THE GLOBAL DEBATE ON MULTICULTURALISM AND WOMEN'S HUMAN RIGHTS IN SOUTH AFRICA

HSRC BASELINE PROJECT REPORT

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1. INTRODUCTION

Conducting research on the rights of women and children in South Africa, particularly from the perspective of their woeful underservicing, is a daunting task. It is one which is embarked upon however in the hope that a serious enquiry into the reasons for the the misuse of the traditional place of women in an embedded patriarchal system can contribute to finding solutions to the problem.

The theoretical framework for this report is the perceived conflict of values between human rights, and the claims of culture. This is part of a broader, contemporary global debate, which goes under the banner of multiculturalism. This debate is often cast as a conflict between the values of liberalism, which are criticised for being culturally biased and reflective of the values of the developed, western world, and those of "other" cultures, who hold alternative conceptions of the "good" life, which may not necessarily entail a respect for individual human rights, democratic governance, or indeed individual freedom. I believe that this cast of the mould for the debate is misconceived. Following Bryan Barry, the report argues that those who wish to defend their cultures and traditions need to arm themselves not against the claims of liberal democracy, but against those of liberal egalitarianism. A fundamental point is missed if the rights enshrined in the Constitution are perceived to be those which buttress the freedom of the individual. Indeed they do that, but they do a great deal more. The underlying ethos of the South African Constitution is that of the enlightenment and the values that it enshrines, most importantly the equal worth of human beings.

Thus claims of culture which conflict with human rights, whether they be hierarchical, property-based, or simply a denial of wrongdoing to another, cannot fall back on the claim that they are in counterpoint to another, equally viable culture which they reject. They have to be held to the same standard of equality in assessing the "right" treatment of others. And in many cases this is in conflict with some cultural norms and traditions. But, in so far as this is what the standard of equal recognition demands, it is not just the only logical answer, but also the only morally right one too.

However, in South Africa, as in any country as richly diverse, and politically colourful as this one, things are not so simple. We do not live in the abstract esoteric world of moral philosophy where problems are so easily solved, and are of no consequence for the abstract parties concerned. In South Africa we are daily confronted with horrifying stories and statistics of the abuse of women and children in all aspects of their lives: at home, at school, at work, on the streets. The types of abuse are manifold. Much of it is reflection of the incredibly high violent crime rate in the country (apparently on the decrease) and so women and children in vulnerable circumstance become the victims of systematic assault, rape and abuse to such an extent that we talk of a "culture of violence" in South Africa, and there is recognised to be a "war" against women and children in this country. Other types of rights violation consist of property based deprivations, some criminal, and others rooted in the claims of custom. Women and children in this country are at all levels and in all "cultures" at the sharp edge of economic hardship as a result of these deprivations, and this is compounded by their additional vulnerability to the effects of the HIV/AIDS pandemic in the country.

On the face of it, it would seem that we in South Africa are very careless of the rights of our most vulnerable citizens. And yet in considering the "real" rights of women and children in this country (by which is meant those enshrined in law) we find that there is a raft of legislation, both domestic and international, as well as the Constitution and the National Action Plan on Human Rights, aimed at the protection of the human rights of women and children. This is buttressed by numerous agencies, NGO's, and Commissions also charged with these duties.

The challenge therefore, is to attempt to reach some understanding of the disconnection that occurs between the declared rights and identifiable duties towards women and children, and the systematic and real violation of those which takes place to such an extent that, by some accounts, it has become part of a new national "culture." Rather than explain this away, it is important to confront it, and to do so from the perspective of culture. Perhaps the very same people who invoke culture as the justification for this treatment have duties too which have not been recognised. Perhaps there is a way to turn the tables and in so doing turn the tide of the abuse of South Africa's women and children. In considering what culture can be taken to mean, and furthermore pressing upon its inherently flexible, egalitarian (rather than its static, unbending, hierarchical nature as conservative multiculturalists would have it) perhaps a more substantive notion of what our duties towards women and children are can be encouraged to emerge, alongside a more robust form for fundamental human rights.

However this project is not intended as an end in itself. Its purpose is to investigate, raise questions, and hopefully contribute to the ongoing debate about human rights and multiculturalism in the South African context. The purpose is also one of developing capacity, as this researcher approaches the subject as a student rather than as a commentator.

The following is the outline and a rough estimate of the time frames of the original research plan. This has been adhered to as faithfully as possible throughout the year but some flexibility has been necessary.

2. RESEARCH PLAN

BUDGET: R160:00
HOURS: 40 DAYS
OTHER COSTS: CONFERENCES,WORKSHOPS, AND PUBLICATION

RESEARCH TIME FRAMES:

PHASE 1: MAY-JULY 2003
MAY (5 DAYS):

- READING (FOR WOMEN'S ISSUES IN CRIMINAL JUSTICE PUBLICATION)
- RESEARCH PLAN

JUNE (5 DAYS):

- VIOLENCE AND CULTURE READING (FOR PUBLICATION)
- BIBLIOGRAPHY
- REPORT OUTLINE
- IPSA AND HSRC CONFERENCES (JOHANNESBURG AND DURBAN)

JULY (5 DAYS)

- VIOLENCE AND CULTURE PUBLICATION

PHASE 2: AUGUST-OCTOBER 2003
AUGUST (5 DAYS):

- READING AND BIBLIOGRAPHY (POVERTY AND INEQUALITY)
- WRITING ROAPE PAPER

SEPTEMBER (5 DAYS):

- RESEARCH AND BIBLIOGRAPHY ON WOMEN'S POLITICAL REPRESENTATION
- NADEL WORKSHOP (CAPE TOWN)
- REVIEW OF AFRICAN POLITICAL ECONOMY WORKSHOP

OCTOBER (10 DAYS)

- CNRS WORKSHOP (FRANCE)

PHASE 3: FEBRUARY-MARCH 2004 (5 DAYS)

- COMPILING RESEARCH REPORT

3. PROJECT OUTLINE: DESCRIPTION, ACTIVITIES AND OUTPUTS

The project was funded out of the HSRC's "baseline" parliamentary grant application, based on a proposal submitted by the researcher in November 2002. The idea was to cultivate capacity in the research area, and develop knowledge and research skills, as this was a broad thematic area in the field of human rights that was flagged as being of increasing importance in South Africa and the world.

As the project was largely a preliminary investigation, the researcher set out to produce a series of publications based around specific questions within the broader project, and these would form the concrete outputs of the project. It was the intention that these smaller research projects fit into a larger whole that would collectively contribute to the knowledge and capacity to do research in this particular area. Owing to the preliminary nature of the study, as well as the constraints of both time and funding, the methodology employed was primarily desktop research, supplemented by the use of contemporary cases and examples from the news and the courts. The researcher also consulted with other academics who are established in this area, in order to double-check facts and ideas, as well as include alternative views in the study. This approach was supplemented by the presentation of the work (as ongoing work-in-progress) at numerous conferences and workshops throughout the year, as well as the publication for discussion of an occasional paper, in order to generate as much debate and feedback during the course of the project as possible. The researcher also attended more practical workshops (see below) on the subject of women's rights and multiculturalism in the South African context in order to develop a more in-depth understanding of the empirical context for this work, in addition to its theoretical underpinnings.

It emerged that the focus of the research was to be women's rights, rather than children's rights in addition, as was originally intended. This narrowing of the focus was for two reasons: Firstly, the types of publication and the projects that were linked to the broader research plan were mostly in the area of gender, rather than youth rights, and so the research focus reflects what was the prevailing focus at that time. Secondly, constraints of time and resources made it impossible to complete a second tranche of the project focusing on cultural challenges to children's rights in South Africa. As a consequence, only a preliminary investigation of this proposed area of research was accomplished, and only one of the concrete outputs (a journal article described below) deals with the topic of cultural challenges to children's rights. This will have to be flagged as an area of future research (see section 5).

3.1 Conferences and Workshops

The researcher attended a number of conferences and workshops during the year. At these conferences, the research was presented in various stages, with a view to getting it published as outputs at a later stage, subject to the input and refinement of the conference. The workshops that were attended were in the area of women's rights and challenges to them, and the researcher aimed to expand her own understanding of these issues by participating in these workshops. The workshop in France was one that the researcher was chosen to attend as one of 8 representatives from South Africa.

