

causa nooit materialiseer het nie. Volle skadeloosstelling behoort dan egter te impliseer dat met positiewe interesse ook rekening gehou word ten einde die ongeregverdig verarmde in dieselfde posisie te plaas as waarin hy nou sou verkeer indien die onregmatige onteiening nie destyds met die beslaglegging plaasgevind het nie. Alle gederfde wins behoort dus ook verreken te word. Vir die doel behoort egter ten einde onsekerheid te verwyder die nodige wetswysiging oorweeg te word sodat die gedraal met die afhandeling van die strafsak nie die ongegrond verarmde burger ook nog sy verhaalsreg via verjaring ontnem omdat die verrykingsvordering ontstaan het ten tyde van die ongegronde vermoënsverskuiwing nie.

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RACE AND CULTURE – ARE WE TALKING ABOUT THE SAME THING?

1 Introduction

The Preamble to the Constitution of the Republic of South Africa, 1996 proclaims that South Africa belongs to all who live in it, united in our diversity, and recognises eleven official languages (s 6(1)) – a clear reference to our cultural heterogeneity. This richness in cultural qualities makes our country one of the most cosmopolitan in the world (Devenish “Minority rights and cultural pluralism – the protection of language and cultural identity in the 1996 Constitution” 1999 *THRHR* 201 209). In fact, South Africa is often referred to as a “rainbow nation” because it reflects so many different cultures.

With our history of apartheid, South Africans in the past usually associated with people from similar backgrounds to themselves. This led to them being extremely rigid in their ways of thinking, and racial background was often associated with an obvious difference in culture (Joubert “Interracial adoptions: Can we learn from the Americans?” 1993 *SALJ* 726 738), in other words, the perception often existed that people of the same race necessarily belong to the same culture (Zaal “Avoiding the best interests of the child. Race-matching and the Child Care Act 74 of 1983” 1994 *SAJHR* 372 378). The aim of this note is to explore this belief.

2 Definitions

2.1 Race

The *Collins English dictionary* (1998) defines race as “a group of people of common ancestry, distinguished from others by physical characteristics, such as hair type, colour of eyes and skin, stature, etc”.

Websters (<http://www.websters-online-dictionary.org/definitions/race>, visited on 2006-03-06) defines the term “race” as a type of classification used to group

living things based on such elements as language, heredity, physical attributes and behaviour, but adds that the term has long been controversial.

According to Fredrickson *Racism: A short history* (2002) 52–53, the modern concept of races as basic human types classified by physical characteristics (primarily skin colour) was not invented until the eighteenth century. He says the term “race” was also frequently used to refer to nations of people, as in “the English race”, but that the term always had stable and presumably unchangeable characteristics. Church *Cross-cultural adoption in constitutional perspective* (unpublished LLM dissertation Unisa 1996) 10 defines race as each of the major divisions of humankind, having distinct physical characteristics or genetic traits, while Ledderboge “Transracial placements of children in the Durban metropolitan area” 1997 *Social Work* 333 334 similarly believes that race refers to physical characteristics which people share, such as facial features, skin colour and hair texture.

Leiris *Race and culture* (1951) 14–15 says that a race may be defined as a group whose members’ physical characteristics conform, on average, to those arbitrarily selected as differentials, and says that there will be overlapping between peoples. This leads him to conclude that, from a genetic point of view, “it would appear impossible to regard the world population of today as other than more or less a hodgepodge”.

2.2 Culture

Defining a concept as multi-faceted as “culture” is not easily achieved. In an attempt to do so, the following definitions are considered.

The *Oxford illustrated dictionary* (1979) defines culture as “improvement or refinement of mind, manners, etc., by education and training; condition of being thus trained and refined; particular form or type of intellectual development or civilization”.

This definition links up with Bennett’s view, namely that “culture” implies high intellectual or artistic endeavour. A “right to culture” in this sense can be juridically construed to mean the freedom – akin to a freedom of expression – to perform or practise the arts and sciences. But “culture” may also denote a people’s entire store of knowledge and artefacts, especially the languages, systems of belief and laws, that give social groups their unique characters. This meaning would encompass a right to customary law, for customary law is peculiarly African, in contrast with law of European origin (Bennett *Human rights and African customary law under the South African Constitution* (1999) 23–24).

