases beyond those mentioned.<sup>1</sup>



- When a community's way of life is under threat, careful listening is critically important. Because of the central, very intimate and often elusive, relationship people have with their own culture, it may be difficult for them to articulate in simple terms the harm that has been done. It is also unlikely that people will use familiar human rights concepts, even about issues that are, at root, human rights problems.

In addition, we should be mindful that many of the cultural aspects of situations are not quantifiable. They are difficult to articulate and hard to pin down. Often what is not quantifiable tends to be ignored. Without careful listening, we may fall into that trap.

- On the other hand, in a situation where a person has been harmed by a cultural belief, institution or practice, respectful listening is essential, because, as has already been said a few times, in addition to the emotional distress caused by the abuse, finding oneself at odds with one's culture can be deeply confusing and disturbing.

### ***Implications for human rights activism***

- There is a practical reason for emphasizing participation and listening in culture and rights cases: Because we are in the very early stages of understanding "culture in human rights" (see Ch. 4), we have much to learn from listening carefully to people affected by abuses related to culture. Careful listening may also enable us to learn more about those values within a culture that are the "functional equivalent" of human rights (see box, p. 49)
- Simultaneous respect for a culture and respect for the individual harmed by the culture requires a particular sensitivity.

### *What culture issue are you concerned about?*

Documenting culture and human rights situations will vary (as will the nature of remedies sought) depending upon whether your concern is one of preserving a culture or you are focused on a "violation by culture." It will also be shaped by the aspect of culture (i.e., which part of the broad definition of culture) you are focusing on, what embodies "culture" in the specific case, and the "cultural rights" standards one is using. For example:

- *The most frequently cited cases of "cultural rights":* The most common such cases center on the rights of indigenous peoples and of ethnic and racial minorities. Also familiar are the rights issues arising around

artistic expression, the freedom to publish books, display paintings, play music or exhibit other art forms.

With regard to the latter, a large number of organizations over the years have documented violations of freedom of artistic expression, and that type of documentation is, in general, relatively familiar and straightforward, as are the remedies.

There is also considerable experience in the human rights movement in documenting violations of minorities' cultural rights, around issues of language, religion, music and art. Minorities' cultural rights claims often focus on issues of discrimination.

With regard to the rights of indigenous peoples,\* access to land, reliance on a community's own justice system, recognition as a distinct people, as well as acceptance of various forms of self-determination—these and other issues have often posed serious challenges, for indigenous groups and governments. At the same time, documentation of violations related to these issues and the appropriateness of remedies have been worked on by a wide-ranging group of organizations, and some ground-breaking advances have been made (including the community mapping just mentioned).

- *Documenting cultural elements within specific rights:* As was already mentioned in Chapter 4, if we use UNESCO's broad definition of culture, there are cultural elements in every human right. Some of these elements have been documented over the years and often familiar remedies sought. This is particularly true for the cultural elements in certain civil and political rights, such as freedom of religion. In some cases, the cultural institution or practice in question comported with rights standards; in other cases, it has seemed or been at odds with them.



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\* While indigenous peoples' concerns are often presented as "cultural rights" issues, the concerns are often, in reality, much broader, spanning the full range of civil and political as well as economic and social rights.

More recently, women's rights organizations and others have documented how culture has affected enjoyment by girls and women of various rights. Girl child access to education (right to education) is one area that is impacted, as is the role of women in parliament (participation in political life) or in speaking up in village councils (freedom of expression). Much of the documentation of these types of cases talks about the particular beliefs or practices underlying the disparities, and includes statistics, for example, that show the proportion of women in parliament relative to their share of the population, or the enrollment of girl children in school, from the beginning of primary school through secondary school, and so on.

***Gender disparity in secondary education: A widening gap***

"While there are signs of progress in terms of gender parity at the primary level, the gap is still noticeable at the secondary level.... The Gender Parity Index (GPI), commonly used to assess gender differences, is the value of an indicator for girls divided by that for boys. ... 56% of children live in countries with gender disparity in primary gross enrolment ratios and, not surprisingly, it is the girls who are generally disadvantaged. One in ten children live in countries where the GPI for primary education is less than 0.85, indicating that for every 100 boys fewer than 85 girls are enrolled. Gender disparity is slightly more widespread in lower secondary education. Only 58% of children live in countries with equal participation in lower secondary education..."<sup>2</sup>

With regard to the cultural elements implicit in economic and social rights more generally, some are making their way into greater consciousness, as is evidenced, in part, by references to cultural "acceptability" in General Comments issued by the Committee on Economic, Social and Cultural Rights (see p. 46). Also, for example, groups concerned with housing rights are increasingly seeking, as a remedy for those who have been evicted, housing that is culturally appropriate.

In other words, with regard to a range of cultural elements integral to various civil and political, economic and social rights, the human rights movement is increasingly documenting them and seeking remedies that take the cultural element into account—either as a positive or negative feature.

### ***The right to housing and culture***

In mid-2005, the Cape Town (South Africa) local government decided to implement an expedited housing process, targeting in particular those members of the area's population living in shacks within an urban area. Under the process, the shacks were demolished and the residents are to be moved into high-density apartments. Soon there were community protests. One of the concerns articulated was that it was not within the community's culture to live in such high-density apartments. Cultural practices, such as the slaughtering of animals and living in extended families, were impeded by the very nature of the apartment complexes. In seeking to implement constitutional guarantees related to housing, the local government had neglected to consult the affected individuals as to what sort of housing would be appropriate for them under the circumstances.

- *Cultural elements within specific rights where documentation is generally not yet well-developed:* There is another layer of complexity in documenting situations of culture and human rights that has received considerably less attention, with the result that relevant remedies are seldom sought.

While human rights groups often investigate and document attacks on communities—whether these take the form, for example, of deprivation of land, banning the use of a community's language or outlawing cultural ceremonies—investigations rarely include inquiries into the impact of the attack on the sense of identity of individuals in the community, their ability to relate to each other, or the community's identity and cohesion. Feelings of personal confusion and loss of meaning may arise in conversations with people in the affected communities, but, as was mentioned earlier (pp. 60-61), they are not normally treated, through documentation, as central facts in a human rights investigation. Arguably, however, they should be, because they are integrally related to human dignity—which is what human rights are all about.

Perhaps an analogous example, related to torture, might shed some light: When, a few decades ago, torture was first brought to international attention, the focus was on the physical impact of torture—the lack of sleep, broken bones, burns, etc. However, as torture victims/survivors received treatment and psychologists/psychiatrists became involved, our "picture" of torture evolved. The psychological and emotional impacts of torture started being documented—not, perhaps, as

***"Social disarticulation" in forced displacements***

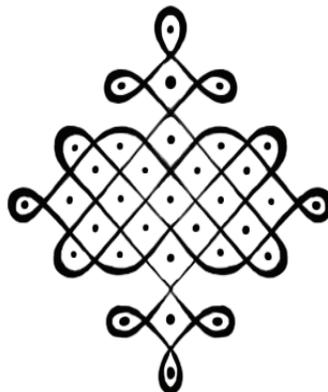
"Forced displacement tears apart the existing social fabric. It disperses and fragments communities, dismantles patterns of social organization and interpersonal ties; kinship groups become scattered as well. Life-sustaining informal networks of reciprocal help, local voluntary associations, and self-organized mutual service are disrupted. This is a net loss of valuable 'social capital' that compounds the loss of nature, physical, and human capital..."<sup>3</sup>

part of the case against a government, but as part of the file compiled by those treating survivors. In addition to lingering fear, anger, nightmares and depression, reports have typically mentioned inability to sleep, flashbacks, loss of a sense of personal boundaries, loss of trust in others, inability to sustain relationships, and so on.

The doctors and psychologists working with survivors have

often argued that in many cases the psychological and emotional impacts of torture—the undermining of the person's sense of self and of relationship—are often more long-lasting and more injurious to the person than the physical injuries.

Drawing on this thinking, let's return to culture. When a community's culture is threatened or attacked, damage is done both to individuals and to relationships within the group. How do we treat as facts to be documented the deep injuries to personal sense of self and/or to the community's relationships and sense of cohesion that can occur in such situations—and which can be evidenced across a whole range of rights (e.g., housing, health, work, education)? What remedies (both preventive and rehabilitative) should we seek for such injuries? These questions are addressed in further detail later in this chapter.



### ***Implications for human rights activism***

- While documentation of the cultural dimensions of various economic, social, civil and political rights is underway, much more can be done and needs to be done. Cultural dimensions of food, housing, etc., will vary from society to society. Documentation at that level is essential if we are to appreciate the complex dimensions of various rights.
- The greatest challenge in this sphere is, perhaps, documenting the more intangible dimensions of rights abuses, such as the impact on a victim's sense of self and relationships with others, or on a community's internal relationships and sense of cohesion.

### ***History and the debate around sati***

"...[A]s the nineteenth century progresses, at a symbolic level the fate of women and the fate of the emerging nation [India] become inextricably intertwined. Debates on women, whether in the context of *sati* (see box, p. 37), widow remarriage, or *zenanas* (separate women's quarters) were not merely about women, but were also instances in which the moral challenge of colonial rule was confronted and negotiated. In this process, women came to represent 'tradition' for all participants: whether viewed as the weak, deluded creatures who must be reformed through legislation and education, or the valiant keepers of tradition who must be protected from statutory interventions and be permitted only certain kinds of instruction. For the British, rescuing women becomes part of the civilizing mission of colonization. For the indigenous male elite, protection of their status, or its reform, becomes an urgent necessity in maintaining the honor of the collective—religious or national... Tradition was thus not the ground on which the status of women was being contested. Rather, the reverse was true: women in fact became the site on which tradition was debated and reformulated. What was at stake was not women but tradition." <sup>4</sup>

### ***Researching history to understand the issues and help frame the debate***

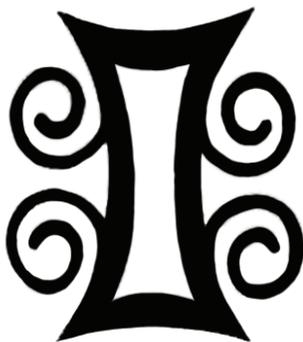
Because of the highly emotional nature of many discussions around culture, along with the frequent political manipulation of cultural beliefs, institutions and practices, human rights activists face a challenge in their

fact-finding and documentation that they do not face when addressing most other rights. The appeal to “tradition” often made in defending specific cultural institutions and practices assumes that the institution or practice as it is currently understood has a solid historical pedigree. That, however, is often not the case. Current representations may, in fact, be misrepresentations of the institution or practice as it existed in the past—or its roots may not be as culturally grounded as is generally believed. Thus, it can be critical for human rights activists to do historical research to understand more fully where an institution or practice comes from, and how it has changed over time. (See Communal Land Rights Act case study, Appendix 1).

*Understanding the institution, practice and context is critical*

Where a specific cultural belief, institution or practice is a focus of concern, it is important not only to know its history, but to develop other detailed information about it. For example:

- *Learning about the roots of an institution or practice:* People’s attachment to an institution or practice is often based on what they believe is its origin. If they understand a practice to be religiously mandated, for example, it may be harder to challenge on human rights grounds. For some time, for example, it was believed that female genital mutilation (FGM; see case study in Appendix 1) was a practice grounded in Islam. Researchers determined, however, that FGM was practiced during the time of the pharaohs in Egypt, that references to it in the Koran are largely unspecific, and that it is not, in any case, specifically enjoined by the Koran.<sup>5</sup> In addition, they found that it was and is practiced in Christian and other communities. In other words, it is a practice based largely in custom rather than religion.



