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[DRAFT PAPER FOR DISCUSSION – NOT FOR CITATION]

ARE THE POWERS[1] OF TRADITIONAL LEADERS COMPATIBLE WITH WOMEN'S EQUAL RIGHTS? THREE CONCEPTUAL ARGUMENTS (YES, NO AND MAYBE)

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Abstract

The paper considers the newly enacted legislation on traditional leaders, and reflects upon the potential conflict between the powers that it entrenches and the equal rights of rural women. The South African Constitution recognizes potentially incompatible rights of both gender equality and cultural recognition, and so the question of which if these should take precedence in the event of a conflict between them is one that challenges the egalitarian foundations of democracy. However this problem is not unique to South Africa, but rather is a facet of the global debate on multiculturalism and the "right" treatment of individual members of inegalitarian groups within democracies. The paper therefore offers three theoretical approaches to the problem, and considers whether a deliberative approach may offer a "middle road" solution to the problem that reduces the costs in terms of the rights of those concerned.

Introduction

This paper is about conflicts of rights, and the particularly difficult challenges that such conflicts present when they entail women's equality[2] and claims of cultural recognition. South Africa since 1994 has presented us with a series of challenging – but by no means unique – circumstances many of which entail conflicting claims of rights. The central aim of this paper is to make sense of the idea that the institution of traditional leadership can be sustained – and indeed given new, more concrete powers – in a democracy; and to explore the implications that this has for women's equality and equal human rights. I hope that I don't have to give an account of why I think this is a particularly pertinent question in the South African context, but I think it is worth reiterating from the outset that there is a distinct impression that women's equality is always "up for grabs" when other, perhaps more powerful interests, come into play, in a way that would be unacceptable for other aspects of identity, and therefore signifiers of equality. It would be inconceivable, for example, to countenance a claim for a hierarchical *racial* arrangement in a given community, no matter how deeply culturally entrenched that arrangement was, and regardless of how much support it (ostensibly) had from the community concerned. I think therefore that we are obliged to ask difficult questions about the new legislation on traditional leadership, and to put it under the microscope of political theory in assessing the claim that this is one way of recognising people's rights and freedoms in a new democracy.

[1] The *Traditional Leadership and Governance Framework Act* 2003, omits reference to the "powers" of traditional leaders, but rather refers to "functions and roles" which was regarded as something of a victory for women's rights groups. However, the Commission on Gender Equality (CGE) and others point out that this victory has been all but nullified by the *Communal Land Rights Act,* 2004, which allocates powers of land administration to traditional councils, which are headed by traditional leaders. In any event, the "functions and roles" that traditional leaders are allocated in terms of the 2003 Act are sufficiently extensive that they may be seen to allocate "power" with the reference to lesser competence appearing to be a mere semantic device for the sake of compromise.

[2] For an account of why multiculturalism is though to pose a challenge for women's rights in particular, see Okin, 1999: 13

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Background to the Problem

Chapter 2 of the *Constitution of the Republic of South Africa,* 1996 recognises of the equal human rights of all, and it also recognises the rights of cultural, religious and linguistic communities. Furthermore, the Constitution makes provision for the recognition of the role of traditional leaders. The Constitution therefore recognises rights and institutions that may potentially be in conflict with one another, and in particular, as far as cultural rights and the powers of traditional leadership are concerned, this is of particular concern for the declared equal rights of women.

Great strides have been made since 1994 as far as the recognition of the equal rights of South African women are concerned. A range of legislation aimed at equalising the position of women has come into effect, combined with the presence of unprecedented numbers of women in politics, the economy, and the academy, which means that the position of women in South Africa is "more equal" now than at any other time. However, these changes have not permeated the lives of all in South Africa. Rural women remain among the poorest and most marginalized, with the least access to resources, education and power.[3]

New legislation entrenching the powers of traditional leaders in the form of the *Traditional Leadership and Governance Framework Act* 2003, and the (recently passed) *Communal Land Rights Act,* 2004, will impact directly on rural women. There are two main areas of concern: the equal rights of political representation and participation at local government level (which is a significant area of overlap in power between elected local government authorities and traditional authorities); and equal rights of access to, and ownership of land. The government and the drafters of this legislation insist that its effects on rural communities will be positive and that it finally lays to rest colonial and apartheid forms of oppression in terms of disenfranchisement and land administration. However, objections have been raised to both pieces of legislation in terms of the political implications that they have for democracy (and the equality that democracy necessarily entails); and the economic and power implications for the distribution of resources, most importantly land.

The accommodation of the claims of traditional leadership, and the recognition of traditional communities in South Africa, poses a great challenge to democracy and human rights. In so far as the equal rights of rural communities are concerned, and in particular women within them, the attainment of a workable balance between the powers of traditional authority, and the democratic rights of the people in the communities over which they preside, could constitute either one of the greatest failures, or one of the greatest achievements of the post-apartheid dispensation. It is a matter of critical national concern that this balance be achieved, as it is integral to the achievement of the rights and well-being of rural women, as well as the peace and stability of the communities in which they reside.

Outline of the paper

There are three routes that can be taken in attempting to confront the potential conflict between the powers of traditional leaders and women's rights. This paper outlines these and considers the costs that each entails, in attempting to decide what the most desirable route would be. The costs of human rights are of course the duties that they generate, and the state has in all instances the duty to choose the option that has the most optimal outcomes for the rights of those concerned. The state may not therefore (normatively) trade rights off against one another for purely pragmatic reasons.

[3] See Kehler, 2001b

Even if the costs in terms of duties are high, human rights must outweigh all other considerations when they are in conflict. I have attempted to illustrate these three approaches (and one other) in the diagram in the appendix to this paper.

