

# Culture and Rights

*Anthropological Perspectives*

*Edited by*

Jane K. Cowan, Marie-Bénédicte Dembour and  
Richard A. Wilson



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# 1 Introduction

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*Jane K. Cowan, Marie-Bénédicte Dembour and  
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## **Rights and culture as emergent global discourses**

In the past few decades there has been a dramatic increase in negotiations between social groups of various kinds and political institutions, whether at the local, national or supra-national level, phrased in a language of 'rights'. Processes of globalization have led to rights discourses being adopted widely throughout the world, far from their original sites in the French and American revolutions. Just as importantly, they have framed new domains of political struggle, such as reproductive rights, animal rights and ecological rights. Constituting one historically specific way of conceptualizing the relations of entitlement and obligation, the model of rights is today hegemonic, and imbued with an emancipatory aura. Yet this model has had complex and contradictory implications for individuals and groups whose claims must be articulated within its terms.

The ubiquity and the diversity of both rights discourses and rights practices on the one hand, and their enormous implications for justice and peace on the other, make it more compelling than ever to widen the debate and make it more interdisciplinary. This volume adds an anthropological perspective to the debate: we argue for the need of a forum in which theoretical explorations of rights, citizenship and related concepts can engage with empirical, contextual studies of rights processes. This is important because local concerns continue to shape how universal categories of rights are implemented, resisted and transformed. However, despite the global spread of rights-based political values, the specificities of any particular struggle cannot be grasped empirically through a methodological focus on the local community alone. For in the process of seeking access to social goods (ranging from land, work and education to freedom of belief and recognition of a distinctive group identity) through a language of rights, claimants are increasingly becoming involved in legal and political processes that transcend nation-state boundaries. Our desire to explore the tensions between local and global

formulations of rights leads us to consider in more detail the interplay between the languages and institutions at a multiple of levels, from the local through to the transnational.

A striking feature within the contemporary efflorescence of rights discourse is the increasing deployment of a rhetoric of 'culture'. We are particularly concerned with the implications of introducing 'culture' into rights talk. Although 'rights' and 'culture' have emerged as key-words of the late twentieth century, their relationship to each other, both historically and in the present, has been conceived in quite variable ways. Nancy Fraser (1997: 2) has identified the 'shift in the grammar of political claims-making' from claims of social equality to claims of group difference to be a defining feature of 'a post-socialist condition'. Yet this condition clearly draws on forms of activism and critique developed within civil society in the past four decades, particularly in North America and Europe. These are worth summarizing briefly.

The 1960s were characterized by struggles in both North America and Europe to achieve political and economic equality for groups facing disadvantage on the basis of race and class and, with respect to Southeast Asia, Latin America and elsewhere, by struggles against neo-colonial exploitation. The failure of these movements to achieve fundamental reforms led, for some, to disillusionment with the legislative and judicial practices of liberal democracies and their models of neutral justice and formal equality. In the absence of economic enfranchisement and greater involvement in political decision-making, attempts to change societal discrimination became focused on 'culture' at the level of discourse and representation. Some activists sought to transform the fundamental values of their society, for instance by creating a global environmental movement, while others worked to renegotiate an existing group's position and status within the larger polity, as happened with the Black Power movement in the US. The latter process involved revalorizing ethnic or racial markers of a despised distinctiveness, and in some cases, creating new markers where had none previously existed.

The emphasis on 'culture' – ideas, beliefs, meanings, values – emerged in the context of the social movements of the 1960s and 1970s as part of a radical questioning of what was derisively dubbed 'the System'. To take the US, where such developments were most prominent, the ensuing ethnic and Native American movements followed the lead of Black activists in criticizing the melting-pot ideal and celebrating their differences from the Anglo-Saxon majority. In the identity politics which have ensued, culture holds a central place. Discourses of identity have appropriated the old anthropological sense of this term as the shared customs and worldview of a *particular* group or kind of people.

The popular conception that a group is defined by a distinctive culture and that cultures are discrete, clearly bounded and internally homogenous, with relatively fixed meanings and values – what we call an *essentialist* view of ‘culture’ – echoes what was until recently a dominant, if contested (see Brightman 1995), understanding of ‘culture’ within the discipline of anthropology. Significantly, this view reflects *both* Romantic nationalism, which conceives of diversity as a problem to be solved, and what Terence Turner (1993) has labelled ‘difference multiculturalism’, which conceives of diversity as a richness to be celebrated (although only as a mosaic of *separate and distinct* cultural units).<sup>1</sup> Intriguingly, in the 1980s, at the very moment in which anthropologists were engaged in an intense and wide-ranging critique especially of the more essentialist interpretations of the concept, to the point of querying its usefulness at all,<sup>2</sup> they found themselves witnessing, often during fieldwork, the increasing prevalence of ‘culture’ as a rhetorical object – often in a highly essentialized form – in contemporary political talk.<sup>3</sup>

Inspired in part by the surprise of this collision of two quite different manifestations of the concept in anthropological research, this volume examines ‘culture’ as an object of rights discourses, as well as examining the local and global conditions which compel and constrain such claims and the contexts in which they are articulated. But it seeks, also, to explore the extent to which the concept of ‘culture’ – *revised*, to be sure, in the light of the thoroughgoing critique – could be useful as an *analytical* tool to make sense of claims-making in the global context. Might it not help us, for example, to identify and think more productively about the *specificities of*, and *differences and relations between*, (a) local or group-specific, (b) nation-state and (c) supra-national concepts, institutions and processes concerning rights? In shifting attention from a formulation which *opposes* culture and human rights to one in which the pursuit of human rights is approached as itself *a cultural process* which impinges on human subjects and subjectivities in multiple and contradictory ways – might it not also help us transcend certain impasses and raise new kinds of questions?