***FGM and alternative rituals***

FGM is accepted by many as a “rite of passage” from girlhood to womanhood. Acknowledging the emotional and psychological importance of such rites in a person’s life, some NGOs in Kenya have encouraged the development of alternative “rite of passage” rituals that avoid the physical cutting of FGM while enabling a young woman to take that important step into womanhood. Many young women have embraced the new rituals.<sup>6</sup>

- *Determining the extent of a practice:* How widespread is a practice? Is it limited to certain groups or locales? This is fundamental information. For example, *sati* (see p. 37) is sometime talked about as an Indian or Hindu practice, and someone horrified by it could easily wonder—as many have: What was wrong with “Indian culture,” or with Hinduism, that it would allow such a practice? Researchers have determined, however, that *sati* was never a widespread Indian or Hindu practice, but was, in fact, limited to specific castes and regions of the country, and to specific Hindu communities.<sup>7</sup>
- *Understanding why people are attached to an institution or practice:* People are attached to a cultural institution or practice for a variety of reasons—family loyalty or pressure, religious beliefs, pragmatic considerations and so on. Their willingness to change or abandon the institution or practice will depend, in part, on their reasons for being attached to it in the first place. These reasons should be an important focus of fact-finding.
- *Identifying who is supporting the institution or practice, and who is opposed to it:* As was mentioned in Chapter 1, there are typically different opinions in any culture about its institutions and practices. Identifying the interests and power of those supporting a problematical institution or practice, as well as the existence of “competing” or dissenting voices in the culture, is important to document. Those who disagree with an institution or practice can help activists understand it more fully, as they will often have different information about it than

### ***Child marriage—why does it continue?***

In some cultures, children are often married when they are quite young—as young as 3-4 years old. Sometimes, even if the practice is illegal (and it typically is), it continues. In India, for example, under a 1929 law, passed during colonial times, the minimum age of marriage was set at 15 for women, 18 for men. In 1970, these minimums were raised to 18 and 21. Despite this, in pockets around the country, child marriage persists. The reasons given include concern about the chastity of the girl (as she gets older, she is increasingly at risk); the desire to shift the cost of supporting girl children to another family; and the cost of dowry, which tends to increase as the girl gets older (in some cases, for example, the more educated the girl, the larger the dowry). In order to end the practice of child marriage, attitudes and beliefs about it need to change, but this can be very difficult (see the case of Banwari Devi, p. 65). NGOs working to end child marriage recognize that other, practical steps, such as discouraging dowry, also need to be taken.

will supporters. They may be allies in the human rights struggle, and their existence within a culture can be helpful in legitimizing human rights critiques—in other words, it is not simply human rights activists who are concerned about what is happening. Indeed, the interests of those supporting an institution or practice are themselves likely to be diverse, and it may, for example, be more feasible to dialogue with one group than with another, depending upon their interests.

### ***Implications for human rights activism***

Research on contextual issues is a part of any good human rights fact-finding, but it is particularly important for issues where culture plays a significant role. It can have a significant impact on:

- our understanding of an issue, which is likely colored by our own cultural “lens”;
- identifying the key human rights concerns, which may be more complex than we are aware;
- framing of the issue for public discussion, as we become more aware of people’s current understandings of the practice and concerns about threats to their culture;
- strategy, since the effectiveness of a strategy will depend upon the reasons people are attached to a practice, etc.; and
- determining an appropriate remedy, since cultural complexities or sensitivities should play a role in identifying the remedy to be sought.

### *A way of life, the social fabric and fact-finding*

One’s fact-finding and documentation are shaped and directed by the ultimate purpose for which the information will be used. When a way of life is under threat or the social fabric of a community has been torn, an important goal of any action is likely to be enabling the way of life to continue or the social fabric to be mended.

Documenting threats to a way of life means, first of all, having evidence about what constitutes that way of life. If a social fabric has been torn, we need to be able to produce evidence about what the social fabric was and how it has been damaged. This type of documentation is not the norm in human rights work.

- International and most national-level human rights guarantees are embodied in laws. The terms of a law normally make relatively clear which facts are relevant to the application of the law, and which are not. A fact-finder in a specific situation will then look for those facts

that relate to the articulated terms of the law, and ignore many others that, by the terms of the law, are not relevant. It has often been noted, when an approach to a situation is defined or limited by a legal framework or, more explicitly, is directed to developing a legal case, the full complexity of the situation is rarely documented or perhaps even understood.<sup>8</sup>

While this may or may not be problematical in other circumstances,

### ***The Garífuna way of life under threat***

What does it look like when a way of life is under threat? Gregoria Flores of OFRANEH describes one situation:

A public institution, for instance, may come to the community and organize a meeting and it is to tell us that a "certain" part of the community is now going to be owned by the State. They say these areas are in danger and they have to be taken care of and, therefore, they have come to "take care of" these areas. At the time this whole process is initiated, they have not come to ask *you* what you want, or what you *permit* them to do. Instead, it is an invasion of the territory of the communities, without allowing that community itself, via the authorities, to determine what is feasible and what is not feasible. Instead, they tell you: here is a proposal, here is a declaration of a protected area and, therefore, members of the community can no longer do certain things.... [T]hey can no longer go to cut down materials for their houses, because it is a forest area and the trees have to be conserved. They can no longer hunt because the animals are in danger of extinction. They can no longer go out and get firewood, or sell it, or use it to cook.

At the same time, this affects processes of "culturalization." I stop buying wood, and soon I have to buy gas instead. I stop getting local materials to construct my house, because now I have to buy lamina, or sheet materials. Now I cannot hunt animals to eat anymore; I have to buy meat from the supermarket. Now I cannot sow crops anymore; I have to go buy rice. The right I have to my way of life is increasingly being denied. This is what happens when such institutions or companies come. What they are doing through their strategies is denying the right to our livelihood. This, therefore, is what the people in our communities express—that they can no longer do those things.<sup>10</sup>

## THE BANYAN TREE PARADOX

when culture plays an important role in a situation or case, an approach that is based solely on a legal framework will inevitably leave out many of the specifics, which in turn embody so much of the complexity of a culture. A number of organizations have found that, as a result, the reality of a culture can become distorted in the very process of trying to state a problem as a human rights claim.<sup>9</sup>

- Much of traditional human rights fact-finding is focused on “who,” “what,” “where,” “when,” “why,” and “how.” The goal of the fact-finding is identifying what happened and who did it, in order to assign responsibility and achieve accountability. This type of approach is critical in a large number of situations.

If, however, the ultimate goal is not simply accountability in legal terms, but a reintegration of a community, then the facts collected should be those that will aid in the process of reintegration. What was lost or destroyed, and how did this affect cultural beliefs, institutions and practices? What happened to social cohesion and why did it happen? What would it take to restore or recreate social cohesion and allow for the resumption of a way of life?

These are not questions with easy answers. We must, however, be aware of these challenges to our traditional fact-finding and documentation, and recognize the importance of exploring approaches that allow for a fuller representation of a situation. The Peruvian Truth and Reconciliation Commission had experience in addressing such a challenge (see box).

These questions should also lead us to ask whether the human rights movement needs to develop or bring in new knowledge and skills—in areas such as sociology, anthropology and psychology. The need for these disciplines has already been referred to above, pp. 68-69. Their knowledge and skills are not only essential in the areas of fact-finding and documentation, but also in the identification of possible remedies.



***The Peruvian Truth and Reconciliation Commission  
(CVR-Peru)***

The CVR-Peru's mandate was "to register violations, to explain the violence, and to establish individual responsibilities" for human rights violations committed from 1980 to 2000 in Peru in the context of the war that *Sendero Luminoso* (Shining Path) fought against the Peruvian State. The Commission determined that the violence was rooted in profound disparities between the indigenous and non-indigenous sectors of Peruvian society. Most of the victims of the violence—committed by both *Sendero Luminoso* and the government—were poor, rural indigenous people, the very people on whose behalf *Sendero Luminoso* claimed to be fighting.

After gathering data about the horrifying levels of violence during those years, the Commission concluded that there needed to be a reestablishment and re-foundation of ties among Peruvians—a new social pact—which would fully guarantee the rights of the indigenous peoples of Peru and their integration into Peruvian society. There was a need for a newly created society.

At the beginning of their work, Commission members had serious disagreements about the methodology to be used in their fact-finding. Unable to resolve their disagreement, they split into two groups, each using a different approach. The first approach—a more "traditional human rights" approach focused on identifying who individual victims were and who was responsible for specific abuses (massacres, etc.)—was to allow for specific people to be brought to account and reparations to be provided to their victims.

The second approach (less traditional in the human rights field) involved anthropologists, who focused on understanding and describing communities, their internal dynamics, the dynamics between them and the State, and how the violence affected the communities as a whole. This approach promised a two-fold benefit: 1) helping determine appropriate reparations for the communities themselves; and 2) providing information that would help identify strategies for establishing new relationships between indigenous communities and the rest of Peruvian society, between those communities and the State.

In the end, all concluded that the two approaches proved to be complementary, enabling the Commission to develop the full picture they needed to accomplish their mandate.

(This case study is set out more fully in Appendix 1)

**Notes**

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1. This summary is based on a paper prepared for IHRIP by Marley Crutcher. A useful summary of the process of mapping is contained in Mac Chapin and Bill Threlkeld, *Indigenous Landscapes: A Study in thnographic cartography* (Washington, D.C.: Center for the Support of Native Lands, 2001).
2. *Global Education Digest 2005: Comparing Education Statistics across the World* (Montreal: UNESCO Institute of Statistics, 2005), 25.
3. Michael M. Cernea, "Risks, safeguards and reconstruction: a model for population displacement and resettlement," in *Risks and Reconstruction: Experience of Resettlers and Refugees*, eds. Michael M. Cernea and Christopher McCowell (Washington, D.C.: The World Bank, 2000), 30.
4. Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (Berkeley: University of California Press, 1998), 79.
5. See Muslim Women's League, "Female Genital Mutilation," at <http://www.mwlusa.org/publications/positionpapers/fgm.html>
6. <http://www.oneworld.org/ips2/jan98/fgm.html>
7. Lata Mani, 1.
8. Jane K Cowan, Marie-Bénédicte Dembour and Richard A. Wilson, "Introduction," in *Culture and Rights: Anthropological Perspectives*, eds. Jane K Cowan, Marie-Bénédicte Dembour and Richard A. Wilson (Cambridge: Cambridge University Press, 2001), 11.
9. See, for example, the discussion of this issue in Gad Barzilai, "The Evasive Facets of Law: Litigation as a Collective Action," *Adalah Newsletter* 10 (February 2005): 2, at <http://www.adalah.org/newsletter/eng/feb05/ar2.pdf>
10. Interview with Gregoria Flores, Director of OFRANEH, by Nnenna Ozobia of the IHRIP staff. October 18, 2005. Translation from Spanish by Ms. Ozobia.

## Chapter 7

### Developing strategies around culture and human rights issues

Many familiar strategies—law reform, litigation, submissions to intergovernmental human rights bodies and so on—can be used in tackling a number of culture and rights issues. However, because culture is so complex, and responses to culture and rights issues can be so highly-charged and emotional, developing effective strategies to address many of them can be challenging.

This chapter includes the following sections:

- Cultural change takes time
- Undertaking a risk assessment
- Creating space for discussion—different contexts, different rationales
- Framing the terms of public discussion
- Culture as an element of advocacy
- Alliances around culture and rights issues
- Making a “cultural rights” claim
- The constraints of a formal legal framework—and the importance of openness, flexibility and creativity

#### *Cultural change takes time*

Some development workers and anthropologists have maintained that human rights activists too often work to get a law changed, and once that is accomplished, they go home, feeling that they have done their job. But, these same individuals continue, that is not how real change happens. Real change happens in the family and in the community.

To the extent that this statement is true, it has a particular relevance for issues where culture plays a large role. Law reform and/or litigation are important potential strategies in much of human rights work, and have a role to play in many situations where culture features prominently. At the same time, if people in communities do not agree with a new law or the results of a court case, they may not follow it or may seek to circumvent it. In other words, while law reform or a positive outcome of litigation can seem to bring about rapid change, cultures typically resist this type of change. With so many individuals sharing beliefs, being involved in and attached to their cultural practices and institutions, change needs to occur over time.



