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# Whose Right it is anyway? Equality and Conflicts between State Policy, Culture and Rights in South Africa

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*"Gender oppression is everywhere rooted in a material base and is expressed in socio-cultural traditions and attitudes all of which are supported and perpetuated by an ideology which subordinates women in South Africa. It is institutionalised in the laws as well as the customs and practices of our people ... all women have a lower status than men of the same group in both law and practice."*

[Statement by the National Executive Committee of the African National Congress (ANC), 2 May 1990]<sup>1</sup>

## 1. Introduction

The contemporary debate between liberalism and multiculturalism is often cast in the mould of a conflict between the rights of individuals and the cultural claims of groups. In modern liberal democracies, the state has to negotiate between these two frequently incompatible claims, and formulate policy and legislation in such a way that is both sensitive to the claims of groups, while still protecting the rights of vulnerable persons, in particular women and children, within those groups.

South Africa today provides a fertile environment for reflection on questions about rights and multiculturalism, because claims grounded in both are frequent, loud and often quite intractable. In post-apartheid South Africa, those charged with the responsibility of policy formulation and legislation are thus faced with the difficulty of striking a balance between the claims of collectives to conduct their lives, in particular with regard to the family and their economic activities, in accordance with their established norms and traditions, while at the same time ensuring that such policy and legislation is compatible with the prioritisation of human rights enshrined in the constitution.<sup>2</sup>

<sup>1</sup> Cited by Frene Ginwala in her paper "Women and the Elephant: The need to redress gender oppression" in Bazilli, 1990: 65.

<sup>2</sup> Chapter 2 of The Constitution of the Republic of South Africa, Act 108 of 1996, contains the Bill of Rights. This enshrines, *inter alia*, the equality of all before the law [section 9(1)] including the standard injunctions against discrimination, as well as the responsibility of the state to "respect, protect promote and fulfil the rights in the Bill of Rights [section 7(2)]. Also of relevance to the state's responsibilities in this regard, and reflective of the declared government policy on human rights in South Africa, is the National Action Plan for the Promotion and Protection of Human Rights, December 1998; as well as South Africa's various responsibilities under international law deriving from, for example, the ratification of CEDAW.

This paper examines the position that these two aims are sometimes irreconcilable, and in instances where they are in conflict, as a result of a conflict between the interests that generate them, the state has to make a hard decision. And in such cases it is the duty of the state to have recourse to a teleological assessment if the likely outcome *for the rights of those concerned* in any given case. This will first be developed as a theoretical argument, and then illustrated with some examples of current “hard cases” in South Africa. The two examples selected here are firstly that of women who are marginalized from constitutional protection of their equal rights as a result of their having contracted marriages under African customary law, and the second is a case involving a community constrained from conducting their everyday life by rules imposed as a result of an environmental policy on which they had not been initially consulted. These two examples illustrate just how intractable this conflict of values can be in a diverse modern state which attempts to be sensitive to both groups, as well as individual rights claims. They also serve to clarify what sort of communal claims ought to be taken into consideration in terms of a policy prioritising human rights, and which are superseded by such consideration.

The following section of the paper attempts to clarify how the claims of collectives can sometimes fall under the aegis of rights, but also to illustrate that in some instances, claims that are framed in rights terms are in fact thinly disguised attempts to entrench the power and privilege of one group over another. Although this is a sensitive subject area, an effort to rigorously work through these issues from a theoretical standpoint that it is true to the *purpose* of human rights – that of protecting the vulnerable from the interference of the powerful – can shed some light on the illegitimacy of some of these claims, in a modern liberal democracy at least. It is not the intention to cast doubt on the validity of people’s traditions or the rich variety of *modi vivendi* that we are so privileged to enjoy unfettered in South Africa. Rather I wish to highlight how conflicting interests can cause confusing political and ethical conundra for the framers of law and policy, and that their duty in such instances is towards the weak rather than the strong, even when tradition bows in the opposite direction.