### **Culture/rights: diverse conjunctions**

In the traditional terms of political philosophy, a focus on culture expresses a Romantic political vision, while a focus on rights is characteristic of liberalism. In political struggles over the past two centuries, culture and rights have been portrayed, sometimes as natural allies, at other times as strange bedfellows. These varying positions on the compatibility of rights and culture have characterized contemporary

political and academic debates as well. We see three major ways in which culture and rights have been conjoined in recent debates. The first two conjunctions – rights *versus* culture, and rights *to* culture – have preoccupied legal and political theorists, philosophers, anthropologists, lawyers, bureaucrats, non-governmental organizations (NGOs) and lay people, and compelled them to engage in conversations about the legal and political status which ‘a culture’ does or should have. These conversations occur more often in national and international institutions than in academia. The third conjunction – rights *as* culture – indicates a perspective that anthropologists have brought to the study of rights and legal processes generally, to delineate their structuring qualities and their connections to other aspects of social life. It is a perspective that can illuminate many aspects of rights processes. From this tradition we derive a fourth conjunction, of culture as a heuristic analytical abstraction through which to think about rights. We suggest that culture, rather than being solely an *object* of analysis, can be employed as a *means* of analysing and better understanding the particular ways that rights processes operate as situated social action.

(a) *Rights versus culture*

Not surprisingly, perhaps, the initial formulation of the link between rights and culture was one of opposition: rights *versus* culture. Recognizing rights was seen to entail a denial, rejection or overriding of culture; conversely, recognizing culture was seen to prohibit, at least potentially and in some cases, the pursuit of universal individual rights. The figuring of culture and rights in a relationship of binary opposition is rooted in a prior politico-philosophical antagonism – that of the ‘blood and soil’ response of nineteenth century German Romanticism to the universalism of the French Enlightenment. This binary opposition has been a core element of most post-eighteenth-century European thinking about society and political constitutions. It has also shown a remarkable ability to transpose itself to other historical moments and places.

One of its obvious contemporary expressions is to be found in the discourse of human rights. This discourse is animated by a fundamental tension between, on the one hand, the desire to establish universal rights and, on the other, the awareness of cultural differences, which seems to negate the possibility of finding common ground on which to base such rights. Hence, the most serious and still ongoing debate about human rights invites us to *choose between* universalism and cultural relativism.<sup>4</sup>

The competing claims of universalism versus cultural relativism have



been exhaustively debated and it is generally agreed that the debate has reached an impasse. It is not that cultural difference as such has disappeared. Different understandings of personhood, agency and bodily integrity, for example – part of what is meant by cultural difference – persist, even in a world replete with global connections, as Marie-Bénédicte Dembour's chapter on female circumcision in this volume reveals. Yet it is undoubtedly misleading to represent conflicts over such an issue as concerning *only* the competing claims of culture and human rights. It is doubtful that cultural practices of circumcision enjoy total consensual support even within the community in which they occur. This is almost certainly the case for African migrants to European urban centres, whose daughters grow up in and are influenced by a milieu generally horrified by such cutting practices, but probably also obtains in their homeland, where African feminist organizations have noisily protested them. Rather than seeing a singular culture with a set of fixed meanings that are incompatible with those of human rights, it is more illuminating to think of culture as a field of creative interchange and contestation, often around certain shared symbols, propositions or practices, and continuous transformation.

Another criticism relating to this putative opposition focuses not on the internal tensions within a cultural field and its dynamic nature, but rather on the ways that these fields – slightly more autonomous in the past, perhaps – have by now been penetrated decisively by external meanings and power relations, while the presents and futures of previously 'separate' societies have become ever more entangled through the vast and expanding regimes of global institutions. It is no use imagining a 'primitive' tribe which has not yet heard of human rights. In the present era, it is precisely some of the smaller, marginalized 'Fourth World Nation' groups that are using international fora to press their claims (Tennant 1994). In so doing, what it means to be 'indigenous' is itself transformed through interaction with human rights discourses and institutions such as the UN Working Party.<sup>5</sup>

Such observations are borne out and expanded in the chapters by Rachel Sieder and Jessica Witchell and David Gellner with reference to Guatemala and Nepal. Yet Colin Samson's chapter about another 'Fourth World' nation, the Innu of northeast Canada, insists that we should not assume thereby that cultural difference has been eradicated. Indeed, he emphasizes the devastating consequences for the Innu of the Canadian state's historical refusal to acknowledge difference, and its insistence on making 'cultural sameness' the price for gaining rights.