### ***The law and cultural change in Kenya***

In December 2000, two sisters, Edna and Beatrice Kandie, ages 17 and 15 respectively, secured an historic court ruling in Rift Valley Province, Kenya, prohibiting their father from subjecting them to FGM. (See FGM case study, Appendix 1.)

Kenyan human rights activist Ken Wafula set a world precedent when he used the courts successfully to seek protection for the Kandie sisters. In 2001, the international women's human rights NGO, Equality Now, sponsored a speaking tour in rural Kenya for the Kandie sisters to talk to students about their legal victory and the dangers of FGM.

The tour inspired others. Following the speaking tour, Ken Wafula was approached by several other girls and has helped a good number of them to successfully take action to get court protection from FGM.<sup>1</sup>

### ***Implications for human rights activism***

- ❑ The gradual nature of cultural change underscores the importance of developing and maintaining strong, long-term relationships with communities.
- ❑ In most cases where culture features prominently, law reform or litigation, standing alone, will be inadequate to bring about social change. Community education about human rights (and options) can be critical in encouraging change, as knowledge of rights (and such options) can influence people to look at and rethink cultural practices.

### ***Undertaking a risk assessment***

Because people are generally averse to cultural change—particularly change that occurs rapidly—there are risks for human rights activism in addressing issues where culture plays a large role. It would thus be important for organizations, before they decide to take on a culture-related issue, to do an assessment of potential risks:

- What are the chances for backlash from the community if we start work on this issue? Whose power in the community would be threatened? What are they likely to do in response?
- What would be other reasons for backlash? How could we address the community's concerns and mitigate them?
- What are the risks for the community or the individual victim in the proposed action? Are they fully aware of them?
- Are we ready and able to take responsibility for the consequences of our actions through making a long-term commitment to the community?

These are just a few of the questions it would be useful to ask. Some of the fact-finding discussed on pp. 78-80 would help inform such a risk assessment.

*Creating space for discussion—different contexts, different rationales*

- There are many reasons why, from a human rights perspective, participation is a good thing. When the situation involves threats to a culture, encouraging the affected community's participation should be a central feature in an organization's strategy. Who can better explain the dynamics and features of a culture than those who live it every day? Who else can better suggest what remedies would be compatible with the values and needs of the community? Moreover, threats to a culture oftentimes leave members of the community feeling disoriented and powerless. Encouraging participation in decisions about their situation is a way of supporting the community's sense of themselves.
- Public discussion of a cultural institution or practice is very important in enabling a process of long-term change to happen. Without broad discussion of problematical institutions or practices, people will likely not be moved to rethink their attachment to them.

The discussions can take place in small groups, in educational forums, community meetings, or in the media. Human rights groups often use theater, music or other arts to facilitate such discussions. Frequently, certain issues (particularly those related to sexuality) are taboo in a community, and public discussion is very difficult to start or sustain. In such cases, it may take a rare, courageous, person to get the discussion going.



### ***Creating space in Nigeria***

BAOBAB, a women's rights organization in Nigeria, encourages discussions of sensitive issues through working against the silencing of such discussions and ending any climate of fear that may be an obstacle to them. BAOBAB initiated a series of workshops in 2000 in which members of Muslim communities—members of the *ulema* and ordinary Muslims, rights activists, conservatives and progressives from different walks of life and parts of the country—came together for several days. Focusing on 30 issues of particular importance to women, participants examined Koranic *surahs* and *hadith*, discussed both dominant and less well-known interpretations of these, and looked at the actual constructions of Muslim laws in countries and communities around the world. The workshops examined how Muslim laws and practices do or could establish and promote women's rights, and critiqued negative constructions and practices, even when the latter are claimed to be Islamic. By hosting such workshops, BAOBAB empowered many of the participants with the knowledge and confidence to challenge assertions that rights violations in the name of Islam and in support of *sharia* should be ignored, and to work instead towards progressive visions of Muslim laws.<sup>2</sup> (See the Amina Lawal case study, Appendix 1.)

### *Framing the terms of public discussion*

An important question facing human rights organizations when addressing controversial issues where culture plays a significant role is how they would like public discussion and debate on the issue to be framed. The debate may already be underway or it may not yet have started. Once an issue has been identified in the public's mind as one where "culture" or "tradition" is at stake, it may be hard for an NGO to move the debate onto other grounds. Thus, if the discussion is not yet underway, the earlier the NGO initiates it on the terms it has decided upon, the better. If it is already underway, the group will need to decide if it should enter the discussion on the already-established terms or try to shift its terms.

In either case, the NGO will likely need to do the initial research and analysis on the history, context and complexities of the cultural beliefs, institutions or practices in question, as discussed in the previous chapter (pp. 78-80). In either case, a key question facing many human rights groups will be whether to pursue a public discussion and other advocacy within the specific cultural framework or outside of it. This question arises particularly with regard to issues related to religious beliefs and practices. BAOBAB in Nigeria, for example, made a decision not to frame as human

rights cases those cases it took up where women had suffered from the imposition of *sharia* law, but chose instead to fight the cases by putting forward alternative interpretations of Islam. (See the Amina Lawal case study, Appendix 1).

A few things should be mentioned here:

- Extensive literature exists that focuses on the compatibility of human rights with various religions and religious traditions. That literature can be very important for groups trying to make a strategic decision about whether to challenge a particular practice within the framework of the specific religion (i.e., through suggesting different interpretations of the religion), or to present the challenge on *explicitly* human rights grounds.

### ***Working with an existing frame***

In 1999 a father in Uttar Pradesh, India, was accused of sexually abusing his 11-year-old daughter; the mother brought the case to Vanangana, a women's human rights NGO. The case became public, and served as the basis for a broad campaign, which included a publication, education component, protests, public hearings, filing a complaint with the National Commission for Women, and a court case. Among the arguments made by the father and his supporters was that the campaign was a Western conspiracy against the Indian value system. Vanangana struggled in its public education campaign with how to respond to this framing:

...[T]wisting the cultural argument in favor of the issue was one of the key strategies.... That was a tough ideological question, and it will always remain a point of discussion whether those compromises should have been made or not. I would like to describe some of them, like the institution of family. It was a cautious strategy not to get into the debate of critiquing the institution, but rather to limit our argument to what happens if it becomes an undemocratic institution. The fact that Chitrakoot was a sacred place was used by the opposition to say that by raising an issue like incest, the activists had given a bad name to the place. Here also the sacredness was used differently to say that it was a virtue that this sacred land has started the struggle. It was very clear that no criticism of religion or cultural practices was allowed; the arguments had to be found within the given socio-cultural framework.<sup>3</sup>

## THE BANYAN TREE PARADOX

- If the question arises in the context of a case that is being tried under a traditional or alternative legal system, an important consideration is whether there is an overriding framework that would subordinate the cultural framework. In other words, is the case before an alternative tribunal which functions in a country with a national constitution having a strong bill of rights (or where the country has international human rights obligations under treaties it has ratified)? This question then is not simply one of framing, but of the extent to which that tribunal is legally subordinate to or independent of the national legal system.
- For a strategy to be a “human rights strategy,” it is not necessary that human rights be the *explicit* rationale for a case. There may be reasons why an organization would want it to be, but other times it may decide that explicitly talking about human rights would hurt their client’s case or progress on the particular issue. In such situations, their strategy would still be a “human rights strategy” as long as the core motivation for the action is a concern for human rights and the central analysis of the issues has used a human rights framework.

Factors relevant to making a decision about whether to explicitly use a “culture framework” or “human rights framework” in a particular case would include:

- What approach would feel more suitable to the affected communities or individuals? They may not, for example, want to be involved in a case that could be perceived as challenging the fundamental values of their community, and thus would want it to be argued within the cultural framework.
- Which approach would provide greater relief and a more appropriate remedy for the client (whether individual or community)?
- To what extent does the organization have as a goal changing the dominant interpretations of the particular cultural or religious tradition? How active a program does it have to this end?
- To what extent is the organization trying to gain public acceptance for the legitimacy and importance of a human rights framework?
- To what extent are there competing voices and is there “room”—and the possibility of movement—within the particular cultural or religious tradition for an interpretation that is in line with human rights guarantees?
- How likely is the more “acceptable” interpretation of the tradition or practice to prevail?
- If a case is being taken to a court that functions within the particular tradition, would the court likely honor an explicitly human rights claim?

*Culture as an element of advocacy*

As was mentioned in Chapter 4, culture can support human rights in important ways. Similarly, culture can be a valuable component of advocacy and campaigns around culture and rights issues. This can take a number of forms. Two examples:

- Where a culture is under threat, including presentations of its art or performances of its music in an advocacy campaign can be a creative way of drawing the attention of the broader public to the culture's concerns. It can also be effective in highlighting the ways the culture's loss would be a loss for the society as a whole.
- When an organization's concerns are about abuses arising from cultural institutions or practices, talking about or presenting positive aspects of the culture can be important in helping allay a society's fears that their culture as a whole is under attack. Positive elements of the culture can also, at times, provide valuable counter-arguments to a harmful tradition or practice.



*Alliances around culture and rights issues*

- Because of the need for allies in the process of social change and because, at the same time, the issue of culture is so complex and can be used to both negative and positive ends, it is important to be aware of and well-informed about the interests of those on different sides of an issue. Groups at one level may appear to be allies, while at a deeper level they are, in fact, aiming towards quite different ends—or vice versa. For example, in the Vanangana case above (p. 89), the organization was surprised to find that some of their strongest support came from the Dalit community. The father charged with incest was a Brahmin, and in that district Brahmins have traditionally been the landlords while Dalits work as agricultural laborers. There was strong anti-Brahmin feeling in the heavily feudal district, and this became an advantage for the campaign.

- Cultural issues are often a way for a community to assert itself—its autonomy, its interests and identity. In such a context, challenges to specific cultural beliefs, institutions and practices can be and often are seen as threats to that autonomy or identity. Consequently, it is often more effective if members of the community are the ones raising human rights concerns about certain practices or institutions. While they may not be immune to attack, they are less vulnerable to charges of seeking to undermine the group's interests and identity.

Conversely, international human rights groups can be very helpful to local organizations on a large range of issues, and international letter-writing campaigns have often had a positive effect on government actions. When the issues in question relate to culture, however, it may be that international pressure will prove to be counter-productive, because it may heighten the community's fear that its way of life or its beliefs are threatened by outside forces. In such situations, it may be wise for local groups not to seek the involvement of international groups.

### ***The Amina Lawal case and international pressure***

During work on the Amina Lawal case (see case study description in Appendix 1), BAOBAB issued an open letter to international human rights groups, asking them not to send letters and petitions to authorities about the case. BAOBAB's concerns were principally that the language and style of the petitions could provoke a backlash among those supporting the imposition of *Sharia* punishments. In an interview, one of the leaders of BAOBAB said:

The other thing that we were trying to avoid was the sense that [Muslim] people in Nigeria—including people who are very uneasy about the way that these acts [related to the imposition of *Sharia* law] have been passed, about the contents of them, about the nature of the convictions—[should] have to feel defensive about being Muslim and wind up saying, "Oh yes, that's what it [*Sharia*] says" although it doesn't say that. As part of that, when everything is seen as the West criticizing us, it really makes it a lot more difficult for us to make the point that respect for rights can be incorporated into different versions of Muslim law, and have been incorporated.<sup>4</sup>

### *Making a "cultural rights" claim*

If an organization decides to use an explicitly human rights framework for a case, there remains the question of whether to state the claim specifically as a "cultural rights" or "right to culture" claim rather than (or in addition to) basing the claim on other human rights provisions. Decisions about which approach to take can vary, depending upon a number of factors (including those considered in many other cases, such as support provided by existing precedent or the likely response of the court that will hear the case). Decisions are, in any event, best decided within the context of the specific cases.