Sir Edward Burnett Tylor, a British anthropologist (quoted by Devenish 1999 *THRHR* 201 203), defines culture as “that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society” (my emphasis).

Beukes *Kultuur: ’n Staatsregtelike perspektief* (unpublished LLD thesis Unisa 1991) 43–44 indicates that Tylor’s definition involves three important characteristics of culture. Culture is acquired by people through a process of acculturation; a person acquires a culture as a member of society; and culture is a complex whole.

According to Beukes 39, culture is a concept that is so rich in meaning that it makes it difficult to reflect in one single definition. She says that no definition of culture is, or ever can be, exhaustive (85). She also focuses on the process of a change in culture (*kultuurverandering*) because of contact between different

groups (43), a process known as acculturation, which is especially important in a country such as South Africa where different communities live together.

As Ledderboge 1997 *Social Work* 333 334 says, culture is a product of the socialisation process. Culture thus consists of learnt ways of acting, feeling and thinking, rather than biologically determined ways (which determines race). It is not something which people are born with, but something gained through normal social interaction (Thornton "Culture: A contemporary definition" in Boonzaaier and Sharp (eds) *South African keywords: The uses and abuses of political concepts* (1988) 22).

When analysing culture, one also has to look at the concept "tradition". Tradition refers to the transmission of culture, the repeated handing down of ideas, conventions and practices which humans need in social interaction (Spiegel and Boonzaaier "Promoting tradition: Images of the South African past" in Boonzaaier and Sharp 40). Tradition can thus be defined as the passing down of elements of a culture from generation to generation, especially by oral communication (<http://dictionary.reference.com/search?q=tradition>, visited 2006-03-06).

According to Venter "The protection of cultural, linguistic and religious rights: The framework provided by the Constitution of the Republic of South Africa, 1996" 1998 *SAPL* 438 442, culture is fundamental to the self-understanding of a person and groups with whom such a person is, or wants to be, associated, in other words, we are dealing with the identity of individuals and their social associations. He comes to the conclusion that we are dealing with traditional, intellectual and spiritual attributes of specific groups of people in society (441). Culture is constantly subject to change (Beukes 31; Thornton 25), and is extremely complex.

Pieterse "It's a 'Black thing': Upholding culture and customary law in a society founded on non-racialism" 2001 *SAJHR* 364 391 says the term "culture" denotes a range of things, from a particular lifestyle to the totality of a group's historical and social heritage. He says "culture" can manifest itself in a number of ways, including way of dress, art, language and peculiar social practices.

2.3 Conclusions flowing from definitions

Whereas race is strictly a question of heredity, culture is essentially one of *tradition* in the broadest sense, which includes the formal training of the young in a body of knowledge or a creed, the inheriting of customs or attitudes from previous generations, the borrowing of techniques or fashions from other countries, the spread of opinions through propaganda or conversations, the adoption – or "selling" – of new products or devices, or even the circulation of legends or jests by word of mouth. In other words, tradition in this sense covers provinces clearly unconnected with biological heredity and all alike consisting in the transmission, by word of mouth, image or mere example, of characteristics which, taken together, differentiate a milieu, society or group of societies throughout a period of reasonable length and thus constitute its culture (Leiris 21).

2.3.1 Race versus culture

Fredrickson 7 believes that there is a substantial grey area, in that culture can be either a concept antithetical to that of race (if we think of culture as historically constructed, fluid, variable in time and space, and adaptable to changing circumstances), or it can be essentialised to the point where it becomes the functional equivalent of race. Roodt *Legal aspects of the protection of cultural heritage*

(unpublished LLD thesis UOFS 2000) 222 confirms this confusion when she says that the concepts “race” and “culture” remain intertwined. Van Wyk “Kultuur, staat, reg – kultuurstaatsreg?” 1991 *Stell LR* 180 199 says it is clear that an intertwinement of race, culture and ethnicity has taken place.