- British Political Science Association Annual Conference, University of Leicester, United Kingdom, April 2004. Paper: Whose Right is it Anyway? Equality and Conflicts Between State Policy, Culture and Rights in South Africa.
- International Political Science Association Conference, Durban, South Africa, June 2003. Paper: Concepts of Childhood and the "Right" Treatment of Children: Culture, Relativity and Human Rights

- South African Political Economy Workshop, Johannesburg, South Africa, August 2003. Paper: Women's Human Rights and the Feminisation of Poverty in South Africa
- National Association of Democratic Lawyers (NADEL) Workshop, Cape Town, South Africa, September 2003. Topic: Women and the Constitution
- HSRC Research Seminar Series, Gender Focus Group. Lead presentation and discussion on Women's Human Rights and the "Culture" of Violence in South Africa . September 2003
- Centre National de Recherche Scientifique (CNRS) "Africa in the World" Workshop, Bordeaux and Paris, France, October 2003. Paper: The Global Debate on Multiculturalism and Women's Human Rights in South Africa

3.2 Publications

The following publications were produced during the course of the year that the project was conducted and were either in print or forthcoming at the time of writing (February 2004).

- ***Whose Right is it Anyway? Equality, Culture and Conflicts of Rights in South Africa.*** Occasional Paper, HSRC Publishers, Cape Town: 2003
- ***Women's Human Rights And The "Culture" Of Violence In South Africa.*** Chapter forthcoming in Women Victims of Violence, Prentice Hall, Women's Issues in Criminal Justice Series: 2004
- ***Women's Human Rights and the Feminisation of Poverty in South Africa.*** Peer reviewed article forthcoming in *The Review of African Political Economy*: 2004
- ***Can there be Any Universal Children's Rights? Some Considerations Concerning Relativity and Enforcement.*** Peer reviewed article forthcoming in *The International Journal of Human Rights* 9 (1): 2005

4. PROJECT OVERVIEW: KEY RESEARCH FINDINGS

The project aimed to examine the contemporary debate on multiculturalism and human rights, and the problems that this poses for the accommodation of cultural minorities within democracies across the world. In particular with regard to the rights of vulnerable members of cultural groups, there are enormous challenges to be met in terms of the assumptions of equality that inform the ideals of democracy and human rights, and the claims of cultural groups to live in accordance with their traditional norms and values without the interference of the state. The problem of the equal treatment of "internal minorities" – members of groups whose equal treatment is in question – is examined in light of the rights-based claims of equal worth and cultural determination that are made in the name of cultural minorities. It is argued that the logic of the claim for equal recognition is in conflict with norms and practices that disregard the equal rights of members of those groups, and that cultural minorities can be held consistently to the egalitarian standards of democracy and human rights in their internal practices, without overriding their cultural norms and practices in terms of the right to self-determination.

The argument is set in the context of the status and treatment of women in South Africa. It is argued that a national "culture" of patriarchy which persists across all races and cultures; but which marginalises poor, Black, rural women in particular; poses the greatest challenge to the realisation of the equal status of all women. Women's formal equality as a matter of law fails to be realised as a matter of fact in both the "public" and the "private" spheres of life, as is demonstrated by economic marginalisation in the case of the former, and endemic violence against women in the latter. The project found that while the South African constitutional and legal dispensation does not condone the unequal treatment of women, it is tolerated owing to the perception that differential treatment of women is an inextricable part of the prevailing "culture" which regards women as human beings of lesser value. In particular rural women are doubly discriminated against in this way, and so the "feminisation" of poverty is a feature of this.

In light of South Africa's position in the world as a new democracy and emerging economy, the "right" treatment of women as human beings of equal worth is of critical importance in the broader, global, debate on multiculturalism. Without the realisation of women's substantive equality and equal worth at the level of both the economy and the family, the realisation of the human rights norms of South Africa's democratic dispensation will be subsumed under the weight of the hierarchical claims of existing holders of power to retain the *status quo*. The project outputs therefore argue that equal recognition of culture *necessarily* implies recognition of the equal worth of vulnerable members of cultural groups. Democracy and a human rights dispensation therefore entail that cultural norms and practices be tempered by egalitarian considerations, even if (perhaps especially if!) these prove politically unpopular with existing holders of power. The argument for the respect for equal rights in multicultural jurisdictions is therefore a global one, and has the same resonance and relevance in African democracies as it does in European ones.

4.1 Human Rights and Multiculturalism

It is frequently 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."[1] It is not disputed 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, this project challenges 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 referred 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 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.

Interrogated here is 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. It is suggested 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.

One distinction that can be made is that between a *corporate* right, and a *collective* right.[2] 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.

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

[1] Howard, 1990: 159-160

[2] This distinction is discussed in more detail below.

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."[3] 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 conception of rights more generally.[4] 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.[5]

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 a 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.[6] 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.

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[3] Jones, 1994: 182-3

[4] 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.

[5] Jones, 1999: 356-7

[6] This is the suggestion of Denise Reaume. See Jones, 1999: 359-361

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 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.[7] In other words, moral standing is a precondition of right-holding.[8]

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.[9]

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 it 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.[10] It is the contention of this paper that group rights morally or 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

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[7] 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.

[8] Jones, 1999: 362

[9] Jones, 1999: 363

[10] 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-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.

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.[11]

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.[12]

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

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[11] Jones, 1999: 377

[12] See note 6

> 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.[13]

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 access, whether to buildings or the mainstream economy, or 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 below, so her argument is briefly examined 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 "important values of solidarity and community."[14] 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 familes, churches, ethnic groups, nations and so on."[15] So far from it being the case that liberal egalitarianism ignores 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.

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

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[13] Hartney, 1995: 220
[14] Green, 1995: 258
[15] Green, 1995: 258

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 maintain 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. Indeed, "[m]any cultures incorporate as part of their fabric disputes about what their ways really are."[16] 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."[17] 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."[18] 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 examples given in this report. 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.[19]

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 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.

Presented here is an example of just such a practice, and this highlights just why the state's primary responsibility is towards the rights of individuals in these instances. I would like to propose,

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[16] Green, 1995: 270
[17] Green, 1995: 270
[18] Barry, 2001: 127
[19] Barry, 2001: 128

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.

4.1.1 Examples of Culture and Conflicts of Rights

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,[20] 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 partriarchy.[21] 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 that recognise people's cultural norms and traditions including marriages contracted under a system of religious or customary law. [22]

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 that, it is argued here, 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 that answer 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 has been 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.[23]

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[20] 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.
[21] See Bennet, 1991: 301-311
[22] Nhlapo, 2000: 139-141
[23] 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 well-being 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 that depends largely on established relationships and the recognition of duties.[24] 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 that is bound by a constitution entrenching the equal rights of all people must concern itself with this.

In 2000, the *Recognition of African Customary Marriages Act* took effect, which allocates equal proprietary 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 precendent 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.[25]

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).

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. This prejudicial judgment left the women in the case 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 19th 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

[24] Bennet, 1991: 328
[25] Magardie, 2002: 4

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.[26] 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.

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.

[26] Van Niekerk, 2002: 7

4.2 Women's Human Rights in South Africa

This section of the report outlines the status of women's human rights in South Africa from the perspective of their legal declaration. It has been noted above that in terms of the legal provisions in the country – both in terms of the Constitution, international law, and domestic law - on paper there is a robust commitment to the protection of the basic rights of women in particular as class of vulnerable persons. Furthermore, much of this law is intended to redress the marginalized and subordinate role to which women have traditionally been consigned.

It is therefore necessary to reflect upon these measures with a view to assessing what the official position is in law with regard to the rights of women, as while it is a cause for great concern that these laws exist on paper only, their existence is also a cause for optimism. It is a cause for optimism in the sense that the state's commitment to the rights of women is clear and unequivocal, and also in the sense that the state's duties correlative to those rights are clarified as a result. However the challenge is to carry out the laws that enforce the rights as robustly as they are specified, and to find ways to remove them from the intellectual space of the classroom and the law library, and make them a part of everyone's lives, not just women's.

This report argues that these provisions are undermined, to the extent that they are often paralysed, by deeply entrenched cultural norms of patriarchy. On this account, the equal treatment and status of women can never be anything other than theory rather than practice, as to enforce such norms would be to shatter the very foundations upon which "African" culture and traditions are seen to rest. But according to *Human Rights Watch: Women's Human Rights:*

> Arguments that sustain and excuse these human rights abuses – those of cultural norms, "appropriate" rights for women, or western imperialism – barely disguise their true meaning: that women's lives matter less than men's. Cultural relativism, which argues that there are no universal human rights and that rights are culture-specific and culturally determined, is still a formidable and corrosive challenge to women's rights to equality and dignity in all facets of their lives.[27]

Worth noting here is the position that women's rights are an inextricable component of their human rights. This is what Hodgson (2002: 3) refers to as "the 'women's rights as human rights' approach to female equality and empowerment" and it echoes Article 18 of the Vienna Declaration on Human Rights of 1993, which states that:

> The human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on the basis of sex are priority objectives of the international community (cited in Hodgson, 2002: 3).