Reasons for stating a claim as a "right to culture" claim would be:

- The right to culture is recognized in international law. Such a claim would add to the jurisprudence on the right, which, in turn, would aid the development of international understanding of the right to culture;
- Framing a claim using an internationally-agreed-upon rights standard would likely legitimize the claim at the domestic level. It would serve to educate the judiciary and further public awareness of the existence of the right to culture;
- One of the most difficult challenges facing many communities is having their culture recognized and acknowledged. A "right to culture" claim is a way of publicly affirming the existence of the culture;
- A right to culture claim could be a way of acknowledging the diverse bases and forms for exercising rights;
- Most importantly, a right to culture claim, if recognized, would provide the community with some breathing space necessary to pursue its way of life.

Potential drawbacks in framing a case as a "right to culture" case:

- International standards related to the right to culture are relatively vague and incomplete. Such vagueness could discourage a court from recognizing a claim. (Given this and the general unfamiliarity of courts with culture issues, it would be particularly important to ensure that the court hearing the claim would be sensitive to it);
- It may often be that the central issues in the case could be framed using other rights, such as the right to housing, land, food and so on, which are more fully formulated at this point. Such a framing would be easier in some ways to explain to a public audience and might put a court at greater ease to rule in favor of the victim;
- Because the right to culture is complicated and can easily be used by politicians as a power play and/or by other groups for negative purposes (e.g., to encourage discrimination or abuse of other groups), framing an issue as a right to culture issue means that it might be harder to control the terms of public discussion of the issue. A careful

analysis of the interests and power of the different actors in the context thus becomes critical. (See box);

### ***The abuse of a culture claim in the United States***

The success of mobilization and litigation in advancing the rights of African-Americans and other minorities in the US in recent decades has meant that race-based discrimination is no longer legal. Those opposed to these gains have turned to "culture" to pursue their interests:

While civil rights reforms are framed as having fully rejected race-based assumptions that African Americans are inherently inferior, racial *laissez-faire*-ism [colour-blindness] permits differential values assigned to individuals and communities on the basis of advanced or disabling culture. Thus, continuity in the material status of African Americans is consistent with a fully functioning regime of civil rights because expectations of cultural equity have never been guaranteed.<sup>5</sup>

- When making a right to culture claim, a group or community has to explain in relatively simple terms what comprises the culture. This skeletal description may feel like a betrayal of the culture's richness and complexity.
- If then courts take the positive step of recognizing right to culture claims, they, on occasion, have required the communities in question to set criteria for who should and should not be recognized as belonging to the particular cultures. Developing such a "checklist" has the drawback of simplifying the complexities of a culture and "freezing" it in time, preventing it from changing, as cultures are wont to do. An organization may, for very good reasons, decide it will make such a claim, but should recognize these limitations or potential drawbacks.

### ***A difficult strategic choice***

"Culturalist claims may be only slightly more sophisticated versions of ethno-nationalism, or they may represent what has been called a 'strategic essentialism.' Activists ... are often well aware that they are essentializing something which is, in fact, much more fluid and contradictory, but they do so in order that their claims be heard."<sup>6</sup>

*The constraints of a formal legal framework—  
and the importance of openness, flexibility and creativity*

As human rights activists, most of us are used to basing our work on human rights law. However, a number of critiques have been developed of formal legal systems as they treat issues related to culture, and these critiques, in turn, have a bearing on the use of human rights law. The critiques have arisen particularly in the context of indigenous people's concerns, and there is considerable literature on the inadequacy of formal legal systems to properly reflect the different worldviews of many indigenous peoples. Another, not unrelated, area of study has been the relationship of formal legal systems to traditional (often tribal) legal systems, and again, there is considerable literature on this.<sup>7</sup> We are not going to duplicate or summarize the literature in these two areas, which can be explored independently by those with a specific interest in it, but will simply mention two somewhat separate points that articulate challenges for human rights activists in addressing culture and human rights issues:

- The role of the state, of law and lawyers, in the development of and advocacy around international human rights standards has meant that quite technical, often legalistic, language features prominently in much human rights work. As a result, many vulnerable communities whose culture is under threat may not understand or be able to relate to the human rights framework, even though the threats they face are quintessentially threats to their human rights.
- Mention was made in Chapter 1 about how aspects of our identity may be in conflict with each other—for example, when a woman suffers from a particular cultural practice, but wants also to remain part of her community. This type of internal conflict often seems to force a person to one side or the other—either with one's culture or with women's rights. It is important to ask ourselves whether there isn't some "third way" that moves beyond such a dichotomy:

[Various constraints on pursuing formal legal remedies] have led to activist strategies and scholarship that engage with the norms that sustain and regulate these relationships (such as kinship) "on their own terms." This engagement with community norms (also referred to as customary law) has prompted attention to micro-level forums, such as intra-family and community-based dispute-resolution processes and made them sites for human rights struggles. These forums play a key role in enabling or constraining people's ability to claim whatever rights are available to them under custom, national laws or international human rights principles.... The strategies adopted or proposed by activists and scholars engaging with these customary fora include:

***OFRANEH's experience with non-legal and legal language***

OFRANEH works with Garífuna communities in Central America. As part of their advocacy work, they help communities prepare to tell their own stories:

One of the most strategic and most difficult parts of working in human rights and jurisprudence is the preparation of the witnesses before presentations. This is not unique to the Garífuna. Many do not have professional preparation. They say what happened to them in a general way. The people don't tell you, "They denied me my right to life." They say, "They stabbed me." They tell you, "They almost killed me," but not, "They fired shots at me." So the key is being able to write up what they are revealing to you and specify the crime that has been committed... But the element of understanding the Garífuna culture is very important. You can have others who help you understand the jurisprudence, but, in the end, you are the only one who can defend your life, because only you know your life.

One cannot just "delegate" or "hand over" the essence of the life of other people in these processes. Two people can be from the same group, but one was born in the city, grew up in the city, and does not really have a sense of how to defend those who live in the communities, and does not really understand the meaning of the land for those that live there. One thing we must understand is that if we have not lived it and we want to help, we must "accompany" others. *You* have the last word, and I accompany you in the process. But I do not do things *for* you. If I accompany you, I can obtain the necessary information and give it to you and ensure that you have the quality information necessary to make those decisions.<sup>8</sup>

- Enforcing obligations recognized under the relevant customary law or community norms;
- Gathering empirical evidence of flexibility and variation in customary practice and its responsiveness to changing social circumstances, in order to challenge rigid, hierarchical and ahistorical assertions of custom;
- Invoking general ideas of justice and fairness within a community; and
- Challenging the disingenuous use of custom to preserve inequitable social arrangements.

The challenge is to craft a legal framework of rights and citizenship that adjudicates fairly in the complex reality of harmony and tension between individual and group claims. One that does not disregard the community context in which people are embedded, but at the same time does not legitimize a narrow definition of personhood that is based on status in hierarchical social relationships.<sup>9</sup>

Reflections on such a challenge in the Indian context is set out in the box on the next page.

### ***Implications for human rights activism***

- Many activists are familiar with the challenge of “translating” human rights language into accessible terms—or understanding how problems not expressed in human rights language relate to human rights. This challenge is, however, particularly acute when the communities in question are speaking about cultural issues that are not easily expressible or understandable in legal terms.
- As has been reiterated a number of times throughout this publication, work on culture and human rights issues requires an unusual openness, flexibility and creativity on the part of activists. Nowhere is this truer than in regard to this last challenge posed: to develop a “third way” to address issues when neither the existing formal legal system nor traditional legal system is fully adequate.



### ***Searching for an alternative in India***

"Liberal feminists have been attacking customary law among the tribal peoples in the North East [of India] on the ground that it ... does not treat men and women equally. At a purely superficial level this stand is absolutely correct from the tribal women's point of view.... But international human rights law also recognizes the rights of indigenous people to their way of life.... [S]ome activists are inclined to give primacy to the rights of the community and the rights of indigenous people over the rights of the tribal woman....

"Can we think of a third model of human rights? A model which gives equal importance to individual and collective rights? I think we can. But it requires that we build a jurisprudence which would question the premises upon which the present human rights and some kinds of feminist jurisprudence are based. We have to create new human rights.... [T]he existence of an alternative legal system assumes a very important role in showing us that there are other ways for dispute settlement than the so-called modern legal system. It is in this context that the fight of indigenous peoples all over the world, including in India, against the imposition of the alien legal system on them assumes a special political significance....

"The destruction of tribal societies means the destruction of ways of life, philosophies and traditions which are a rich source of cultures which teach values based on co-operation, rationality and consensus.... When I say this it does not mean that I am advocating the 'preservation' of these societies in museums. Nor do I think that we can revive the past. What I am saying is that there are alternatives to filing writ petitions on grounds of violation of human rights....

"What are the other ways? First of all there is a need to build a movement based on tribal socio-cultural traditions ... an alternative to a movement cannot be a petition. [W]e should resort to the law only when the movement is strong enough to carry the law reform forward.... Having said this I feel that we do need to build a movement for creating a new jurisprudence which draws on the human rights law and certain feminist legal critiques....

"... But we cannot hope to begin this task without a political understanding of our society and economy and without a vision of a future society. If our vision is limited, so will be our legal strategies. It is not an easy task. But then nothing worth doing is or has been easy. There lies the challenge." <sup>10</sup>

## Notes

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1. Based on a November 15, 2002 media advisory issued by Equality Now, which is headquartered in New York.
2. Drawn from *BAOBAB for Women's Human Rights and Sharia Implementation in Nigeria: The Journey So Far* (Lagos: BAOBAB, 2003), 33.
3. Adapted from <http://www.humanrightsconnection.org/advocacy/case-studies/confronting-child-sexual-abuse/>
4. "New Zeal for *Sharia* Penalties Reflects Political Climate, Says Rights Activist", allAfrica.com interview (November 13, 2003), at <http://allafrica.com/stories/200311131020.html>
5. Kimberle Crenshaw, "Were the critics right about rights? Reassessing the American debate about rights in the post-reform era," in *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture*, ed. Mahmood Mamdani (New York: St. Martin's Press, 2000), 68-69.
6. Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson, "Introduction," in *Culture and Rights: Anthropological Perspectives*, eds. Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson (Cambridge: Cambridge University Press, 2001), 10.
7. See, for example, S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996); Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988), 869-896.
8. Interview with Gregoria Flores of OFRANEH by Nnenna Ozobia of the IHRIP staff, October 18, 2005. Translation from Spanish by Ms. Ozobia.
9. Celestine Nyamu-Musembi, "An Actor-oriented Approach to Rights in Development," *IDS Bulletin* 36, no. 1 (January 2005), 46.
10. Nandita Haksar, "Human Rights Lawyering: A Feminist Perspective," in *Engendering Law: Essays in Honour of Lotika Sarkar*, eds. Amita Dhanda and Archana Parashar (Lucknow: Eastern Book Company, 1999), 82-88.



## **Appendices**



**Appendix 1**  
**Case studies discussed at the Siem Reap workshop**

**Case study 1**

***The Amina Lawal Case***

Presented by Sindi Médar-Gould, Executive Director  
BAOBAB for Women's Human Rights

BAOBAB for Women's Human Rights is a women's human rights organization that protects the rights of women in Nigeria under the customary, statutory and religious legal systems. BAOBAB is part of the international solidarity network, Women Living under Muslim Laws. BAOBAB's vision is that women's human rights should become an integral part of everyday life. BAOBAB was the lead defense organization for Amina Lawal.

Amina Lawal, a divorcee with three children living in Katsina state in northern Nigeria, was in a relationship with a man in her village who promised to marry her. When Ms. Lawal became pregnant, her fiancé acknowledged that he was the father, and the village they lived in acknowledged this as well. When it came time for them to be married, however, Ms. Lawal's father was unhappy with the bride price offered and wanted more money. He took the case to *Sharia* court and soon Ms. Lawal's case became a public issue. She was arrested by the Islamic police, accused of adultery in a *Sharia* court, and sentenced to be stoned to death.