An interesting and important question now is what the relationship between race and culture is (see in this regard paras 2 1 and 2 2 above). To illustrate the complexity of distinguishing between race and culture, consider the example of the birth of a child. It is often said that someone is born into a specific culture. If this is so, race and culture must surely be synonymous, but we have established that this is not so (see *ibid*). This view must therefore be rejected. When a child is born in a specific environment, that is certainly no guarantee of the culture to which the child will belong. In other words, if a child is born to a white mother and a white father, will the child have a “white” culture, and if so, what does this mean? In the case of a white mother from an Afrikaans background and a white father from an English background, or a black mother who grew up in Johannesburg while the black father grew up on a farm in Mpumalanga, will they have the same cultural background? This certainly seems unlikely. What about a child born to a black mother and a black father, where the mother comes from a Zulu background and the father from a Sepedi background? A French citizen may wish to marry a Chinese citizen. Where, for instance, a white woman and a black man marry and have a baby, what is the race of the child, and what is the child’s culture?

Since race is merely a matter of physical characteristics, race by itself is a neutral factor (Joubert 1993 *SALJ* 726 733; also see para 2 1). It is thus static, while culture is acquired by people living in a specific environment. Culture (including tradition) constantly evolves (Van Bueren “Children’s rights: Balancing traditional values and cultural plurality” in *Children’s rights and traditional values* (1998) 17). It develops when and where a person grows up (see the definitions in para 2 2 above). What I am trying to illustrate, is that while race is an issue that can be determined in a fairly objective manner, determining culture is dependent on various issues and has to be ascertained by looking at each specific case.

All peoples have the right to freely pursue their cultural development (a 15 of the International Covenant on Economic, Social and Cultural Rights, ratified by South Africa 1994-10-03). Race and culture are two different concepts that have to be treated as such. In our legal system race on its own is not, or at least should not be, an issue that is relevant in any way. Race as a determining factor has been removed from legislation. An example of this is when the Prohibition of Mixed Marriages Act 55 of 1949 was repealed in its entirety by section 7 of the Mixed Marriages Amendment Act 72 of 1985. Culture, on the other hand, is important and needs to be taken into account when various decisions are made. Legislation still contains references to culture, such as section 40 of the Child Care Act 74 of 1983, in terms of which regard has to be had to the religious and cultural background of a child where an adoption is considered. Culture is also protected in the Constitution. This of course does not mean that culture will necessarily be the most important factor.

Pieterse 2001 *SAJHR* 364 367 suggests that culture has replaced race as the primary distinguishing factor. He explains that there is an ideology that assumes that indigenous culture is the same across the designated racial/cultural group and ignores variations of culture between individuals as well as between different subgroups within the broader group (373). He further explains that one must

distinguish between racism and racialism. He says racism is seen as a form of behaviour, while racialism is used to denote doctrines of racial superiority and inferiority, which are often used to justify racist behaviour, and that racism could be conceived of as a manifestation of racialism (365). He warns that, due to the link between racialism and culturalism, we must remain wary of dichotomising and reinforcing racial “difference” through engagement with culture (389).

Leiris’ conclusions (31) that a given culture is not the creation of a particular race, but normally of several, and also that no given race necessarily practises a single culture (32), seem to be correct. The world is so much smaller in the sense that world travel has become the order of the day, people of different countries, different races, different cultures and backgrounds are meeting and mixing on a daily basis. It should be clear that there is no homogeneous culture that can be identified by simply determining the race of a person. Culture is a complex issue completely separate from race.

3 The Constitution

The Constitution does not define the terms “race” or “culture”, but makes provision for both. Non-racialism is one of the founding provisions of the Constitution (s 1(b)), and discrimination based on race is prohibited (s 16(2)(c)). This is re-iterated by not extending the right of freedom of expression to the advocacy of hatred that is based on race (s 16(2)(c)).