The first option – which is labelled as the "low road", because it is the least "costly" in terms of the duties of enforcement that it generates – is that of non-interference. This is the approach of some multiculturalists such as Chandran Kukathas, who hold that the equal recognition of all cultures demands that the state refrain from intervening in their ways, even when the norms upon which they are based are inegalitarian and potentially a threat to the individual rights of their members. On this approach, because members are (negatively) free to leave the group, and therefore the site of their oppression, there is no conflict between hierarchical or discriminatory cultural practices and the equal rights of members of the group. This approach therefore yields a "yes" answer to the question of the compatibility of the powers of traditional leaders and the equal rights of women. I will also briefly deal with communitarian multicultural approaches, such as that of Taylor, and explain why I have chosen *not* to engage with this brand of multiculturalism.

The second option – which is labelled the "high road" because it entails high costs of enforcement on the part of the state – is to insist upon the equal treatment of all people, in this case women, even when this is in conflict with the norms and values of a given cultural community. This is the approach of liberal egalitarians such as Bryan Barry, and liberal feminists such as Susan Moller Okin, who argue that the demand of equal recognition for one's culture cannot conceptually entail using that recognition to treat others unequally. This approach to rights therefore yields a "no" answer to questions about entrenched cultural rights that give some power over others, and would therefore reject the compatibility of traditional leadership and women's rights.

The third option – labelled here the "middle road" because it has some costs in terms of the duties that it generates - is that of deliberation and negotiation of a compromise. Ayelet Shachar's model of transformative accommodation is briefly considered as an example of this middle road, which seeks to uphold both the rights of members of groups, as well as the equal recognition of the group itself. The paper also briefly considers the argument of Andrea Baumeister, and Monique Deveaux's "strategic interests" approach to deliberation as possible solutions. This approach yields the answer of "maybe", as while it insists that all parties must be regarded as having an equal say in what their ways actually are, it is not prescriptive of the outcomes of deliberation as a liberal approach would be. So "traditional communities" (as they are referred to in the legislation) could quite feasible agree on many different arrangements that accommodate the powers of traditional leaders *and* recognise the rights of women in those communities to choose their own legitimate way of life. This position hinges on whether one adopts a value pluralist, or a relativist approach to human rights yielding either an argument from the perspective of toleration, or alternatively autonomy, which is discussed below.

The paper concludes by considering the costs of all three routes, both in terms of the duties that they generate, and for the rights concerned when they are in conflict. It is tentatively suggested that the middle road is worth considering, as, while it entails some costs in terms of duties, it is best able to accommodate the claims of cultural determination that underlie the powers of traditional leaders, and the egalitarian claims of women's equal human rights. It is also the approach that is most likely to *maximise* human rights on both a tolerance, and an autonomy account of the rationale for human rights (see below).

Dual Recognition: Women's Rights and the Powers of Traditional Leaders

As is noted above, the South African Constitution recognises first generation (civil and political), second generation (social and economic) and third generation (cultural) rights. In as much as the

declared equality of all may come into conflict with the specific cultural practices and beliefs of some, the Constitution therefore implicitly acknowledges conflicts of rights, and sets up a situation in which such conflicts will have to be confronted rather than evaded.[4] This raises difficult questions about *how* such conflicts are to be dealt with, and indeed whether some rights take precedence over others. Do rights have an ordinal value? Or are all rights equal?

It may be worth noting the relevant sections of the Constitnution to emphasise this point. Section 9 of the Constitution contains the all-important equality clause, which establishes equality before the law in section 9(1) and full and equal enjoyment of rights and freedoms including mandating the promotion of equality by legislation in section 9(2). Section 9(3) prohibits unfair discrimination on the basis of, *inter alia,* but most importantly in the context of this discussion, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, and culture. This is followed by section 10 which establishes the right to be treated with equal dignity, and section 11 the right to life. Section 12 deals with the freedom and security of the person, and in particular section 12(1)(c) establishes the right "to be free from all forms of violence from either public or private sources." This is significant as it would seem to indicate that the domain of the home and family, which are traditionally regarded as "private," and therefore beyond the reach of the law, are for the purposes of this right a matter for public enquiry and policy. However, it is interesting to note further that this particular section is *not* included in the table of non-derogable rights included in the constitution, and it is therefore implicit that this right is subject to limitations. One such limitation would be the right to privacy, in particular within the home, which is enshrined in section 14; as well as possibly section 15 which establishes freedom of religion, and the potential legislative recognition of "systems of religious, personal or family law" although this would be subject to the limitations of section 9.

Other possible limitations in this regard could be the rights enshrined in sections 30 and 31, that recognise linguistic, cultural and religious communities. Again these are subject to the limitation that they do not violate any other provision of the Bill of Rights, but it could be argued that by omitting section 12(1)(c) from the list of non-derogable rights, a loophole has been left in the constitution itself forming the basis upon which to argue that the treatment of women within the home is not a matter for intervention, and that there is a cultural "right" to mete out unequal treatment free from outside scrutiny.

One of the most interesting recent developments in South African law is the entrenching of the powers (or "roles and functions" as the Traditional Leadership Act would have it) of traditional leaders in the form of the two acts mentioned above. Sections 30 and 31 of the Constitution recognising the rights of cultural, religious and linguistic communities are noted above, and section 25 deals with property rights, in particular the right of equal access to land. This right is cast with reference to past racial discrimination that disenfranchised and dispossessed many Black South Africans of their land. Furthermore, the Constitution makes provision for the recognition of the role of traditional leaders in Chapter 12.