## 2. Considering “Group Rights” and Culture

I have frequently read and heard it argued that what exemplifies the African (and other non-Western cultures) approach to human rights is that the claims and practices of the group supersede the rights and choices of the individual. The problem therefore is to frame human rights in such a way that

does not compromise this collective consciousness and way of life. As Rhoda Howard comments, "[a] major theme of this argument is that Africans are community or group oriented rather than individualistic, and hence the rights of the individual are not relevant to them."<sup>3</sup> I do not wish to dispute that that African culture and traditions are generally more communitarian than those in the West. I do wish to argue however, along with Howard, that even if this is so, it is irrelevant to the question of the appropriateness of basic human rights norms for African people. In particular, I wish to challenge the idea that the retention of some hierarchical norms and practices, at the expense of more vulnerable members of a group, is in some sense justified on this basis. The particular example I refer to below is one in which the primogeniture of male relatives (sometimes even distant ones) in African customary law is still today being used as a tool with which to bludgeon vulnerable women and children, in that they can be disinherited from the deceased estates of their husbands and fathers. It is unclear to me how the alleged "communitarian" ethos of African culture can countenance such an abuse, but it is clear that an application of the constitutional right of such individuals to equal treatment before the law would mitigate against the cultural claims invoked in these cases which effectively upholds the right of an already empowered person to make destitute countless others. I will return to this argument in section 4.

I wish here to interrogate what a viable theory of group or cultural rights should entail, and how this would relate to other human rights that are usually understood to be those of individuals. I would like to suggest that the category of group rights is much narrower than is usually considered, and that many cultural rights claims, while they are *de facto* asserted by a collective, in fact break down to individual rights rooted in freedom of choice and association. And there is nothing in a liberal constitution that entails trampling upon or disrespecting such rights. On the contrary such freedom is very close to the heart of the ethos of a liberal state. What is problematic for liberal constitutions are claims framed as cultural rights to coerce, abuse and disenfranchise members of a given collective, and it is precisely these sorts of claims that deserve to be most critically scrutinised, rather than ignored, because the abuse of culture in this way is no less destructive than the abuse of culture through its suppression. Presumably if one regards the integrity of cultures as being worth preserving, one would have an interest in challenging precisely those things that prove most detrimental to the continuation of a way of life, rather than upholding them on the basis of apocryphal and specious claims of culture and tradition. And surely a practice that marginalizes and makes destitute its members (to the benefit of someone else!) is such a practice.

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<sup>3</sup> Howard, 1990: 159-160

One distinction that can be made is that between a *corporate* right, and a *collective* right.<sup>4</sup> The latter are far more common than the former, and it is frequently these that are confused with group rights. Collective rights are rights that are asserted by collectives, or groups, or communities, but which in fact break down to something that can just as well be practised by individuals, and which would retain their viability in the absence of the group. Furthermore, culture and tradition is not a necessary condition for the assertion of such a right, as it is generated by a pre-existing interest or justification for that practice. And the state ought to respect such rights and practices where possible, because they form part of people's freedom to associate and conduct their lives as they choose. I hope this point will become clearer in section 4 where an example of just such a right, and the balancing act with public policy that it entails, is given.

However this is precisely where the difficulty for liberal democratic states arises. What kind of principles can justifiably be waived for the sake of the free exercise of culture or tradition? To what degree, if any, should principles of justice, equality, and respect for the peace and privacy of others be limited to give effect to the continuation of a cultural norm, however dearly held? It is often argued that liberalism is unfriendly to the idea of group rights, as liberalism takes as its primary subjects of rights individuals, and so the good of an individual must always count against the claims of a group. However this is unreflective of what a theory of group rights can be properly taken to entail, because while one may accept that such rights exist, and that they have equal weight with those rights of which individuals are the subjects, it must surely nevertheless be conceded that group rights are different from other rights, and the ways in which such rights are specified, and indeed their shape and extent, is worth interrogating.

Peter Jones, in considering this remarks that "[a] group right properly so called is a right possessed by group *qua* group. It is not to be confused with a right which is common to a group of individuals but which each individual possesses as an individual."<sup>5</sup> So for example, disabled people's rights of access, according to Jones's definition, would not be a group right, but rather an aggregative individual right, but what defines the right holders of this particular aggregated individual right is that they are disabled.

