

## AN ARTICLE BY JOHN SMYTH PUBLISHED IN THE Eastern Cape Dispatch newspaper 7/02/08

INSIGHT: Individual Rights vs Community Rights: Which matter more?

The forthcoming case of Bonani Yamani, the young King William's Town man is expected to throw some light on the tension between an individual's rights and community rights. Yamani is seeking an apology from Nkosi Ngangomhlaba Matanzima, the Chairperson of the Eastern Cape House of Traditional Leaders, and from Nkosi Mwelo Nonkonyana, Chairperson of Eastern Cape Contralesa, for violating his constitutional rights after he was allegedly forced to submit to initiation against his will by a group of traditional leaders led by his father. The Justice Alliance of South Africa is also asking the court for an order which will ensure that this won't happen to other youths.

South Africa's Bill of Rights (Chapter Two of the Constitution) is highly regarded, and rightly so. But it is undoubtedly a document which puts the emphasis on individual rights. Only one section of some 70 words grants the right to practice "cultural, religious and linguistic" rights, and 20 of those words state that those rights may not be exercised in a manner "inconsistent with any provision of the Bill of Rights".

Yamani takes his stand on the equality clause in the Bill of Rights which forbids unfair discrimination against him on the ground of religion, conscience or belief. He says his Christian faith did not permit him to be circumcised in a manner that involves a blood covenant with his ancestors.

Custom, on the other hand, maintains that a young man who refuses to submit to the rite should be ostracised by the community because it is this initiation into Xhosa manhood that marks his passage from "ubukhwenkwe" (boyhood) to "ubudoda" (manhood). To be stigmatised in such a way, traditional leaders say, would amount to "fair", not "unfair", discrimination.

In traditional culture the Nkosi is seen as a "kgosi ke kgosi ka batho" (a leader who is a leader through his people), the father of his people who serves as a symbol of unity. He is seen both as the embodiment of law and order, and the upholder of traditional values. Hence the dilemma which our Constitution raises, but seeks to solve only by that curt little phrase declaring that rights in the Bill of Rights must prevail.

Community rights, sometimes referred to as "communalism", depend on "ubuntu" which means "a person is (only) a person through other people". Traditional leaders fear that caving-in to the Western demand for individual rights at all costs will undermine their tribal authority, and destroy what the Westerner would describe as the camaraderie of the community.

Excommunication is the ultimate weapon they wield in their efforts to maintain the rights of the tribal community as paramount. Hence the demand for the ostracism of Yamani.

Individualism is often seen as a Western ideology. It is, however, noteworthy that Western countries today are increasingly using the powers of the State to forbid practices which cause health problems or social problems. So, for example, the UK bans smoking in all public places and horse-riders are no longer allowed to hunt foxes. These are blatant interferences with individual rights but they are tolerated on the basis of “the greatest good for the greatest number”. Human rights are highly regarded but they are increasingly circumscribed by what has come to be called the “nanny state”. Democracy has many facets, even in Western societies.

For Africa, however, history suggests that unbridled communalism can lead to fragmentation of nations. But as much as the ubuntu principle is seen as a guiding light for Africa, to bring it out of its cycle of poverty and war, it carries in itself the very seeds of that poverty and war, when tribal leaders decide to take up arms against one another and the whole tribe is forced either to participate or to leave the tribal land. The recent post-election violence in Kenya has followed just such a pattern, where the ruling tribal elite, desperately clinging to power, is finding itself under siege. One only needs to mention Rwanda to understand the chilling reverse of the ubuntu principle – “a person who is not one of my people is not a person”.

Somewhere there is a balance. Section 36 of our Constitution provides for human rights to be limited “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors”. There are surely many traditional rites and practices which the different tribes, races and communities of our rainbow nation can rightly retain without undermining the dignity, equality and freedom of the individual. That is the balance which the Constitution requires of us all. Furthermore, we not only live in a rainbow nation, but also in a global village. Strong leadership and upright lifestyles among those who lead are in short supply the world over. The traditional leadership structures of our nation have much to teach us and indeed the world. “Ubuntu”, by what ever name it is called, is a principle which many communities desperately need. Inner cities, for example, are falling apart for lack of it. At the same time, some traditions may have to be reviewed, or at least the freedom of individuals to participate in them. In a country where human dignity and freedom of speech and religion are rightly prized, all of us must be willing to adapt and change.

*John Smyth is a retired Queen's Counsel from Britain, living in Cape Town and a constitutional legal consultant. The respondents in the case are the the MECs for Health and Local Government and Traditional Affairs., Bonani's father and the two Chiefs.*