The Constitution therefore recognises potentially conflicting rights and institutions, and in particular, as far as cultural rights and the powers of traditional leadership are concerned, this is of concern for the declared equal rights of women. The Constitution does not explicitly state whether individual equality should prevail over the rights and claims of groups when they are in conflict and there is therefore a certain amount of ambiguity, as is noted above. Traditional leaders were vehemently opposed to making African customary law subject to the equality clause at the time of

[4] The Constitution is therefore implicitly based on an interest, rather than a choice theory of rights, as the choice theory seeks to define rights in such a way that conflicts between them do not occur, while the interest theory regards them as unavoidable. 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.

the constitutional negotiations, and as a result "the relationship between the clauses on custom and equality was not clearly articulated."[5] As Monique Deveaux remarks:

> The question of how to reform customary practices and arrangements so as to bring them in line with the sex equality provision of the Constitution has proved to be no easy matter, however: what the Constitution does for sex equality and individual rights generally, it also does for the rights of cultural, linguistic and religious groups. Moreover the Constitution specifically recognises the validity of African customary law and the system of traditional leadership associated with it.[6]

The preamble to the Traditional Leadership Act, however, states explicitly that "the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that gender equality within the institution of traditional leadership may progressively be advanced." It is of course the need for this *progressive* advancement of gender equality, rather than an absolute insistence on it in the first place, that is the sticking point in the argument between advocates of women's rights and equality, and defenders of the institution of traditional leadership on cultural grounds.

As is noted about, since 1994 there have major developments towards the recognition of the equal rights of South African women but that these changes have, for many women, been "on paper" only. This is particularly the case with rural women. As Cherryl Walker notes, commenting on the frequent disjuncture between policy and practice, "institut[ing] programmes that challenge unequal gender relations is difficult, partly because the subordinate status of rural women is embedded in multi-layered relationships that are not easily reduced to policy prescriptions and managed within bureaucratic budget and project cycles."[7]

The Bill which preceded the Traditional Leadership Act caused some consternation, especially amongst women's NGOs and advocates of women's rights in South Africa. The Women's Legal Centre (WLC) made a submission before the Provincial and Local Government Portfolio Committee on 25 September 2003. In particular, the WLC was concerned with section 2 of the Act (then a Bill, still being debated), which deals with the Establishment of a "Traditional Community."[8] The WLC argued that "wholesale adoption of customary law without examining practices that continue to militate against women's rights to equality offends the very same principles in the Constitution that it seeks to uphold."[9] They recommended that the Act should provide mechanisms to promote equality and prohibit discrimination, and provide for sanctions where the principle of equality was violated. The WLC pointed out other provisions of the Act relating to the powers and roles of traditional leaders that were in conflict with women's equal rights, and argued that the Act provided an ideal opportunity to rectify these once and for all.

However the Provincial and Local Government Portfolio Committee (PLPC) argues that the Act and its amendments "constitute, we think, an intricate set of balances of the demands of the key stakeholders. Essentially, they revolve around simultaneously enhancing the role of traditional leadership institutions and requiring them to be more transformative."[10] In this regard the PLPC, in reporting to Parliament on the Bill (before it was enacted),

> noted that while the provisions for the transformation of the institution of traditional leadership conform with the Constitution, in particular its democratic and gender equality aspects, were adequate, they might not be in future. The Report recommended that the Bill should be reviewed over time to take account of this

[5] Albertyn and Hassim, 2003: 146
[6] Deveaux, 2003: 796
[7] Walker, 2003: 114
[8] This is the term used in the Act
[9] *Women's Legal Centre Submission on Traditional Leadership and Local Governance Framework Bill*: 4
[10] *Report of the Portfolio Committee on Provincial and Local Government on the Traditional Leadership and Governance Framework Bill*, 29 October 2003

need. In particular, the Committee noted that the issue of gender equality as it applied to succession of traditional leaders needed to be addressed further.[11]

There are cases where women are traditional leaders but these tend to be the exception. According to Likhapha Mbatha, with the exception of a few communities such as the Balovedu of Limpopo Province, "women do not have leadership rights under customary law."[12] This is problematic because it means that "there is no established custom of female authority in community decision making." [13] Mbatha, in a recent article on the Act, has emphasised gender inequality in the institution of traditional leadership, by commenting that while the Act has made provision for women to be allowed to succeed to positions of traditional leadership, it does not confront the problem of "why women do not participate in the institution of traditional leadership in the first place." [14] She goes on to comment that a flaw in the Act is that it presented an opportunity to set out explicitly how to achieve the objective of women becoming traditional leaders – "an implied suggestion that women may be traditional authoritites does not fully satisfy the equality provision of the Constitution."[15]

So what is necessary to remedy this would be for the Act to explicitly lay down not only the ways in which women may succeed to positions of traditional leadership, but perhaps also to, at least, strongly encourage their representation in this way in adequate numbers. While there is a one third quota for women on traditional councils (over which traditional leaders will preside), there is no such quota for leadership positions. However, according to the Department of Provincial and Local Government (DPLG), the new legislation is aimed at "loosening up" the traditional structures to ensure that there is greater involvement and participation of women in developmental issues,[16] and this will hopefully lead to a co-operative relationship between local government and traditional leaders, as well as facilitate the participation of women in traditional authorities (which is presumably in line with the aim of "the progressive advancement of gender equality" that the Act refers to).

Sipho Sibanda, the director in charge of the Communal Land Rights Bill (before it was passed into law) in the Department of Land Affairs argues, "the bill seeks to democratise the system of land ownership and administration by transferring both aspects from what used to be a paternalistic state system."[17] Sibanda goes on to vehemently deny that the Bill entrenches discrimination against women as far as land ownership is concerned, and states that "[t]his new dispensation serves as a springboard for the government's continuing review of related laws, such as the law of succession, to further democratise customary law systems."[18]

However, Sibanda's view is in stark contrast to that of, among others, the WLC, women MP's, COSATU and the Programme for Land and Agrarian Studies (PLAAS) at the University of the Western Cape. The Commission on Gender Equality (CGE) has undertaken to lead a Constitutional challenge to the Act, which was regarded as a "sop to traditional leaders ahead of elections" and which prejudices women in terms of their equal rights of land ownership, and in particular it disenfranchises unmarried women as "no express provision has been made for them" despite the CGE specifically requesting this.[19] This also casts into doubt the right of women married under

