



# *Human rights discourse: friend or foe of African women's sexual freedoms?*

*Louise du Toit*

*Prof L du Toit, Dept of Philosophy, Faculty of Arts and Social Science, University of Stellenbosch, Private Bag X1, Matieland 7602; Email: [louisedt@sun.ac.za](mailto:louisedt@sun.ac.za)*

First submission: 25 November 2014

Acceptance: 1 December 2014

From an overview of the current state of the global debate on human rights, the need to strike a balance between the transcendent and immanent dimensions of such rights claims is distilled as an important guideline. The implications of such a balance are spelled out in a list of seven principles that should guide the activation of human rights claims in any context. In the second section of the article this general framework is brought to bear on the serious issue of sexual violence against women in the South African postcolony. I argue that at least one of the reasons for the fundamental unfreedom of women in contemporary South Africa is the clash between two dominant, but opposing frameworks that tend to quash the radical potential that a claim to the fundamental right to bodily integrity holds for women. Strategically, it is vitally important that human rights activism be used to bolster this cause in the South African context. This should, however, be done very consciously and explicitly with the various dangers for perversion and co-optation, as spelled out in this article, firmly in mind. Ideally, feminist thinkers and activists should forge solidarity around a critical, transcendent claim to bodily bolstered integrity as strongly as possible by indigenous traditions of women's resistance to oppression and exploitation. Such a claim should be mobilised for an internal critique of the master narrative of South African liberation. Such a stance will resist and refuse both dominant frameworks that collaborate – despite their overt mutual opposition – to portray African tradition and identity as irredeemably patriarchal.

## 1. Introduction

This article investigates whether human rights discourse, and international frameworks and legal developments could and should be used as a lever to support African women's struggles for greater sexual freedom and autonomy. The first section of the article gives an overview of the current state of the global debate on the advantages and potential benefits, as well as the numerous obstacles and problems with human rights discourse, particularly when these are invoked in postcolonial contexts. This overview is focused on demonstrating that the central paradox of human rights traditions can be understood in terms of the tension within human rights claims between the immanent and the transcendent dimensions, or between the 'is' and the 'ought', or between fact and ideal. I argue that the paradoxical and, in many instances, contradictory moments detectable in human rights struggles are neither contingent nor fully avoidable. Since the radical emancipatory potential of human rights lies precisely in their ability to critique what is, and to keep alive the promise of a better world, this tension should be kept alive. I furthermore show that violence (whether perpetrated by pro- or anti-human rights groups) is the closing down of this fruitful tension, an immanentisation of rights, which kills its promise. By listening to different thinkers' various concerns about the use of human rights, I also start to show in this section how human rights claims can best be drawn upon in the struggle for African women's sexual freedoms. Seven important themes in this regard are crystallised in conclusion.

The second section of this article is devoted to considering South African women's ongoing struggle for sexual freedom. The real contribution of the article lies in this section, in which I bring the 'lessons' learnt from criticisms of human rights claims in the international arena to bear on this specific issue in the South African postcolony. I first discuss, in broad strokes, the actual treatment of international human rights by the newly created South African Constitutional Court, and I lament the fact that the watershed verdict of the International Criminal Tribunal for the former Yugoslavia (ICTY) declaring war rape as a crime against humanity in 2001 has not found stronger resonance in our sexual offences legal reform process. I show further that the same paradox identified in the global debate on human rights is at work in our local context, and I analyse this tension through the lens of monumental versus memorial moments of constitutional interpretation in South Africa. Taken to their logical extremes, both these moments tend to quash the promise embodied in the new Constitution, and thus they need to be kept in balance. However, in the case of women's sexual autonomy, instead of a fruitful or productive tension between the monumental and memorial moments of constitutional interpretation, we find that two violent, but opposing frameworks reinforce each other in order to resist women's claims.

Thus I conclude that, while the current profile of human rights works against the creation of an indigenous feminist call for an end to sexual violence, the power of human rights or something like them remains an indispensable tool for African women's fight for sexual liberation.

## 2. Paradox keeps human rights alive

### 2.1 Douzinas and the 'fight for transcendence in immanence'

Human rights discourse remains paradoxical to the core. In Part 1 of his book, *Human rights and empire: the political philosophy of cosmopolitanism*, Costas Douzinas (2007: 8) "explores the paradoxical ways in which the ideal, transcendent position of natural law and human rights has been reversed turning them into tools of public power and individual desire". When these rights, expressed as a corrective ideal, lose their transcendent character, they soon function ideologically. As Douzinas views it, currently the two main ideological uses of human rights discourse entail "public power", mostly state and imperial power, and "individual desire" by which he refers to the colonisation of rights talk by capitalist power where rights typically get reduced to, and perverted into the satisfaction of individual and private desires. With the current rapid rise of a new middle class in postcolonial Africa and South Africa, corruption, conspicuous consumption of the leading classes, and the growing gap between rich and poor, the latter form of perversion of the liberation and anti-colonial struggle has become particularly salient in this context. In his earlier *The end of human rights*, Douzinas (2000) claimed starkly "human rights have only paradoxes to offer" and, in the later book, he goes even further, stating, "[t]he paradoxical, the aporetic, the contradictory are not peripheral distractions awaiting to be ironed out by the theorist. Paradox is the organising principle of human rights" (Douzinas 2007: 8). We should thus not expect that human rights could be invoked in any cause or context without the danger of their perversion being present.

Indeed, from Douzinas' overview of the history of natural and human rights, it becomes exceedingly clear that the driving impulse behind such claims or assertions throughout history has been the attempt to critique and oppose the immanent and totalising power of state or empire, in particular in so far as these structures drew their authority from custom and tradition (Douzinas 2007: 12). Such contestatory claims constituted appeals to various elements, including to nature, to God or to human reason or human nature as supposedly transcendent sources beyond the current power dispensation. Nature, God or Reason, believed to ground or found human rights, were seen as proclaiming 'higher', timeless, supra-cultural moral laws that could be successfully evoked in order to resist

local custom and to explode totalitarian, closed systems of power. Proponents of such claims were thus, in effect, searching for some authoritative ‘thing’ or some ‘place’ external to the instituted and established order from where critique on the bounded, self-grounding and self-reinforcing whole could be leveraged. In practice, then, “[h]uman rights are part of a long and honourable tradition of dissent, resistance and rebellion against the oppression of power and the injustice of law” (Douzinas 2007: 13). This tradition rested on assumptions of access to some form of higher moral authority.

