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Liberal Constitutions and Traditional Cultures: The South African Customary Law Debate[1]

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Socially plural, liberal states that have attempted to offer constitutional recognition of the rights of traditional *or* non-liberal *cultural groups alongside the right of sex equality face formidable legal and political challenges. The uneasy relationship between cultural protections for traditional cultural groups and constitutional protection for the sex equality rights of citizens is much in evidence in South Africa's 1996 Constitution. This article examines the political context surrounding the debate about the relative status of cultural rights and gender equality rights in the South African constitutional process and argues for a reframing of similar such conflicts as primarily* political *and not moral in character. Accordingly, such tensions are best mediated using political methods of conflict resolution, namely, dialogue, bargaining, and compromise.*

Liberal constitutions that protect citizens' individual equality rights as well as their right to practice their culture run into difficulties where gender is concerned. In particular, socially plural, liberal states that have attempted to offer constitutional recognition of the rights of *traditional or non-liberal* cultural groups alongside the right of sex equality—notably Canada and South Africa—face formidable legal and political challenges. Indigenous peoples and communities bound by customary or traditional law, as in sub-Saharan Africa, adhere to systems of family and personal law that may sit uneasily with constitutional protections extended to individual citizens, especially *equality provisions*. Nor are these individual rights always warmly welcomed by traditional or non-liberal cultures. Chief among the equality protections that traditional cultural groups view as imposing unwelcome constraints on hard-won group rights and autonomy—without which they may face discrimination and unwanted assimilation—is the guarantee of sex equality.[2] Yet where traditional cultural communities are successful in securing immunity from relevant individual rights provisions, there is a risk that some members of the group will be left vulnerable to internally

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discriminatory or unjust practices and arrangements, without recourse to the rights and protections extended to fellow citizens outside their group. This phenomenon, which Ayelet Shachar (2000, p. 65) has aptly termed the 'paradox of multicultural vulnerability', gives rise to important questions about the scope and legitimacy of liberal norms in cultural plural democratic societies, and the tradeoffs required by explicit policies of cultural accommodation. Precisely *how* liberal states decide to reconcile constitutional tensions between cultural recognition and protections for sex equality is a matter that holds direct significance for these questions and for the relationship between democracy and pluralism more generally.

The controversy over the constitutional status of African customary law in post-apartheid South Africa concerns just such a tension between group accommodation and individual sex equality provisions. As an instance of a state attempting to combine constitutional recognition for both liberal and traditional or customary systems of law, it may prove to be a particularly instructive test case for other culturally plural, democratic societies. South Africa's 1996 Constitution, widely hailed as liberal and egalitarian, recognizes African customary law—with its patrilineal systems of inheritance and political rule, and patriarchal customs of family law—as well as offering extensive protection for individual rights and equality, including sex equality. The legal and constitutional tensions that have ensued have given rise to court cases in which black women have cited sex discrimination resulting from the application of customary law. These legal challenges, and the robust political debate over the future status of customary law that surrounds them, provide an occasion for thinking about how such dilemmas of cultural accommodation might justly be resolved. The South African case shows why neither judicial decisions alone nor bald appeals to normative democratic values as trumps can provide a feasible resolution to cultural conflicts.

My aim in this paper is to argue for an explicitly political understanding of constitutional tensions between cultural rights and sex equality protections. Unlike some recent commentators addressing the issue (Spinner-Halev, 2001; Eisenberg, 2003), the perspective I defend refuses to see cultural disputes as entrenched meta-ethical conflicts or even as primarily normative in character. Viewed from up close, I shall argue, disagreements between traditionalists and reform-minded suggests a struggle of vested interests and power more than they reflect any deep conflict of moral values. The South African constitutional debate over the legal status of customary law, in which African traditionalists went head-to-head with liberal equality advocates, is a prime illustration of this. More of a political than a moral or metaphysical dilemma—in Rawls' (1985, 1993) sense of the distinction—the customary law dispute shows how misleading it is to view tensions between traditional cultures and liberal constitutional norms as reflecting a struggle between opposing moral values. In the case of South Africa, this has led to an unfortunate and deeply unhelpful framing of the customary law debate as a choice 'between culture and equality' (Van Der Meide, 1999, p. 112). By characterizing such conflicts as primarily *political* instead of normative, as I urge, we may render the problem much less interesting to philosophers and legal scholars. However, I believe we may also open up some worthwhile