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[11] *Report of the Portfolio Committee on Provincial and Local Government on the Traditional Leadership and Governance Framework Bill*, 22 October 2003
[12] Mbatha, 2003a: 5
[13] Mbatha, 2003b: 199
[14] Mbatha, 2003a: 4
[15] Mbatha, 2003a: 5
[16] Interview with DPLG representative, 3 February 2004
[17] Sibanda, 2004: 16
[18] Sibanda, 2004: 16
[19] Merten, 2004: 31

customary law before 1987, as well as women married under customary law since the inception in 2000 of the *Recognition of Customary Marriages Act*, 1998, but whose marriages have not been registered, because "women's entry point remains marriage" according to attorney Sibongile Ndashe.[20]

The objections that have been raised to both pieces of legislation in terms of the political implications for democracy (and the equality that democracy necessarily entails); and the economic and power implications as far as the distribution of resources, most importantly land, will have to be assessed carefully. Rural women in particular are regarded as especially vulnerable, because there is little tradition of women in leadership positions; and traditionally women have not been recognised as the owners of land in rural areas.[21] Section 21(2) of the Communal Land Rights Act provides that "[i]f a community has a recognised traditional council (in terms of the Traditional Leadership Act), the powers and duties of the land administration committee of such community may be exercised and performed by such council." It is precisely this allocation of concrete powers to traditional authorities that the CGE and others are opposed to. The legislation then, it is feared, will serve to perpetuate the subordinate position of rural women by allocating unprecedented power to traditional leaders and putting the rights of rural women beyond the reach of the constitutional section 9 guarantees of equality. However, the state's position – which is that the legislation constitutes a careful balance between communal rights and women's equality - equally will have to be assessed over time. An evaluation of the legislation will require examples in practice of how the legislation will give effect to the rights of rural communities while respecting the equal rights of members of those communities.

Can political theory assist us in making sense of these claims and conflicts? It may be possible not only to illuminate this conflict of rights, and therefore understand it better using the tool of political thought, but also to navigate a way between abstract universalism on the one hand, and cultural relativism on the other.

Liberal Universalism, Cultural Relativism and Value Pluralism

The debate about culture and conflicts of rights is often portrayed as one between the polar opposites of liberal universalism and cultural relativism, and therefore as a conflict between the rights of individuals and the corporate rights of groups. However the content of this debate is more nuanced, reflecting a sliding scale with many points along the way between these two extremes, and indeed very few theorists actually subscribe to either of the polar opposites in their entirety. Almost everyone who comments on the subject agrees that rights matter, people's choices matter, and people's culture and cultural decisions and practices matter, and therefore that people have *cultural rights* of one sort or another. However the content of those rights, and indeed whose choices they actually are (that is who the subjects of such rights are) is highly contested.

There are three paradigm positions that determine where one would place oneself on the sliding scale, and a brief consideration of these is necessary, because they correspond with the 3 "roads" or ways of dealing with conflicts of rights outlined here. These are the universal, liberal egalitarian position, the cultural relativist position, and the value pluralist position.

There are many strands to liberal thought, but the two unifying beliefs of all liberals are the enlightenment idea that human beings are of equal worth or value - that is no one person counts more than another; and that freedom is a good to be pursued. From this stems the belief in a set of universal *human* rights, as all people are equally entitled to a basic standard of treatment and well-

[20] Cited in Merten, 2004: 31
[21] Merten, 2004: 31

being. Liberals are therefore firmly in the camp of universal political values, as while they believe that culture and tolerance of diversity are goods that stem from freedom, and therefore not to be suppressed; they do not think that diversity should entail the subsuming of individual human rights beneath claims of culture. This corresponds with the "high road" approach to resolving conflicts of rights and claims of culture outlined below.

There are two important strands of liberalism that need to be distinguished from one another here: the strand that emphasises *tolerance*, and the strand that emphasises *autonomy*. As Kymlicka describes what is at issue between the two:

> For some people, the fundamental liberal value is tolerance, including tolerance of non-liberal groups (so long as they allow a right of exit[22]). For others the basic liberal value is autonomy, and so a liberal state should ensure that all citizens have the liberty and resources needed to make informed decisions about the good life, including the right to question and revise traditional cultural practices.[23]

The liberal position of concern here is that which emphasises autonomy, as it is that strand which is most concerned with the rights and choices of the individual. The other strand of liberalism, which is sometimes associated with libertarian ideas, is not necessarily unfriendly to notions of multiculturalism, and so Kukathas at one and the same time regards himself as both a liberal and a multiculturalist. His position is discussed below.

In contrast to the liberal universal position, there is the cultural relativist approach that holds that there are no universal values, and that liberals are guilty of cultural imperialism by claiming their values and ideals to be universal norms. Rather a principle of equal respect should entail equal respect for, and recognition of, a diverse array of ways of life, some of which do not correspond with the liberal concern for the rights of individuals. On a relativist account, the good of the group can, and frequently does, outweigh the rights of individual members of the group, but relativists would argue that human rights themselves are a liberal construct, and therefore inappropriate standards of measurement for many "traditional" cultures and ways of life. The weaker version of this approach is what corresponds with the "low road" of enforcing equal rights (see below).

Somewhere in the middle of these is the value pluralist position, which is similar to some strands of liberalism (see above) in the sense that it takes *tolerance* as its lodestone. Value pluralists hold that, while there are "ultimate" values that have "objective worth" (contra the relativist position), these objective values are not always commensurable with one another (as liberals would have it) and may generate a wide variety of conceptions of a good, moral life. So on this account, equal respect entails that, in as much as these values are objective, tolerance for, and understanding of, the ways of others is what is required. Value pluralists most often also turn out to be deliberative democrats (in keeping with the ideal of toleration) and their position corresponds with the "middle road" referred to in this paper.

This then raises the question of what our duties are in a democratic state that respects both individual rights, and rights of cultural self-determination. More importantly, what are the *state's* duties in ensuring that the rights of all are respected equally? The answer hinges on what one considers the purpose of human rights to be – tolerance or autonomy.