Yet, paradoxically, and as regularly as human rights have been invoked in the struggle for greater freedom or justice, they have also been appropriated to bolster absolute sovereignty in the immanent powers they set out to resist. Rights claims and their particular moral force has since its inception been “usurped by those against whom they were supposed to be a defence”, states Douzinas (2007: 13). Rights claims have thus been used in justifications of capitalist expansion, bourgeois interests and, increasingly, of invasive, neo-colonial wars. Some of the most glaring recent examples concern US justifications of their military attacks on Middle Eastern states in the name of women’s rights. And so, for Douzinas (2007: 13), “the radical potential of right [is] both revealed and concealed in human rights”. Umut Özsü (2008: 863), in his review of Douzinas’ *Human rights and empire*, describes this structural ambivalence at the heart of human rights as the “unique ability of rights discourse to shuffle back and forth between the vitality of modernity’s promise and the violence of its practice”. The two most prominent problematic aspects of current human rights discourse that need addressing for Douzinas are their implication in “the projects of colonialism and imperialism [the ideological gloss of emerging empire] in which they have been affiliated” and the “stultifying processes of commodification to which they continue to be subjected” (Özsü 2008: 863).

How to do this? For Douzinas, the answer to this dilemma entails that “the work of critique must be grounded in a commitment to safeguard the distance between the utopian promise and current profile of human rights”, in other words, between transcendence and immanence (Özsü 2008: 863). This means that intellectual and activist critique “has to remain both mindful of and faithful to the need ‘to discover and fight for transcendence in immanence’” (Özsü 2008: 863). When struggles for greater freedom for oppressed peoples depend on keeping alive the transcendent claim (longing, protest, refusal) within the immanent context, then one can understand why Douzinas sees violence as constituting the opposite move of the “closing down or forgetting of the gap” (2007: 287). Violence closes the gap with the assertion that the actual or the real in some preferred form actually corresponds with the ideal. It is clear that such a claim, this type of violence, may just as easily take the form of a rejection as of an appropriation

of human rights discourse. It is not an exaggeration to say that these are the two most prevalent forms that armed violence currently assumes. For Douzinas, what these two globalised, opposing, forms of violence share is a resolute erasure of the transcendent nature of human rights claims. Whether they are pro- or anti-human rights, they curtail the idealistic dimension, and thus close down the utopian promise of human rights at their best. Put simplistically, the one side claims to represent and embody human rights, and the other combats human rights coaxed in its own particular version of such an incarnated, immanent form of human rights. By reducing and solidifying human rights in superficially opposed ways, both sides in fact collaborate to destroy what is most radical, most promising and most powerful about them. This is namely that they can open up radically new possibilities in stultified cultural environments such as the religious and patriarchal fundamentalisms often underlying both these dominant forms of globalised violence. Advocates of human rights should therefore work to keep open and emphasise the gap, the difference between positive law (immanence) and the ideals of justice (transcendence). In contrast to violence thus conceived, critique entails “care for the distance, the cultivation of its memory and possibility” (Douzinas 2007: 287).

## 2.2 The need for a thin conception of human rights

With this emphasis on the need to care for the distance and to cultivate the memory and possibility (promise) of the gap between immanent and transcendent, Douzinas seems to place a special emphasis on an aspect of human rights discourse to which he referred earlier in his analysis of the necessary vagueness of human rights: “the ‘human’ in human rights is a floating signifier; ‘human rights’ is a thin, underdetermined concept” (Douzinas 2007: 8). A central aspect of their apparent vagueness is the fact that human rights claims are moral claims made by individuals or groups that may or may not be recognised by the particular legal system in, or against which they are made (Douzinas 2007: 9). Human rights discourse thus has an undeniably moral dimension that aims to limit and shape political and legal power by stating in descriptive language what ‘ought to be’ the case. In contexts where human rights claims are most persistently made, they are likely to be least acknowledged; there is clearly something deeply paradoxical when a black South African under apartheid claims that she has ‘a human right to moral equality and dignity’. Her claim amounts to a metaphorical (figurative, imaginative) one in which she claims that she possesses something because she does not possess it; she simultaneously does and does not have moral equality and dignity. As Douzinas (2007: 10) explains, “right” in this sense clearly does not refer to any kind of “positive or legally enforceable right [but rather] to a claim about what morality demands”, in contrast with the positive law. As such,

it amounts to an aspirational claim or a call for reform of the current legal and political system. Such a claim would only have power in a context where there is a chance of its being heard or received by some sympathetic audience, even if that audience is located elsewhere, outside of the narrow context. The same claim would have had (did have) resonance in South Africa in the 1980s, since there would have (and was) resonance internationally, but no such resonance in the South Africa of the nineteenth century, for instance.

In addition, for human rights champion Michael Ignatieff, the emphasis in human rights should fall on the ethical and moral dimension, but then more specifically on the negative moral category of cruelty. In 2001, Ignatieff delivered the Tanner Lecture Series called 'Human rights as politics and idolatry', in which he considered and responded to the best known criticisms of the international human rights framework. These included the allegations that

human rights are vague and unenforceable; [...] they are more symbolic than substantive; they cannot be grounded in any ontological truth or philosophical principle; in their primordial individualism, they conflict with cultural integrity [...]; they are a guise in which superpower global domination drapes itself; they are a guise in which the globalization of capital drapes itself [...]  
(see Brown 2004: 451).