There is yet another reason why we argue that the stark either/or terms of the debate are wrongly conceived. The perceived dichotomy is

not just about incompatible values, attitudes and practices – what we might call, in their entirety, worldviews – but relates to a fundamental aspect of rights as a legal process. It is located in the inherent tension between the desire to formulate general principles and the need to apply these principles within particular circumstances and contexts. The tension goes beyond the human rights discourse to pervade legal discourse in many of its conceptions, particularly Western positive law and Islamic law.<sup>6</sup> This is because a universal status is claimed for legal rules by legal officials. As it is usually grounded in a positivist<sup>7</sup> view of truth, law essentializes social categories and identities. However, it never completely eradicates the complexity of social facts, which present themselves in the courtroom, in the legislative arena and in political struggles. Legal principles are constantly being readjusted to the demands of the present, the unpredictable and the local. This explains the contradictions that exist – without necessarily being acknowledged – in case-law, the constant need for legislative reforms, and the evolution of the legal system.

This way of understanding the tension between a universal rule and a particular manifestation – reminiscent of a Saussurian system/event, or *langue/parole*, distinction – subtly alters the traditional formulation of the problem. Rather than seeing universalism and cultural relativism as alternatives which one must choose, once and for all, one should see the tension between the positions as part of the continuous process of negotiating ever-changing and interrelated global and local norms. It is inescapable as long as flux and change exist in the world. The tension is inevitably magnified in our era when there is a drive to set and to implement global standards for humanity.

Granted, such philosophical nuances are seldom noted in the cut-and-thrust of the politics of culture in international arenas, in which arguments opposing universalism to cultural relativism have been used instrumentally in the light of which ‘culture’ (as an abstract entity) is either criticized or championed. Yet even here, the question must be posed: is it always *really* ‘culture’ that is at issue?

Consider the following case. In an early and notorious manifestation of the universalism *versus* cultural relativism debate in the international forum, a few Asian states argued that it was justifiable for them to resist western-cum-universal human rights in order to preserve their own cultural values. 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 spiralling downwards. This inconsistent attitude towards western-

ization 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 denunciations of internal repression of political dissent.<sup>8</sup>

In this case, then, the rhetoric of cultural relativism appears to have been motivated by a political opportunism which has little to do with a concern for cultural values. Yet its rhetorical invocation has forced challengers of those governments' views themselves to adopt the language of culture. Dissidents and critics of state policy now frequently argue that 'traditional Asian values' are by no means incompatible with human rights. To the contrary, the core values in Western human rights discourse are easily found, they argue, in Buddhism and in the moral lessons of Indian epics (Cowan n.d.).

A second case, developed in more detail in this volume by Heather Montgomery, concerns child prostitution in Thailand. Montgomery questions whether the right of children to be free from prostitution should be implemented, considering that the children directly concerned do not want this right. At first sight this seems a classic illustration of the debate between universalism and cultural relativism. On the one hand, we have the right of the child to be protected from all forms of sexual exploitation, as inscribed in Article 34 of the UN Convention on the Rights of the Child. On the other hand, we have the right of Thai children to act as they see fit, in accordance with the demands of their cultural environment. The children with whom Montgomery has worked appear willingly to subscribe to a 'way of life', and in particular to a 'cultural value' of filial duty towards their mothers, which enjoins them to support the economic survival of the family through prostitution. However, it is possible to read the situation in a different way. Despite the long history of prostitution in Thailand, it is clear that the children only prostitute themselves because of the lack of other viable economic opportunities. If they could, they would avoid prostitution. But they have reasoned that begging and rummaging through garbage constitute poor and less lucrative alternatives. In this case, we are confronted less with a problem of culture than with one of poverty.

The tensions between the dictates of universalism and those of respect for cultural difference, and thus between 'rights' and 'culture', are in important ways real and persistent. They cannot be made to vanish through an analytical sleight of hand which appeals to the eradication of local forms of difference through global processes and to the increasing hybridity of identities and cultures, because these phenomena occur at an uneven pace. Moreover the responses generated mix local and global elements into ever new and more potent cocktails. Even

so, we believe that the debate has tended to exaggerate the irreconcilability of the terms 'rights' and 'culture'. This is in part a consequence of essentializing them and of ignoring their close historical interdependencies, as Sally Engle Merry's chapter reminds us. The debate has also exaggerated the incommensurability of different worlds at the very moment when a new global 'culture of human rights' (see Rabossi 1990) is becoming entrenched and, as Dembour's and Montgomery's analyses emphasize, when this very fact makes possible – and imperative – the development of *conversations* between local worlds of meaning and global ones. Merry goes even further, showing through the example of Hawaiian women organizing around the problem of male violence against women, that local appropriations of both 'culture' and 'rights' have led to the transformation of both terms. Finally, we think that shifting our approach to this opposition, from a focus on supposedly irreconcilable worldviews to that of the inherent tensions between an abstract ideal and its implementation in the real world, between principle and practice, helps to clear a new path.

### *A right to culture*

A second conjoining of the two terms reverses their relationship, asserting a universal right *to* culture. The human rights discourse has stretched to allow culture to become an object of rights claims. The rights of an individual to 'belong to' and 'enjoy' a culture are enshrined in several international instruments: notably, Article 2.1 of the United Nations Declaration on the Rights of Persons Belonging to Ethnic or National, Linguistic and Religious Minorities, and Article 27 of the International Covenant on Civil and Political Rights. A third example, the International Labour Organization Convention (No 169) concerning Indigenous and Tribal Persons in Independent Countries, signed in 1989, aims at 'promoting the full realization of the . . . cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions' (Article 2 (2) b of the Convention). In this formulation, cultural features are seen as intrinsically valuable and worthy of recognition and legal protection. As in the rights *versus* culture phrasing, culture here is understood as a unified arrangement of practices and meanings. It is yet another 'thing' that an already formed actor is entitled to 'have' and 'enjoy'. Acknowledgement of its ontological aspect, its role in constituting persons, is muted.