Taking the low road: non-intervention

As I indicated above, this paper deals with paradigm cases, and so the examples user here are ones that have been selected as representative of their particular schools of thought. The paper makes no

[22] This is Chandran Kukathas's position
[23] Kymlicka, 1995: 15

claim to present a comprehensive or complete inventory of *all* the different strands and exponents of any given position. Rather I want to highlight the main features of each of these three approaches for the purposes of comparing them from the perspective of the costs (duties) that they generate, and how they weigh-in on the "human rights scale" – that is, are they good for rights? In assessing the latter, I will not be prescriptive in giving precedence to any right(s) in particular, but rather I will take it as given that all the rights specified in the Constitution are normatively equal. So for example, while an approach may be good for *some* rights (by maximising, for example, negative freedom) on aggregate it may not score well on the scale, because in prioritising only one category of rights, it neglects others. To weigh-in heavily on the human rights scale, an approach would have to, in theory at least, be able to contextually take account of first, second and third generation rights.

I have taken as a paradigm case, or representative example, of a libertarian multicultural approach, the theory of Chandran Kukathas, as his argument, it seems to me, makes a strong case for merely leaving distinct cultural groups to themselves regardless of the rights implications of their internal practices.

A word about communitarianism. There is a stronger version of multiculturalism than Kukathas's that I choose not to engage with at all on the basis that there is no case to answer. If Kukathas's case fails, and I believe it can be convincingly shown to collapse under pressure, then the more "extreme" version need not be considered at all, because if there isn't a justification for multiculturalism from a libertarian argument, then there can scarcely be a justification from a communitarian one, which it is even further towards one end of the scale. An example of such an argument is that of Charles Taylor. On his communitarian account, it is not sufficient that people be *free* to choose to engage in their cultural practices and communities (or not, as Kukathas would have it). Rather the state has duties to actively intervene in *enforcing* people's cultures, on the basis that people have a right to have their culture recognised. Taylor's approach – which is avowedly anti-liberal – would therefore compel people to conform to some kind of imposed notion of their culture, whether they want to or not, presumably because it's good for them (even if they don't know it!).

However, it may be worth considering whether the Traditional Leadership Act in fact does do what Taylor is advocating. By consigning people to "traditional communities" under legally constituted "traditional authorities" is the South African state not perhaps *imposing* culture on people who may perhaps otherwise not have subscribed to these forms of political organisation? The exploration of a "deliberative" approach to the problem in the section below is mooted as a way of mitigating this potential problem.

However, from the outset I wish to reject the communitarian position as being too costly in terms of the duties that it generates (for the state and for the people who have a duty to comply with the strictures of an imposed culture), and furthermore because it is a featherweight on the rights scale (represented by the red rectangle in the diagram). This approach *only* considers rights of cultural self-determination, and rejects first and second generation rights. Even if one's cultural identity were the most overriding human interest that any person had, it could scarcely count as the only contender.

Kukathas's position is more challenging, rooted as it is in the idea of freedom and autonomy. It is also important to note that Kukathas's stated position is that "cultures should not be given special protection [and] that there are no cultural rights"[24] which sounds, on the face of it, like a decidedly right wing liberal position, rather than one friendly to multiculturalism. Kukathas is however firmly in the camp of liberal toleration, rather than liberal (individual) autonomy (see above) and for him

[24] Kukathas, 1995: 245

there is therefore no contradiction in simultaneously holding these two positions. His position is opposed to that of Taylor of course, because Kukathas's argument is based on non-interference.

His argument is as follows: Kukathas notes the objection to universal liberalism that assumes that the proper subject of moral political thought is the abstract individual, and that with the proper application of difference blind principles and rights, diversity will disappear. Indeed, far from being on the decline, the politics of difference is now itself a universal phenomenon, in both democratic and non-democratic societies alike. However, Kukathas rejects the criticism of liberalism that holds that it is mistaken in taking as its subjects "isolated, atomistic individuals." Rather, he argues,

> [i]ndividuals invariably find themselves members of groups or associations which not only influence their conduct but also shape their loyalties and their sense of identity. There is no reason for any liberal theorist to deny this. What has to be denied, however is the proposition that fundamental moral claims are to be attached to such groups and that the terms of political association must be established with these particular claims in mind. The primary reason for rejecting the idea of group claims as the basis of moral and political settlements is that groups are not fixed and unchanging entities in the moral and political universe. Groups are constantly forming and dissolving in response to political and institutional circumstances. Groups or cultural communities do not exist prior to or independently of legal and political institutions that are themselves given shape by those institutions.[25]

Is this true? Certainly, as Leslie Green points out, there is nothing in liberal thinking that entails hostility to identity rooted in group membership. Indeed liberal thought developed precisely in response to the struggle of many groups for equal treatment and recognition.[26] However, I think Kukathas underestimates the extent to which cultural groups are *not* merely products of political and institutional circumstances. Certainly, traditional African culture, and the institution of traditional leadership associated with it, has been influenced in these ways, and manipulated to suit the political ends of the apartheid state, but it cannot be contended that it was *created* by the "political and institutional circumstances." It is in this overstatement of the fluidity and, if I understand Kukathas correctly, "artificiality" of culture and group identity, that I think his argument goes awry.