In response to these objections, Ignatieff defends a negative and minimalist conception of human rights. He believes human rights may be grounded more securely in the notion of cruelty than in any supposedly shared notion of what constitutes the good for humans. Here he follows the intuition of his teacher, Judith Shklar, who claimed that it is easier to reach universal and transcultural consensus on what is bad about human suffering intentionally inflicted (cruelty as a crime against the deep-seated human capacity for compassion) than about what is the good life. Ignatieff's conception of human rights is thus negative, in the sense that he claims that we should "put cruelty first" and use human rights instruments merely to "stop unmerited suffering and gross physical cruelty [... such as] torture, beatings, killings, rape, and assault" (Ignatieff 2001: 173). It is minimalist in a sense that is closely connected with its negativity: for Ignatieff, human rights should not prescribe the good or the right, but rather fight against what we can all (universally, presumably) agree on to be unequivocally evil or wrong. In other words, the universality of human rights is "compatible with a wide variety of ways of living [with many different cultures and world views] only if the universalism implied is self-consciously minimalist [... and] a decidedly 'thin' theory of what is right, a definition of the minimum conditions for any kind of life at all" (Ignatieff 2001: 56-7).

One can see here an attempt to ground human rights in some transcendent, supra-personal and, at the same time, minimalist account of what human life requires to be worth living. Douzinas would probably criticise Ignatieff's strategy as merely another attempt to reduce and then fix the meaning of human rights, which goes against their grain; what the two thinkers share is an insistence upon a 'thin' conception of right.

### 2.3 The political dimension of human rights

Wendy Brown (2004) criticises another aspect of Ignatieff's argument, in that she views his emphasis on the moral dimension of human rights (focused only on cruelty and suffering) as ultimately a refusal to acknowledge the political dimension in which, against which and from which human rights claims inevitably operate. Although Brown agrees that human rights claims necessarily couch themselves in moral (extra-legal or transcendent) language, she is also concerned that human rights activists (and, increasingly, bureaucrats), in the process of doing so, dangerously deny or ignore the inevitably political dimension of their work:

What are the implications of human rights assuming center stage as an international justice project, or as *the* progressive international justice project? Human rights activism is a moral-political project and if it displaces, competes with, refuses, or rejects other political projects, including those aimed at producing justice, then it is [...] a particular form of political power carrying a particular image of justice, and it will behave us to inspect, evaluate, and judge it as such (Brown 2004: 453).

Human rights claims, in their attempt to retain their universal thrust, are often couched in impossibly abstract ('thin') terms such as the entitlement of each individual to moral equality or in terms of their stand against the immorality of politically induced suffering (Brown 2004: 453). If they remain on this level of abstraction, they are irrelevant for people's political struggles. Yet, the moment that activists try to promote these principles in any concrete context, that is, to say what it means in context for people to have moral equality, the force and efficacy (if any) of such principles is dependent on taking on some decidedly political dimension. Brown's example in this regard is the supposedly 'humanitarian' intervention in Iraq by the US and Britain, where the local people simply 'traded one form of subjection for another'. The power to interpret what human rights could or should mean in those contexts was not worked out within the contexts themselves. Brown says that any 'moral' intervention seems unable to refrain from being at the same time a political intervention.

Posing as a type of “merely moral” anti-politics, the political effect of “liberal individualist” humanitarian interventions like these for Brown is that they do not empower individuals as political actors and autonomous agents, but rather “[cast] subjects as yearning to be free of politics, and, indeed, of all collective determinations of ends” (Brown 2004: 456). Add to this Sylvia Tamale’s (2008: 52) observation that “first-world” feminists often represent “third-world” women as helpless victims of their cultures, and as “objects devoid of any agency” and one gets an even stronger sense of how human rights interventions from afar may both deny and stunt political, interpretative agency in their ‘humanitarian’ interventions. In this way, the human rights flag carried by the (sometimes war) ship of liberal individualism may, in fact, announce and promote the end of politics, struggle, and resistance, in a gesture of ultimate self-refutation. Douzinas (2007: 6-7) formulates this paradoxical effect more strongly: “the ‘victories for freedom and democracy’ in Afghanistan and Iraq [...] have been drowned in a human rights disaster for the local people”.

And so, like Douzinas, Brown also concludes that human rights are inherently much more paradoxical than Ignatieff acknowledges, especially in their political effects and concrete manifestations: “[a]s such, [rights] are not simply rules and defenses against power, but can themselves be tactics and vehicles of governance and domination [...] they] can simultaneously shield subjects from certain abuses and become tactics in their disempowerment” (Brown 2004: 459). She adds succinctly: “there is no such thing as mere reduction of suffering or protection from abuse – the nature of the reduction or protection is itself productive of political subjects and political possibilities” (Brown 2004: 460). One could add that suffering itself never constitutes a brute fact. It is instead always embedded in a context whose interpretation and meaning are politically contested. To see this one should only consider the media spectacles of suffering created with the aim to justify certain wars and aspirations and to condemn others. Consider the dearth of images of suffering that do not serve the most powerful political agendas (Guantánamo Bay, victims of the US military invasions of Iraq and Afghanistan, Israel’s brutal practices of occupation, supported by the US) to understand to what extent our grasp of the global distribution of suffering is mediated politically, financially, ideologically, and otherwise.<sup>1</sup>

It might seem on the face of it as if Douzinas and Brown are pulling in opposite directions, with the former emphasising the need to retain the transcendence of human rights (to heed the ‘gap’ between the real and the ideal) in order to avoid becoming ideologically subservient, and the latter emphasising that human rights

---

1 In this regard, consider Judith Butler’s (2003, 2009) notion of “grievable lives” and the work of Dubravka Zarkov 2007.