Prior to BAOBAB's involvement in the case, Ms. Lawal had accepted the sentence as passed by the *Sharia* court and did not want to challenge Islamic law. She did not realize that her rights had been violated, because she was unaware that she had the right to appeal under that law. BAOBAB has in general found that men have imposed a great deal of their own perspective on their teachings of Islam to women, and women have internalized that version of the religion.

Because of Ms. Lawal's desire not to challenge Islamic Law, BAOBAB concluded early on that it should not deal with the case outside of Islam. The organization filed an appeal on behalf of Ms. Lawal as well as a petition for a stay of execution to prevent any extra-judicial punishment's being imposed. They approached a number of prominent people who did not agree with the reintroduction of *Sharia* law in Katsina and other states in Nigeria, and sought to involve them in the case. They also assembled a group of Muslim lawyers from the community into a strategy team. BAOBAB's role then was to frame the case, and use its international network to look for precedents from other countries to be used in the arguments.

## THE BANYAN TREE PARADOX

In their research, BAOBAB learned about the “sleeping embryo” theory, which, under *Sharia* law, posits that a woman, though divorced, can carry a pregnancy for a period of five years from the time of her divorce. If she becomes pregnant during that time, the child is legally presumed to be the offspring of the ex-husband. This argument was used extensively in the appeal.

Additionally, there were a number of procedural flaws in the handling of Ms. Lawal’s case by the *Sharia* court. These flaws pointed to a clear lack of due process, and were the primary arguments used in the Amina Lawal case. The case carried on for almost two years. The *Sharia* Court of Appeals finally overturned the conviction, finding that:

1. Ms. Lawal had been arraigned before the court and charged with the offense of *zina* solely on the basis of information from the police, while it is mandated by the Koran that she could only be arraigned on that charge on the basis of testimonies from four witnesses to the act;
2. The person alleging that *zina* had taken place must prove it by evidence, failing which he or she should receive the mandatory hundred lashes for defamation. (The police officer who brought Ms. Lawal to court was given this sentence);
3. The lower *Sharia* court was not properly constituted at the time of conviction and sentencing. Section 4 of Katsina State Law of the year 2000 provided that for a court to be properly constituted, it must be presided over by three judges. In Ms. Lawal’s case, only one judge sat;
4. The court did not dispute Ms. Lawal’s divorced status, and, on the basis of the sleeping embryo theory, Ms. Lawal was presumed to be pregnant from her husband. If that was so, then her pregnancy could not provide the grounds for a trial and conviction of *zina*. The husband was the only person who could refute the presumption, and for his own reasons, he had chosen not to;
5. Additionally, the court found that Ms. Lawal had never been given the opportunity to retract her earlier statement, a right that is guaranteed under *Sharia* law.

In light of the procedural flaws brought to light in this case, efforts are currently underway to create a unified code of law. BAOBAB is continuing to work on this issue, as there is the possibility that such a unified code would close some of the loopholes that can be used to help women, particularly as only men are working on developing the code. BAOBAB is stressing that the team in charge of creating this unified code should not let culture and custom override the Koran.

## Case Study 2

### ***United States Exceptionalism***

Presentation by Larry Cox, Sr. Program Officer, The Ford Foundation<sup>1</sup>

US exceptionalism—that is, the notion that the United States is different from other countries, and that this uniqueness gives the country the freedom to act as if it were exempt from international laws and human rights standards—has posed many problems for the development of a human rights movement within the United States. There are, of course, many countries that feel that human rights infringe upon their sovereignty, but because they are not in the same position of power as the US, they eventually have to yield to international pressure and accept the standards.

US exceptionalism is often evidenced when the US, while not complying with international laws and recognized human rights standards, feels it legitimate to apply those same standards to other countries. US exceptionalism has tended to confirm some people's view that human rights are not universal guarantees to be applied to everyone, but are, in fact, a tool used by strong powers against other, weaker powers.

The US belief in its exceptionalism is manifest in many ways, one of which is the fact that the US has ratified very few international human rights treaties, despite its earlier role in the creation of international human rights standards and its open championing of human rights around the world. When the US has ratified human rights treaties, it has done so in such a way as to guarantee that those treaties cannot really be used in the US court system. As far as the US is concerned, these are not self-executing treaties. When the US signs an international human rights treaty, it pinpoints each provision where there are differences between those provisions and guarantees under the US Constitution and laws, and notes that the US will not be bound by the specific treaty guarantees. As a result, ratifying the treaty has no practical effect—which is the entire point of US exceptionalism.

Why does the US insist on its exceptionalism? Is it a reflection of US culture? Someone once said that "exceptionalism is not only a practice in the US, but part of the identity of the American people." That idea—that US exceptionalism is something that Americans want, accept and believe in—is an idea that has had very important consequences for human rights work in the US. Key organizations give that idea such credence that many have, in effect, given up the battle of trying to get human rights standards used or applied in the country. At the Ford Foundation we have, in recent years, begun funding a number of programs that aim at

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<sup>1</sup> Background materials for the workshop were prepared by Heidi Dorow

## THE BANYAN TREE PARADOX

challenging US exceptionalism by beginning to do human rights work in the US. We have tried to persuade other donors that they should fund not only international human rights work, but also human rights work in the US.

There is probably some evidence showing that Americans do not like exceptionalism, but it is contradictory evidence. To date, there have been no serious empirical studies that demonstrate that Americans are somehow incapable of accepting international law. There are polls that show that Americans often have different attitudes than say, Europeans, on certain issues like economic and social rights, but there are not dramatic differences. Other polls show that Americans are very supportive of the UN, and that the US should cooperate in upholding international law. The problem of exceptionalism is nonetheless still presented as a matter of American culture. This concept of an "American culture" or character in itself poses some problems, because the US is a very multi-cultural society.

The history of US exceptionalism with regard to human rights treaties reveals that it is, indeed, not a cultural problem or a problem of US culture, but a problem of a number of people's using aspects of culture in order to protect very particular interests. What history reveals is that those in charge of the country at relevant times were terrified of what human rights would do to the US. Their determination to keep human rights out of the US was not because every protection was already guaranteed by the US Constitution. It was, rather, because international human rights law could be used against their interests, which were 1) to reverse the process begun in the US under the New Deal of developing an economic and social safety net for people (there was a fear that human rights would be used to criticize how little economic protection there was in the US); and 2) the continuation of white supremacy (there was a real fear that human rights would be used to attack racial *apartheid* in the country). Thus, a determined group (of mostly Southern Democrats and conservative Republicans) worked to stop human rights from being developed, or, once developed, being used in the US.

The push within the US for creating a Universal Declaration of Human Rights (UDHR) came from groups that were indeed determined to use international human rights law to protect their interests. These were mainly African-American groups that recognized that they could not get adequate protection under the US Constitution, and were thus eager to have a strong UDHR. If that declaration had an enforcement mechanism, it could then be used to change US law. As the UN was being created, however, the US government did everything in its power to ensure that the UDHR would not have enforcement power. In addition, it fought for a domestic jurisdiction clause, which said that none of the human rights agreements would apply to the internal affairs of any particular nation.

Anyone who tried to use the new UN human rights system was labeled as un-American. This included the NAACP, which had early on brought a very compelling case to the UN indicting the US. To counter that case, the US created a link between international human rights law and Communism—arguing that the Soviet Union wanted to use the US's disgraceful practices on race in its Cold War with the US. Thus, people in positions of power used the fear of Communism, and the idea that human rights (including economic and social rights) were Communist ideas designed to undermine the US, to protect themselves from international human rights laws. Eventually, groups like the NAACP gave up.

The political strategy used to protect the US from human rights was very successful, and led to a split between the US human rights movement (which became largely focused on issues beyond the US borders) and the civil rights movement (which focused on the US and relied only on the US Constitution and laws). A serious consequence of the absence of a US-focused human rights movement was that economic and social rights issues within the US would never be raised. Leaders such as Malcolm X and Martin Luther King, Jr. recognized this, and advocated moving from civil rights to human rights, but were often attacked for their views.

The two movements were initially successfully divided, but that success was not complete. There is currently a burgeoning US human rights movement, aided by the ending of the Cold War. There is a US Human Rights Network, which includes about 180 organizations dedicated to fighting US exceptionalism by applying international human rights standards to the US. It is still fragile, but it is growing. Grassroots movements are challenging the idea that the US has always been a leader and champion of human rights around the world, and that the US Constitution and laws provide the same protections as do international human rights treaties. In their battle, they have to look for parts of the US mythology that can be used to argue against US exceptionalism, which itself fundamentally runs counter to the very best of US traditions.

Presently, US human rights organizations have little ability to mobilize people; Amnesty International remains the exception. Although there are some small openings that could be used to argue for the application of human rights standards to the US, the lack of a mass mobilization that cuts across various identities within a multi-cultural US prohibits any significant human rights activity. More work needs to be done to encourage that mobilization.

### Case study 3

#### ***The Communal Land Rights Act and human rights litigation in South Africa***

Presented by Aninka Claassens

Researcher and consultant to the Legal Resources Centre (LRC)

At the time of the Siem Reap workshop, the Legal Resources Centre, acting on behalf of rural clients in the northern parts of South Africa, was preparing a challenge to the constitutionality of the Communal Land Rights Act (CLRA), which had been passed by the South African Parliament in 2004. This Act applies to communal areas in South Africa (mainly ex-“homeland” land) and would affect an estimated 14 -18 million rural people.

The Act provides for the transfer of ownership of land from the state to rural “communities.” It also provides that within the boundaries of communally owned land, individual rights would be registered as “new order rights.” The most controversial aspect of the Act is that it would impose “traditional councils” as land administration committees in communal areas, and give them the power to represent the communities to whom the land had been transferred.

Another recent piece of legislation, the Traditional Leadership and Governance Framework Act (TLGFA), deems existing tribal authorities to be traditional councils, provided that they comply with certain composition requirements within a year.<sup>2</sup> Tribal authorities were created through the terms of a controversial 1951 *apartheid* law, called the Bantu Authorities Act, which is widely considered to have distorted traditional leadership institutions, in particular by undermining internal accountability mechanisms and making traditional leaders agents of the *apartheid* state. Tribal authorities were a key building block of the system of “homeland” government for different African “ethnic groups” under *apartheid*.

The CLRA was rushed through Parliament before the 2004 elections. Civil society came out in force to oppose the bill. For example, the Human Rights Commission, the Commission for Gender Equality, the trade union federation COSATU, and women’s rights, land and legal NGOs all made submissions calling for the bill to be scrapped. Furthermore, community leaders from various rural areas opposed the bill. The only organisations to support it were those representing traditional leaders.

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<sup>2</sup> 40% of the members of a Traditional Council must be elected. 30% must be women. However, the women’s quota can be selected by the “senior traditional leader” and can be reduced to lower than 30% by the Premier of a province if insufficient women are “available”. (Women constitute 59% of the population in “tribal” areas.)