Jones goes on to distinguish between the two concepts of group rights mentioned above – the collective and the corporate concepts – in a later article on the subject of group rights. The former, attributed to Joseph Raz, is also a conception of group rights that is consonant with Raz's interest

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<sup>4</sup> This distinction is discussed in more detail below.

<sup>5</sup> Jones, 1994: 182-3

conception of rights more generally.<sup>6</sup> This interest-rooted collective conception is friendly to the idea of legal group rights. Jones cites Raz as specifying three conditions for the existence of a group right: Firstly, in accordance with the interest conception of rights, the right in question exists because it relates to an interest of sufficient importance to its holders to justify holding others to be under a duty. Secondly, the relevant interest is that of people as members of a group and the good is a public one. Finally the interest of any individual member of the group in the public good in question would not on its own be sufficient to justify holding others to be under a duty, but rather it is the combined weight of the interest of all the individual members of the group that add up to create a right in this sense.<sup>7</sup>

Now the problem with this conception of rights is that it is difficult to distinguish rights in this sense from aggregative individual rights, as all that is required here is that a group of individuals have a shared or common interest that is in sum sufficiently weighty to justify holding others to be under a duty to honour it. Furthermore, important individual interests that otherwise ought to have the "trumping" power of the interests that standardly ground rights may be subsumed by a utilitarian balancing of interests on this account. For example, if only one person was affected by noxious pollution from a factory, would we want to say that they had no right not to be harmed in this way?

One way of narrowing the definition of rights on this account would be to restrict the objects of rights, so for example, group rights would be those things that have as their objects some sort of participatory good.<sup>8</sup> Even so, it is hard to see how a right in this sense would still not boil down in essence to an individual right to freedom of choice and association rooted in an interest in autonomous agency.

The other alternative conception of rights that Jones identifies, and one that corresponds more closely to what is normally understood by the notion of a group right, is what he labels the "corporate" conception. He approaches this conception of rights by reflecting on the question of capacity to be a right-holder, which is also at issue between the choice and interest conceptions of rights. And the capacity to hold rights

turns upon the attribution of moral standing. To violate a right is to *wrong* the holder of the right. It is to fail to do what is *owed* to the right holder. That indicates that someone or

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<sup>6</sup> The scope of this paper is too narrow to give an account of the rival choice and interest conceptions of rights, but for a discussion of the salient differences between them, see Kramer, M.H., Simmonds, N.E., and Steiner, H. 1998. A Debate Over Rights. Oxford: Clarendon Press.

<sup>7</sup> Jones, 1999: 356-7

<sup>8</sup> This is the suggestion of Denise Reaume. See Jones, 1999: 359-361



something can hold rights only if it is the sort of thing to which duties can be owed and which is capable of being wronged.<sup>9</sup> In other words, moral standing is a precondition of right-holding.<sup>10</sup>

The corporate conception of rights is therefore contingent upon assigning to groups the moral standing that is necessary for that group to be a right-holder. This is distinct from the collective conception in the sense that the moral standing of the group on that account derives from the moral standing of the individual members, but the whole is no more than a sum of its parts. The corporate conception requires the assignment of moral standing to the group separate from or in addition to the sum of that of its members. The whole is therefore at least separate from (if not greater than) the sum of its parts. So the difference between the two conceptions of group rights is summarised thus by Jones:

[W]hat distinguishes a group as a group for right-holding purposes is quite different for the corporate than for the collective conception. Just as an individual has an identity and a standing as a person independently and in advance of the interests and rights that he or she possesses, so a group that bears a corporate right must have an identity and a standing independently and in advance of the interests that it has and the rights that it bears. Its being a group with moral standing as a group is a logical prerequisite of it being an entity that can bear corporate rights. So the 'groupness' of rights, for right-holding purposes, is understood quite differently by these two conceptions.<sup>11</sup>

However it is worth noting that the corporate conception is not incompatible with an interest theory of rights (in a way that the collective conception is with the choice theory). On an interest theory account of rights, the interest that generates the right will be understood differently according to the two conceptions of group rights outlined here: On the collective conception, the weight of the interest collectively in sum is what is deemed to be sufficient to justify the corresponding duties; while on the corporate conception, the interest in question is one which vests in the group as a single entity, and which need not correspond with the individual interests of its members.