In a certain sense, a right to culture is not a new idea. Most cogently expressed by Herder, the right to follow one's culture is one of the central tenets of European Romantic nationalism (Berlin 2000). Yet inter-

national treaties from the late nineteenth century until the mid-twentieth century dealt in an ambivalent fashion with sub-national and transnational minorities. In the (rather enlightened, in many respects) Minorities Treaties agreed at the Paris Peace Conference after the First World War and 'guaranteed' by the League of Nations in the 1920s and 1930s, for example, the rights of members of 'racial, religious and linguistic minorities' (as it was then phrased) to pursue their distinctive ways of life were recognized and protected by law. Yet League reluctance both to challenge state sovereignty and to upset the fragile European peace constrained its efforts to enforce compliance by states. In 1948, with the establishment of the United Nations and the Declaration of Human Rights, the recognition of cultural diversity was placed on a different footing, grounded in the human rights of each individual. Protection of the 'rights of minorities', a prerogative sullied by its exploitation by the Nazis in the 1930s, was discontinued. Given the individualist philosophical assumptions of the new regime, moreover, rights could not be extended to groups.

However, attention to minority rights and more generally to cultural diversity has received a renewed impetus and reached an unprecedented scale in the last two decades. Under pressure from an ever proliferating range of supra-national institutions (now including not only UN agencies but also, for example, those of the Council of Europe, the Helsinki Convention, the Inter-American institutions and the OSCE) to accommodate with greater justice the 'others' in their midst, be they migrants, minorities or indigenous populations, nation-states have been increasingly challenged to encourage, rather than repress or even merely tolerate, diversity within their boundaries.<sup>9</sup> Group rights has returned to the agenda, involving re-theorizations such as 'the rights of peoples', particularly as a response to concerns about, and mobilizations by, 'indigenous' peoples. Such developments signal a significant historical shift.

Consequently, 'culturalist' claims – claims which invoke notions of culture, tradition, language, religion, ethnicity, locality, tribe or race – have become a familiar rhetorical element in contemporary rights processes. More and more, though not without exception, they are likely to carry weight in contexts of adjudication. They may, additionally, be used to ground and justify other kinds of claims, for example, to land, environmental protection, education, employment and even political autonomy or independence.<sup>10</sup> They may be invoked to argue for exemption from laws binding other citizens, such as the exemption for Sikh men from the requirement to wear motorcycle helmets granted by British law (Poulter 1997: 258), or for legal interpretations that take into account the claimants' particular cultural identities and beliefs. Opposi-

tion to infrastructure and economic development projects is now conducted by pointing to the threat these projects represent for cultural survival (see Samson's contribution to this volume).

Invocations of culture have seemingly become inseparable from the language of resistance. However, the political implications of such claims cannot be generalized because culture may be called upon to legitimise reactionary projects as easily as progressive ones. In June 1997 a spokesman for the loyalist Protestant Orangemen in Northern Ireland invoked their 'cultural right' to parade through Catholic neighbourhoods during the 'drumming season' in triumphalist celebration of the historical memory of William of Orange's violent routing of Catholics from the region – a 'right' that had led to riots in the recent past. Conversely, indigenous groups in the Americas that have long been marginalized within formal state institutions are invoking the language of culture and rights in national and international tribunals to further claims to land and political autonomy – a process that Rachel Sieder and Jessica Witchell's paper on the Guatemalan case explores in some detail (see also Kymlicka 1989).

Jane Cowan's chapter on the Macedonian human rights movement reveals a situation of greater ambiguity; the impulse to label this movement as 'progressive' and those resisting it as 'anti-progressive' simply obscures a complex contestation within the community over its identity and the nature of claims it might generate, as well as over tactics and goals. Considering how such conundrums are faced (or avoided) at an international level, Thomas Eriksen's chapter examines the view of culture articulated in UNESCO's 1995 report *Our Creative Diversity*. He shows this product of an international committee to be an optimistic celebration of diversity, seen in fairly essentialist terms, and an affirmation of cultural rights, which skirts round the matter of the explosions that competing claims around culture can trigger. Whether negotiated locally or in meeting-rooms in Geneva and New York, the uses to which culture can be put in relation to rights are evidently multiple.

Culturalist claims may be only slightly more sophisticated versions of ethno-nationalism, or they may represent what has been called a 'strategic essentialism'. Activists from, or working on behalf of, communities making claims 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. Moreover, as David Gellner's chapter illustrates, the proclivity of legal systems to demand clearly defined, context-neutral categories (including categories of identity and membership) in order to be able to classify persons and deal with them on the basis of these categories – the *essentializing proclivities*

*of law*, in other words – contributes enormously to the strategic essentializing of culturally defined groups. According rights to collectivities may exacerbate this tendency by compelling them to define ‘a unanimous, or seemingly unanimous, set of demands’ (Tamir 1993: 47). This point is important, but not yet well appreciated, as analysts typically view a group’s tendency to essentialize as a product solely of its own enchantment with the presuppositions of Romantic or cultural nationalism. James Clifford’s (1988) famous account of the Mashpee Indians’ courtroom battle – an attempt to institute a land claim which, it transpired, could only be successful if they could prove to the courts that they ‘were now’ and ‘always had been’ a ‘tribe’ – sharply reveals the political pitfalls of arguments deconstructing their ‘culture’ and emphasizing the situational nature of ‘tribal identity’.