paths of inquiry in which normative political theory could play a central role. When understood primarily as *political* conflicts—or as conflicts of power and interests—tensions between cultural recognition and equality (especially sex equality) may appear more multifaceted, but they also emerge as more amenable to resolution, with effective conflict-negotiation processes in place. Political solutions befit political problems, so resolutions will come in the form of practical compromises, rather than through processes designed to determine which norms and values hold the most moral authority in liberal democratic societies. In the final part of the paper, I suggest a possible direction that the political mediation of cultural conflicts might take.

Customary Law and Sex Equality in South Africa

South Africa's 1996 Constitution offers more extensive legal protection of individual rights than any other liberal state. Especially notable is its inclusion of racial and sex equality. Section 1(b) of chapter one of the Constitution states a commitment to 'Non-racialism and non-sexism', and the Bill of Rights contained in the document includes a section on equality stating that neither the state nor individuals may 'unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth'. The Constitution is also far-reaching in its protection of cultural rights, in recognition of the country's deep social diversity.[3]

Protection for culture has been interpreted, in the South African context, as including formal recognition of African customary law as it has developed in that country over the years. The precise degree of recognition of customary law would enjoy was however the subject of much heated debate during the constitution building process, as I shall discuss shortly. Briefly, traditional leaders sought to establish 'customary law and general South African law [as] parallel legal systems, neither empowered to interfere with the other', as in nearby Zimbabwe (Currie, 1994, p. 149). The main reason why traditional leaders were so keen to establish the independent authority of customary law at this time is that several aspects of customary law conflict with the provisions in the Bill of Rights, particularly those provisions stipulating women's equal status and rights. By contrast, under customary law, women are seen as perpetual 'minors', and there are severe restrictions on women's ability to hold and inherit property.

In the constitutional process leading up to adoption of the 1993 interim Constitution, traditional leaders sought, but ultimately failed, to ensure that customary law would in no respect be limited by the Bill of Rights. Women's rights activists, however, fought to have the equality clauses in the Bill of Rights to supersede the authority of customary law, especially in cases of conflicting principles and protections. Facing pressure and seemingly irreconcilable demands from African traditional leaders, legal reform groups and women's rights advocates, the drafters opted to recognize customary law alongside individual equality rights, leaving the precise relationship between the two

indeterminate. By contrast, the final 1996 Constitution recognizes the legitimacy of customary law but indicates quite clearly that specific applications are limited by the fundamental rights guaranteed in the Constitution (Chapter 2, section 39(2, 3)). Additionally, in the list of non-derogable rights cited in the Bill of Rights, the right to equality is listed—'with respect to race and sex only'—along with human dignity, life, and several others, with cultural rights conspicuously absent.

Despite this affirmation of the equal rights of South African citizens, it remains unclear 'whether the Bill of Rights should apply directly or indirectly to common law and to customary law' (Himonga and Bosch, 2000, p. 316). Effectively, this means that the question of how conflicts between constitutional provisions and practices associated with customary law will be treated in future is an open one. Indeed, some recent court challenges have interpreted the sections pertaining to culture in the Constitution as reaffirming the relative autonomy—and authority—of customary law in matters of family law and inheritance rights, despite protest from women's equality proponents. In June 2000, the South African Supreme Court of Appeal[4] upheld protection for the custom of male premogeniture (or male-line inheritance) against a constitutional challenge, arguing that 'women, if married under African customary law, are bereft of all rights under a matrimonial property regime' (Magardie, 2000, p. 1).[5] This decision made clear the need to reform the practices around marriage under customary law so as to bring certain traditions in line with the Constitution. The *Recognition of Customary Marriages Act of 1998*, put into effect in November 2001, was the ultimate result (for a discussion of this legislation, see Govender, 2000; Deveaux, 2003). In the meantime, important tensions between traditional practices and certain individual rights enshrined in the Bill of Rights persist, particularly in such areas as family law, property law, inheritance, and succession.