The choice theory, almost by default, has to have recourse to the corporate conception, as only on this account can sense be made of the requisite powers of waiver and enforcement that such a conception of rights entails. And indeed it is doubtful that such a right could be conceived of that was not legally established as well.<sup>12</sup> It is the contention of this paper that group rights morally or

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<sup>9</sup> The distinction is being drawn between those things which we have *duties in respect of* – for example the duty not to deface works of art or buildings – and those things *towards which we owe duties* and which we wrong if we fail to honour those duties. A person is clearly wronged if we fail in our duties towards them (as are arguably animals, the dead or future generations) but the wrong in the case of the destruction of a work of art is not towards the work of art itself, but to others who will be prevented from benefiting from it.

<sup>10</sup> Jones, 1999: 362

<sup>11</sup> Jones, 1999: 363

<sup>12</sup> According to Hillel Steiner the right to national self-determination is an example of a collective moral right on such a choice theory account, but without recourse to some explanation as to *why* nations or groups ought to enjoy such self-



normatively specified would have to rely on an interest theory conception of rights, and would also take the shape of a corporate conception of such rights, if they are not to be a mere aggregation of individual rights. So consideration now needs to be given to the types of *objects* of such rights – what sort of things could a group feasibly be seen to have a right *to*?

The most obvious answer refers to those things which distinct cultural or ethnic groups claim rights to. And so this brings the discussion back to the topic of multiculturalism and the treatment of individuals within groups that are deemed to have the requisite moral standing, and therefore rights. Because it is only on the corporate account of group rights that claims to treat individual members of the group unequally, possibly in contravention of their rights, can arise. This is not a problem for the collective conception, since the interests of the individuals inform the interests of the collective, and so anyone whose interests were not consonant would (and presumably could) cease to be a member of the group for the purposes of that interest or right (if it generates one).

Jones makes the further distinction between group rights that are externally directed and those that are internally directed. On a collective account, the interests of the group could potentially conflict with those of people outside of the group, but not, as is explained above, those within the group. For example a collective right to have designated cycle paths could conflict with the rights of individuals whose private property was potentially infringed by those paths. And in that case the relative weight of the interests in question would determine which collective or group should prevail. It is the corporate conception however that raises concerns about the rights of individuals within the group, and whether the rights of the group can be internally directed in conflict with those of individual members. The corporate conception, relying as it does on the moral standing of the group, can also lay claim to an equal status for groups *vis-à-vis* other groups. And it is frequently such claims to equal respect and self-determination which are invoked to preclude inquiry into the treatment of individual members of the group. And as Jones goes on to remark,

the internal threat posed by the corporate conception consists not only in its enabling a group to claim rights against its own members. It lies also in its propensity to allow the moral standing of the group to displace that of individuals and sub-groups who fall within the group's compass.<sup>13</sup>

The following section considers this problem.

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determination - why they have an *interest* in doing so - it is difficult to see how the choice theory could make sense of such a right if it was not legally established and protected.

<sup>13</sup> Jones, 1999: 377

### 3. Rights and Interests: Individuals, culture and policy

As is indicated above, the position on rights being argued for in this paper is rooted in an interest rather than a choice conception of rights. Why this matters for the purposes of the argument presented here is firstly because the two conceptions of rights differ as to what the content of rights can feasibly be, but they also disagree on what the extent or limits of rights are. Interest theory is more flexible in the sense that it can accommodate the idea of conflicts of rights and so can conceive of the idea of balancing rights against one another. Choice theory on the other hand more or less precludes trade-offs between rights, and I doubt that an adequate theory of moral rights, group or individual could be grounded on a choice theory account. A deontological theory of group rights therefore, it is suggested, has to be grounded in an interest conception.<sup>14</sup>

This raises the problem of how different interests are to be traded off against one another. How are those charged with the formulation of law and policy to determine which interests are weightier and are to take precedence in any given case? Indeed determining which interests generate rights, (because of their fundamental importance for the well-being of their holders) is another problem for a universal theory of rights, moral or otherwise.