only ever become effective politically, and that to claim otherwise is likely to serve ideological purposes. Yet I would suggest, following thinkers like Debra Bergoffen, Judith Butler and Drucilla Cornell,<sup>2</sup> that by coming at the issue from different sides, Douzinas and Brown are highlighting the need to keep alive the paradox at the heart of human rights. Brown emphasises the violence that is likely to follow if the immanent, political dimension of human rights is ignored; Douzinas draws attention to the violence that results from forgetfulness about the transcendent, moral dimension of human rights. Cornell explains this paradox by drawing a key distinction between the concept of justice and any particular conception of justice, arguing that “the concept of justice [cannot] be fully realized in a conception of justice” (Cornell 1995: 14). Yet, for any conception of justice to retain its force, it should draw energy and inspiration from the concept of justice. It is on the level of the conception of justice that both African (and other postcolonial) thinkers and feminists “demand greater room for political contestation” (Cornell 1995: 14). Such contestation is always in principle possible because, for Cornell (1995: 16), justice is a “limit principle”: “[j]ustice is not something to be achieved, it is [rather] something to be struggled for”. Similarly, Douzinas (2007: 13) states, “Every exercise of right, every rearrangement of social hierarchy, opens in turn a new vista, which, if petrified, becomes itself an external limitation that must be again overcome”. Judith Butler (2001: 430) argues along the same lines, saying:

What is permitted within the term universal is understood to be dependent on a consensus [and ...] presumes that what will and will not be included in the language of universal entitlement is not settled once and for all, that its future shape cannot be fully anticipated at this time.

It is clear that for these thinkers, the universal should be kept radically undecidable, “transcendent”, in Douzinas’ terms. Butler also wants to protect the ideal or promise expressed in the universal aspiration of human rights, and she counter-intuitively approaches this task by insisting that we remember precisely the particularity of its historical emergence. She calls this a performative contradiction: by remembering the concrete, particular, specific, historical roots and contexts of the emergence and revision of any universalising concept, any particular expression of justice, one keeps alive its core meaning, namely the way in which it emerges in protest and refusal to what is. This would ideally remind us of the possibility that it may and, in fact, must always be interpreted anew, that the critical-hermeneutical task of deciding what the political thrust of human rights should be in any given context is never exhausted. This is also why Butler

---

2 The discussion over the next two paragraphs is closely modelled on, and draws freely from an article I have published elsewhere (see Du Toit 2013).

aligns the universal with the “not yet”, with “that which remains unrealised”, and its articulation with challenges to its existing formulations (Butler 2001: 431, as discussed in Bergoffen 2003: 125). Bergoffen (2003: 125) notes that Butler resists “align[ing] the universal with an absolute unerring content”, and does not ignore, but rather draws attention to “the disjunction between the specificity of the content and the claim to universality”, which is a necessary and ever-present disjunction, a tension that should at all costs be kept alive. Bergoffen detects a similarity between Butler’s “politics of hope and anxiety” and Derrida’s (1997: 29) “democracy of the perhaps” and sees them as linking “the possibility of justice to a thinking that frees the thought of the future from its betrayal [...] by already determined concepts of universality” (Bergoffen 2003: 126). Bergoffen (2003: 125) formulates this concern very well:

Dethroned from their position as absolute Platonic realities, universals become embedded in material realities – sites where the tension between the specificity of those articulating the universal appeal and the absolute resolution articulated in the particulars of the appeal become politically productive.

The next section is devoted to bringing this international, philosophical debate on the nature, status and structure of human rights to the current South African context, and to asking how human rights discourse could or should function in women’s struggles for sexual freedom. In particular, by keeping in mind the themes that have crystallised in this section, the question to be answered is *how* could or should human rights frameworks and claims be made productive in South Africa, in fighting for African women’s sexual autonomy and freedoms? The themes to be kept firmly in mind include protecting human rights claims against their usurpation and monopolisation by state power; protecting human rights claims against their usurpation and monopolisation by imperial powers such as the US and others; protecting human rights claims against being co-opted into a capitalist frame which reduces them to individual need satisfaction; keeping alive the transcendent claim or dimension of human rights; neither negating nor avoiding the political dimension of human rights, which is closely linked to the need for local contestations over what specific human rights such as bodily integrity should mean in particular contexts; maintaining the ‘human’ in human rights as a thin concept and thus actively challenging ideological understandings of the human ‘from below’, for example, where humanity or dignity is conflated with middle-class existence or male embodiment, and similarly, preserving the proposed thinness of human rights conceptions and safeguarding the distance between the concept and the conception of justice by resisting interpretations of human rights claims that are overtly individualistic or abstract and that thereby threaten cultural integrity. A golden thread running through most of these themes

is the need for South African women to work out for and among themselves what transcendent human rights principles such as bodily integrity could and should mean within local places, and then to find or create responsive audiences both inside and outside the country to help exert pressure on governmental and other structures to rearrange power relations within the young state in order to improve the protection of women's and girls' sexual integrity.

### 3. Sexual freedom in the postcolony

#### 3.1 Women's sexual rights as human rights

The previous section showed how feminist theorists such as Bergoffen, Butler and Cornell cautiously adopt and adapt human rights discourses to be used in specific struggles, thereby emphasising the need for such discourses to be activated. On the one hand they suggested that we cannot today do without the universalising and transcendent moral claims emanating from these discourses and on the other they showed that this can only happen if their concrete application remains eternally open to fresh and competing interpretations, i.e. in Douzinas' terminology, if they resist the violence of closure. They want the content, but also the structure and status of human rights discourse to remain open to political contestation. As soon as the universalising thrust or aspiration gets bogged down by being equated with something like individual desire, satisfaction, public power, imperialist interests or even liberal individualist feminism, it becomes self-defeating. In the limited space available here, I want to briefly consider what this critical appropriation of human rights discourse may imply for (South) African women's struggle for sexual freedom.