Sources of Conflict

In order to understand the nature and depth of the tensions between customary law and sex equality in South Africa, it is helpful to know how this system of law has developed in the modern era. The version of customary law recognized by the Constitution is known as the 'official code of customary law', which colonial courts and administrators formalized in the nineteenth and first half of the twentieth centuries; according to customary law scholar T.W. Bennett, this official version is widely believed to have 'exaggerated the subordinate status of women', and indeed, ever contributed to a 'decline in [women's] overall status' (1999, p. 84). A parallel development that further entrenched African women's subordination was the spread of capitalism, for although it 'forced women to play roles never expected of them by traditional society, its long-term effect was to downgrade or marginalize women in both the family and market place' (Bennett, 1999, p. 84).

A more sinister side to the development of customary law in South Africa lies in the history of manipulation and co-optation of traditional leaders by colonial and apartheid administrators. Under apartheid, administrators had an interest in reinforcing the cultural differences of different African groups: the ideology of

the 'separate development' of the races helped to facilitate and justify the organization of separate tribal 'homelands' for monitoring and control of blacks. Traditional African leaders were wooed by apartheid administrators, who in turn shored up and underwrote the chiefs' power and authority in return for guarantees of loyalty. This task was made easier by the recording and formalization of customary law, which secured the authority of traditional leaders. Indeed, 'it was a law of the "white" parliament, the Black Administration Act of 1927, that reinstated customary law' (White, 1995, p. 23). It is no surprise, then, that the formal code of customary law has frequently been described as securing an 'alliance between the colonial authorities and African male elders', whose superior status within African society was thereby entrenched (Nhlapo, 1995, p. 161).

Which aspects of the official code of customary law have been most criticized by women's rights activists, legal reformers, and human rights proponents? Women's lack of authority and power under customary law stands out as exceedingly problematic—women may not seek or hold political office—as does their general marginalization in local political decision-making. Of even greater significance to women's daily lives was their status as perpetual minors under customary law, unable to enter contracts in their own name or to hold, inherit, or dispense of property. It is therefore not a little ironic that it is women who have mounted constitutional challenges to the authority of customary law, the very system that denies their *locus standi in judicio*, or power 'to bring actions in their own names' without her husband's (or father's) legal guardianship and assistance (Bennett, 1999, p. 89).

Until very recently, women married under customary law, as most rural and many urban black South African women are, passed from their father's to their husband's realm of authority and remained under their guardianship for their entire lives. Since women's proprietary capacity was not recognized, women married under customary law could not hold property separately from her husband. Aside from the question of land, 'any movable property accumulated in the course of the marriage is not hers either: when a husband dies his kin may remove everything from the joint homestead and leave his wife destitute, unless her own family or children are prepared to take care of her' (White, 1995, p. 22). Moreover, because of a woman's minor status, she could not '(directly at least) negotiate her marriage, terminate it, or claim custody of her children' (Bennett, 1999, p. 80). These aspects of customary law—inheritance, succession, and family law—thus conflict very sharply with women's individual equality and property rights as stipulated in the Constitution, and very possibly with their political rights. It is too soon to say just how much (and how soon) the Customary Marriages Act will change these features of customary law in practice.