An informative contribution to this debate is that of David Hartney who argues that only legal rights can vest in communities or groups, but that the interests which ground such rights are ones which inform individual moral rights, because sustaining a community is only of value in so far as it is important for the well-being of its individual members. However the difference is one of kind rather than degree, as it turns on

the distinction between rights which all individuals possess simply in virtue of being human beings ('individual rights' or 'human rights') and rights which individuals possess in virtue of their membership in a certain kind of group ('group rights'). Individual rights are rights to be treated like any other human being; group rights are rights to be treated differently. Thus both kinds of rights are held by individuals; the difference turns on whether the right is universal or limited to a group ... individual rights require governments to refrain from interfering in people's lives, while group rights require them to provide services.<sup>15</sup>

So the main question to ask about a theory of group rights (rights which people have by virtue of their membership of a group) is: under what circumstances is it justified to mete out unequal treatment? If the enlightenment ethos of equal worth that underlies the idea of human rights is accepted, the only justification for unequal treatment would therefore be to rectify an existing inequality. So we can see how the disabled, for example, have special rights to facilitate their

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<sup>14</sup> See note 6

<sup>15</sup> Hartney, 1995: 220

access, whether to buildings or the mainstream economy, or even how certain indigenous or cultural groups may have special rights to the continuation of a way of life in terms of their equal rights of access to political participation and resources. What it is difficult to see is how this idea of group rights could justify the *unequal* treatment of members of a group.

Leslie Green identifies this as the problem of minorities within protected minorities – what she labels *internal* minorities. Green's argument is particularly pertinent to the example of women married under customary African law discussed in the following section, so I will briefly examine her argument here, as well as the similar and more rigorous argument of Barry in this regard.

Green firstly points out that it is mistaken to dismiss liberal concern for the value and autonomy of individuals as being insensitive to the “important values of solidarity and community.”<sup>16</sup> Rather the values of liberal politics developed precisely from the claims of group-based strife and religious oppression and so “the individuals in the historically dominant forms of liberalism are not isolated monads; they are members of families, churches, ethnic groups, nations and so on.”<sup>17</sup> So far from it being the case that liberal egalitarianism wants to ignore the differences between people – differences which are largely informed by the various groups with which they identify – rather it is precisely the ability to assert that difference and live according to one's own values and culture without interference and with respect, that is at the heart of a liberal democracy. However what logically follows from this is that individuals, whatever group they may belong to, are equally free to associate with whom they please, and ought to be treated equally by the group. There is a fundamental contradiction in the claim to have one's culture treated as being of equal worth when this is being used to justify maltreatment of individual members or preclude enquiry into internal discrimination.

So perhaps the criticism of liberalism which is sometimes framed as “individuals are *also* (first and foremost) members of groups” and all which that implies, should be reversed to say that “members of groups are *also* (first and foremost) individuals.” And if the claim of equal respect for the practices of the group is to hold good, then it is unclear how this does not equally apply to the internal equal treatment of members of those groups. It hardly makes sense to demand equal recognition on the one hand, and deny it on the other, both in the name of one's culture.

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<sup>16</sup> Green, 1995: 258

<sup>17</sup> Green, 1995: 258

Green goes on to argue that given the “density” of theories of minority rights, conflicts are bound to occur. How such conflicts are to be resolved is of course dependent upon the relative weight attached to different rights in different contexts, but what is at issue is that such conflicts are the stuff of ordinary moral and political life. They are the very essence of what should occupy public debate and inform the formulation of policy. They are not to be resisted or evaded as conservative communitarians would have it. So there is a difference between “changes in” and “changes of” a culture. Conservative multicultural arguments would want to hold that the former amount to the latter, in the sense that any change in cultural practice undermines its very existence.

However, as Green argues, it is perfectly feasible for cultures to adapt and change without this undermining their existence. On the contrary, “[m]any cultures incorporate as part of their fabric disputes about what their ways really are.”<sup>18</sup> Furthermore, as Green argues, without assigning equal respect to all members of all groups (respect for internal minorities) what will result is “a mosaic of tyrannies” and so “[t]he task of making respect for minority rights real is thus one which falls not just to the majority, but to the minority groups themselves.”<sup>19</sup> If arguments for the protection of minorities against powerful majority hegemony are right, then they are no less morally right for the disempowered within those groups, as the claim for protection of one’s ways is justified by reference to relative power.