Women are therefore not a special interest group whose rights need to be weighed against other interest-generated rights,[28] such as those of groups to cultural self-determination. At the heart of the "women's rights as human rights" approach is the assumption of the equal worth and value of the individual which is implicit in, and indeed integral to, the very notion of human rights itself.

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[27] See *Human Rights Watch: Women's Human Rights,* http://www.hrw.org/women/index.php

[28] This argument is conceived in light of an interest, rather than a choice theory of rights. See section 4.1 and footnote 4 above.

4.2.1 The South African Constitution and the National Action Plan

South Africa's constitution, which has been hailed as one of the most progressive in the world, developed out of a process of negotiations in the aftermath of apartheid and the progression towards democracy. As a result, it contains many provisions that reflect the spirit of compromise of the negotiation process, as well as an extensive set of rights. It is worthwhile to reflect briefly on the specific clauses in the Constitution pertaining to the equal status and "right" treatment of women, as the Constitution is intended to inform all other law and policy in the country.

Chapter 2 of *The Constitution of the Republic of South Africa* (Act 108 of 1996) contains the Bill of Rights including a number or provisions relevant to the topic of this report. Firstly, section 7(2) outlines the duty of the state to "respect, protect, promote and fulfil" the rights there enshrined, and section 8 deals with the application of the Bill of Rights in terms of its extent and who the subjects of rights are. It is significant that the Bill of Rights applies to all laws, as well as binding all the branches of governement and organs of the state, because the intention is clearly to give human rights overriding importance as a matter of policy and law. This reinforces section 7(1), the introductory clause to the Bill of Rights which states that "This Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

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 which 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.

Most importantly from the perspective of women's economic status, sections 23 and 25 establish the right of equal treatment with regard to labour conditions and property. Again, the extent to which these may be challenged or limited by sections 14, 15, 30 and 31 is uncertain. In particular the right of women to inherit property has been challenged in the courts on the basis of the rights enshrined in sections and 30 and 31.[29]

Chapter 9 of the Constitution establishes the State Institutions Supporting Constitutional Democracy. Section 181(1)(b)–(d) establishes the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Linguistic and Religious Communities, and the Commission for Gender Equality. The Commissions are independent, and are charged with promoting respect for the relevant rights (outlined above), as well as having a monitoring role. In addition they have the power (if not always the capacity) to carry out research and make recommendations on such things as legislation and the establishment of other bodies they regard as useful to the task of protecting and promoting the rights in question. In terms of section 181(1)(5), "These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year."

The constitutional establishment of these Chapter 9 institutions is therefore intended to give the declared rights in Chapter 2 (see above) "teeth that can bite" to use Hoebel's phrase.[30] By providing for mechanisms to monitor and evaluate, as well as make recommendations on the enforcement of these rights, the intention is clearly to carry them out actively, rather than merely declare them passively. However the Constitution contains other provisions that may be seen as a challenge to the enforcement of the declared rights, most importantly the equality clause.

One of the compromises agreed to in the negotiation process leading up to the drafting of the Constitution was the recognition of Traditional Leaders. In this regard, see the recently passed *Traditional Leadership and Governance Framework* Act, 2003. South Africa has a dual system of law, which recognises alongside the ordinary "western" law (a combination of Roman Dutch common law, with Anglo American law superimposed, all subject to the Constitution) traditional African Customary Law. The origins and development of this parallel system of law is beyond the scope of this report, but it applies only to Black South Africans and only in certain instances, and only applies in respect of civil matters, primarily those in the domain of family law.[31]

To a large degree, the sustenance of customary law was a product of the apartheid system, as it was maintained and shaped to fit the complex discriminatory laws intended to separate the races. As a result, there was an appeal to traditional authorities to assist in maintaining the parallel system of law, and it is these – unelected, usually male, senior members of cultural or linguistic groups - that today make the claim to retain their "traditional" powers and authority.[32] And that claim is rooted in the right to cultural determination. It is no great leap from acknowledging this traditional patriarchal authority, to tolerating patriarchy as a national institution. It may be politically unpopular to argue that the retention of these hierarchical norms, formalising the role of Traditional Leaders, undermines democracy and human rights, but it is this very entrenching of the authority of those

[29] The basis of this challenge is the cultural "right" of male primogeniture in African Customary Law, which stipulates that in the event of a husband's death, his wife (or wives) and children's entitlement to the estate can be overridden by the claim of a senior male relative, even if that person is a stranger to them. Furthermore, it is unclear what responsibility, if any, that senior male has towards them in terms of maintenance out of the estate. See the case outlined in section 4.1.1 above. This is clearly in breach of the common law of inheritance, according to which children have a primary claim on a deceased parent's estate, as well as the laws on maintenance and testation. The justification for the suspension of the equal treatment of women, and indeed children, in these cases, on the basis of "culture" is therefore in conflict with their basic human rights.

[30] Cited in Riddall, 1999: 17

[31] See Bennet, 1991

[32] See Nhlapo, 1991: 112-113

who are existing holders of power that, it is argued, contributes to entrenching the unequal status of women in South Africa.

Chapter 12 of the Constitution deals with the recognition of Traditional Leaders and outlines their role, but most importantly it allocates to them the power to deal with matters pertaining to African Customary Law and the communities that observe this law. This may not sound terribly threatening and rather axiomatic, but the allocation of power to those whose authority does not derive from democratic processes underscores the unequal treatment of women, and serves to promote the idea that this inequality is tolerable, because it is "traditional." In particular this may serve to reinforce the limited proprietary capacity of women in traditional African culture, and so the retention of these hierarchical norms creates the backdrop to the continued economic subordination of, in particular, rural women. As has been mentioned, the *Traditional Leadership and Governance Framework Act* has recently come into effect, and so the impact of this on the lives of, in particular, Black rural women remains to be seen. However, it is a cause for some concern that while some provision has been made for representation of women on Traditional Councils, no clear procedures are laid down in this regard, and it is unclear how Traditional Leaders will be held to the egalitarian standards of the Constitution in the event that they fail to uphold them in the course of exercising their powers under the new legislation.

South Africa's major policy document responding to the human rights enshrined in the Consitution is the *National Action Plan for the Promotion and Protection of Human Rights* (NAP) of 1998 was drafted in response to the recommendations of the World Conference on Human Rights of 1993, which resulted in the Vienna Declaration and Programme of Action. Article 71 of Part 2 of the Vienna Declaration recommends such a national action plan in order to identify the steps the state ought to take in order to promote and protect human rights.

It is significant that while the NAP reinforces the constitutional grounds for equality and non-discrimination in the section on Civil and Political Rights, it does not focus specifically on either gender or the rights of women. Furthermore, while the historical factors it identifies as contributing to South Africa's past poor human rights record are colonial domination, racial discrimination, political oppression and economic exploitation; gender oppression does not make it onto the list. Furthermore, racial and socio-economic inequalities are cited (following the 1995 World Bank report) as the main causes for concern and action in terms of section 9 of the Constitution, but gender-based inequalities are again taken to be implicit.

In looking at the section on Economic, Social and Cultural Rights in the NAP, again it is interesting to note that the Freedom of Culture Religion and Language merits special attention (including a reiteration of the powers of Traditional Leaders), and the rights of children and young people are also singled out as requiring further attention. However the social and economic rights of women specifically are not identified, which again flies in the face of their patent inequality, less so in law, but largely in practice.

These two key documents therefore, it seems to me, while they acknowledge the gender inequalities that riddle South African society, do not go far enough in ameliorating this situation. The bias seems to be strongly in favour of the retention of traditional power hierarchies, and certainly this is borne out in fact. This is not to suggest that the South African constitutional dispensation *condones* this inequality and discrimination. But by leaving the basic human rights norms deliberately so ambiguous, they create room for the *tolerance* of inequality and discrimination on the basis of cultural norms and traditions, and it is this implicit tolerance that undermines the implementation of the specific international and domestic laws, outlined below, which are aimed at equalising the status of women.

4.2.2 *International Law*

In the post 1994 era since South Africa's first democratic elections, there is has been a concerted move towards accession to the major human rights treaties and conventions in keeping with the avowed priorities of the government in promoting and protecting the human rights of all. The provisions of the *Universal Declaration of Human Rights* (UDHR), which are so widely accepted that they are regarded as part of customary international law, are taken to be sufficiently well established that they do not need to be recounted here, except to comment that the UDHR has as its core the belief that human rights are informed by the norms of *equality* and *universality*. The former rests on the belief that human rights are normatively those of all people, and all people are normatively regarded as being of equal worth and dignity; and the latter rests on the assertion of a "common standard of achievement for all people's and all nations" as while the UDHR recognises cultural diversity, it does not conceive of this as being in conflict with basic human rights norms. South Africa is also a party to the two 1966 covenants on Civil and Political, and Economic Social and Cultural Rights.[33] Again these are regarded as sufficiently well-established that a discussion of their content need not detain us here.