Kukathas goes on to argue on this basis that group membership is therefore a matter of personal choice, and owing to the ability of groups to change in response to the circumstances, that individuals within groups will be able to adapt too, or choose to no longer be a member of the group. However, if they choose to remain, then they cannot complain about the treatment that they receive. For Kukathas, the individual right of freedom of association is "what is given recognition first and foremost." He goes on to expand on this argument thus:

> No one can be *required* to accept a particular way of life. Thus if, as has often happened, some members of a particular culture on making contact with the wider society wished to forsake their old ways, they would be free to do so, and the objections of their native community would not be recognised. In this respect, minorities within cultural minorities receive some protection. On the other hand, if those members wished not to leave their community but to assert rights recognised by the wider society but not their culture they receive no recognition ... The practices of communities of individuals, the majority of whom accept the legitimacy of the association, must also be accepted, the views of dissidents notwithstanding.[27]

[25] Kukathas, 1995: 232
[26] Green, 1995: 258
[27] Kukathas, 1995: 247

Now this is true as far as it goes. If, for example, I live in a community in which it is customary to ring bells, or sing or chant at certain times, and those happened to be times at which I would prefer to sleep, I could scarcely demand that the community refrain from these activities. Rather, recourse is to be had in my freedom to move elsewhere or wear earplugs or headphones at those times. However, Kukathas, relying as he does on the argument that communities are mere institutional and political constructs, is dismissive of the force behind the coercion that is brought to bear on vulnerable members of groups, and furthermore, far from their being free to leave as he presumes, they are often scarcely consulted about their opinions and wishes at all. Kukathas also empties the argument for the exit option of all contextual content, as most often it is the case that those members of the groups to whose disadvantage the illiberal and inegalitarian practices of the group operate, are the most vulnerable and ill-resourced members of those groups. In what sense then can there be a meaningful right of exit? If one is without resources – of either finances or skill – how is one to make a meaningful choice about operating outside of the group, and indeed how can one exit?[28]

Actually, as an aside, I think an argument can be made that Kukathas's normative position is positively true for many women in rural communities in South Africa, which scarcely commends it! However it must be noted that on Kukathas's account, there is no conflict between the rights of individuals and the claims of groups to treat their members in illiberal ways, because everyone is deemed to be equally free to exit the site of their oppression if they object to it. This libertarian account then clearly yields a "yes" answer to the question posed in the title of this paper, and has been characterised as the "low road" in terms of the duties is generates and the rights that it yields. It is represented by the blue line in the diagram in the Appendix.

Taking the high road: enforcing women's equal rights

From the perspective of a purely modernist, liberal approach, this is not only the best road to take, it is the *only* possibly route if human rights have the trumping power that Dworkin claims for them. The primary exponents of this approach referred to here are Bryan Barry and Susan Moller Okin.

Barry, in contrast to Kukathas's argument that liberty is the founding norm for human rights, bases his argument on the prioritisation of *equality*. In considering the problem of the equal treatment of members of cultural communities, 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."[29] 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, which are based on the recognition of the equal worth of human beings. What makes Barry's position different from Kukathas (who also emphasizes freedom of choice and association) is that Barry assumes that individuals have a right to prioritise their own interests and well-being, and that the community is therefore obliged to respect their equal rights (rather than the other way around). So according to Barry's position, a multicultural approach to this issue not only contains the contradictory justification of the abuse of individuals, but it is also a redundant position. On this account then, there is a resounding "no" answer to the question that this paper raises.

Okin's position is in the same vein as Barry's, but she casts her argument with specific reference to the rights of women – her now (in)famous essay, *Is Multiculturalism Bad for Women*[30] has served to highlight why it is that cultural rights claims frequently operate to the particular disadvantage of

[28] See Green, 1995: 262-270
[29] Barry, 2001: 127
[30] Okin, 1999

women in illiberal communities. Her argument has also stimulated a wealth of debate and reaction (and some overreaction too I think!) as the issues she raises are ones that cannot be avoided in any modern democracy.

Okin's work has been seminal in insisting that the realm of the private and the family are equally the subjects of justice as the realm of the public and citizen, and consequently that if the consideration of gender is not at the centre of our political analysis, justice cannot be served. This forms the basis for her assertion that multiculturalism can be particularly discriminatory towards women. There are two reasons for this that she points out. Firstly, religious and cultural communities are often most concerned about aspects of private law pertaining to marriage, divorce, custody of children, control of property and resources such as land, and the rules of inheritance. Given that women are generally more involved in the personal, familial and reproductive aspects of life – the realm of the "private" – the defence of entrenched cultural practices is therefore likely to impact upon them much more than on men and boys. So,

> [while] culture is not only about domestic arrangements, [these] do provide a major focus of most contemporary cultures. Home is, after all, where much of culture is praticed, preserved, and transmitted to the young. On the other hand, the distribution of responsibilities and power at home has a major impact on who can participate in and influence the more public parts of the cultural life, where rules and regulations about both public and private life are made. The more a culture requires or expects of women in the domestic sphere, the less opportunity they have of achieving equality with men in either sphere.[31]

Secondly, and more controversially, Okin argues, there is a connection between gender and culture in that most cultures are patriarchal to some extent and therefore "have as one of their principal aims the control of women by men."[32] This is important for the topic under discussion because

> [where] there are fairly clear disparities in power between the sexes, [then] the more powerful, male members are those who are generally in a position to determine and articulate the group's beliefs, practices and interests. Under such conditions, group rights are potentially, and in many cases actually, antifeminist. They substantially limit the capacities of women and girls of that culture to live with human dignity equal to that of men and boys, and to live as freely chose lives as they can.[33]

So clearly, Okin is in the autonomy rather than the toleration camp of liberal thought, which also places her firmly on the side of equal worth of individuals, rather than equal recognition of cultures, when they are in conflict

I have labelled Barry and Okin's approach as the "high" road, as, insisting as they do on the enforcement of women's equal rights both formally and substantively in both the public and the private spheres, this approach is "costly" in terms of the duties that such rights generate. This approach would require a set of intricate monitoring mechanisms on the part of the state, and on this account, inherently patriarchal cultures would be required to transform in line with the demands of equality. However, this approach also has high payoffs for the rights of those concerned (as represented by the green square in the diagram) and so on a deontological account of rights, the attached costs would be justified.