Some of the problems raised by these groupings and LRC's clients include the following:

- Under the law, traditional councils are imposed as the structure representing rural people in respect of issues pertaining to land rights. Rural people are denied the right to choose who their representatives will be.
- Neither the CLRA nor the TLGFA includes provisions that make traditional councils accountable to those whose land rights are at issue. They are accountable only "upwards," to the Minister of Land Affairs, Land Rights Boards appointed by the Minister, or the provincial Premier and Provincial Houses of Traditional Leaders in the case of the TLGFA.
- The Acts serve both to deny the right to democracy and to undermine indigenous accountability mechanisms that in the past mitigated abuse of power by traditional leaders.
- Existing community boundaries do not coincide with the historically disputed boundaries of tribal authorities that would be entrenched by the Act. This means that groups of people with separate identities would find their land rights managed, and themselves represented, by structures they do not accept, and, in many instances, oppose because of past abuses by these structures.
- There are current problems of tribal authorities unilaterally entering into mining and business deals in respect of communal land, which deprive community members of access to land, as well as concerns that these problems may accelerate with the entrenched status and increased powers of traditional councils.
- Women's organisations raised two main problems with the bill:
  1. Upgrading and registering land rights held by men would formalise the consequences of past discriminatory laws which provided that land rights could be allocated only to men. Furthermore, "new order" rights are potentially alienable; men would be able to sell family-owned land without requiring consent from their wives and other family members, and would be under no obligation to distribute the proceeds of the sale to all the family members who have an interest in the land. Thus, it was argued, the bill entrenches and deepens insecurity for women rather than increasing it as required by the constitution.
  2. Tribal authorities currently discriminate against women in various ways. For example, they generally refuse to allocate land to women and side with men in family disputes, including disputes that result in the eviction of women from family land. Furthermore, women are generally not represented in tribal authorities, and in some cases are not allowed to attend or speak at their meetings. It was argued that patriarchal power relations would be reinforced by the recognition and role given to traditional leaders in the CLRA, and that traditional leaders would become less susceptible to pressure for change than they currently are.

Amendments to the CLRA were introduced to address the problem of the bill's formalising past discrimination against women, and the Act then provided for the joint vesting of new order rights in all spouses in a marriage. However, the Act remains problematic in that it undermines the rights of single women (for example, widowed mothers and divorced sisters) within the family, and other family members including children—a particularly serious problem in the context of the AIDS epidemic. The Act is criticised as ignoring the family-based nature of land rights under customary law.

A focus in the LRC's legal challenge will be that the Act undermines, rather than enhances, tenure security for key categories of rural people. The South African Constitution creates a right to tenure security for people whose tenure is insecure as a consequence of past racially discriminatory laws and practices (section 25(6)). For example, it will be argued that the CLRA, by registering family rights in the names of two people, undermines the status and security of other family members who have rights in the land under customary law and indigenous systems of land rights. One such category is single women, another is orphaned children.

Many of the arguments in the case deal with the connection between power and land rights. The LRC will argue that the Act entrenches past distortions that undermine accountability mechanisms within indigenous systems of land rights. Furthermore, it will be argued that land rights' management and allocation functions are centralised away from local processes and structures that historically managed and preserved land rights for specific user groups. These changes undermine local control and security of tenure for members of user groups. It will be argued that the content and nature of indigenous systems of land rights have been misconceptualised to fit Western preconceptions about systems of property rights. This argument is not primarily about the historical nature of African systems of land rights, but about key features of such systems that continue to manifest themselves in the client communities, which, it will be argued, amount to "living customary law."

Customary law is protected by the South African Constitution. A clash between customary law and other human rights contained in the constitution has long been anticipated. Many people perceive the CLRA as the government swinging in favour of custom and tradition at the expense of such values as equality for women.

The legal challenge will argue that, in fact, the CLRA distorts key features of customary systems and entrenches colonial and *apartheid* constructs that ignored the content and strength of localised systems of land rights and exaggerated the power of traditional leaders in land allocation. Furthermore, it will argue that the CLRA superimposes a Western model of exclusive ownership on African systems of relative and nested land

rights, thereby undermining decentralised mechanisms of control and security of rights at lower levels of the system. The superimposed grid of exclusive ownership sees land as a commodity, and conflicts with existing systems of land rights that manifest a land ethic and set of values that is inclusive and redistributive, focusing on survival for members.

Issues of tradition, custom and identity are burning political questions in South Africa. In many quarters there is antagonism to the perceived imperialism of a human rights discourse that asserts that "imported" human rights "trump" African customs and culture. Many South Africans are offended by this discourse and feel that it insults their dignity and attacks their identity as African people.

A false dichotomy has developed between "rights" and "culture." This false dichotomy is dangerous, because the emotions it provokes can play into the hands of elites who use constructed "tradition" to cloak the pursuance of their own narrow interests—often at the expense of key African values such as sharing and inclusiveness. Most dangerous of all, however, is the fact that a discourse which says that human rights are foreign to Africa denies the existence of and potential inherent in sophisticated African systems of relative rights, which, in balancing needs and entitlements, prioritise meeting basic needs. These systems should be assessed on their merits, not through the prism of Western pre-conceptions about the nature of human rights. They have much to teach about the realisation of socio-economic rights and survival mechanisms in a hostile world. To ignore them makes it easier for them to be destroyed by a variety of forces, including elites cloaked in "tradition."

## Case study 4

### ***Female Genital Mutilation (FGM)***

Presented by Efua Dorkenoo

Founder

Foundation for Women's Health Research and Development (FORWARD)

### **Background**

Female genital mutilation (FGM), also referred to as *female circumcision* or *female genital cutting*, constitutes all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for cultural or other non-therapeutic reasons.

In 2001, 100-140 million girls and women were subjected to one of several forms of genital mutilation.<sup>3</sup> Most of these girls and women live in 28 African countries, although some live in the Middle East and Asia. They are also increasingly found among immigrant population groups in Europe, the United States, Canada, Australia and New Zealand. Review articles as well as UN and NGO documents frequently note that Type III FGM, the most severe form, is found in 15 percent of affected women. The vast majority of these women are from Djibouti, Somalia and Sudan, although Type III is also found in parts of Egypt, Ethiopia, Kenya, Mali, Mauritania, Niger, Nigeria, and Senegal where it accounts for 3% of women subjected to FGM in these countries. Approximately 80% of girls and women undergo partial or total clitoridectomy.

The age at which FGM is practised differs from one ethnic group to the other. The age of mutilation ranges from a few days old to adolescence—before marriage—and occasionally on pregnant women and on widows. It is estimated that 2 million girls are at risk of undergoing some form of the procedure every year.

There is ample clinical documentation of the short- and long-term health consequences of FGM. However, there are few large series of case reports or quantitative community-based reports of frequency and patterns of the consequences of FGM. The clinical case reports strongly suggest that the more severe forms of mutilation are particularly likely to

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<sup>3</sup> Classified by a WHO Technical Working Group:

Type I Excision of the prepuce with or without excision of part or all of the clitoris;

Type II Excision of the prepuce and clitoris together with partial or total excision of the labia minora;

Type III Excision of part or all of the external genitalia and stitching/narrowing of the vaginal opening (infibulation); and

Type IV Unclassified.

Report of a WHO Technical Working Group, Geneva 17-19 July 1995  
(WHO/FRH/WHD/96.10)

result in serious and long-lasting physical complications. Data on the psychosexual and psychological health complications is scant, but it is here that most of the complications may predominate, particularly as girls and young women have more access to scientific information on FGM and become aware of their rights.

Like other social behaviours, the practice of FGM derives from varied and complex belief systems. The rationalizations for FGM include the beliefs that it is a "good tradition," a religious requirement or a necessary rite of passage to womanhood, that it ensures cleanliness or better marriage prospects, prevents promiscuity and excessive clitoral growth, preserves virginity, enhances male sexuality, and facilitates childbirth.

The degree of "fixedness" of FGM varies widely. For example, in some settings FGM persists essentially as a rite of passage whilst in other areas the focus is on preservation of virginity, chastity and fidelity. The "cultural keepers" of the practice vary as well. Among the keepers in different settings may be excisors, older women in the family or culturally designated groups of women in the community, and, in some cases, even male barbers.

To make sure that people conform to the practice, communities have put strong enforcement mechanisms into place. These include rejection as marriage partners of women who have not undergone FGM, immediate divorce for unexcised women, derogatory songs, public exhibitions and witnessing of complete removal before marriage, forced excisions, and instillation of fear of the unknown through curses and evocation of ancestral wrath. On the other hand, girls who undergo FGM are provided with rewards, including public recognition and celebrations, gifts, potential for marriage, respect and the ability to participate in adult social functions.

### **Human Rights and FGM**

The female clitoris is anatomically analogous to the male penis and plays a central role in women's sexuality. The equivalent of mutilation performed on the male will be amputation in various degrees of the penis. In its comparable extreme form the penis will be stitched together so as to make sexual intercourse and other bodily functions difficult. The concern about FGM is based upon human rights standards and the health consequences. FGM constitutes an unacceptable violation of the rights of the girl child and adult women to their natural sexuality. International human rights covenants underscore the obligations of the United Nations member States to ensure the protection and promotion of human rights, including the rights to non-discrimination, to integrity of the person, and to the highest attainable standard of physical and mental health.

FGM violates the human rights of girls when performed on them as infants and young girls. The fundamental issue at stake here is that of consent. Whilst an adult is quite free to submit herself to a ritual or a tradition, a child, having no formed judgement, does not consent, but simply undergoes the mutilation (which in this case is irrevocable) while she is totally vulnerable.<sup>4</sup> The descriptions available of the reactions of the children—panic and shock from extreme pain, its taking six adults to hold down an eight year old girl—indicate a practice comparable to torture.<sup>5</sup> Girls who have undergone FGM Type III, where the vulva is closed except for a miniscule opening (the equivalent of the head of match stick), may take a long time to void and for release of menstrual blood. This trauma imposed on the girl child is indicative of a practice comparable to torture.

Human rights treaties which are relevant to FGM are as follows:

#### *Rights of Children*

- Article 5 of the Universal Declaration of Human Rights (prohibition of torture or inhuman or degrading treatment);
- Article 2 of the Convention on the Rights of the Child (CRC) (gender equality);
- Article 19(1) of the CRC (prohibition of all forms of mental and physical violence and maltreatment);
- Article 24(1) of the CRC (right to the highest attainable standard of health);
- Article 37(a) of the CRC (prohibition of torture or cruel, inhuman degrading treatment); and
- Article 24(3) of CRC (States must take effective and appropriate measures to abolish traditional practices prejudicial to the health of children).

Other treaties which are violated are the African Charter on the Rights and the Welfare of the Child, in which Article 21 stresses: "Appropriate measures can be taken in order to eradicate practices and customs which are prejudicial to the child."<sup>6</sup>

#### *Rights of Women*

Article 5(a) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) calls for States to take "all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the

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<sup>4</sup> Dorkenoo E., *Cutting the Rose. Female Genital Mutilation. The Practice and its Prevention* (London: Minority Rights Publications, 1995).

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.”

### **Cultural relativity and FGM**

A view opposing the belief that FGM constitutes a human rights abuse is that of cultural relativity. This viewpoint comes from a number of sources—nationalists, some Western cultural anthropologists, Western liberals, and elite African women who advocate for a right to cultural self-determination. This viewpoint has shifted quite a lot in the last decade, as human rights arguments have gained ground. However, the relativism position is never far from the surface, as can be seen from ongoing changes in terminology. The cultural relativity position held by different groupings is also never straightforward. There is a psychological interplay of guilt, shame, anger and fear embedded in the positions, the mix depending very much on the baggage which each defender of the practice brings to the debate. It also depends on who is raising the issue, where it is raised, and the extent to which women themselves, as a coping mechanism, normalize the practice.

## Case study 5

### ***The Peruvian Truth and Reconciliation Commission***

Presented by Sofía Macher  
*Instituto de Defensa Legal, Peru*

The Truth and Reconciliation Commission (TRC) was established to address violations that occurred during the internal armed conflict in Peru lasting from 1980 to 2000. Seeing the exclusion of the country's indigenous peoples in the democratic elections of 1980, *Sendero Luminoso* (Shining Path) initiated a "popular war" against the State. It resulted in significant abuses, both by *Sendero Luminoso* and by the denial of cultural diversity, and ethno-cultural discrimination and racism in Peru. Ironically, the victims were, by and large, the indigenous peoples.

The Commission divided the 20-year armed conflict period into three parcels: the Belaunde Government (1980-1985), the Garcia Government (1985-1990), and the two-term Fujimori Government (1990-2000). The first period was marked by an outright military war against the Shining Path. During the second period, President Garcia tried to modify the anti-subversive strategies of the army by providing weapons to peasants, to be used for self-defense. The result was that the government lost control of the situation. Finally, during the Fujimori administrations, the President used terrorism and fear of terrorism to dismantle the rule of law. In its place, Fujimori initiated a reign of corruption at a level that had never been witnessed before in Peru.