As far as regional Human Rights instruments are concerned, South Africa is bound by the *African "Banjul" Charter on Human and People's Rights* of 1985. The Banjul Charter retains all the standard basic human rights clauses, but it also has a distinctly "liberationist" flavour in that it emphasises the struggle against colonialism and apartheid in its preamble. It is also mindful of the more collective conception of rights which is often associated with non-western cultural traditions in that it includes the rights of "peoples" (as collectives) as well as the rights of "humans" (as individuals).

Article 18 of the Banjul Charter also emphasises the family as "the natural unit and basis of society" as the family is regarded as "the custodian of morals and traditional values recognised by the community" (sections 1 and 2). However article 18(3) goes on to indicate that the state also has a duty to ensure that discrimination against women is eliminated, and to protect their rights. The Banjul charter also differs from other human rights instruments in that it contains a chapter on the duties of the individual, in particular duties towards the family, and in the case of children, a duty to respect their parents. There is thus implicit within the Banjul charter the idea of the retention of "traditional" norms, including hierarchical ones.

The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) of 1979 was intended to overcome the ongoing "extensive discrimination that continue[d] to exist"[34] in spite of the numerous human rights instruments that preceded it that held the equality of women to be an implicit facet of human rights. The following articles are particularly worth noting with reference to the present discussion: Article 5 places on state parties the responsibility of taking measures to "modify social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." Article 16 places a duty on the state to act against discrimination against women within marriage and the family, and to ensure that men and women have equal rights within marriage and the family.

Furthermore, CEDAW commits state parties to equalising the role and status of women in all areas of social and economic life (article 13), and in particular employment (article 11). Article 14 recognises the particular difficulties faced by rural women in terms of their economic position as

[33] In the case of the latter, signature has not yet been followed by ratification.
[34] See the preamble to CEDAW

supporters of dependents and their activities within the informal economy. It commits state parties to incorporating women into decision-making about rural development and economic planning, as well as to ensure their access to basic services and state benefits. This has resonance in the South African context as rural women bear the brunt of the burden of poverty and economic inequality, and usually have the least access to social services, and are most vulnerable to exploitation.

South Africa signed and ratified CEDAW without reservations in 1995, and since then efforts have been made to equalise the position of women in law. However, the role of the family, and the customary inequalities therein remain a complicated matter, and one that has not been entirely resolved. As Tomasevski notes:

> [CEDAW], as much as any other human rights treaty, lays down human rights norms which are necessarily worded in abstract terms. Human rights treaties are negotiated during protracted and sometimes conflictual intergovernmental meetings. In the case of the Women's Convention, 'the drafters had to face the difficult task of preparing a text applicable to societies of different cultural characteristics and traditions. The ways in which discrimination against women manifested itself varied from one culture another. The Convention therefore represents a constructive compromise' (Tomasevski, 2000: 234, citing U.N. Doc. RS/CEDAW/1992/WP.1 24 March 1992).

She goes on to comment that the reporting process of CEDAW is what creates a "yardstick to monitor the realisation of the human rights of women" (Tomasevski, 2000: 234). The reporting mechanism consists of country reports that are prepared by the governments of state parties and presented for comment and questions by representatives of the state. The Committee of CEDAW frequently questions issues not addressed in the report, as well as commenting on the consistency of specific laws and policies of that state with the articles of the Convention. The reporting mechanism therefore represents "constructive dialogue" rather than a decisive forum for declaring states to be in breach of their obligations (for which CEDAW has sometimes be criticised).

South Africa reported for the first time to CEDAW in 1998.[35] The report noted the establishment of the Office on the Empowerment of Women in the Office of President, the Office on the Status of Women located in the Office of the Deputy President and the Commission for Gender Equality, all of which are aimed at gender mainstreaming in South Africa and giving effect to the equality of women. However, South Africa's representative also noted

> that continuing deep entrenchment of patriarchy and customary, cultural and religious practices contributed to widespread discrimination against women in South Africa. She informed the Committee that violence against women and children was increasing, including domestic violence, sexual violence and sexual harassment.[36]

As far as women's economic situation is concerned, it was reported that only 6% of African women over the age of 20 held tertiary qualifications, and 20% of African women had no formal education. Unemployment was higher among women than men, and more women were self-employed "with little job security and lower incomes than those in the formal wage employment sector." The representative also noted the prevalence of HIV/AIDS among poor and marginalized African women.[37]

The Committee, in responding to the South African delegation's report, noted stereotypical attitudes towards women and emphasised that these attitudes that needed to be addressed. The Committee further noted that "the legacy of apartheid for women includes widespread discrimination and underdevelopment, and is visible in areas such as women's high levels of unemployment, illiteracy

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[35] Note that at the time of writing South Africa was in the process of finalising their second report to CEDAW due to be presented in March 2004.

[36] See the *Report of the Committee on the Elimination of Discrimination Against Women,* Nineteenth Session: 59

[37] *Report of the Committee on the Elimination of Discrimination Against Women,* Nineteenth Session: 59

and poverty and in the violence against women."[38] The Committee also reiterated its concern for the plight of rural women who are especially vulnerable to poverty as a result of low levels of education and literacy, unemployment, and lack of access to in particular health and fertility services. The Committee further emphasised that women needed to be included in land reform programmes.[39]

South Africa's international law obligations with regard to the equal rights of women, and in particular women's rights to economic equality are therefore extensive. Furthermore, in accordance with these obligations, the domestic law of the country is rapidly evolving to meet these obligations. The most relevant legislation is briefly presented here.

4.2.3 South African Domestic Law

The *Promotion of Equality and Prevention of Unfair Discrimination Act*, (4) 2000, and its amendment by Act 52 of 2002 includes, *inter alia,* the prohibition of discrimination on the grounds of gender. The act identifies "the system of preventing women from inheriting family property" as one such prohibited form of "discrimination" [section 8(c)] as well as "any practice, including traditional, customary, or religious practice, which impairs the dignity of women and undermines equality between women and men, including undermining the dignity and well-being of the girl child" [section 8(d)]. Furthermore, the Act prohibits "any policy or conduct that unfairly limits access of women to land rights, finance and other resources" [8(e)]; "limiting women's access to social services or benefits, such as health, education and social security" [8(g)]; "the denial of access to opportunities" [8(h)]; and "systemic inequality of access to opportunities by women as a result of the sexual division of labour" [8(i)]. The framers of this law were clearly mindful of the obligations created in this regard by the Constitution and South Africa's international law obligations.

These provisions are supported by the *Domestic Violence Act* (116) 1998, section 1 of which recognises economic abuse as a form of such violence, which is usually perpetrated against women and children as vulnerable members of domestic or family units. This can take the form of withholding resources to which the complainant is entitled by law (such as maintenance or child support), or disposing unreasonably of property in which the complainant has an interest. Furthermore, the Act created the duty on the part of police attending an incident of domestic violence to assist complainants (for example by assisting in finding shelter, or obtaining medical treatment) and inform them of their rights.

Also worth noting is the *Recognition of Customary Marriages Act* (120) 1998 (amended by Act 42 of 2001). This act was designed to not only formalise the law with regard to marriages entered into in accordance with African Customary Law, but to "provide for the equal status and capacity of spouses in customary marriages" (see the preamble). The Act seeks to equalise women's proprietary status within customary marriages, but the Act suffers from the flaw that marriages entered into under Customary law before 2000 remain unaffected (and so women in such marriages remain legally minors) and customary marriages which are not registered also do not fall under the aegis of the Act. The protection it offers to women is therefore contingent upon the goodwill of their partners in cooperating in following the legal steps required to formalise the union, and they are therefore to a degree as vulnerable as before.

The struggle for women's equal recognition before the law is not enough. The recognition of women's rights in law must be mirrored by women's emancipation in fact, and it is this that remains the greatest challenge to the "right" treatment of women in South Africa today. The following

[38] *Report of the Committee on the Elimination of Discrimination Against Women,* Nineteenth Session: 60
[39] *Report of the Committee on the Elimination of Discrimination Against Women,* Nineteenth Session: 61

statement was made by Susan Bazilli in 1990 prior to the drafting of the post-apartheid interim Constitution, but as is argued in the section below, this continues to be the context in which women's entrenched poverty in South Africa today should be seen:

> When "rights" intersect with "law" the real issue is "power." Who has the power to demand and who has the power to cede these rights? How do we attain our rights in the face of structural and systemic inequality? And in South Africa, the legacy of the legislated and instituted inequality of apartheid is legion. The history of "rights" has developed from the liberal notion of equality under the law in an individual capacity, and not from the structural inequalities of race, class and gender. But the extension of "rights" is associated with the foundations of democracy and freedom: the protection of the weak against the strong, the individual against the state ... Where we must be vigilant is to recognise that *if* the gender power relations remain the same, legal individual rights do not resolve problems, but rather transpose the problem into that which is defined as having a legal solution (Bazilli, 1990: 13-14).