Although it is possible to make a convincing argument that South African men's sexual freedoms are also not optimally realised, my focus is on the sexual un-freedom of women and girls in the country. With an annual South African Police Service rape report rate of 66 000 and apparently still on the increase, and with over 40% of the victims of rape being under the age of 18 (Jewkes et al. 2009), the impact of actual and threatened sexual violence severely violates women's sexual freedom as well as many other of their most basic freedoms guaranteed in our Bill of Rights such as freedom from violence, the right to bodily integrity, freedom of movement, and so on.<sup>3</sup> Moreover, I would argue that these cruelties are not generally framed as grievable under our current dispensation. Now and then a particularly cruel or sensational rape or rape-and-murder grabs the media headlines: think of baby Tshepang from Upington, Anene Booysen from

---

3 <<http://rapecrisis.org.za/rape-in-south-africa/>>

Bredasdorp, and Ina Bonnett, victim of the 'Monster of Modimolle'. Yet, if one considers the actual numbers of victims involved – approximately 180 reported cases per day – then it is clear that the phenomenon does not receive the high-level political and public response that it deserves. South African society seems to be mainly reconciled with, and thus complicit in sexual violence as firmly woven into the daily fabric of our lives. One could thus reasonably expect that international and human rights frameworks can and should be more strongly enforced or applied within the South African legal and governing systems, regarding this issue. But in light of the concerns around human and international legal frameworks explored earlier, how could this be done?

When these questions are raised, it should be noted that there has been an intensification and expansion of international attention to sexual violence, especially after the February 2001 verdict in the Kunarac case of the ICTY (see Bergoffen 2003). In this instance, three men were sentenced for war rape, condemned by the Tribunal as a war crime as well as a crime against humanity. It was the first time in history that war rape had been condemned and sentenced internationally as such a severe crime. Bergoffen's extensive analyses of this watershed verdict show that its power was derived from political pressure mounted by lobby groups on the issue of war rape around the world in the wake of the UN Fourth World Conference on Women in Beijing in 1995; the retention of the transformative, transcendent and aspirational thrust carried by the vocabulary of 'crimes against humanity' and, importantly, the openness of the Tribunal to allowing its understanding of the 'human' in human rights to be informed and finally changed by women's testimonies about war rape, i.e. 'from below'. Bergoffen (2012) demonstrates the latter by showing how a certain interpretation of women's sex-specific vulnerabilities to rape was incorporated into the Tribunal's definition of the 'human' in human rights at the cost of the traditional, invulnerable and heroic idealised male body.

In my view these developments in international and human rights law should have more profoundly affected our domestic frameworks for dealing with sexual violence than they finally did. It is a pity that they did not feature more strongly during the reform process, which culminated in the new Sexual Offences Act of 2007. Although there are differences between rape as an explicit strategy of war and ethnic cleansing as it was employed in the former Yugoslavian conflict, on the one hand, and the high levels of 'everyday' rape that happens in South Africa as a post-conflict society, on the other, there are also, scholars realise, important overlaps and insights that are transferable between pre-, post- and armed conflict contexts. It could arguably be demonstrated that South Africans have a long history of self-exceptionalism, in which the alleged uniqueness of South African circumstances (and later after liberation of South African autonomy

*vis-à-vis* the West) have been used as rationalisations for resisting international pressure. Indeed, such resistance is tied up with legitimate struggles for self-determination against ongoing pressures exerted by imperialist, neo-colonial and other globalising powers and interests. Yet, a blanket rejection of international pressure in the name of autonomy and self-determination and in the name of custom and tradition constitutes a kind of violence and closure – the kind of violence most typically challenged by the universal and moral thrust of human rights. It kills the promise of a better life just as surely as does an invasive war waged under the banner of humanitarianism.

### 3.2 Human rights in South Africa

How should South Africans then respond to international human rights and humanitarian frameworks and activities? Renowned South African legal philosopher Lourens du Plessis draws attention to the mixed reactions of the newly created Constitutional Court of South Africa to international and human rights frameworks. On the one hand, in the very first case handled by that Court, the *Makwanyane* case in which the constitutionality of the death penalty was contested, the Constitutional Court triumphantly declared the death penalty to be unconstitutional.<sup>4</sup> They did this, not only in the name of the South African Constitution, but explicitly also in the name of human rights standards worldwide (Du Plessis 2000: 387). Du Plessis adds that two justices, Mokgoro and Madala JJ, went further than this and “solemnised a marriage of Western and African human rights values” with reference to *Ubuntu* (Du Plessis 2000: 387). Interestingly, among this and other “remarkable judgements” of the Constitutional Court which “have given short shrift to the remnants of long-cherished biases” on the basis of the newly celebrated human rights culture in the country, Du Plessis (2000: 388) lists rights and freedoms regarding gender and parental roles and prominently also gay and lesbian rights. There was thus, at least initially, great enthusiasm for the application of human rights standards to the opening up of sexual freedoms for all South Africans.

Following the work of Johan Snyman (1998) in this regard, Du Plessis distinguishes between a monumental and a memorial approach to the Constitution. The confident thrashing of “long-cherished biases”, held by the majority of South African citizens in the name of human rights, he calls a monumental moment of constitutional interpretation. He contrasts with this the memorial moment in constitutional interpretation where the emphasis is more on mourning (of past victims) than on triumph or celebration – echoing the ideas

---

4 S v *Makwanyane* 1995 6 BCLR 665 (CC).

of Shklar and Ignatieff discussed earlier. For Du Plessis, the memorial moment limits triumphant constitutionalism by allowing for a multiplicity of perspectives, for voices coming from concrete, local contexts, and for political contestation. In particular, Du Plessis is concerned that the voices of actual and potential victims of constitutional decisions should be more clearly aired and prioritised. This would mean, for example, in the case of the death penalty decision, that victims of violent crime should have ideally been given the chance to testify about the impact of criminal violence on their lives, thereby giving a voice to the majority of South Africans who seem to favour the return of the death penalty. At the same time, South Africans should have been reminded of the unsavoury political role that the death penalty had played in apartheid South Africa. These emphases imply a much more modest constitutionalism and, for Du Plessis, they give better effect than monumental constitutionalism to an “open community of constitutional interpreters”. One aspect of this latter notion is that the Constitution does not ‘belong’ in any sense to the Constitutional Court, but that its promise along with its interpretation instead belongs to all South Africans.