However this approach attracts a number of criticisms that beg consideration. Firstly, in as much as the costs (duties) of this approach *are* high, it generates objections of the Kantian "ought implies can" variety – where resources are scarce, and inequalities are great, can one really do justice to an approach which aims to optimise the individual rights of all? Secondly, this approach is often

[31] Okin, 1999: 13
[32] Okin, 1999: 13
[33] Okin, 1999: 13

charged with being rather paternalistic in the sense that it assumes that its premises (liberal egalitarianism) are correct and therefore universal, whereas there are many other forms of the good life (some of them more communitarian) that are equally viable that perhaps do not give precedence to individual rights and equality. Thirdly – and I think most importantly – the liberal approach reduces relations between people to sterile policy prescriptions and abstract principles of justice. In reality, this fails to take account of the complexity of the relationships between people, and indeed may even serve to mask women's oppression behind a veil of formal equality. Can a deliberative approach mitigate some of these problems? The following section considers this possible third, "middle" way.

Taking the middle road: negotiating a compromise

Theories of deliberative democracy, like multiculturalism and liberalism, come in many forms. The most notable exponent of this school of thought is Jürgen Habermas, whose "discourse ethics" is intended as a way to extend recognition to marginalized groups in liberal democracies.. Many feminists have added their voices to the debate, and injected it with questions about women's participation in the deliberative process, and whether this can assist in both respecting cultures equally, and honouring women's rights.

Andrea Baumeister, in critically assessing the shortcomings of Habermas's approach, argues that "he ultimately underestimates the depth of diversity and the fundamental nature of value conflict."[34] On Baumeister's account, the point of deliberative democracy is not to reach a "rational consensus" (as this may be impossible, given the depth of "value pluralism") but rather that the point of deliberation precisely is deliberation as a process. Or to put it another way, "democractic legitimacy [rests] purely on the procedural fairness of the process whereby decisions are reached."[35] However, it is important to note that what is crucial is that the process is inclusive of all voices, not just those that claim to represent a given group or culture. This is harder than it sounds on the face of it, because how is one to determine what constitutes fair and inclusive procedures?

A possible solution is offered by Ayelet Schachar, who in her *Multicultural Jurisdictions: Cultural Differences and Women's Rights*[36] considers the position of women members of minority, illiberal religions in liberal societies. She argues that rather than setting up the problem as a polar conflict between multiculturalism on the one hand, and liberal egalitarianism on the other, what is really needed is greater intercultural dialogue and what she labels "transformative accommodation." She argues for an expansion of jurisdiction of both the state *and* cultural groups, so that neither has a monopoly of power and decision-making in any given case. This expands the choices that individuals can feasibly make and both underscores their cultural membership *and* presumably their individual rights by making the exit option a viable one. In this way, cultural groups will have to consult with all their members and take their interests seriously if they are to get the most mileage out of their expanded powers and jurisdiction.[37]

What does all of this mean in practice? An example is provided by Monique Deveaux who illustrates her argument by looking at the reform of African customary marriage laws in South Africa. Deveaux adopts a deliberative approach, but she proposes that deliberation should be wider than just formal politics and the scope of democratic activity should be expanded to include "nonformal democratic expression, such as cultural resistance and reinvention in the private realm" as these "also speak to the issue of a social custom's legitimacy or illegitimacy." Furthermore,

[34] Baumeister, 2003: 740
[35] Baumeister, 2003: 751
[36] Shachar, 2001
[37] See Shachar, 2001 and Baumeister, 2003: 753-4

Deveaux argues that deliberation aimed at mediating internal cultural conflicts should engage "participants' *strategic* interests and needs, rather than foregrounding *normative* argumentation and justification." This "more politically oriented approach" as Deveaux describes it "aims to secure political compromises through debate and negotiation, rather than normative consensus, or even moral compromise." The outcomes of such deliberative dialogue that focuses on needs and interests, according to Deveaux, will produce democratically acceptable, but not necessarily *liberal* outcomes.

So from the perspective of the question posed in this paper, Deveaux's approach will yield an answer of "maybe" because requiring the participants – in this case traditional leaders and their communities, including women taken on an equal footing – to debate the merits of their powers and functions from the perspective of their *interests*, may yield a result whereby these will have to be exercised in a way that is conducive to all. It also avoids the rather tautological justification for cultural practices and traditions that they are justified (and therefore presumably normatively good) *because* they are traditional.

This is also a "middle road" in the sense that the state's duties are to facilitate this sort of intracultural dialogue, and to implement the outcomes and decisions that are arrived at in this way, but that they are not required to intervene to equalise the relationships between the participants that may arise from the negotiations. It is also an approach that lends itself well to the recognition of cultural rights, as it allows groups this type of deliberative autonomy. However, it is not careless of first and second generation rights as a communitarian approach is (see above). This approach takes individuals seriously by placing them, and their interests, all on an equal footing at the level of deliberation. It also takes their *freedom* seriously by respecting the outcomes of that deliberation, even when those outcomes are not liberal egalitarian ones. This position is illustrated by the yellow block in the diagram. The dotted line illustrates the proposal that this approach *may* serve to weigh in more heavily on the rights axis than the (green) liberal approach, because it takes both autonomy *and* tolerance seriously, and is therefore inclusive of a wider range of rights, both corporate and individual.

The most obvious objection to this approach is to point out that even if one did create the forum for deliberation as Deveaux envisages it, and even if the deliberations were to focus on strategic interests rather than normative justifications, it is unlikely that rural African women in South Africa would be able to participate as equals. This version of deliberation threatens to disguise the layers of cultural conditioning, lack of access to resources and education, confidence and possibly even intimidation, that exist in the ever-intrusive *real* world of politics outside of moral discourse. Perhaps by focusing on the *procedure* rather than the lived reality, this approach cannot take account of the genuine disparities in power relations that would threaten to overwhelm egalitarian democratic deliberative participation in such a forum. And in this sense then, this approach yields too much, as by foregrounding the powers and interests of those who are in traditionally hierarchical positions, it seems to imply that such hierarchies are in some sense justifiable as long as they are honestly identified as such. And this flies in the face of the constitutional guarantees of equality which make it indefensible to allocate power to some over others for no other reason than that it has always been that way.