There are various references to culture in the Constitution. There is a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (ss 185 and 186; in terms of s 181 this is one of the state institutions meant to strengthen constitutional democracy in the Republic), while there is also a reference to cultural heritage (s 235). Discrimination on the ground of culture is prohibited (s 9(3) and (4)). The right to a cultural life is protected in section 30. Here the term “culture” means a particular way of life of an identifiable group of people (De Waal, Currie and Erasmus *The bill of rights handbook* (2005) 629). Section 30 should be distinguished from the protection of cultural rights enshrined in section 31 (Mireko “Culture and the South African Constitution: An overview” 1999 *SAPL* 439 450). Section 31 does not refer to culture in general, but to “their culture”, and is thus understood as a source of identity (De Waal *et al* 629). Section 31 introduces a collective dimension, in other words, this is the right of a collection of people “belonging to a . . . community” (Devenish 1999 *THRHR* 201 212; Mireko 1999 *SAPL* 439 450). The question now is what would be considered a “community”.

3.1 Community

De Waal *et al* 626–627 say that defining “community” is difficult. At its most general, it can mean simply an aggregation of people, or, more precisely, the modern usage of the word denotes an aggregation of people with a particular quality of relationship, held together by something in common, and that it is the quality of the relationship that is important. They conclude that a community for purposes of section 31 should be an identifiable group, united by a common religion, language or culture, that is self-consciously a community. In other words, the members should identify themselves as part of the group, and they should be identifiable by other members as such.

The phrase “[p]ersons *belonging* to a cultural . . . community” (my emphasis) in section 31(1) indicates that the right is not a right of just simply anybody, but

that claimants have to prove that some tie exists between them and their group (Currie “Minority rights” in Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman (eds) *Constitutional law of South Africa* (1996) 35-17). An individual’s right of participation in cultural life will be impugned if some harm comes to the cultural community in which that individual takes part (De Waal *et al* 624). An important point made by Currie 35-17 is that section 31 seeks to protect ties of affinity rather than genealogy, and that culture is more a matter of shared experience than a matter of genetics. De Waal *et al* 627 confirm this viewpoint, stating that ethnic origin is far less important than ties of affinity with an ethnic group and that the important issue is that membership of a cultural community is proved by demonstrating a history of shared experience and identification with the cultural community in question.

3.2 *Conclusions drawn from the Constitution*

The Constitution clearly makes a distinction between the concepts “race” and “culture”. The references to race deal with non-racialism, which is also a founding value of the Constitution (s 1(b)), non-discrimination (s 9(3) and (4)) and hatred based on race (s 16(2)(c)). In my view race *per se* is not the issue, but rather the references to the negative connotations associated with race that are important. The quest is to promote a democratic, equal, non-racial society (s 1).

Culture, on the other hand, clearly forms an integral part of society and is a concept that, in itself, requires protection. Although culture is not a founding value, this should not be interpreted to mean that culture is not a very important right. It greatly contributes towards the identity of the individual. Discrimination on the ground of culture is prohibited (s 9(3) and (4)), and cultural rights (ss 31, 185 and 186), cultural life (s 30), cultural community (s 31) and cultural heritage (s 235) are protected. As Pieterse 2001 *SAJHR* 364 402 says, the constitutional right to culture mandates the accommodation of cultural principles, practices and values in the legal system in a manner that promotes the spirit, purport and objects of the Bill of Rights.

4 **Conclusion**

In the past twelve years since democracy South Africa has changed dramatically, and so have the beliefs, views and mind-sets of its people. The country is experiencing a period of restructuring. South Africa is a multi-ethnic country, and people from different backgrounds, of different races, with different beliefs and cultures, to name but a few, mix on a regular basis with the result that there is an intertwinement of cultures, religion, beliefs etcetera taking place. South Africans are being exposed to a variety of cultural influences, which has resulted in acculturation between groups, and cultures that have existed for centuries are slowly being eroded and diluted. The importance of cultural rights is not denied in any way, but in my opinion culture will become even less defined in the future. As people are exposed more to different races and different cultures it will also, I hope, go a long way towards eradicating the (erroneous) belief that race and culture are the same.

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