

Book review

Women, Law and Human Rights: An African Perspective

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This is a wide-ranging, thoughtful book from which I have learnt a lot. It joins a number of debates ongoing for a generation about law and its impact upon gender relations (for example, Smart, 1989). It does so specifically within the context of Africa: a continent of weak and often corrupt states, where famine and fundamentalism have had greater impact than feminism, where development (a concept of the ‘developed’ world) has to battle with tradition, religion, culture and history. It is a continent whose practices and laws tend to be viewed by the developed world in stereotypical and negative terms – we tend to associate Africa with polygamy and female genital mutilation (FGM; Banda prefers ‘cutting’) – so that the positive uses to which cultures (I use the plural intentionally) can be put get overlooked. The African Protocol on Women’s Rights of 2003 contains, in Article 17, an important statement on this: women are to have the right to live in a ‘positive cultural context’, and to participate in the determination of cultural policies. Banda pays little attention to this provision, which is a pity.

In the US and in Europe we have had to confront the issues raised in Banda’s book in the context of such matters as the ‘cultural defence’ (Renteln, 2004; Coleman, 1996; Volpp, 1996), the arranged/ forced marriage and the headscarf controversy. But, of course, we too have had to grapple with polygamy and female genital mutilation as well as Islamic divorce (the *talaq*), upon which, incidentally, Banda says very little, though private international lawyers in Britain are beginning to appreciate its incompatibility with human rights norms (e.g. Briggs, 2003). The questions may be more complex in Africa – universalism may be seen or seen there as a Western hegemonic view with European practice as the norm and African cultural practices as deviant (de Sousa Santos, 1997) – but they

are sufficiently similar for us to fail if we ignore our experiences and understandings (Kuenyehia, 2006).

Thus, the fact of cultural pluralism (Banda calls it ‘weak cultural relativism’) was known as early as the Greek historian Herodotus, and can be traced though Montaigne, Vico, Hume and Montesquieu, who may have been the first to try to explain cultural difference (though explanations are crude and naive). But it is to twentieth-century anthropology (Boas, 1901; Benedict, 1935; Herskovits, 1972) that we must look for articulation of the concept.

Pluralism is a theory about the sources of value, as are relativism and monism (or universalism, as Banda characterises it). Pluralists believe that there are many reasonable conceptions of a good life, and many reasonable values upon which the realisation of good lives depend. There are conflicts among reasonable conceptions of a good life, as well as among reasonable values. Political ethics needs to cope with these conflicts, to attempt to surmount difficulties caused by the incompatibility and incommensurability of values whose realisation is thought to be essential (and see Rawls, 1993). Where values are incompatible – one of particular resonance in the context of Banda’s book is a belief in equality of the sexes and a belief that men’s interests are more important – the realisation of one value must exclude the other. Values are incommensurable where there is no measuring rod by which they can be compared. Incommensurable values need not necessarily be incompatible, and, where they are not, they can co-exist. If values were only incommensurable the problem could be surmounted – a vision which allowed for and satisfied discrete but compatible conceptions of the good life is attainable. It is the incompatibility of values that offers us the greatest challenge.

Pluralists accept that conflicts among values can be resolved by appealing to some reasonable ranking of the values in question. They acknowledge that there is such a plurality of reasonable rankings, but this is contested.

Monism (universalism), by contrast, is committed to there being an overriding value or set of values and, if the latter, to a ranking scheme on the basis of which values can be compared in a way that all reasonable people would find acceptable. The UN Convention on the Rights of the Child is a statement of universalist

principles: it condemns 'traditional practices which are prejudicial to the health of children' (Article 24(3)). It does not specifically identify any practice, though it is clear it was female circumcision, as it then tended to be called, that was its target (Detrick, 1999, p. 415). But can it be justified in the name of culture or is it like rape indefensible as an affront to a woman's (or girl child's) dignity? CEDAW is another statement of universalist principles, and is surprisingly silent on FGM – the Committee has subsequently addressed it, including in its General Recommendation on Violence against Women.

There is also relativism (Banda calls it 'strong cultural relativism'). Pluralists reject relativism. Pluralism may have emerged out of relativism, so that the two are frequently conflated and confused. Relativists go beyond pluralism and think all values are conventional. Relativism emerged as a reaction to cultural evolutionism, which was European and often racist. Hatch explains: 'it goes without saying that people who were thought to be the least cultured were also thought to be the least intelligent and the darkest in pigmentation' (1983, p. 26). When cultural relativism emerged in the first third of the twentieth century it was seen as a challenge to racist, Eurocentric notions of progress. Like pluralism, it is a theory about the way judgments are made. But, to the relativist, 'evaluations are relative to the cultural background out of which they arise' (Herskovits, 1972, p. 14). The presumption is of the equal worth of cultures (Taylor, 1992, p. 72). It is easy to see the attractions of relativism: it is rooted in egalitarianism, in liberalism, in modernism. Larmore characterises it as belonging to a disenchanting vision of the world (1994, p. 71). It is anti-assimilationist, anti-imperialist, hostile to ethnocentrism. It has the value also, in a Millian sort of way (1859), of enhancing the prospects of achieving moral knowledge, though this presupposes the possibility of real communication across cultures, which is not always possible.