Conclusion: comparing the costs

I have two possible conclusions to this paper. I have rejected the (liberal) multiculturalist position – the so-called "low road" above, as while it scores well on the duties scale, its costs for rights are too high, and so cannot serve the purpose of recognising both individual and corporate claims of equal worth and recognition in a constitutional democracy like South Africa. Furthermore, I have given an account of why I think a communitarian argument fails too.

I am therefore left with two other contenders: the high (liberal egalitarian) and the middle (deliberative democratic) roads. And for each there are teleological reasons, to do with the likely *outcome* of taking that road; and deontological reasons to do with respect for people's *rights*; that recommend them.

The deliberative, middle road is compelling because it takes account of first, second and third generation rights, and therefore creates greater options and choices for both groups and individuals. The deliberative approach also encourages debate and participation by those whose rights are affected, and therefore has greater potential for "transformation" which would presumably be conducive the goal of the "progressive" realisation of women's equal rights in traditional African communities. This road is therefore commended both in terms of its costs, and in terms of its likely outcome for the rights of those concerned (individually and collectively) as it takes rights seriously on both an autonomy and a tolerance account of the *raison d'être* for human rights.

However, the liberal egalitarian insistence on the equal treatment of women – *all* women – morally and theoretically also seems to be right. Furthermore, it seems to be *politically* right too, because to have come so far in South Africa as far as the democratisation of society is concerned and now concede so much (that some are more equal than others) seems to fly in the face of the constitutional guarantees to the contrary. It is also the right road because to give an inch in the direction of hierarchical claims of culture (as the middle road has the potential to do), may send us back down a slippery slope where we have categories of citizens, some of whom enjoy a full set of rights and liberties, and others who are invisible and not consulted. Which is not to say that people's cultural rights should not be taken seriously, but rather that the rights claims of *all* should be taken *equally* seriously, which would imply that the rights – first, second and third generation - of rural African women are a matter of priority, and that claims of traditional authority to be upheld should take second place. The problem with the "high" road however is precisely that it is high in terms of its costs and therefore enforceability. Furthermore, this road, while it takes autonomy seriously, has the potential to fail on a tolerance account of rights.

The fundamental question to ask therefore is: Which of these two is the core value underlying human rights? If one's moral and political instincts tend to lead one in the direction of autonomy, then clearly the high road is the only choice. If however, an element of tolerance is to be conceded, then the middle road appears to be the better route. In the absence of an objective method or scale for weighing these two core values against one another, this paper can only conclude that the choice between the two is entirely in the (moral) "eye of the beholder." However, the legislation on traditional leadership seems to create a unique opportunity to try the middle road and adopt creative deliberative methods in holding traditional leaders to the aim of the progressive realisation of the equal rights of women in their communities. By allowing for some concessions in the direction of tolerance (as the Constitution clearly does) South Africa may perhaps be able to provide a working "best practice" model of how deliberative democracy can operate in a way that honours both individual (equal) rights, and the claims of cultural communities to equal recognition.

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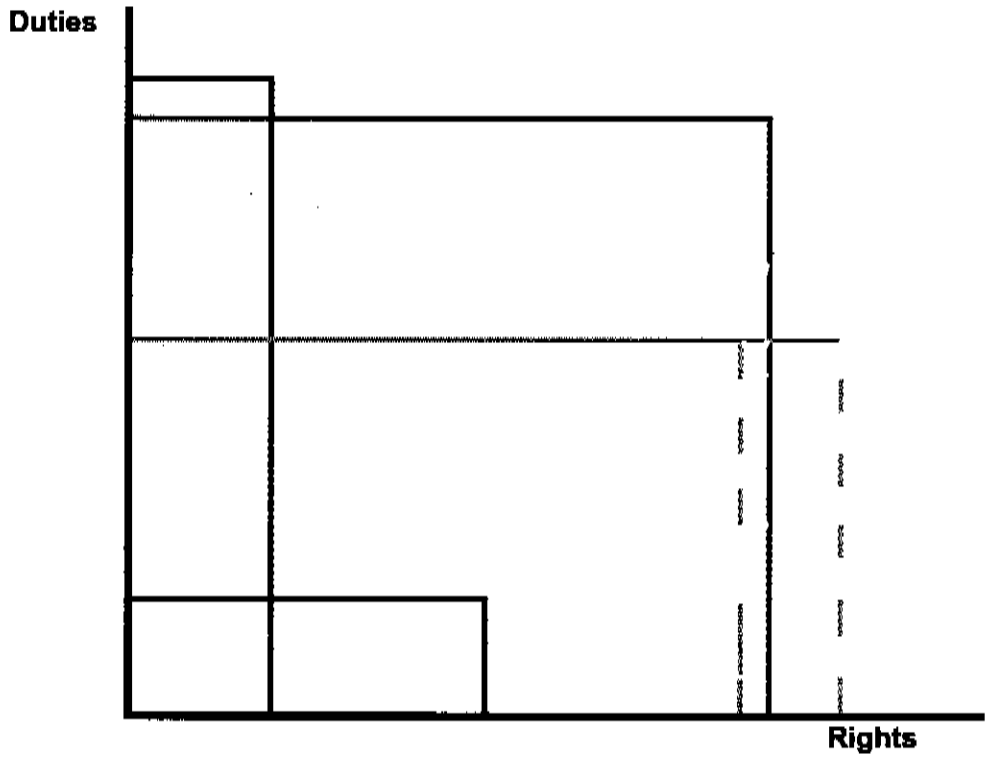
Appendix:

Diagram Illustrating the Costs (Duties) and Benefits (Rights) of each approach



Libertarianism (Kukathas)
Communitarianism (Taylor)

Liberalism (Barry, Okin)
Deliberative Democracy (Deveaux, Shachar)