Bryan Barry, in considering this problem, makes a similar point when he argues that “[e]qual respect for people cannot therefore entail respect for their cultures when these cultures systematically give priority to, say, the interests of men over the interests of women.”<sup>20</sup> This point is particularly pertinent in light of the interest theory approach to rights which underlies this argument, but also because the example he gives is one which has resonance in light of the example given in the following section of this paper. So what does the work in recognising the equal claims of groups to engage in cultural practices is not respect for those practices themselves, but rather respect for the traditional liberal freedoms of choice and association. So a communitarian or multicultural approach to this issue not only contains the contradictory justification of the abuse of individuals, but it is also a redundant position. The example Barry gives are illiberal religious divorce laws that discriminate against women. Barry argues that it is not the business of the state to interfere in such religious laws and practices with a view to equalising them, but it is also not their business to interfere by endorsing them legally either.<sup>21</sup>

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<sup>18</sup> Green, 1995: 270

<sup>19</sup> Ibid

<sup>20</sup> Barry, 2001: 127

<sup>21</sup> Barry, 2001: 128

So for example if I were to choose to enter into an ante-nuptial contract in which I agreed that I had no claim to my spouse's estate in the event of their death, there is no reason morally why I may not do so, and the state ought not to intervene in preventing me from doing so. Such a contract would normatively be as binding as any other in civil law. However, the state may not intervene to generalise this agreement, by legislating that all women of my race, creed or culture who marry do so under these conditions. If I choose to disenfranchise myself, I may do so, but the state – a liberal democratic state anyway – cannot do so on my behalf, even under the guise of respecting or protecting my culture. Furthermore, my having repudiated my claim to my spouse's estate should not be morally taken to entail my having done so on behalf of any children of the union. All children have an equal right (in terms of the natural and common law) to the support of their parents and to claim from their deceased estates. For the state to uphold a cultural claim to make destitute children under these circumstances in the name of culture is to violate their fundamental human rights, as well as their constitutional right to equal treatment, and is therefore *ultra vires*, but also morally wrong. And any culture which claims this as an integral practice is in danger of self-destructing, not from outside interference in its ways, but by alienating and impoverishing its members.

The following section raises an example of just such a practice and highlights just why the state's primary responsibility is towards the rights of individuals in these instances. I would like to propose, following Jones and Green, that there is a difference between internally directed and externally directed claims of right and culture. In both instances the state is charged with the responsibility of upholding the rights of the weak against the strong, and public policy ought to be shaped to reflect this. However in the case of internally directed rights, the state is charged with upholding the equal rights of individuals, while in the latter case – that of externally directed rights – the state ought to consider the claim of the group to the continuation of their way of life or whatever, as such claims usually reflect an imbalance of power, and the weak party in these cases tends to be a community. An example of this latter type of externally directed claim is also given.

#### 4. Two examples: Conflicts of rights, culture and policy

In South Africa today there is something of a backlog of leftover laws from the apartheid era, as some of these contain provisions that are still applicable to some people, and so cannot merely be revoked wholesale without leaving lacunae in the law. One of these is the Black Administration Act



of 1927,<sup>22</sup> which, among other things, regulates marriages entered into under Customary African Law, and which includes the rules of succession in the event of the death of a spouse.

It is widely recognised that traditional African culture and law are largely informed by the norms of patriarchy.<sup>23</sup> One of the results of this is that women's capacity is limited in various ways, and in particular for the purposes of this discussion, women's proprietary capacity is limited both within marriage, and also on the dissolution of a marriage. It has therefore been the case that in post-apartheid South Africa, this unequal capacity of women in African custom (and indeed in South Africa more generally) has come into conflict with *inter alia*, section 8 of the constitution which accords equal status to all regardless of their race, sex, or culture. Further confusing the picture are the constitutional provisions which recognise people's cultural norms and traditions including marriages contracted under a system of religious or customary law.<sup>24</sup>

Now clearly these provisions can potentially come into conflict with one another, and that being the case, the correct forum for those conflicts to be resolved is in the first instance the courts, and if this proves unsatisfactory, then by means of legislation. The problem is however the highly subjective standards by which such conflicts are to be judged. And it is for this reason I think that the best and only objective standard that can assist in making sense of these conflicts is to reflect on the *purpose* of these respective rights. *Why* do we think that people ought to be treated with equal respect? *Why* do we think that people ought to be protected in conducting their lives according to their own norms and traditions? And it seems to me that answer is usually entails some consideration of protection in a situation where there is an imbalance of power. So the duty of the state in these instances is to protect the weak from the strong, rather than entrench the power of some over others.