Following Fujimori's departure from the country in 2000, human rights organizations demanded the creation of a Truth Commission to investigate allegations of rights abuses during the conflict period. A number of political parties resisted the idea, particularly as they would be the subjects of any investigation carried out. Nonetheless, the TRC presented its findings in August 2003. A key conclusion was that the internal armed conflict produced far more casualties than had been previously believed. Earlier news accounts had reported only 25,000 deaths. The TRC found that over 70,000 people had been killed, and most were indigenous peoples. More than 50% of all deaths were caused by *Sendero Luminoso*. Furthermore, the Commission's reports revealed deep ruptures and gaps within the society; patterns of human rights violations along ethnic lines were quite visible early on.

The TRC assigned significant responsibility to the political class and political parties—the parties had abdicated their constitutional responsibility to protect Peru's citizens. The presidents who were in power during the war also could have stopped military action against alleged *Sendero Luminoso* members. Unfortunately, however, the political parties refused to recognize what was occurring in the field.

The TRC essentially re-wrote the history of the 20 years. By using testimonies from some 17,000 witnesses, it was able to create a fairly accurate picture of actual occurrences. These histories were told by the invisible people who were the victims of the violence. They revealed the identity of the victims, as well as the tremendous gaps that exist in Peru's society: 79% of the 70,000 killed lived in rural areas. Of these, 75% were Quechua, and 68% either had very incomplete primary school education or were wholly illiterate.

Much of the violence was propagated against ethnic minorities simply because of the victims' backgrounds. Likewise, the violence reflected class and socio-economic differences, and the level of violence differed depending upon whether the victim lived in the city or in rural areas. This pattern of selective violence was seen on both sides of the war that was carried out by the military and *Sendero Luminoso*, with the Quechua ethnic minority people between the two.

Victims demanded justice, and justice is the backbone of any democracy. This brought to light the issue of reconciliation. The Commission found "reconciliation" difficult to define. To Peruvians, reconciliation is a very long process and does not simply imply a return to the beginning of the conflict. It instead implies a re-foundation of society, and involves the elimination of the gaps that led to the conflict in the first place. Thus, what must be changed is the relationship of the State to the people. Part of the recommendations made by the Commission related to a belief that the State should be present throughout the entire national territory, integrating all the cultures that constitute the country of Peru. It cannot merely be a pact between members of the elites.

When we began trying to document individual violations of human rights, we found it impossible to reconcile methods normally used for this purpose with anthropological methods. We could not reconcile a qualitative database using an anthropological and historical methodology with a database that gave statistical listings of violations of human rights—a more legal or judicial approach. While the anthropological approach looked at the history of the community, who was there at the time and who supported or opposed *Sendero Luminoso*, the human rights approach sought to prove specific facts, relate information about events, identify the victims and perpetrators. The two approaches seemed wholly incompatible, though we wanted to have a database that covered all the facts.

The Commission decided to open up the process—that is, instead of having a single area of facts (combining the qualitative and quantitative), we had four. The database included information about the victims of violations and those responsible, as well as—using a more qualitative approach—twenty different aspects of the national conflict process. We analyzed moments that changed the course of the violence, which were

thought to be important to understanding the twenty years of conflict. That part of the study was far more anthropological.

Throughout this whole process, the Commission sought to work within the framework of international standards and treaties. It sought to separate its work from the work of lawyers who would have to prove, on the basis of the national criminal code, what kind of crime had been committed. The Commission had to recognize the limitations of the national criminal code.

The Commission consisted of an army of people spread across the country collecting information, followed by public hearings. Every subject was touched on. In the end, the TRC had only six months to write its report—which wound up being nine volumes in length. It was impressive how, when we had to compile all our data and submit the report, the information, as if by magic, began to fit into place with relative ease. It was then that we realized how the human rights violations were more readily understandable with the additional, qualitative information. The way the anthropological approach complemented the formal, legal approach surprised everyone who participated in this process.

Aside from the factual information, the other important question was of reparations. We soon learned that there is a right to justice, but also a right to reparations. From the justice perspective, the State has a duty to provide justice for wrongs committed against an individual. From the human rights point of view, this is evidenced particularly in the restoration of citizenship. Taken to the community level, however, it is important to recognize the difference between those duties of the State and reparations made to the community. The building of schools in this context, for example, is not much different from the social programs the State traditionally runs to alleviate poverty. However, in instances where a community has been thoroughly destroyed, such an activity might then be considered reparations. The State is not giving the people the school because the people need it, but rather because the State has a debt to pay. This is still a topic of debate.

The members of the Commission discussed how to avoid a repeat of the violence seen from 1980 to 2000. More work needs to be done to render visible the victims of this violence, to bring to light the gaps within Peruvian society that led to the outbreak of internal conflict in the first place. We do not believe the Commission will resolve the problem, and that is not its function. Rather, identifying the actors in the conflict should be a part of a national process, and a new national pact must be drafted that extends to the entire population. Victims must be transformed into citizens, into people who are responsible for their own development. This is the most important goal to be achieved through this process of justice and reparations. If the country does not change, history can repeat itself at any moment.

## Case study 6

### *Concessions in Cambodia*<sup>7</sup>

#### **Introduction**

Most Cambodians live in rural areas, and depend on access to land and forests for their livelihoods and subsistence. How Cambodia's land, forests and fisheries are managed and administered, by whom, and for whose benefit, is crucial for the country's continued political and economic stability.

In the aftermath of the Khmer Rouge and two decades of war and civil strife, the 1990s saw precarious, unsettled populations, with many people returning from refugee camps, and the country being opened to a market economy. With growing stability, land increased in value, attracting diverse and often predatory groups of interests, including private companies (many foreign), government officials and military officers. The past decade has seen a growing population and increasing numbers of newly displaced, along with continuing insecurity of land tenure, land grabbing and land conflicts.

Between 1993 and 1999, the Government conceded over a third of Cambodia's most productive territory to private companies for commercial development, including for forestry, agriculture, mining, tourism and fishing. It also handed over significant amounts of land to the military to develop.

The concession system, with historic roots in the French protectorate, is premised on a "win-win" approach: Cambodia's state land and natural resources would be managed efficiently and profitably by private companies, and, through private investment, the rural poor would be better off and the Cambodian people as a whole would benefit through increased state revenue. This has not happened. The concessions have not generated any significant state revenue by way of rental fees, deposits or taxes. Bribes have been paid at all levels, lining personal pockets of government officials and others. Forests have been destroyed, natural resources depleted. The rural poor have been denied or lost access to their means of survival, with few others to turn to and nowhere to go.

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<sup>7</sup> Due to lack of time, "Concessions in Cambodia" was not discussed at the Siem Reap workshop. This paper, developed for the workshop by IHRIP staff in consultation with the Office of the High Commissioner for Human Rights in Phnom Penh, draws heavily on a report issued in November 2004 by Peter Leuprecht, the UN Secretary-General's Special Representative for human rights in Cambodia, on land concessions for economic purposes from a human rights perspective (updated in 2005).

Concessions may come tax-free, but they do not come people-free. People inhabit the land that is conceded, often with rights of ownership under a 2001 Land Law, although they may not know they do or may lack the means to assert them. Local people have seen a general worsening of their situation. Companies have denied them traditional rights of land use, blocked access to their farming and grazing land and forests, filled in community streams, while not delivering on promised jobs, schools and infrastructure. There have been frequent conflicts between the companies and the local people, with the authorities usually siding with the companies.

Concessions have been awarded secretly, without required environmental and social impact assessments or consultations with local populations. Information about concessions, contracts, as well as the companies and individuals involved, is very difficult to obtain.

### **Cases**

#### **1. Pheapimex Company and Wuzhishan L.S. Group**

In January 2000 Pheapimex company was awarded the largest economic land concession in Cambodia—some 318,000 hectares for a eucalyptus plantation. The concession spans Pursat and Kompong Chhnang provinces in the northwest of the country, affecting also the Tonle Sap Lake region. A population of some 100,000 people has been affected.

Pheapimex has close links with Wuzhishan L.S. Group, a company from the People's Republic of China. In August 2004, Wuzhishan was granted a concession of up to 199,999 hectares for a pine tree plantation in Mondulhiri province in northeast Cambodia. The Phnong indigenous people constitute over half the population of the province.

Both concessions were granted without the required environmental impact assessment, consultations with local populations, or consideration for the social situation in the areas. Concession land has not been demarcated, and, in the case of Wuzhishan, detailed maps are not available. In the case of Pheapimex, there has been concern that the concession could pollute tributaries to the Tonle Sap Lake and destroy spawning grounds for migratory fish. The concession has deprived some communities of the higher lands they have traditionally used for grazing cattle, and has adversely affected communities in many other ways. In the case of Wuzhishan, prolific use of herbicide on the hillsides, starting in September 2004, resulted in villagers and animals falling sick. (This is denied by the company and the authorities). The Phnong, who practice swidden agriculture, lost their ancestral and cattle grazing lands. Their spirit forests and burial grounds were desecrated. Protests by villagers have brought outright threats by the authorities in order to subdue attempts at resistance.

Pheapimex stopped activities in March 2005; its plans for the future are not known. In July 2005, the UN Secretary-General's Special Representative for human rights in Cambodia requested the Government to cancel the Wuzhishan concession and asked that no further concessions be granted until sub-decrees related to the 2001 Land Law came into effect. NGOs took up this call. The Government instead set up an inter-ministerial committee in July 2005 to resolve the dispute. The Phnong and their leaders have since come under pressure to accept the company and the pine tree plantation, and to agree that their land be parceled up in the name of development.

## 2. Tum Ring commune

Tum Ring commune, deep in the forest in Kompong Thom province, has a population of 2,600 inhabitants who have traditionally relied on rice farming, resin tree tapping and gathering forest products for their livelihoods. In August 2001, the Prime Minister issued a sub-decree allowing for up to 6,200 hectares of red soil to be excised from three forest concessions and given to Chup State Rubber Plantation for industrial use and for family-scale rubber plantations. No social or environment impact assessment was undertaken. Chup subcontracted with three companies to log the trees inside the rubber plantation before bulldozing the land. Large numbers of valuable trees, including resin trees, were cut down, in contravention of the country's Forest Law.

The impact on the villages and people of Tum Ring has been severe. They have been wrenched from a traditional life with little regard for their welfare or culture. Most of the resin trees and forest resources upon which they have depended have been destroyed. Their spirit forests have been cut down and ancestral burial grounds bulldozed. According to local beliefs, the forest is populated with supernatural beings who rule the destiny of the people, and misfortune and disease result from a negative relationship with a spirit.

The rubber company said it would provide three hectares of cleared land to each family. Distribution began in some villages in early 2002. Initially, there were protests, but by March 2004, many villagers had accepted the three hectares lest they ended up with no land at all. They were told that they could grow whatever they want on the three hectares, but have been under pressure to plant rubber trees.

The activities of the company have generated conflict within communities. While many villagers want to continue their traditional life and resist the change, others are attracted by the promise of economic benefit. These are often the more powerful, who are close to the local authorities and rely upon their patronage. The people have also had frequent confrontations with company armed security guards, and several incidents of violence and intimidation have occurred, including one murder when a

security guard shot one villager dead. The guard has never been apprehended or brought to trial.

### 3. New Cosmos, a concession for eco-tourism<sup>8</sup>

A concession for eco-tourism in the Aural Wildlife Sanctuary "was awarded to New Cosmos Development (Cambodia) Co., Ltd, a Chinese company, in 2004. The company registered with the Ministry of Commerce ... in February 2003. A month later, it requested 900 hectares for 99 years in an area with natural hot springs in the Aural Wildlife Sanctuary to develop a resort and entertainment facility, including a hot spring tourism village, an international conference centre, folk cultural villages, a theme park, a luxury residential area, and a golf course. The Government agreed in principle, and in May 2004 appears to have agreed to a request from the company to expand the requested area to 1,900 hectares. The company began operating mid-2004. No environmental and social impact assessment was conducted.