Women's rights in South Africa continue to exist on paper only. While this is a significant improvement from the prior situation where they were actively legislated against, it is nevertheless a challenge to translate this law into practice. The greatest challenge to this lies in deeply embedded attitudes towards women in South Africa, and the following section attempts to outline the main outcomes for women in terms of their gender violence and ongoing economic subordination.

4.3 Culture, Patriarchy and Challenges to Equality

4.3.1 Considering the "Culture" of Violence

The following statement was made by the Mpumalanga Province Focus Group in The National Survey of Violence Against Women:

> It is culturally acceptable to hit a woman when you are angry. If a woman makes a man angry she must apologise and has to respect the man. Culturally [it is acceptable] to beat a woman with a stick or a sjambok,[40] and not with an open hand. [41]

The argument presented here focuses on the context in which violence against women takes place in South Africa, rather than its extent. While there are numerous studies and surveys on violence against women, there are no unanimously accepted national figures available, as the police's crime statistics are not broken down to indicate whether the victims are men or women, or know their assailants or not. Violence against women is therefore subsumed within these figures. For example, "violent crime" is used as a category, as are murder, attempted murder, assault GBH, and common assault, all of which may or may not constitute domestic violence or violence against women. The category of rape is less ambiguous, but even this is not broken down to indicate where it occurred, and whether the assailant was a stranger or known to the victim.[42] All that is agreed upon is that violence against women in South Africa is endemic, and occurs within the context of an overall crime epidemic, much of which is violent.

The *National Survey on Violence Against Women* (2002) conducted by the Institute for Security Studies (ISS) reiterates the difficulty in *quantifying* violence against women in South Africa (only survivors were interviewed for the survey). However, it may be useful to present some of the facts that are available, as some idea of the scale of the problem may be necessary to understanding the contextual outline below. By far the most prevalent violent crime committed against women in South Africa is rape. Statistics on rape vary, and assessing the extent of this crime is made even more difficult by the fact that less than half of all rapes are believed to be reported.[43]

Nevertheless, in 2001, 24 892 rapes were reported to the police[44] and a 1999 estimate placed the incidence of rape for that year at a staggering 1 million,[45] the highest in the world for any country which records such data, according to Interpol and the United Nations (Haysom, 1997: 3). Furthermore there has been an alarming increase in the incidence of infant rape in South Africa in recent years, and these figures cannot of course be divorced from the spiralling crisis of HIV/AIDS, and women's particular vulnerability in this regard.

Accurate figures on violence against women in the home are also impossible to obtain, most importantly because these crimes are most often not reported. However, the *National Survey on Violence Against Women* "confirmed that violence against women is most likely to happen in the home" (Rasool et al, 2002: 3) which makes it an area of critical priority for intervention. Furthermore, as in other countries, one of the greatest shortcomings in protecting women victims of violence is that less than half of such crimes are reported. According to the National Survey, only

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[40] A type of whip made of animal hide, usually that of a rhinoceros.
[41] cited by Rasool et al, 2002: 57
[42] See Masuku, 2003: 18-20
[43] See the *Country Report on Human Rights Practice – South Africa,* 2000
[44] *Rape – Silent War on SA Women,* BBC News Online: Africa
http://news/bbc.co.uk/1/hi/world/africa/1909220.stm
[45] *Fighting Back Against Rape,* BBC News Online: Africa
http://news/bbc.co.uk/1/hi/world/africa/452714.stm

46% of the women in the study (all of whom were survivors of abuse) reported these incidences to the police (Rasool et al, 2002: 112).

There are of course many reasons for this, and one should be cautious in castigating the police who for the most part cope as best they can with limited resources and difficult circumstances. However, it is also worth noting the pivotal role that the police play in providing effective recourse in the case of assaults and domestic violence, and as the survey notes, "police may be reluctant to intervene in domestic affairs as they often place more value on privacy and family rights than on the survivor's right to freedom from assault" (Rasool et al, 2002: 112). The survey comments that an additional reason why the police may be reluctant to intervene in such cases is because of well-founded doubts about the likelihood of a successful prosecution should the case reach the courts.

However, this in turn fuels the problem of women not reporting assaults to the police. Just by way of illustration, the following statistics may indicate a powerful reason for this reluctance: In 25% of the cases that were reported, the abuser was arrested, but in only 18% of the reported cases was a case opened or were charges laid. In 13% of the cases, the case was withdrawn, while in 8% of the cases the police refused to get involved. In 6% of the cases the abuser was not arrested. 9% of the cases went to trial, while in 4% of the cases the state declined to prosecute. In 3% of cases the police are still looking for the abuser, and also in 3% of cases nothing came of the report to the police. In 1% of the cases, the abuser was given a warning, in a further 1% charges on file were lost, and another 1% the case had still not gone to court (Rasool et al, 2002: 128). Given that the consequences of reporting a domestic attack can have the result of provoking further, or even more severe abuse at home, especially when as the above figures suggest in 75% of cases the perpetrator is not even taken into custody, it is hardly surprising that many women are reluctant to report such cases to the police.

These dismal figures are replicated at the level of the courts – as the ISS survey reveals, very few cases of abuse ever reach the courts, and even fewer result in a conviction. Furthermore, in only a small percentage of cases is the abuser sentenced and imprisoned. Of the cases that the study focused on, only 3% had resulted in a court case, and furthermore, the process of obtaining legal assistance is almost impossible for rural women, with only 6% applying for such assistance, and of those only 1% of the cases went to court. The study also reveals that the legal process which women survivors are forced to endure in order to get their cases heard is lengthy, costly, complicated and often insensitive to them as victims of violence.[46]

What these figures raise is the question of whether or not such violence is fuelled by the low rates of arrest, cases and convictions, or indeed if these low rates of response reflect a deeper problem at the level of the police and courts in responding to violence against women. While this cannot, based on the available data and research, be anything more than speculation, it is useful to reflect upon some of the attitudes on the part of the police to domestic violence that the national survey revealed.

According to a 1999 study, the police have been shown to "reprioritise" responding to domestic violence calls, in terms of a lack of vehicles and personnel, because these calls sometimes turn out to be "not worth the effort." This is because cases of domestic violence are regarded as "not so violent" as to warrant an immediate response or sending a vehicle, and furthermore the police claim that by the time they arrive in many cases "everyone has made up." A further attitudinal reason that was given was that "women drop charges anyway" implying that it is a waste of valuable time and police resources to lay these charges in the first place (Rasool et al, 2002: 116).

[46] For further details, see the ISS survey, (Rasool et al, 2002)

In general the National Survey reveals that while police attitudes vary a great deal throughout the country, and with them the quality of service that victims of violence receive. There are nevertheless deeply rooted attitudes that inform their behaviour, particularly in the rural areas where women are most vulnerable. Furthermore, many police seem to regard the provisions of the *Domestic Violence Act*, which increases their responsibility in such cases for reporting and providing assistance, as placing them in an invidious position where their traditional role and authority is being undermined. The following quote from a police officer who is involved in human rights training highlights this difficulty:

> For many police, implementing the interdict is a contradiction between their culture and how they were brought up, and the responsibilities of the job. So they treat violence lightly. In some cases, in small communities they have to serve interdicts on their friends so they tend to counsel the family rather than the abused in many cases (Rasool et al, 2002: 123).

The following section of the report considers the perceived conflict between rights and culture, with a specific focus on the feminisation of poverty in South Africa.

4.3.2 Inequality and the Feminisation of Poverty

Poverty affects women differently than it does men. According to UNECA's *Report on the Status of Women in Africa,* which cites the UNDP Human Development Report of 1997 in this regard,

> the problem with the feminisation of poverty is not so much the numbers of women who are poorer than men, but rather with the severity of poverty and the greater hardships women face in lifting themselves and their children out of poverty ... In addition they are likely to have fewer job opportunities. If they are the heads of households under these conditions, probably without access to land, or if they do, it is user rights that they have no control of, they are more likely to find themselves on the margins of society than men.[47]

The *Human Development Report 2003* reveals enormous disparities between men and women in South Africa at the level of their economic access and activity. This is worth reflecting upon in light of the declared equal rights of women in this regard set out above. South Africa is ranked 111 out of the 175 countries measured, and is in the middle of the Medium Human Development band with a Human Development Index (HDI) of 0.684. The estimated number of people in South Africa living on US$2 a day or less is 14.5% of a total of just under 45 million people. However, the *disparities* between the wealthiest and poorest are revealing. South Africa's Gini index is a high 59.3, reflecting the fact that the poorest 20% of the population's share of income or consumption is just 2% compared with the wealthiest 20% who account for 66.5%. Material inequality in South Africa is therefore vast, and growing.