As I have indicated, limitations on proprietary capacity for women has been one of the defining features of African customary law, and this is compounded by the custom of male primogeniture in succession. As Bennet describes the situation:

Access to property is one of the most sensitive indicators of power relations, and the inferior position of women is especially evident in this regard. The courts' ruling that women lack proprietary capacity is testimony to this restricted access to the means of production and to the lack of opportunity to acquire property.<sup>25</sup>

<sup>22</sup> The South African Law Commission is in the process of considering how best to proceed in amending or rescinding this law in order to bring it in line with the post-1994 constitutional norms.

<sup>23</sup> See Bennet, 1991: 301-311

<sup>24</sup> Nhlapo, 2000: 139-141

<sup>25</sup> Bennet, 1991: 325



In the past, the South African courts have ruled that women's capacity to own property in African Customary Law is limited to a very small category of things. One of the most glaring examples of this limitation is the assertion that women do not have the right to inherit the estates of their deceased husbands, but rather have a claim for maintenance from the most senior male relative of their husband's family. By extension therefore, they are dependent for their wellbeing and that of their children on the largesse of someone who in some instances is a stranger to them. This is an extremely fragile arrangement and one which depends largely on established relationships and the recognition of duties.<sup>26</sup> Furthermore, the potential for abuse inherent in such a situation must surely raise concern for the vulnerable position in which women and children are placed as a result, and surely a state which is bound by a constitution which entrenches the equal rights of all people must concern itself with this.

In 2000, The Recognition of African Customary Marriages Act took effect, which now allocates equal capacity to both spouses, and deems all marriages to be in community of property unless there is an agreement to the contrary. However the major shortcoming of the act is that it only applies to marriages contracted and registered after 2000, and so anyone entering into an African Customary Union before that date, or who does not have it formally registered, still suffers from the same lack of capacity and legal protection as before.

A landmark case that recently came before the courts and which presented them with an ideal opportunity to rectify this by precedent was that of Mildred Mthembu and her two daughters, Thembi and Sonto. On the death of their husband and father, Watson, in 1992, their paternal grandfather/father-in-law, Henry Letsela, laid claim to his deceased son's estate, and the court, in a widely criticised judgment, awarded him their home and property in 2000. The upshot of this is that the traditions of African culture in this case (as the court understands them) take precedence over the constitution.<sup>27</sup>

Now one could argue that on a strict application of African custom, Letsela has a duty towards his granddaughters and daughter-in-law to maintain them from the deceased estate, and that his right of primogeniture merely makes him an administrator. However even this solution still renders Mildred Mthembu an inferior party to the marriage and of diminished capacity on the basis of the fact that she is a woman (and by extension her daughters' capacity to inherit is diminished simply because they are not sons).

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<sup>26</sup> Bennet, 1991: 328

<sup>27</sup> Magardie, 2002: 4

On this sort of internally directed account of culture and tradition, it seems to me that the state has a responsibility to uphold the equal claim of those who are vulnerable. On what basis do the Mthembu sisters count for less than any other child in South Africa that would be entitled to support from their deceased parent's estate? Furthermore, if this is to count as the upholding and support of a culture, then it is unclear how it will serve to encourage people to continue to engage in such marriages and agreements in the future. I can't imagine that the women in this case feel anything other than repugnance and alienation from their culture as a result of this prejudicial judgment which has left them destitute and without the support of the very cultural community that this judgment is intended to appease.