Indeed, such insights lead to a larger issue: the extent to which not only national but also international legal regimes, including the human rights regime, dictate the contours and content of claims and even of identities. There is an intriguing, and as yet mostly unexplored, dialectic between the discourse and practices – one might say, the culture – of human rights, and those of the groups that appeal to them. It is not even clear that all the ‘cultures’ caught up in the process exist prior to rights claims on their behalf; rights may be *constitutive* of cultures and their associated identities. Sieder and Witchell allude to such a phenomenon in Guatemala, and Cowan considers its relevance for understanding the Macedonian human rights movement in northern Greece. To the extent that claimants are compelled to use a language of rights in pursuit of what they need or want, and to portray themselves as certain kinds of persons, when these may be alien to their self-understandings, it is evident that rights discourses are not ethically unambiguous or neutral. While emanating an emancipatory aura, their consequences both for those who use them and for those asked to recognize them are more contradictory. This volume enhances our understanding of the *paradox of rights*, the ways in which rights discourses can be both enabling and constraining.

### *Rights as culture*

A third formulation of the relationship between the terms under investigation could be phrased as: rights *as* culture. It proposes that rights constitute a kind of culture, in the sense that the rights discourse embodies certain features that anthropologists recognize as constituting culture. Rights – understood as rights talk, rights thinking, rights practices – entail certain constructions of self and sociality, and specific

modes of agency. This formulation draws from and extends insights developed about law – which is analogous in certain ways to rights, though rights are also a subsidiary element in a larger framework of law – in the ‘law and culture’ anthropological paradigm, initiated by Clifford Geertz and carried forward by Laura Nader (1996), Laurence Rosen (1989) and non-anthropologists such as Santos (1995). In this paradigm, law is conceived as a worldview or structuring discourse which shapes how the world is apprehended. ‘Facts’ are not simply lying around waiting to be discovered; they are socially constructed through rules of evidence, legal conventions, and the rhetoric of legal actors. Certain things can be said; others cannot be said and thus simply disappear from view. In many societies, legal reasoning becomes one of the most important ways in which people try to make sense of their world. *Pace* Geertz (1983: 184), law is ‘part of a distinctive manner of imagining the real’.

As the human rights regime becomes increasingly entrenched at a global level in international declarations, conventions and agreements which are negotiated, implemented and monitored by national, international and transnational institutions, this understanding of rights as a structuring discourse seems increasingly persuasive. Many analysts already talk about the human rights culture as a core aspect of a new global, transnational culture, a *sui generis* phenomenon of modernity.<sup>11</sup> A ‘culture of rights’ has its own possibilities and limitations, both as a set of ideas and as a realm of practices. To name a few of its structuring ideas: it is individualistic in conception; it addresses suffering through a legal/technical, rather than an ethical, framework; and it emphasizes certain aspects of human coexistence (an individual’s rights) over others (an individual’s duties or needs). These are foundational ideas, even though they are contested and modified in an ongoing process, as evidenced in the African Charter, for instance.

With respect to practices, the pursuit of human rights requires people to become involved in specific political and legal processes. It often entails moving between the local site of a particular ‘human rights violation’, national courts, and supra-national or international fora such as the European Court of Human Rights or the UN Human Rights Commission. However, it is important to understand when and why this *does not* happen, an issue that Anne Griffiths’ chapter on Kwena women’s use of the Botswana legal system explores. While each of these sites may have its own particular rules and practices, it is the culture of human rights itself which has intensified the ways they interpenetrate. The process may be manipulated, moreover, by claimants who may deem it strategic to have a case fail at national level in order to carry it to



an international forum, in the hope of a more sympathetic hearing and an ultimately more favourable resolution. Finally, as Wilson has stressed in an analysis of human rights reporting in Guatemala (1997: 134–160) the culture of human rights dictates that certain ways (and certain ways *only*) of representing violations, motives and the subjectivity of victims be adopted by both claimants and their advocates if they are to have any chance of being heard. As he points out, this is engendered by the fact that human rights are saturated with what Habermas (1971: 112–113) refers to as a ‘technocratic consciousness’, which entails (again in Habermas’ words) ‘a repression of ethics as a category of life’ (Wilson 1997: 155).

It has been argued that although human rights (as discourse and practice) is in many ways ‘culture-like’, it constitutes a truncated and artificial culture in relation to the ‘more organic’ cultures it impinges upon. It is true that this ‘culture’ differs from what is usually described by the term, as a product of modernity and transnational intercourse. Yet we prefer to turn this criticism on its head, and insist that thinking of human rights as a ‘culture’, if it is to be useful at all, is useful for precisely this reason: to unsettle the organic assumptions which the term too often carries. Moreover, the ways that this structuring discourse is not bounded in time or space or with respect to particular institutions, but interpenetrates other structuring discourses is an apt illustration of what anthropologists mean when they argue, as Eriksen has in this volume, against the metaphor of a mosaic of bounded and discrete world cultures.