Relativists regard all values as the products of the customs, practices and beliefs which have developed within a particular tradition. They deny that any value has authority, epistemological or moral, outside of this cultural context. They deny that conflict between values belonging to different traditions can be settled in any reasonable way, because, so they argue, what is reasonable is itself a product of particular cultures. And, so they demand of us, not whether social practices like FGM or child marriage or polygamy or suttee (obviously not within the remit of Banda's book, though 'mourning rites' such as 'widow cleansing' are) are justified by the moral considerations we find cogent, but whether they are sanctioned by the

relevant social understandings of the cultures within which they are practised.

But, if this means that a culture can only be judged by endogenous value judgments, and that moral principles which derive from outside that culture have no validity, morality has become a slave to custom. John Stuart Mill, of course, wrote of the 'despotism' of custom (1859). If cultural relativists were to agree that there can be standards for judging justice that are independent of social consensus, they must 'give up the distinctive premise of cultural relativism' (Gutmann, 1993, p. 177). The argument for any practice must be more than that the practice exists. A culture which permits child marriage or FGM must be able to support these practices by a stronger argument than that there is – if indeed this is the case – social consensus. An examination of the social understandings within the culture may reveal that there is no social understanding at all or that there are conflicting understandings, misunderstandings or inconsistencies. Often, it will reveal – and many examples are documented in Banda's book – that the so-called dominant understanding is in reality the understanding of the dominant. (Gutmann, 1993, p. 176). Many cultural practices, when critically examined, turn on the interpretation of a male elite, with a consensus having been engineered to cloak the interests of a section of the society. Banda does not so argue, at least directly, as regards FGM in Africa, but others have done, and I would endorse their interpretation.

Monists and pluralists disagree: monists because they believe that a practice can be judged by an overriding value and pluralists because it is their claim that there are values independent of the context of the culture in question to which an appeal can reasonably be made to settle conflicts. There is surely no dispute that there are certain needs which do not vary either temporally (they are historically constant), or culturally (in that they are the requirement of people everywhere). Some needs are obvious – for food and shelter. Such needs can, of course, be met in different ways, but there are basic minimum requirements. There are psychological needs too: for affection, comfort, companionship. And there are social needs, for order, security, dignity, respect, privacy. These are minimum requirements of human welfare, and must be met whatever the conception of what constitutes a good life, and regardless of what other values are upheld in any particular culture.

It is easy to distinguish this model of pluralism from one of relativism. Relativists do not acknowledge these primary values, and therefore fail to see that there are standards independent of a particular culture

by which it can be judged. It is less easy to distinguish it from monism, but it is a different claim, for primary values may conflict with each other, in which case it may become necessary to put the conflict into its cultural context to determine which, if either, should prevail. The contribution that the achievement of the particular values makes to the life of the individual concerned may also be significant: which of two values, for example, enhances the goal of his/her 'good life'.

Okin (1999) – in a book surprisingly not referred to by Banda – has argued that multiculturalism, that is pluralism, is bad for women. Banda does not put it as bluntly as this. However, her book assembles extensive evidence to leave one in little doubt that – in Africa at the very least – this is so. A constant theme of the book is the way custom and tradition are invoked to justify discriminatory practices against women. So the bride-wealth institution constructs woman in two roles, as wives and as mothers. Of course, it also undermines women's dignity and welfare. That it was outlawed as long ago as 1956 does not seem to have made much difference. Banda notes that the 2003 African Protocol on Women's Rights is silent on bride-wealth. Why, we are not told. Similarly, there is legislation in different parts of Africa banning polygamy but it continues, and the African Protocol on Women's Rights does little more than 'encourage' monogamy as the 'preferred form of marriage' (Art 6.3). Polygamy is a complex issue and there is no problem-free solution. Banda is thus surely right to believe it would be better to improve women's socioeconomic rights and thus their agency. But this, of course, is a global problem. Levirate marriage also persists: again the solution may lie in improving the socioeconomic status of women. And so does early marriage, again despite injunctions, international and national, setting a minimum age usually at eighteen (marriage is allowed at sixteen in the UK). Banda is right to emphasise that specifying a norm by itself is insufficient: the legal sanction 'must go hand-in-hand with strong social rights provision, including appropriate schooling, health and access to resources and employment opportunities' (pp. 122–23). And, she adds, citing Article 12 of the United Nations Convention on the Rights of the Child, children have the right to be heard.