However the reverse of this situation would be one in which an external, corporate, claim against the state were made by a community. An example of this sort of claim arose recently in the context of an environmental policy that had the unforeseen result of placing restrictions on the daily lives of the Baviaans community in the Eastern Cape. The area in which the community lives, and where they have lived since the 19<sup>th</sup> century, has recently been declared a conservation area, as it is home to a number of rare species of plant life. One of the regulations that was imposed was that the community's donkeys were not allowed to roam freely in the veld in an effort to prevent them from cross-breeding with the zebra that are indigenous to the region. However, this ban proved to have the unfortunate outcome of threatening the main mode of transport available to the community, as the donkey's hooves became too soft for them to be used to pull a cart on a gravel road, and so the community was unable to attend church three times a week as was their custom.

The case received the attention of the Minister of Environmental Affairs, who immediately took steps to rectify this situation, including the commissioning of a poverty relief programme to assist the community in preserving their way of life. The community complained that the new environmental policies had brought hardship to them, and had driven many of the community from their homes by preventing them from growing certain crops, and banning them from the area once they had lived away for a period of time. The Minister pointed out that the latter stipulations, if found to be true, were unconstitutional.<sup>28</sup> So this case is an illustration of how a state policy (in this case one aimed at environmental preservation) can come into conflict with the interests of a group, and in this case, the state has a duty, once again, to have regard for the equal rights of the vulnerable.

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<sup>28</sup> Van Niekerk, 2002: 7

This is precisely the reverse of the first example of a cultural or group claim framed as a right. In the latter case, the object of the right is externally directed, as the community requires the state to allow them sufficient space to continue their way of life. Furthermore, the subject of the right (the right-holder) is the community as a whole, rather than one beneficiary of a deceased estate as in the male primogeniture example. While state policies aimed at protecting the environment are one sort of good to be pursued by the state, so too are the rights of communities to live in accordance with their traditions and norms. It could of course prove to be the case that these two goals or interests are wholly incompatible, if for example the possible extinction of certain flora and fauna would result from the continued human habitation of the area. In that case the state would have to weigh this against the rights of the community and come up with some form of adequate compensation and hopefully be able to reach a consensus on how best this could be distributed. However, in the case mentioned here, there is no inconsistency between the lives of the people and the care of the environment, and so the state, with minimal effort and expense can balance these two interests with one another and reach an optimal outcome for all concerned. What I would like to highlight with this example however is the difference between this as a group right to have one's community's existence protected, and the cynical manipulation of a cultural claim to the detriment of vulnerable dependents in the former.

## 5. Conclusion

This paper has sought to establish two main premises that are regarded as clouding the issue of the individual right to equal treatment in South Africa. Firstly, women's claims to be treated equally materially, legally, and within the family do not stem from a group claim of women *qua* women. These are the individual rights of every person in South Africa under the constitution, regardless of their race, gender, sex, culture or even age. What adds impetus to these claims is the fact that there are groups of women who are marginalized in this way on the basis of assumptions about their identity that are irrelevant to their status as holders of equal rights.

Secondly, this paper is committed to the view that the primary responsibility of the state – whether this be at the level of the courts, the legislature, or those who make and carry out policy – is towards the equal rights of each individual within the state, regardless of any other group to which they may belong. In as much as respect for people's culture and the practices that this entails is an inextricable component of those equal rights, it is a self-defeating exercise to uphold practices which undermine people's ability to engage in the life of their choice by reinforcing existing

inequalities in economic and social power. If South Africa (and I suspect this is true of many other countries too) is to live up to its declared objective of being an egalitarian multicultural democracy which respects the rights and freedoms of all people equally, then this responsibility of the state must supersede all others, even if it does result in decisions that prove unpopular with existing holders of power.

This paper is not intended to provide conclusive answers to any and every difficult decision that states face in the course of conducting the business of a modern, diverse democracy. Rather I am concerned that in trying to accommodate all claims (whether they are framed as rights or not), we may be in danger of further marginalizing the already vulnerable, and entrenching existing inequalities. In doing this, the claim that "this is the way we do things around here" may become a self-fulfilling prophecy, as the equal place of women, children, and others who have traditionally not been allocated an equal place in the economy, the family, and the courts, will be perpetuated in a new disguise – that of rights *to* culture, rather than cultural rights occupying an equal (and competing) place alongside all other rights claims, which may, sometimes, outweigh them.

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