### *Culture as analytic to rights*

We think it helpful, in this context, to disaggregate two aspects of the law-as-culture project which tended either to be conflated, or to oscillate uncertainly between two meanings. The law-as-culture project applied culture to law in two subtly different ways. First, as we outlined in the previous section, it made law-as-culture an *object of analysis* (much as we have done in making rights such an object) in order to delineate the ‘culture-like’ qualities of law. It also reframed law in relation to culture (while shifting ambiguously between law-*in*-culture, and law-*as*-culture approaches), granting law more autonomy than traditional frameworks had and stressing its own framing capacities. Yet in seeking to reconceptualize the relation between law and culture, and more broadly, between law and society – that is, by showing how law influenced myriad dimensions of people’s lives and experiences, but also how social institutions including kinship or social practices such as gossip affected how

power was wielded and resisted in legal contexts – this project entailed a second application of culture, this time in its *analytic* sense, to tease out patterns and relationships of meaning and practice between different domains of social life.

It may be that culture is too implicated in the language of neo-romanticism, too laden with its ideological baggage, to be of much use as an analytical tool. It may also be just too indeterminate as a concept to offer the clarity which is so much needed. This is the position of some of the contributors to this volume. Without doubt, few words in the English language are so fetishized, and so contested – and not just by anthropologists – as ‘culture’. Raymond Williams, working in the fields of literature and media, saw it as a keyword of British society, incessantly defined and redefined over the course of the last two centuries (1976; see also Kahn 1995). Yet he did not, for that reason, abandon it, but instead went on to rework the concept, helping to inspire the new academic field of cultural studies. A second position articulated in this volume, engaged in constructive dialogue with the first, holds that anthropologists, too, still need such a concept, and in any case that they would be wise not to hand culture over too quickly to those who would essentialize it, if only because the stakes in the real world are so high.

Those of us subscribing to the second position suggest that a similarly reworked anthropological notion of culture retains value as an analytical tool, as a heuristic device that can help the analyst to talk about processes, grasp connections between different domains, and abstract more general patterns and relationships from specific manifestations. This entails a sensibility, a way of seeing and of discerning the connections offered up by the particular context being investigated, rather than a prescriptive set of analytical moves. Roy Wagner’s sense of culture as an ‘invention’ of the anthropologist, a ‘foil (and a kind of false objective) to aid the anthropologist in arranging his experiences’ (1975: xii), rather than a description of something which exists in the world, is therefore still provocative. Culture in this sense ‘does not *cause* behaviour, but summarizes an abstraction from it, and is thus neither normative nor predictive’ (Baumann 1996: 11). Culture is a sociological fiction, a shorthand referring to a disordered social field of connected practices and beliefs which are produced out of social action, and thus it is mistaken to imbue it with any independent agency or will of its own.

However, an analytical concept of culture which emphasizes process, fluidity and contestation could still elucidate rights processes, including those with a particular culture as their object, much better than one which negates or underestimates these aspects. As many of our chapters

exemplify, this analytical approach to culture in the context of detailed empirical accounts of actual struggles around rights enables a better grasp of both the patterns and the contingencies, the logics and the contradictions, of these social processes.

### **Theories of culture and rights in political philosophy**

The agitations of recent years around rights and culture have posed new challenges to political theory and philosophy. Theorists of rights have been confronted with critiques of universalism and demands that various forms of difference be taken into account when formulating and implementing rights. These critiques have emanated from diverse quarters – from new social movements such as feminism, gay and lesbian liberation, anti-racist politics, from ethnic and nationalist movements, from critical social theory and from post-structuralist deconstructionism – with often quite divergent epistemological assumptions and political goals.<sup>12</sup> Critics have identified both disguised particularisms in universalism (its androcentrism, heterosexism and Eurocentrism) and the exclusions and disparagement towards certain collectivities that it entails (sexism, homophobia, racism). Those theorists of rights who have not simply ignored such criticisms, viewing them presumably as the ‘false consciousness’ of identity politics (Fraser 1997: 5), have often responded by an axiomatic acceptance of the existence of other cultures and by exploring how their differences affect and are affected by a regime of rights. Strikingly, even though ostensibly opposed in their views on multiculturalism in education or on self-determination for minorities, prominent exponents of both liberal and communitarian positions share similar views on culture.

Thus, in the universalistic ethos of what Michael Walzer (1994) calls ‘Liberalism 1’, an orthodox liberalism espoused by Ronald Dworkin among others, rules defining rights are meant to be applied uniformly, regardless of the religious, linguistic or gender characteristics of the *dramatis personae*, with certain basic rights (such as freedom of speech and freedom of conscience and religion) considered as absolute. This kind of procedural liberalism was hegemonic in twentieth-century North American politics and in the democratizing countries of Eastern Europe and Latin America. It asserts no *substantive* conception of the common good but only creates mechanisms to facilitate a dialogue over what may constitute a collective good. In substantial works such as *Taking Rights Seriously* (1977), as well as in shorter, more polemical pieces (eg, 1994), Dworkin argues that freedom of speech is an absolute right on which no reservations should be placed by, for example, the

need to protect minorities from hate speech. Such a position places Dworkin's model in conflict with the claims of groups which insist that the state should actively facilitate positive recognition of their particular forms of distinctiveness.