When the data are further broken down to consider gender disparities, these inequalities are even starker. According to the Gender-Related Development Index which is included in the overall report, there is no remarkable difference between women and men in South Africa in terms of life expectancy (slightly higher for women), literacy, and enrolment for primary, secondary and tertiary education (78% for both men and women). However, what is remarkable is that despite women and men being at similar levels of development of their skills in this regard, women's estimated average per capita income (US$7 047 per annum) is *less than half* that of men (US$15 712 per annum).

This would support the contention that women are marginalized in terms of their access to the mainstream economy and employment opportunities, which in turn is consistent with the position

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[47] See *Report on the Status of Women in Africa:* United Nations Economic Commission for Africa (UNECA) http:www.uneca.org/eca_resourcescdroms/status_of_African_women/default0.htm

that there is an enduring patriarchal cultural bias in this regard. As the World Bank's Report on *Gender, Equality and the Millennium Development Goals* (2003) notes:

> while achieving equal access to education is an important step towards gender equality, it is by no means sufficient. Even as gender disparities in education are reduced, other gender differences tend to persist – in labour market opportunities, legal rights and the ability to participate in public life and decision making (World Bank Gender and Development Group, 2003: 3).

The data on Gender Inequality in Economic Activity are further indicative of this bias. The rate of female economic activity (for women over the age of 15) is just 47%, which is 59% of the male rate. However, women work longer hours than men (122% of the male rate). Overall, South Africans spend 51% of their working hours in market related activities, and 49% on non-market related activities. However, for men the split is 70% market and 30% non-market related activities, while for women the split is 35% market and 65% non-market activities. What these figures reveal is that women do more work, for less pay, and are the primary actors outside of the formal economy, as well as in the domestic sphere. However it is important to note that these data do not reflect the massive disparities *between* women in South Africa, as inequality is as much an issue of *class* as it is of race or gender.

As far as women's political representation is concerned, South Africa's levels are relatively high. Women comprise 30% of parliamentary representatives, and 38% of posts at ministerial level are occupied by women. This is good news for the empowerment of women, as overall the HDI figures reveal that a higher human development ranking is in proportion to more equal political representation between men and women. This is supported by the World Bank Gender and Development Group's Report *Gender Equality and the Millennium Development Goals*, which argues that gender equality is a *sine qua non* for sustainable development. The report states that

> [t]here is now a shared understanding within the development community that development policies and actions that fail to take gender inequality into account and fail to address disparities between males and females will have limited effectiveness and cost implications ... an approach to development that strives to increase gender equality has high payoffs for human well-being.[48]

There are of course many reasons why this may be the case, but it is feasible that a larger proportion of women in power will go some way towards putting women's issues on the national agenda. However, as Shireen Hassim cautions, this is not a *necessary* outcome – rather formal equality and representation have to be matched by "turning presence into power."[49] It is only when women have the power to access resources as equal citizens that their formal equality will have any effect on their lives substantively.[50] Therefore the presence of many empowered women in the higher echelons of the state and the economy should not serve to obscure the fact of the far larger proportion of women who live in abject poverty, as a matter of critical national concern.

Furthermore, women who are marginalized in this way are more vulnerable to the effects of HIV/AIDS, which is inextricably linked to poverty in South Africa. While a discussion of the impact of HIV is not possible here, this dimension of gender and poverty cannot be omitted from consideration. As Wayne Ellwood describes this relationship:

> Poverty doesn't cause AIDS. But it is the ideal incubator. And gender and poverty are inextricably combined: 70 percent of the world's poor are women and poor women are most

[48] 2003: 4-5
[49] Hassim, 1999: 14
[50] Hassim, 1999: 16

> susceptible to HIV. Violence against women and sexual assault are cornerstones of the AIDS epidemic.[51]

This position is backed up by the findings of UNAIDS's *Gender Analysis: Fiscal 2004-2010 Strategic Plan*, which investigates the links between poverty, violence and AIDS, and links this to "the subordinate social status of women and girls, which makes it difficult or impossible for them to negotiate safe sex."[52] With particular reference to South Africa, the UNAIDS report cites Vetten and Bhana's 1991 study, *Violence, Vengeance and Gender: Investigation into the Links between Violence Against Women and HIV/AIDS in South Africa* in this regard, which argues that strategies to address HIV/AIDS and violence against women need to be "complementary" rather than "parallel."[53] Such a strategy relies upon empowering women as economic agents, rather than dependents, as it is the power imbalance that results from their dependence that frequently forms the backdrop to their physical abuse.

In turn, women's vulnerability in this regard cannot be separated from the particular vulnerability to poverty and exploitation faced by rural women. The divisions between women of different races and economic classes in South Africa within the broader context of a culture of patriarchy is considered by Cora Burnett. Burnett argues that patriarchy in South Africa is a unique hybrid of indigenous and settler cultures. This has been influenced and exacerbated by other forms of inequality, particularly imbalances in power "organised around social, political and economic hierarchies of race and class" which has in turn produced "unique forms of gender oppression for women who have been divided along racial lines, being products of their circumstances and coerced by national loyalties to struggle for national freedom prior to freedom for women" (Burnett, 2002: 28).

These divisions between women can disguise the particular burdens faced by rural women. Of the overall population who live in poverty in South Africa, 72% live in rural areas. Of these, women comprise the majority, as poverty affects women more severely than men, not least because women are "lower on the social hierarchy."[54] According to Johanna Kehler, citing the UN Human Development Report of 2000, African rural women comprise the 49% of poorest of the South African population as a whole.[55] As many as 60% of female-headed rural households are below the poverty threshold, because, as has been argued, there is a gender element to poverty which "finds expression in the lack of facilities, energy and time-consuming domestic work, lack of time, transport and unequal access to market-related employment, education, mobility and security."[56]

In considering the plight of poor rural women in South Africa, Kehler emphasises that women's inferior economic status is a reflection of "prevailing cultural and social norms which regard women as less 'valuable' members of society" and this not only affects the way they are treated, but also fuels the belief that women's contribution to sustaining the family is less valuable work than men's.[57] Kehler furthermore argues that the privatisation of social services, such as those that have occurred in South Africa, has a greater impact on poor women, as it is primarily women as caretakers who are the primary recipients of those services. This is an additional dimension of the "feminisation" of poverty, but one that has particular resonance for rural women. As Kehler describes it:

> African[58] rural women's lack of access to resources and basic services are combined with unequal rights in family structures, as well as unequal access to family resources, such as land

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[51] Ellwood, 2002: 12
[52] UNAIDS, 2003: 42
[53] UNAIDS, 2003: 43
[54] Burnett, 2002: 29
[55] Kehler, 2001
[56] Burnett, 2002: 30
[57] Kehler, 2001
[58] Kehler here is using "African" to denote Black South African women, as opposed to women of any of the other races.

> and livestock. This explains further why African rural women are not only poorer in society as a whole but also in their own families, and defines why their level and kind of poverty is experienced differently and more intensely than that of men. This translates into reality where African rural women are not only burdened with multiple roles concerning productive and reproductive responsibilities, but also subjected to discrimination and subjugation both in and out of their homes.[59]

Kehler goes on to argue that both statistically, and in terms of their lack of access to resources, services and support, Black rural women in South Africa comprise the very poorest of the poor. She goes on to point out further that in their role as sole breadwinners and heads of households these women are further exposed to health and safety hazards, as the lack of basic services requires many hours a day to be spent walking long distances to fetch firewood and water, which is often not potable.[60] Kehler argues that basic social services for rural women need to be made not only accessible in the sense of being available, but also affordable, which requires a more gender-nuanced understanding of poverty and how it affects women and their basic rights.