One could thus plausibly link Du Plessis’ notion of monumental constitutionalism to the transcendent, universal aspiration of human rights, and thereby with their radical and disruptive potential and promise, which should clearly be protected. On the other hand, his understanding of memorial constitutionalism insists on the difficulty of deciding what a specific human rights claim should mean in any particular, concrete context; in other words, he acknowledges the difficulty of simultaneously keeping alive the promise of human rights and contextualising them, making them politically effective. Like Butler, Bergoffen and others discussed earlier, Du Plessis (2000: 385) makes a clear case for striking a constant, if dynamic, balance between the memorial and monumental moments of constitutional interpretation:

the promise(s) which a constitution holds can only emerge from contradictory modes of dealing with that constitution as memory. In other words, *the manner in which we deal with the Constitution as memory predetermines the fulfilment of the Constitution as pledge*. The Constitution as memory is a *monument* and a *memorial* at the same time. In purpose and style these constitutional modes of existence are largely contradictory, but they need not necessarily exclude or eliminate each other.

Like Brown, Du Plessis is clearly uncomfortable with the persistent tendency to treat human rights as a purely moral category and thereby to de-politicise them. He dislikes the way in which the Constitutional Court adopts an a-political, “merely moral” human rights stance on certain issues, thereby denying that they in fact interfere politically, or that their actions have political effects and

consequences in the sense of actually redistributing power. This was for him particularly striking in the *Azapo* case where the Constitutional Court resisted clear principles of international law in order to make what it considered to be strategic political moves by granting amnesty to apartheid perpetrators (Du Plessis 2007). This is doubly ironic since the Court then went on to defend its stance as motivated by morality alone, and to thereby be elevated above politics and political pressures, operating somehow from a pure moral realm beyond political considerations (Du Plessis 2007: 53). In doing so, the Constitutional Court insisted on the transcendent moment of human rights, without acknowledging the complexity of interpreting their meaning in context, i.e. their necessary immanence. We have seen time and again how global imperialist powers make a similar claim to neutrality and objectivity when they most glaringly serve their own power interests. Taken into extremes, memorialism and monumentalism may actually constitute the two opposing types of violence that Douzinas warns against: both tend toward the closure or fixation of the promise and disruption of human rights claims in an attempt to exert control over others. Whether the claim is one of the triumphant 'realisation' of human rights ignoring local protests and concerns or whether it is an opposition to human rights in the name of local 'political necessities' that 'require' certain 'sacrifices' to be made, neither of these strategies respects the promise (and thus necessary transcendence) of any human rights claim worth its salt.

### 3.3 Human rights and sexual violence

In conclusion, let us focus more narrowly on the everydayness of sexual violence committed against women and girls in this country, and the promise contained in human rights discourse to put an end to it. I agree with Helen Moffett's (2006) analysis, which shows that the debate and political contestations around sexual violence in South Africa get bogged down by a racialisation of the issue that occludes the fact that sexual violence is overwhelmingly intra-racial and intra-communal, and an issue of sexual rather than racial power. Of course, nothing in our country is untouched by race dimensions and it would be naïve to assume that this is untrue for sexual identity and sexual violence. The history of the sexual dimension of colonial power in South Africa still needs to be researched extensively (see Thomas 2007). But what I see as happening is that the issue of sexual violence is/gets racialised so that it can then be pronounced too sensitive and thereby removed from public debate. Read in feminist terms, what we get is a dominant public strategy, which declares male honour to carry more weight than female bodily integrity and sexual freedom, in a context where racial stereotypes also impact on these different valuations. The wider frame in which I understand the passivity, the silence and the complicity around sexual violence in our country

is the clash in our context between the two global frames referred to earlier, both of which exert the violence of closure. On the one hand, there is the too western-monopolised and US-dominated human rights framework which threatens indigenous traditions, because it treats human rights as immanent and, on the other, there are the ossified systems of control that are acknowledged as authentic and 'traditionally African' which resist those same immanentised human rights claims, often with no clear normative frame to put in their place. And of course, most typically, the clash between these two misogynist traditions chooses as its battleground women's sexual bodies. Viewed from women's perspective, these two interpretative frames that seem to oppose one another are, in fact, deeply complicit in maintaining women's sexual un-freedom. Drawing on Douzinas, one could say this is because both are strongly invested in existing power distributions (one global, one local) and, therefore repress the radical potential of transcendent human rights claims in postcolonial contexts.

If the struggle for women's sexual freedom and in particular their freedom from sexual violence in the South African postcolony is to be successful (without which the democracy is postponed and the liberation has not yet happened), it is crucial that we understand the nature of the beast that dominates the public discourse, as set out earlier. It is imperative that we understand the deeply paradoxical nature of human rights. It is important that women realise that neither of these two opposing agendas serve their interests and I suggest that it is crucial that women unite across race, class, ethnicity and religion in solidarity around issues of sexual violence and oppression in order to ensure that racial, class, religious and other agendas do not hijack the debate. The next step would be to insist on a link between, on the one hand, the promise and power contained in human rights discourse, which historically played a decisive role in our political transition in this country, and on the other, the power and authority of women to express what sexual freedom and the basic right to bodily integrity as promised in the Constitution *mean in our local contexts*, cultures and neighbourhoods. I thus propose that it is necessary to resist and refuse the tendency of the dominant discourses to force the sexual violence debate into a stalemate by pressing the issue into the service of national (or race or class) interests.