The Suy indigenous people have inhabited the Aural mountain area for many generations. After the Khmer Rouge regime, they turned from shifting to permanent cultivation. The present community consists of some 200 households with a total population of around 900. The hot springs and the surrounding forests have great spiritual significance for the Suy. They also depend on the forests, the habitats of wildlife, including deer, bears and over 60 species of birds, for their livelihoods. Recognising the rich potential of the hot springs, forests, river, and the Suy culture for eco-tourism, the Lutheran World Federation and Flora and Fauna International have been working with the Suy and local authorities for several years to help them manage the hot springs under a community-based eco-tourism project. When the Suy learned about the project of New Cosmos, they and NGOs appealed to all levels of government to stop the project, but to no avail.

Eventually, the Government agreed to an environmental impact assessment. According to the initial report of June 2005, prepared by Strategic Consultancy Services Co. Ltd, the impact of the project will be minor and manageable, and will not have significant or accumulative impact on the environment.... The report said that local people supported the project, and wanted to see the development come soon, so that they could get jobs. However, in carrying out the assessment, it seems that only a few families, mostly outsiders who settled near the hot springs, were consulted.

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<sup>8</sup> The new UN Special Representative for human rights in Cambodia, Yash Ghai, visited Kompong Speu province in December 2005 and met with community representatives and NGOs. The extracts on this case are drawn from his report to the UN Commission on Human Rights in 2006.

The Suy have reacted strongly to this assessment, and say they have never been consulted. They fear the extinction of their culture and way of life, a concern shared widely by NGOs and others. The community and its representatives have come under continuing and increasing pressure and threat.”

#### 4. Peak Kantel floating fishing village

Cambodia is a land of water and many of its people depend on fishing from its rivers and the Tonle Sap Lake for their livelihoods and survival. As with land, fisheries have come under commercial production, and these have caused conflict with local populations.

Peak Kantel is a floating fishing village on the Tonle Sap Lake, established as a storm shelter by the French in 1952. During the Khmer Rouge period, villagers were forced to leave, starting to return in 1979. The residents of Peak Kantel say they are now 153 families, including some 30 Vietnamese families, with a population of around 900. In 2002, UNICEF provided Peak Kantel with a floating school. Over 100 children study at the school, which is recognized by the Ministry of Education.

Ben Sok is 75 years old and has lived in Peak Kantel since 1952. He says that the village enjoyed official status until the Lon Nol Khmer Republic, yet Peak Kantel is classified as illegally resettled. The villagers have submitted requests for the Ministry of Interior to recognise it as an official village, but to no avail.

In 1989 the government leased out fishing lots, and in 1997, put them out to competitive bidding. The village is located between Fishing Lots 1 and 2. In 2003, the permit holders of Lots 1 and 2 decided to attach their two lots, thereby threatening the very existence of Peak Kantel. A joint commission was established to study the situation. Its report said that the people would have to leave Peak Kantel, that they were mobile and of no fixed abode, and they had damaged the ecology of the area. According to the authorities, most villagers are recent settlers who fish during the prohibited period and encroach on Prek Toal bird sanctuary. The villagers say that all floating villages on the Tonle Sap Lake are constantly on the move in accordance with weather patterns and changing water levels, and that the commercial fishing enterprises are responsible for damage to the environment through clearing natural wetland forests and using illegal fishing materials and methods.

On 4 August 2004, the authorities with police and soldiers, armed with loaded AK assault rifles, came to evict the villagers and to drag away the school. The villagers resisted. Interventions from NGOs and others followed. No further attempts have been made since to evict the villagers, but they live in a state of continued uncertainty and anxiety.

Lot 2 is located in one of the most important ecological reserves in the Tonle Sap area and is a primary breeding ground for fish. Illegal fishing practices are said to be rife. The space and netting between bars in the fencing prevent fish from leaving for the lake to breed during the dry season. The lot operators also seal and drain the reservoirs, selecting fish of a certain size from the riverbed, leaving others to rot. At the current level of fishing, it is estimated that Lot 2 will be fished out within five years. The Government says it plans to turn Lot 2 into a conservation area by 2007 because of its proximity to the bird sanctuary.

Peak Kantel villagers believe the real reasons for trying to get rid of the village include the illegal fishing practices they have documented and reported to the authorities, bribes that have been given to the authorities, and because 90 percent of the village supports an opposition party and voted against the majority Cambodian People's Party in the 2003 national elections. Some also believe that the authorities want to get rid of the Vietnamese families without being accused of racial discrimination, and are therefore demanding the relocation of the whole community.

NGOs believe that Peak Kantel should be accorded official status and that, with their assistance, the villagers should be organized as a fishing community to enable them to make a sustainable living, as well as to help conserve the fisheries, wetland forests, water birds and the ecology of the area. This would be in line with stated Government policy to reduce commercial fishing lots for the benefit of local fishing communities.

### **The Future**

Many are of the view that the concession system needs to be reconsidered, and that alternatives in natural resource management are necessary to protect the environment and improve the welfare of Cambodia's rural people. However, the Government has yet to show it is ready to do things differently: It has yet to disclose information about the concessions. It has yet to take steps to enforce the law and ensure that concessionaires and fishing lot holders both uphold the law and respect the terms of their contracts. It has continued to award concessions. It has not cancelled concession contracts despite the many serious breaches that have occurred. Community leaders and activists speaking out against the concessions and fishing lot operators have encountered increasing difficulties with the authorities and the companies in many provinces.

Cambodia's rural people are often seen as "backward." Their ways of life are little understood or valued by those in power, who believe they need to be "developed" and persuaded to join the modern world. As holders and transmitters of Cambodia's culture, damaged by so many years of war and conflict, they should, on the contrary, be listened to and given a chance.

## **Appendix 2**

### **Some international and regional standards related to culture and rights**

#### **International declarations and treaties**

- Universal Declaration of Human Rights, article 27:
  1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
  2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
  
- International Covenant on Economic, Social and Cultural Rights, article 15:
  1. The States Parties to the present Covenant recognize the right of everyone:
    - (a) To take part in cultural life;
    - (b) To enjoy the benefits of scientific progress and its applications;
    - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
  2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
  3. The States Parties to the present covenant undertake to respect the freedom indispensable for scientific research and creative activity.
  
- International Covenant on Civil and Political Rights, article 27:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

- Convention on the Elimination of All Forms of Discrimination against Women:

*Article 3*

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

*Article 5*

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women...

*Article 13*

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular...

- (b) The right to participate in recreational activities, sports and all aspects of cultural life.

- Convention on the Rights of the Child

*Article 30*

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

*Article 31*

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

- International Convention on the Elimination of All Forms of Racial Discrimination

*Article 7*

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups....

*Article 5*

...States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:...

(e) Economic, social and cultural rights, in particular...

(vi) The right to equal participation in cultural activities....

- Convention on the Prevention and Punishment of the Crime of Genocide, article 2, has been interpreted to forbid the deliberate destruction of a people's culture.

- UNESCO Universal Declaration on Cultural Diversity

*Article 4 – Human rights as guarantees of cultural diversity*

The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.

*Article 5 – Cultural rights as an enabling environment for cultural diversity*

Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.

*Article 6 – Towards access for all to cultural diversity*

While ensuring the free flow of ideas by word and image, care should be exercised that all cultures can express themselves and make themselves known. Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity.

□ The UN Declaration on the Right to Development, article 1:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

□ International Labour Organization Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries

*Article 1*

1. This Convention applies to:

- (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

*Article 2*

1. Governments shall have the responsibility for developing ... action to protect the rights of these peoples and to guarantee respect for their integrity.
2. Such action shall include measures for ...
  - (b) Promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions...

*Article 4*

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned....

*Article 5*

In applying the provisions of this Convention:

- (a) The social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected....

*Article 7*

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development....
3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities....

*Article 10*

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics....

*Article 13*

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, and in particular the collective aspects of this relationship....

*Article 22*

- ... 3. Any special [vocational] training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned....

*Article 23*

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development....

*Article 25*

... 2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines....

*Article 27*

1. Education programmes and services for the peoples concerned ... shall incorporate their histories, their knowledge and technologies, their value systems and further their social, economic and cultural aspirations....

*Article 31*

... efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

**Regional treaties and declarations**

□ African Charter on Human and Peoples' Rights

*Article 17*

...2. Every individual may freely take part in the cultural life of his community.  
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

*Article 22*

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

□ American Declaration of the Rights and Duties of Man, article 13:

Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

### Appendix 3

#### Multiple definitions of culture

There is considerable confusion in most discussions around culture and rights, and often one of the roots of the confusion is that participants are relying on different definitions of culture. Some of many available definitions are:<sup>1</sup>

- *Webster's New Collegiate Dictionary* gives three definitions that are relevant in this context:<sup>2</sup>
  1. *Acquaintance with and taste in fine arts, humanities, and broad aspects of science as distinguished from vocational and technical skills.*
  2. *The integrated pattern of human behavior that includes thought, speech, action, and artifacts and depends upon man's capacity for learning and transmitting knowledge to succeeding generations.*
  3. *The customary beliefs, social forms, and material traits of a racial, religious, or social group.*
  
- The World Bank uses two definitions:
  - 1) *Particular shared values, beliefs, knowledge, skills and practices that underpin behaviour by members of a social group at a particular point in time (with potentially good and bad effects on processes of poverty reduction).*
  - 2) *Creative expression, skills, traditional knowledge and cultural resources that form part of the lives of people and societies, and can be a basis for social engagement and enterprise development. These include, for example, craft and design, oral and written history and literature, music, drama, dance, visual arts, celebrations, indigenous knowledge of botanical properties and medicinal applications, architectural forms, historic sites, and traditional technologies.*<sup>3</sup>
  
- B. Malinowski<sup>4</sup>
  - *Inherited artifacts, goods, technical process, ideas, habits, values and the organization of human beings into permanent groups.*

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1. Most of the definitions here came to our attention in an unpublished paper prepared by Jennifer Orange for the Ethical Globalization Initiative, New York. We are thankful to EGI and Ms. Orange for making the paper available to us.
  2. Definitions are taken from *Webster's New Collegiate Dictionary*. (Springfield, Massachusetts: G. & C. Merriam Company, 1974).
  3. <http://www.worldbank.org/poverty/culture/overview/>
  4. B. Malinowski, *A Scientific Theory of Culture* (Chapel Hill: University of North Carolina Press, 1994), as cited in Mahnaz Afkhami, "Identity and Culture: Women as Subjects and Agents of Cultural Change," in *From Basic Needs to Basic Rights*, ed. Margaret A. Schuler (Washington, D.C.: Women, Law and Development International, 1995).

## THE BANYAN TREE PARADOX

- R. Firth<sup>5</sup>
  - *The component of accumulated resources, immaterial as well as material, which a people inherit, employ, transmute, add to and transmit; it is all learned behaviour that has been socially acquired.*
  
- As we said at the beginning of this publication, for the purposes of this publication we are using the UNESCO definition of culture:
  - *The set of distinctive spiritual, material, intellectual and emotional features of society or a social group ... it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.*

For effective activism, it is not necessary to know all of the definitions of culture that have been developed or proposed. It is important only to:

- know there is a multiplicity of definitions,
- recognize that others may be using different definitions,
- understand that different definitions potentially imply different areas of or issues in human rights work, and
- reach clarity in your research, or in any discussion, as to what others mean when they are using the term "culture."

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<sup>5</sup> R. Firth, *Elements of Social Organizations* (London: Tavistock, 1971), as cited in Mahnaz Afkhami, "Identity and Culture: Women as Subjects and Agents of Cultural Change."

## **Appendix 4**

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