The conclusion to Kehler's study, which focuses on women farm labourers in South Africa, is that while the laws in South Africa aimed at protecting women are adequate (she refers in particular to the laws on employment standards and equity), the problem is with their enforcement in the face of deep, culturally embedded, resistance to the "right" treatment of women. She concludes that:

> For the majority of women in South Africa, existing socio-economic rights, as guaranteed in the Constitution, remain inaccessible resulting in the perpetuation and increase, as well as the feminisation of poverty. Furthermore, especially for rural women and women on farms the constitutional guarantees of equality and non-discrimination remain merely theoretical rights that lack practical implementation. What remains is women's day-to-day realities marked by the struggle for pure survival that is additionally determined by deteriorating socio-economic conditions and lack of development.[61]

[59] Kehler, 2001
[60] Kehler, 2001
[61] Kehler, 2001

4.4 The Cultural Status of Women in South Africa

As has been been indicated, the central thesis of this report is that violence against women and the feminisation of poverty in South Africa is a symptom of an embedded cultural attitude towards women. So while this inequality is not expressly permitted in terms of the law of the country, it is tolerated in various guises under the aegis of "culture" and "tradition" which are used to reinforce existing hierarchies. This is not to suggest in any way that people's culture, beliefs and traditions ought to be overridden – indeed as has been indicated above these are expressly protected in the South African Constitution and law. The problem is not one of a choice between two irreconcilable interests – rights on the one hand, and culture on the other. The problem is rather redressing power imbalances in such a way as to give equal recognition to the basic rights of women in *all* spheres of life, and in *all* economic circumstances, such that their abuse cannot be hidden behind a veil of tradition.

It is worth considering here the status of women in South Africa, as the real challenge is to redress the imbalances in power relations. As Frene Ginwala has observed, gender oppression and inequality is not a matter of scientific fact or a matter for cultural preservation – it is a social construct designed to serve the interests of those in the dominant position.[62] Furthermore, as Goldblatt and Meintjes point out in assessing the difficulty that women encountered in testifying about their abuse before the Truth and Reconciliation Commission, women's status in South African society is secondary in almost every sphere. Furthermore, the distinction between the public and the private spheres is deeply entrenched, and it this division that contributes to the socially constructed idea of women as passive, secondary and dependent:

> The home falls within the private sphere and what happens between men and women here is regarded as outside the realm of the state and public authorities. This division allows violence against women to occur unchecked because what a man does to his wife 'in the privacy of his home is his business.' Her rights as a citizen are rarely protected. Cultural stereotypes reinforce this position as do desparate economic conditions which put pressure on family life and create limited opportunities for women to remove themselves from these oppressive situations.[63]

As is noted above, attempts have been made in recent legislation, such as the *Domestic Violence Act*, to breach this barrier, but the extent to which such legislation is feasible is challenged by what appears to be a low rate of reporting such crimes, as well as the impression of ongoing resistance to the enforcement of this law at the level of the police and judicial system.

The issue is therefore one of power, and attempts to retain it, rather than a difficult struggle between traditions that are incompatible with rights. This is an issue that is often mistaken in the discourse on multiculturalism, and it may be useful to reflect upon the outline of the background to this debate presented above. However, it is also worth considering briefly the history of power relations in South Africa, as it is held here that the levels of violence against women are embedded in an institutionally violent past, and a history of domination by force.

While the history, development and nature of the apartheid system in South Africa are beyond the scope of this report, it is significant to note that the nature of that system was authoritarian and hierarchical and that state structures were shaped to reflect this. Furthermore, the hierarchy was as much a reflection of power imbalances between the races, as between the sexes. The inherently gender-biased legacy of apartheid was acknowledged as a challenge to be faced in the new

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[62] Ginwala, 1991: 63

[63] Goldblatt and Meintjes, 1997: 10

democratic dispensation, reflected in a statement by the National Executive Committee of the African National Congress (ANC), 2 May 1990: [64]

> 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.

This imbalance in power between men and women has been replicated in the post-apartheid era, and while there are of course numerous examples of women who are "empowered" in all spheres of life in South Africa,[65] women still remain among the most marginalized, and vulnerable to the effects of poverty, violence and HIV/AIDS. And it is of course no coincidence that women in these vulnerable positions have least recourse to remedies for their abuse. Rural women in particular are most likely to be victims of violence as a result of this perpetuated power imbalance which is justified as a cultural norm, and therefore seen to be worth retaining.

The claim of culture is a powerful tool in the hands of those whose interests and power are undermined by rights-based claims of equality. This is a problem that is obviously not unique to South Africa, as the accommodation of claims of culture versus rights, and groups versus individuals, are ones which are encountered in all modern diverse democracies. Understanding the theoretical underpinnings of these claims goes some way towards resolving the perceived conundrum. In this regard, see the account offered above.

Why this matters for the present discussion is that it assumes women, particularly rural women whose lives governed by the norms of African custom, have an identity that must be protected by non-interference on the part of the state. However, what this does is to perpetuate and entrench existing power imbalances, in particular with regard to property. The state's responsibility is therefore first and foremost towards women as human beings of equal value, rather than as faceless members of a cultural group.

It is argued that diminishing the worth of women in South Africa is part of a national culture cutting across all demographic groups that entrenches the power of men over women. And it is precisely traditional dominance and the hierarchies entrenched under apartheid that today there is a battle is to retain. Furthermore, the tolerance of the unequal status of women in the name of culture in the particular instance of the African customary family law is mirrored, it is argued, in a national tolerance for hiding the abuse of women behind closed doors.

Now, again, this problem is of course not unique to South Africa, although the scale of violence against women makes it remarkable. Nor is South Africa unique as a democracy that is seemingly willing to tolerate the entrenching of "traditional authorities" and therefore hierarchies. But in the face of such a depressing analysis, it is tempting to conclude that the rights of women in South Africa are doomed to remain in the realm of law rather than being realised in fact. However, it is suggested in the following section of this paper that the very cause of this problem – the appeal to culture, in this case a culture of inequality – also holds a possible solution.

Ayelet Shachar has recently posed the question of whether accommodating differences and respecting rights is an "unattainable marriage" in her study which focuses on the rights of women members of religious minorities in multicultural jurisdictions, and she focuses in particular on

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[64] Cited by Frene Ginwala in her paper "Women and the Elephant: The need to redress gender oppression" in Bazilli, 1990: 65

[65] As has been noted above, according to the *UN Human Development Report* of 2003, 30% of parliamentary seats in South Africa, and 38% of posts at ministerial level, are held by women.

family law. Shachar proposes a way out of the labyrinth of reconciling human rights with cultural inequalities that she labels "transformative accommodation" which entails allocating "joint governance" to the individual, the state and the community. On this account, the strengths and weaknesses of the justice meted out by either of the latter two jurisdictions can be weighed by the individual, and so it is only if they are in keeping with the interests of the individual that they can be sustained. The section below considers Shachar's solution and how it may be reconciled with the prevailing "cultures" in South Africa.

4.5 Reconceptualising Culture – The Case for Transformative Accommodation

A theme that consistently runs through debates about the suppression of women in the debate on multiculturalism is the concern that women lack options in terms of their ability to either exit the site of their suppression, or lack the power to do anything to ameliorate their situation in terms of exercising their human rights. As Shachar describes the problem

> well-meaning accommodation by the state may leave members of minority groups vulnerable to severe injustice within the group, and may in effect work to reinforce some of the most hierarchical elements of a culture. I call this phenomenon the *paradox of multicultural vulnerability*. By this term I mean to call attention to the ironic fact that individuals inside the group can be injured by the very reforms that are designed to promote their status as group members in the accommodating, multicultural state.[66]

Women in South Africa are not a minority, but women within various groups that constitute cultural minorities may be vulnerable in this way. However, the argument here is that this cultural hierarchy pervades the whole of South African society, and therefore different cultures, to some degree.

The appeal to culture is also worth considering. When one claims a practice as one's culture one means to defend its exercise, and this inevitably involves adopting an evaluative normative stance – to defend one's culture and its practices is necessarily to assert that there is something *good* or valuable about them that makes them *worth* defending. Of course, this evaluation need not be shared by those outside of the group for it to retain its value, but it must at least be intelligible in the sense that it relies upon an "equality of worth/value" type argument. For example your right (freedom) to wear a mini-skirt is as inherently valuable a choice as my right (freedom) to wear a headscarf. Where appeals to culture break down, as is argued above, is when they are devoid this logic of the evaluative equality of worth, such that they are claims to treat unequally those within the group, which involves the appeal to culture and the practice in question in a logical contradiction.

What concerns advocates of women's rights in South Africa is the idea that gender violence and women's economic inequality may be such widely accepted facets of their overall suppression that it has indeed become part of our collective "culture." What is necessary here, in order to salvage the idea of cultural worth as an aspect of diversity in South Africa, is a re-evaluation of the norms and traditions that apartheid is charged with having destroyed. Perhaps within the disputed norms of culture itself lie the values of equal worth and dignity that are clearly absent in the discourse on multiculturalism and women's suppression in South Africa.