Women (and their male allies) should insist on again and again returning this debate back to the question of what the basic human right to bodily integrity should and could mean when the proclamation of that right is allowed to critique and explode local interpretative frames that want to limit and contain its promise. The power of human rights should be mobilised in order to combat the often invisible cruelties committed against women in the everyday in the way that Ignatieff proposes, but then not by naively claiming to be 'merely moral', or to be minimalist and purely negative in their approach. It is a truism that, if you



want to end the banal invasions of women's bodies, the violent appropriation of their humanity through the subjection of their sexuality, it will require a radical redistribution of power (see MacKinnon 2005). It will be political and it cannot but be political, but we should not shy away from this. Not only will women and men in the process insist on and highlight the public-political nature of the pervasive 'private, sexual' violence made possible by the current nature of the state and government structures, but they will also assume real political power for women (see Nedelsky 2011). At the same time, feminists would challenge western-monopolised human rights frameworks by re-activating forgotten indigenous traditions of women's sexual freedoms and autonomy, and would challenge local authorities to state in so many words that African traditions oppose women's right to bodily integrity and autonomy, and to substantiate those claims. Also, claims to tradition will hereby be removed from the murky realms of the untouchable and the timeless, and brought into the living gathering of people, the *lekgotla*, where they belong, for scrutiny and reinterpretation, for inquiring rigorously about whether they (still) serve the flourishing of human life or not. Neither the promise of human rights nor the meanings of African traditions should be handed on a tray to powerful groups who have no real interest in women's lives and consider the sacrifice of women's sexuality to 'higher causes' as justifiable.

Finally, I want to draw attention to the close affinity between the proper transcendence of human rights claims and the imagination. Stories in all cultures have served the purpose of critiquing the violent closure of meanings and worked to open up avenues for thinking and acting differently. In a dynamic African past, which some contemporary individuals want to close down and freeze in time according to their own skewed interpretations, stories have played the same role. In a recent anthology, Jean Lombard (2014) from Cape Town collected numerous stories dealing with the legendary big Water Snake of the Groot Gariep – the largest and longest river in our country, winding its way through an arid landscape. What strikes the reader about this series of stories, a small selection out of a large multicultural tapestry of southern African stories about the Water Snake, is how the snake represents the male sexual organ, the Phallus, on the one hand, but how closely aligned the Water Snake is to women's sexuality and women's procreative powers, on the other. The Water Snake is the perfect example of what the ancient Greeks called the *pharmakon*: the medicine that could also be a poison, the deeply ambivalent phenomenon. The snake lives in the deepest hollows of the river – in a land where water is the most precious resource and the source of all life. The river itself is almost mythical, supernatural – a large body of water winding its way through a semi-desert. The Water Snake is closely associated with the river itself, and highlights both its life-saving and life-threatening aspects. The Water Snake carries a bright stone on its forehead, which it takes off and hides in the reeds

when it feeds. This stone is marvellous and enticing and brings riches to the one who can get hold of it. Yet, the same stone can act as a trap by which the snake can catch a person for prey. In some stories, the snake swallows all the water of a river or fountain so that the humans starve.

Also sexually speaking, the Water Snake is deeply ambivalent, representing both the pleasure and the dangers of sex itself. It is mostly regarded as straightforwardly threatening to men and boys – it eats them. But the snake has a more complex relation with women and girls. When girls reach puberty, it is customary in some cultures that the young girl (*die maagmeisie*) gets introduced ceremonially to the Water Snake – an acquaintance that is understood will empower her, especially in her womanly role of life-bearing (see Deacon in Lombard). In addition, in almost all of the stories recorded, ranging from Sotho to Xhosa to Griekwa cultures, the Water Snake seeks to marry a girl, to find a wife. It is said that once a woman has had intercourse with the snake, she will lose sexual interest in men. According to one story-teller, the woman ‘gets wise under the water’ and no man can give a woman the kind of pleasure that the snake can (Strauss in Lombard 2014: 39): “Ek en jy kan tog nie met haar gedoen kry wat die slang met haar gedoen het nie. Die slang gee haar ‘n anner soort lekkerte”. I read this as the kind of legend that plays an important corrective role in a male-dominated society. In a world where male sexuality is constructed as dominant, stories of the Water Snake place emphasis on female sexuality – not only on its procreative and life-giving and life-sustaining aspects, but also, very importantly, on the female capacity for pleasure. The exaggerated, impossible pleasure that the Water Snake is capable of bestowing on his wife (or anyone’s wife!) acts as a reminder of women’s capacity and need for sexual pleasure, and the Snake, in its mythical proportions, embodies something transcendent, something which by its very nature pushes against the boundaries of the immanent, the given, the closed, the tradition and the custom. The Water Snake makes the impossible possible and stretches the imagination. It inspires awe, and serves as a reminder of how human sexuality is embedded in nature and how both its constructive and destructive powers ultimately transcend us.

In line with the thinking of Sylvia Tamale (2008), I also think it is strategically important to revisit African cultural traditions in an effort to deliberately work against “the totalising effect of obscuring the potential that culture may hold as an emancipatory tool” (Tamale 2008: 49). Tamale wants to pursue a “constructive approach to African sexual rights”, an approach that works through rather than against or around African culture, and I agree with this strategy. It is important that African feminists highlight both the positive, emancipatory as well as the negative and restrictive aspects of contemporary African cultures. From such a perspective, we, as African scholars, shall also be better placed to highlight both

positive and negative aspects of contemporary Western cultures, where, as far as women's sexual freedoms are concerned, there are also still many problems. We should consistently fight the stereotypes that portray, for example, Europe as completely woman-friendly when compared with 'patriarchal, oppressive' Africa. These pictures are purely and simply false.

Echoing the two South African Constitutional Court judges referred to earlier, Tamale (2008: 60) asks that we must "find those values that resonate from indigenous cultures that will speak to the rights repertoire, as feminists know it" and build our case that way. Through her investigation into the Baganda cultural practice of *Ssenga* (sexual initiation of a girl by the paternal aunt), Tamale discovers not an outdated, static and oppressive practice as African cultures are usually portrayed, but a practice that has adapted to changing realities such as HIV and AIDS, and which now serves to help young Baganda women "negotiate agency, autonomy and self-knowledge about their sexuality", as well as their sexual autonomy and economic independence. As in the Water Snake stories of South Africa, we find in *Ssenga* an emphasis on women's sexual pleasure. According to Tamale (2008: 62), these young African women are empowered through a contemporary version of sexual initiation into using "the erotic as an empowering resource to claim justice". In the midst of the real, empowering new possibilities are opened up through a redescription, a reimagination of the world. What young girl raised in the West can lay claim to this kind of sexual empowerment through cultural initiation?