Although he supports a procedural liberalism and state neutralism which is blind to difference, Dworkin (1977:160–8), following the philosopher Quine, is an avowed constructionist and opposes grounding basic rights in a notion of natural rights. Unlike many proponents of 'Liberalism 1', he concedes that relativism is 'logically impeccable', though morally wrong. Thus, even if culture rarely figures in his discussions, existing primarily as a source of difference which must be bracketed, the conception of culture which can be abstracted from his work seems unreconstructedly nineteenth century in its bounded, whole and static nature. He sees community, community morality and cultural difference as ontologically prior to rights.

Communitarian approaches that have emerged within political philosophy attempt to address the limits of an alleged philosophical 'atomism' within liberalism, and to incorporate an acknowledgment of the community's role in relation to the subject at two quite different levels: ontological and normative.<sup>13</sup> Much like anthropologists, they stress the social nature of being, and the ways in which subjectivity is formed in the context of social relations. They thus point out the inadequacy of both methodological and ontological individualism for understanding human needs, desires and capacities, which are always formed within – rather than prior to, or outside of – society. It is their arguments at the normative level, however, which pose the most direct difficulties for a liberal conception of justice and rights. Communitarians insist that the community, as the social collectivity in which individual subjectivity is formed and nurtured, and as the site which makes possible the expression of that subject's selfhood, must also be taken into account in considerations of rights and justice.

Charles Taylor, who does not call himself a communitarian yet is often deemed one of its leading theorists, has participated in this debate not only as a philosopher but also as a Canadian of mixed parentage, growing up under the influence of both the English-speaking and the French-speaking Quebecois traditions. In the face of what he and others have perceived as a threat to the long-term collective survival of the 'Quebecker' community, and in the context of the debate around the implementation of the new Canadian Charter of Rights in the 1980s and early 1990s, he has supported political efforts toward Quebec's formal recognition as a distinct society within Canada, a status that would, in exceptional cases, allow the pursuit of collective goals to

justify certain limited restrictions on individual freedoms. Taylor's conviction that collective goals may validly be recognized in modern constitutions contrasts with Dworkin's preference for complete state neutrality, and leads him to the position Walzer describes as 'Liberalism 2'. This position accepts the invariant defence of certain rights, such as *habeus corpus*, but encourages flexibility on others, depending on the collectively negotiated view about how distinct cultures in one society should relate, as well as about what constitutes 'the good life', and providing that such decisions are subject to democratic accountability. Taylor argues that communities are culturally distinctive, yet this does not entail, on the evidence of his other work, that he sees Quebecois or any other culture as a fixed, homogeneous and consensual entity. 'Any cultural field involves a struggle', he writes in another context. 'People with different and incompatible views contend, criticize and condemn each other' (1991: 72). More recently, he has reiterated that unity of 'the people' as an agent of decision does not require uniformity (1994: 256). Indeed, an understanding of culture as static would ill fit his dialogical conception of the formation of subjectivity.

In his essay 'Multiculturalism and "the Politics of Recognition"', however, Taylor assumes the task of assessing the claims of those arguing for the recognition of 'distinct cultural identities'. It is problematic to take the text as representing Taylor's own view on the subject, since sometimes he appears merely to present their views in order to examine them, while at other times he seems to speak with them, extending their insights and elaborating their claims. Without attributing all the views expressed to Taylor himself, we can take his text as a sympathetic presentation of voices within the field of multiculturalism and identity politics, articulating views with which many communitarians concur. In that discussion, culture and the relationships between different cultures emerge as a primary preoccupation. Despite qualifications and although he also uses terms such as 'community', 'distinct society' and 'cultural community', Taylor often slips into a more reified rhetoric. Cultures are referred to as distinct, bounded entities, even if they are not necessarily co-terminous with a national society, but rather, are 'commingled in each individual society' (1992:72).

In both liberal and communitarian texts, 'the community' is the favoured term for a collectivity, rather than 'culture', which has made its appearance rather belatedly. Both theories treat the community as a universalized abstraction, one whose scale is usually not specified. Kymlicka (1989) argues that communitarians have underestimated the importance which liberalism attaches to the community, in the sense of acknowledging that human beings are ineluctably social and that an

individual's revision of his or her projects necessarily occurs within a communal field, even if contemporary liberals such as Ronald Dworkin and John Rawls do not talk about this very much. However, both approaches, have until recently tended to take 'the community' as meaning 'the political community' (that is, the nation-state), assuming that the the political community and what Kymlicka calls 'the cultural community' coincide. The mobilization over the past few decades of marginalized groups and categories of person – the 'others' within – aimed precisely to upset this complacent assumption, both in politics and theory, by citing the multiple axes of differentiation within 'the community'. Yet it could be argued that the alternative conceptualization they were proffering, of multiple and distinct 'cultures' coexisting within a larger 'community' (or society or polity), simply transposed the problem to another level. The units are perhaps smaller, and mono-focused (around a specific 'identity'), but assumptions about, and sometimes demands for, uniformity and consensus can remain.