Shachar regards the "paradox of multicultural vulnerability" as raising the problem not of conflicts between rights and culture (this is given she argues) but rather the more demanding problem of how to reduce injustice between groups, while at the same time enhancing justice within them. So she wants to move the debate away from the prevailing idea that there is a choice for individuals between *either* their culture and its norms *or* their rights which are seen to be in conflict with that culture. Rather Shachar thinks that these can be reconciled through her proposed strategy of "joint governance" – the proposal is to expand the jurisdictional autonomy of religious and cultural minorities *while at the same time* sharpening the legal and institutional instruments designed to deal with internal violations of the rights of members of the group.

This may sound like a paradox, and an impossible project, but Shachar poses the problem of power imbalances between cultural minorities and the state, and proposes that as long as these prevail, in-

[66] Shachar, 2001: 3

group abuses will merely be driven further underground. Shachar's scheme requires "establishing structures of authority which require the state and the group to co-ordinate their exercise of power, while at the same time ensuring that no group member is left without fundamental legal rights and social resources."[67]

So Shachar's proposal relies upon the empowerment of both individuals, as well as groups, such that decisions about which jurisdiction to employ in any given case are informed rather than imposed. The "no-monopoly" rule stipulates that neither the state nor the group has absolute power over any aspect of life, so while marriage for example may be contracted in accordance with the rules and norms of the group's culture, the state retains the power to ensure that within marriage, or on its dissolution, an equitable distribution of property is adhered to, reflecting the concerns of the broader society.[68]

Furthermore, Shachar argues that her "transformative accommodation" approach makes provision for a renegotiation of the degree of autonomy and the imbalances of power *within* the group for traditionally disempowered members, which works especially to the advantage of women. The price of the expanded recognition of the jurisdiction of the group on the "joint governance" model is that the distribution of resources within the group, for example in the case of divorce, must be in accordance with the egalitarian norms of the state. So this prevents women from being left destitute, or from having basic resources withheld within marriage, so their participation in the group is as willing members, rather than economic hostages. While groups retain the power of "demarcation," the state retains the power of "distribution."[69]

So different cultures and groups on this account have the autonomy to "demarcate" their own family relations, structures, norms and traditions, free of the fetters of the laws of the liberal state. What they do not acquire, however, is the power of economic coercion over their members. In this way, basic rights are preserved as a fall-back position, but cultural groups are internally reinforced by having their practices both expanded and to a large degree "voluntarised" and therefore normatively affirmed.[70] So transformative accommodation

> reconceptualises the move toward differentiated or multicultural citizenship as an important opportunity to affect the complex matrix of conditions that affects the degree of freedom, or the 'bargaining' position of historically vulnerable members ... According to this model ... women (and other categories of historically vulnerable groups members) acquire the tools, knowledge, and resources needed to exercise greater leverage within the group. It can only strengthen women's position ... if they already know that they have acquired the basic capacities needed to live effectively outside it ... [and] will likely prompt her group's leaders and fellow group members to ensure that her experience within the group is congenial, in order to maximize the chances that she will choose to stay under its sub-matters of jurisdiction.[71]

So in breaking the cycle of "property-status extortion" – that is by ensuring that the benefits of remaining a part of a particular group, culture, or situation exceed those of leaving – Shachar suggests that multiculturalism can at one and the same time be expanded, as well as curbed in its potential excesses.

Why this matters for the consideration of violence against women as a national "culture" in South Africa, is that is affirms the value of different cultures, without entrenching the traditional power

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[67] Shachar, 2001: 7
[68] Shachar, 2001: 121
[69] Shachar, 2001: 132
[70] Shachar, 2001: 136-137
[71] Shachar, 2001: 137-138

imbalances of patriarchy that currently pervade the "national culture." Shachar's scheme – which guarantees the rights of basic well-being and viable options of "reversal" – would allow women currently trapped in this cycle to break with it, as well as to renegotiate the terms of their membership of any given group.

It cannot be emphasised strongly enough that women's subordination in South Africa in terms of their violent abuse is inextricably linked to their inferior status within the family in terms of their ability to control property. Thus by obliging all cultural groups to transform themselves so that women are willing participants rather than hostages of fortune, serves the twin purpose of reinforcing and expanding the jurisdiction of those cultures, while still serving the basic rights of all members. Furthermore, the duties of the state are clarified in terms of honouring basic rights: the state's "jurisdiction" lies in providing for a basic equitable share of social goods and services to all individuals, and to provide legal recourse in the event of abuse.

An example of Shachar's theory in the South African context is Thandabantu Nhlapo's account of the perceived tension between women's rights and the traditional conception of their role in the family in African customary law. Nhlapo points out that the traditional African family is exemplified by the communal nature of marriage, and therefore women's role within that family is defined by the needs and interests of the group. However, "in patriarchal societies group interests are framed in favour of men" and women's interests, and the rights which emanate from them, are therefore subsumed by the overriding interests of power and domination. But Nhlapo argues that there are norms that are traditional in African culture and customary law that are on all fours with universal human rights norms, such as the notion of respect for the elderly, duties of care towards children, and the economic protection of women to ensure the survival of the group, which is worth emphasising in light of women's role as mothers.[72]

So it is not the *values* of African custom that are in conflict with basic human rights norms, but rather the inegalitarian social norms and practices that were once required to give effect to those values in a *different* social and economic context that are. And Nhlapo argues that these practices can feasibly be adapted to egalitarian norms to give effect to the same values in a democratic, egalitarian social context. Like Shachar, Nhlapo is of the view that the endurance of culture can be assured rather than threatened by denying women equal rights and status, as the reasons for retaining the patriarchal imbalances in power are not what underlie those cultural values to begin with:

> Removing inequalities will thus crucially involve the discovery of ways of ensuring that cherished African values are not expressed in a form that de-personalises women. This is not an argument for western-style individualism: it is an argument for individualisation. It is premised on the belief that it is unintelligible to speak of human rights if one is not speaking also of a certain level of concern with the wellbeing of each and every individual (Nhlapo, 1991: 120).

This is not of course to suggest that this social context is appropriate to all women in South Africa, but rather that the strongest reason for retaining patriarchal inegalitarian norms – that presented by the challenge of traditional African custom – turns out to be a chimera. And this permits the identification of the real reason for the tolerance of violence against women in South Africa, as a power struggle against the redistribution of social and economic goods traditionally distributed hierarchically along racial and gender lines. Furthermore, it facilitates the recognition of how culture can be affirmed within a broader national ethos of protecting the equal rights of all.

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[72] Nhlapo, 1991: 116-120

5. CONCLUSION AND SUGGESTIONS FOR FUTURE RESEARCH

By way of conclusion, it may be useful to identify some of the issues and areas that this project has not dealt with. As this project represents largely a desktop study, and as the researcher in question approached it in order to develop capacity rather than disseminate existing expertise, it has necessarily covered only some aspects of this topic, and left many unexplored. As with much exploratory research, it generates more questions than it provides answers.

One of the most obvious omissions from this study is either a quantitative or a qualitative empirical study to support the theoretical arguments outlined here. The South African context in this report was treated as merely that, and was used to support the theoretical stance being adopted rather than the other way around. Certainly an opportunity for future research would be to *apply* the arguments made here to a wider and more scientific sample and thereby to use the theory to interpret and critique the practice, rather than using the practice to underline the theory as has been done here.

Secondly, the project would undoubtedly benefit from a sharpening of focus, in the sense of "bringing it down to earth" to focus on the *disparate* experiences of South African women. South African women are distinguished by barriers of race, class, religion, language and culture, such that, while patriarchy is embedded in our national social fabric, its extent and its effects differ greatly with these factors. A more focused study of the *particular* experiences of South African women and how they experience cultural claims about their roles and rights in specific contexts, would provide a far richer analysis than has been offered here.

In this regard, the most pressing example of research that is urgently required is the effect of new legislation, rooted in culture, on the rights of women that will be affected by that legislation. The two most important pieces of legislation in this regard are the *Traditional Leadership and Governance Framework Act*, 2003, and the *Communal Land Rights Bill*, which looks set to become law in 2004. Both of these pieces of legislation are in response to the cultural claims of traditional communities, but have generated much concern over their likely effect on the rights of women in those communities, especially their right to access and own land. A longitudinal study, tracking the implementation of this legislation and the effect that it has on rural women is critical.

Finally it cannot be omitted from mention that this study set out to examine the cultural challenges to the enforcement of children's rights in South Africa, in addition to those of women. This goal has not been met in any systematic or substantive way. As a way forward, it is suggested that consideration be given to the idea that there may be different *concepts* of childhood that inform what special rights children may have, aside from their human rights. The exploration of different concepts of childhood would make a necessary and timely study in the South African context, and is one which should not be conflated with the fact of different *experiences* of childhood as it so often is in situations where children suffer from privation and abuse.

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