The question remains: Could there be uniform codes of marriage in Africa? Would such codes be complied with? Some, Martin Chanock (1991) being one example, advocate this. Banda responds that 'some cultural practices are immune to top-down legal change' (p. 123). 'Culture' (broadly defined) is to blame. We need a fuller answer than this. There is sociological research

(Dror, 1959; Górecki, 1966) which shows that social engineering works least well in expressive areas of life, most obviously those which relate to personal life, marriage and the family. The most important work is by Vilhelm Aubert and his associates (1970). The significance of these studies (they were on the impact of the Norwegian Law of Housemaids of 1948) is their searching examination of the aetiology of failure. 'In spite of the law and the general economic and social development, the working conditions of many housemaids have preserved many important traits from the old *Gemeinschaft* – pattern' (p. 565). The universalistic legal standards were insufficiently institutionalised and internalised in actual housewife–housemaid interaction. Why? In part the problem was the insufficiency of the law's information channels. Ignorance of the law may not be an excuse, but it is a severe obstacle to proactive legislation. Legislation needs to be explained at a multiplicity of levels. At the moment it is phrased in language that lawyers can understand – if there is a dispute or something goes wrong – but with scant regard for the subjects of the legislation. This point applies universally, not just to Norway obviously or Africa.

There are other reasons why legislation fails to shift customary practices. Expressive laws often target areas of life traditionally protected against public inspection. It is the old story of why laws about domestic violence have not eradicated the problem. Further, paternalistic – perhaps even in this area maternalistic – relations are traditionally very strong (Massell, 1967).

But the evidence is also available that even entrenched customary practices can be broken down. As Banda also acknowledges, laws do not work in isolation from other policies. And resistance, unless it is massive (see Evan, 1965), can be overcome. Thus, it is important that laws which modify mores are shown to be compatible with existing values. In the context discussed in Banda's book this may not be easy, but it is worth trying. One condition of success is that deliberate and conscious use be made of the element of time. On this, there are schools of thought. One argues that the incremental approach is appropriate, that old patterns of behaviour cannot be broken and new ones instituted overnight. The opposite view is taken by those who press for rapid change to minimise the capacity for resistance to the mooted new pattern. It seems that the first view – arguing for change in the long term – is the dominant approach in Africa. And this seems to be Banda's view, too. I favour the view that change has to be swiftly implemented. Much then depends on those charged with enforcing new norms,

and on imaginative incentives offered to those who comply: the carrot may work better than the stick.

It is not surprising to discover that violence against women and girls is endemic in Africa. Banda's chapter is wide-ranging – it links violence and reproduction rights – and frightening. Sexual violence takes on a new perspective in a continent ravaged by the pandemic of HIV/AIDS. As is well-known, young girls, even babies, are vulnerable to sexual assault where people – Banda says 'few' – believe intercourse with a virgin will cure HIV/AIDS. Violence against women has only belatedly come to be recognised as a human rights issue (see e.g. Choudhry and Herring, 2006). Banda makes all the right points here: she emphasises state responsibility, she notes the Special Rapporteur on Violence Against Women has labelled domestic violence as a form of torture, but she stops short of developing the implications of these conclusions. We need to know more about how different African countries are responding to domestic violence. There is only a little on the place of religion and nothing on pagan beliefs which might explain domestic violence. There are, I would assume, many Victoria Climbiés in Africa, and adult ones as well. And what of the role of the media? How prominently does violence against women feature on this in Africa? What views are taken of pornography by African legal systems? We know that violence against women is lowest in cultures which do not link masculinity to actions of dominance, aggression or male honour, and that have flexible gender roles (Levinson, 1989; Sanday, 1981). The Arapesh of New Guinea and the Gusii of the Kenyan highlands have often been compared (discussed briefly by Freeman, 1979, p. 135). The Gusii, according to research conducted fifty years ago (LeVine, 1959), virtually institutionalise rape. Is this still true? Are there other groups/tribes in Africa with similar value systems? I do not know: Banda presumably does, but stops short of providing this information.

Violence against women and reproductive rights are discussed in the same chapter. But this is not because violence against women is seen as a health, that is a public health, issue. Of course, there are clear links between abuse and women's wellbeing (as well as their ability to participate fully in social and economic development) (Carrillo, 1992). Banda does not draw these links, and development issues are treated fully in a later chapter. The section on reproductive rights is interesting both for what it includes (there are obvious references to HIV/AIDS), and what is not considered (there is nothing on fertility treatment, though in South Africa at least there are human rights issues in relation to this).

There is much more in this book which I will not consider. To cover all the issues across a tapestry of countries with different cultures and economies as well as different religions is no easy task. Banda must be commended for putting together an excellent survey of ideas and a huge amount of data. Whilst there is little very original in the thesis or the details, this is nonetheless a book of significance, and certainly one that should command a substantial student market.

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