In both models, cultures, like communities, simply exist. They are empirically and logically prior to the question of rights. Neither Dworkin nor Taylor (or those he is representing) poses the questions: how does 'culture' come to exist and through what social and political processes? In what sense may 'culture' itself be the product of legal categories and institutional practices? The *a priori* and decontextualized view of distinctiveness exhibited by both Dworkin and Taylor ignores the cross-over, intermingling and borrowing which undermine simplistic depictions of 'distinct cultures'. In a rejoinder to Taylor's essay, Anthony Appiah (1992) remarked that the important point about cultures is not that they are *distinct*, but rather that they are *related*. 'Black culture', for instance, is in no way simply an expression of the African roots of former slaves, but something that emerges out of certain politically asymmetrical historical relationships between social groups. It is, in addition, a response to a *contemporary* politics of culture in which, as Appiah has ruefully noted, the more culturally similar Americans become, the more loudly they proclaim their cultural differences. Culture neither is, nor should be, the sole basis of identity, political or otherwise, according to Appiah. Indeed, he equates the politics of recognition with the politics of compulsion, where difference is tightly scripted and forced upon the bearer of an identity.

The multiculturalist emphasis on the equal worth of different cultures and the indignity of cultural disparagement also comes through in Taylor's answer to a famous remark attributed to Saul Bellow, that 'When the Zulus produce a Tolstoy, we will read him'. Taylor takes issue with Bellow's Eurocentric reasoning: 'The possibility that the Zulus,

while having the same potential for culture formation as anyone else, might nevertheless have come up with a culture that is any less valuable than others is ruled out from the start' (1992: 42).

While we might want to be sympathetic to Taylor's puncturing of Bellow's arrogance (cultural or otherwise), we would be reticent to do so on the basis of notions of an independent and benign process of 'culture formation' which leads to 'a culture'. As any cursory perusal of the history of the articulations of white and Zulu nationalisms in South Africa would show, 'Zulu-ness' is very much the product of concrete political processes.<sup>14</sup> These include apartheid policies, which created a homeland on the basis of a single, fixed vision of 'Zulu culture', but also the violent, primordialist ethnonationalism pursued by Chief Mangosuthu Buthelezi and the Inkatha Freedom Party during the collapse of apartheid in 1990–4 in particular.

When legal and political philosophers make statements about culture extracted from any specific social and historical context, they are liable to ignore its shifting political meanings. Lacking a theory of the relational attributes of cultures and their capacities for transformation, both scholars and activists who support cultural recognition tend to become preoccupied with 'cultural survival', rather than seeing cultural change as potentially positive, as well as inevitable. In the stark distinction between mass or majoritarian cultures, on the one hand, and disadvantaged minority cultures, on the other, internal homogeneity is too easily assumed and taken as natural. An endangered 'culture' is perceived as a pre-existing given which must be defended, rather than as something creatively reworked during struggles to actualize rights.

Such difficulties surrounding the usages of 'culture' and 'community' in relation to 'rights' have not gone unremarked within the field of political philosophy. Kymlicka, notably, has argued that many of the concerns about culture and community presented by communitarians, including cultural survival, are best defended from *within* a liberal framework of rights (1989). This requires, however, a more differentiated understanding of the term 'culture'. For Kymlicka, 'Culture is defined, as I think it should be defined for these purposes, in terms of the existence of a viable community of individuals with a shared heritage (language, history, etc.)' (1989: 168). He then distinguishes between 'cultural membership', a phrase acknowledging a person's attachment to a 'cultural structure' seen as 'a context of individual choice', which both liberals and communitarians claim to value; and the *character* of a culture at a particular historical moment, which is *not* coterminous with 'the culture' as such, since it may represent simply the version of 'the culture' promoted by the social groups which happen to be in power.

Kymlicka further criticizes communitarian arguments which assume, rather than investigate, 'shared meanings' and 'shared projects'.

These are caveats that we endorse. They resonate with many points made within the anthropological debate, some of which we have reiterated here. Kymlicka's more differentiated approach to culture seems a promising move. Yet we note that it illuminates some cases better than others. It is significant that Kymlicka's primary political concern is with Canada's aboriginal communities. While not making them paradigmatic, he insists that their case has wrongly been seen as anomalous and of little interest, when, in fact 'far more of the world's minorities are in a similar position to American Indians (i.e. as a stable and geographically distinct historical community with separate language and culture rendered a minority by conquest or immigration or the redrawing of political boundaries)' (1989: 258). The formal similarities to which Kymlicka points are intriguing. Yet the particular features of the Canadian case, including relatively recent sustained contact, in certain cases, between aboriginal groups and the European settlers and state institutions, the geographically remote locations concerned and the consequently restricted interaction between these two groups, and the ambiguity around the rights and sovereignty of aboriginal communities (see Samson in this volume), differ substantially from cases of minority groups in Europe, for example. There, such a degree of isolation is virtually unthinkable. Even when groups proclaim cultural difference, they typically do so from a context of greater social proximity to and interaction within and across groups. As an everyday lived experience, this can produce hybridities of identity and cultural forms, as much as perceptions of difference, and one is led to ask when, why and from whom such claims arise. We are brought back to where we started, to the task of trying to account for claims to culture as a human right in an increasingly globalized, post-socialist world.

### **Conclusion: towards better theory and practice**

The cases in which rights and culture are mutually implicated have proliferated, emerging in the context of diverse local and national regimes and stymying the international community's efforts to deal with them coherently at the level of principle. It is therefore unlikely that any single model of the relationship between culture and rights, or between minority and majority rights, is going to be adequate for all cases, either normatively or analytically. Clearly, all of us, but especially those involved in advocating or adjudicating rights such as theorists, NGOs and legal and political institutions, need to become more sceptical about