To return to the question which is the title of this article, the current profile of human rights, narrowly associated with Judaeo-Christian legal traditions and, increasingly, with liberal individualism and the gradual capitalist destruction of the political sphere, probably constitutes more of a foe than a friend to African women's sexual freedom aspirations. On the other hand, they may still prove to be (even if in a somewhat transformed guise or form) an indispensable ally. Something like them (in their imaginative power to inspire and empower by picturing things otherwise than they are; 'it was and it was not the case') may very well be necessary to leverage critique against ossified, closed systems that resist calls for change and that insist on only one correct (resolutely patriarchal) reading of the African past, against systems that kill stories and the possibility to imagine things wildly differently. Just as African tradition is open to interpretation and contestation, human rights should be, too. We should probably not conceive of human rights as absolutes or irreplaceables. We should rather focus on the kind of stories that human rights at their best allow us to tell. They allow us to consider a world in which women's sexuality is celebrated and revered, women's sexual pleasure cultivated, and there are real sanctions placed on anyone violating them. They allow us to say in our context: "We simultaneously have and do not

have an equal moral right to sexual integrity and autonomy”, but not to blow this message into the wind; rather, they also help to create an audience who could ‘catch’ that story, echo it, and help to give birth to the world evoked by it. Should we dare to once again let loose the spirit of the Water Snake on the South African landscape? Allow the poison of the snake to do its healing, its protective as well as its destructive work? Can the Water Snake of a truly transcendent, but at the same time materially embedded (in the *boegoe* and the clay of the Groot Gariep) human rights discourse help us embrace the risks of an uncertain future of sexual freedom for all? Can we call again on the Water Snake to revitalise an indigenous tradition of sexual freedom and celebration, and to “discover and fight for transcendence within immanence”, as Douzinas suggests?

## Bibliography

- BERGOFFEN D (2003) February 22, 2001: toward a politics of the vulnerable body. *Hypatia* 18(1): 116-34.
- BERGOFFEN D (2012) *Contesting the politics of genocidal rape: affirming the dignity of the vulnerable body*. New York: Routledge.
- BROWN W (2004) "The most we can hope for ...": human rights and the politics of fatalism. *The South Atlantic Quarterly* 103(2/3): 451-63.
- BUTLER J (2001) The end of sexual difference? In: Bronfen E and Kavka M (eds) *Feminist consequences: theory for the new century*. New York: Columbia University Press, pp. 414-34.
- BUTLER J (2003) Violence, mourning, politics. *Studies in Gender and Sexuality* 1(4): 9-37.
- BUTLER J (2009) *Frames of war: when is life grievable?* London: Verso.
- CORNELL D (199) *The imaginary domain: abortion, pornography and sexual harassment*. New York: Routledge.
- DERRIDA J (1997) *Politics of friendship*. Transl G Collins. New York: Verso.
- DOUZINAS C (2000) *The end of human rights*. Portland, OR: Hart.
- DOUZINAS C (2007) *Human rights and empire: the political philosophy of cosmopolitanism*. New York: Routledge-Cavendish.
- DU PLESSIS L (2000) The South African Constitution as memory and promise. *Stellenbosch Law Review* 3: 385-94.
- DU PLESSIS L (2007) Azapo: monument, memorial or ... mistake? In: Le Roux W and Van Marle K (eds) *Law, memory and the legacy of apartheid: ten years after Azapo versus President of South Africa*. Pretoria: Pretoria University Law Press (PULP), pp. 51-64.
- DU TOIT L (2013) In the name of what? Defusing the rights-culture debate by revisiting the universals of both rights and culture. *Politikon: South African Journal of Political Studies*. Special edition entitled *Citizenship and competing equality claims of universal human rights and culture/religion: a North-South dialogue*. Gouws A and Stasiulis D (eds), pp. 15-34.
- IGNATIEFF M (2001) *Human rights as politics and idolatry*. Princeton, NJ: Princeton University Press.
- JEWKES R, N ABRAHAM & S MATHEWS (2009) Preventing rape and violence in South Africa: call for leadership in a new agenda for action. Report, Gender and Health Research Unit, Medical Research Council. <[http://www.mrc.ac.za/gender/prev\\_rapedd041209.pdf](http://www.mrc.ac.za/gender/prev_rapedd041209.pdf)>
- LOMBARD J (2014) *Die ding tussen die riete: verhale byeengebring deur Jean Lombard*. Kaapstad: Tafelberg.

- MACKINNON C A (2005) *Women's lives, men's laws*. Cambridge, MA: Bellknap Press of Harvard University Press.
- MOFFETT H (2006) "These women, they force us to rape them": rape as narrative of social control in post-apartheid South Africa. *Journal of Southern African Studies* 32(1): 129-44.
- NEDELSKY J (2011) *Law's relations: a relational theory of self, autonomy, and law*. Oxford: Oxford University Press.
- SNYMAN J J (1998) Interpretation and the politics of memory. *Acta Juridica* 312: 317-21.
- TAMALE S (2008) The right to culture and the culture of rights: a critical perspective on women's sexual rights in Africa. *Feminist Legal Studies* 16: 47-69.
- THOMAS G (2007) *The sexual demon of colonial power: pan-African embodiment and erotic schemes of Empire*. Bloomington, IN: Indiana University Press.
- UMUT Ö (2008) Book review: Costas Douzinas, *Human rights and empire: the political philosophy of cosmopolitanism*. New York: Routledge-Cavendish, 2007. *European Journal of International Law* 19: 862-4.
- ŽARKOV D (2007) *The body of war: media, ethnicity and gender in the break-up of Yugoslavia*. Durham, NC: Duke University Press.