Whether or not the system of customary law is permitted to operate without significant limitations by the Constitution and the Bill or Rights, or whether it will be subject to extensive legislative reforms, will depend in part on whether its defenders can establish that women's status under customary law does not reflect *unfair* discrimination. Proponents of sex equality argue that whereas affirmative action policies that aim to ameliorate the status of disadvantaged

groups in South Africa do not risk violating the Constitution's prohibition on 'unfair discrimination', practices and arrangements under customary law that systematically restrict and disadvantage women do.[6] Yet customary law defenders can easily deny the charge that customary law *unfairly* discriminates against women. Moreover, they may also argue that the recognition and accommodation of customary law constitutes a legitimate and necessary form of affirmative action for an oppressed group, namely, black, especially rural black, South Africans (Venter, 1995). Still another option, as Venter notes, is that 'customary law adherents may even claim that their legal system does not *unfairly* discriminate against women, because it is not predicated on the individual but on the community. Since it is the community or group that is important and not the individual, the fact that women do not bear the rights on behalf of the group [may be deemed] more incidental and not "unfair" ' (1995, p. 17). Yet even if the Constitutional Court were to rule that aspects of customary law do indeed perpetuate unfair sex discrimination, it seems clear that questions surrounding the relationship of the Bill of Rights to the system of customary law are by no means fully resolved.

The Political Context of the Customary Law Debate

The framers of the new Constitution found it difficult to accommodate sex equality alongside recognition of culture not only because of the normative and legal tensions between these two areas but more importantly because of the intense political pressure exerted from all sides. In the multi-party negotiations leading up to the drafting of the 1993 interim Constitution—the CODESA (Convention for a Democratic South Africa) talks—the traditional leaders' lobby fought hard to establish protection for customary law as a parallel system of law *not* subject to the Bill of Rights. If customary law was to be limited by the fundamental rights set out in the Constitution, including the equality provisions, the scope of power of customary law and the authority of leaders themselves would be severely curtailed. Of equal if not greater concern to traditional leaders was the fact that the anticipated equality clause in the Bill of Rights, with its protection for gender equality, effectively 'placed a question mark over the custom of patrilineal succession to the chieftancy' (Currie, 1994, p. 149). Traditionalists managed to secure several concessions in the interim Constitution, including mention of customary law as a legitimate system of informal law, but did not win the entrenched cultural rights they sought. Due to the efforts of a strong feminist lobby as well as the African National Congress's (ANC) fear that traditional law could undercut a democratic bill of rights, the constitutional framers were careful to include a limiting clause.

That customary law received formal recognition in the interim Constitution at all was surely the result of strong pressure from traditional leaders and the Inkatha Freedom Party (IFP), whose leadership threatened to boycott the first national election if this key concession was denied. It was widely understood that the ANC was bowing to pressure from these groups for its own pragmatic political reasons. Specifically, the ANC did not want to risk a boycott of the elections by the IFP, or to lose the slim support it enjoyed among African

traditionalists to the IFP, or to the Pan African Congress.[7] According to Fishbayn (1999, p. 157):

> The ANC was also implicated in putting forth arguments in defence of the integrity of culture. It had assisted in the formation of the Congress of Traditional Leaders (CONTRALESA) to act as a moderate voice in the Constitutional negotiations. However, CONTRALESA joined with Inkatha to argue explicitly for the inclusion of a right to culture which would protect discriminatory practices rooted in patriarchal customary law and patriarchal forms of traditional leadership.

As if this political backfire were not enough, the executive of the ANC had to fend off internal opposition from women within the ANC in order to strike a compromise with the traditional leaders' lobby: not surprisingly, the ANC Women's League opposed the entrenchment of customary law in the Constitution on the grounds that it would weaken the sex equality provisions in the Bill of Rights. Until the constitutional negotiations the ANC generally seemed to endorse an egalitarian line, but then changed its position for what appear to be purely pragmatic reasons. As Krikorian recounts:

> In May 1990, the National Executive Committee of the ANC said that any 'laws, customs, traditions and practices which discriminate against women shall be held to be unconstitutional'. This appeared to be confirmed in their draft constitution called 'A Bill of Rights for a New South Africa'… Unfortunately, this provision was not incorporated into the interim constitution. (1995, p. 249)

Meanwhile, women's rights groups mounted their own lobby efforts to try to prevent the entrenchment of customary law in the Constitution, and to ensure that any constitutional protection for traditional law (which looked likely) would be subject to limitation by a Bill of Rights. As Constitutional Court Justice Yvonne Mokgoro comments, 'fighting this rearguard battle, the feminist lobby aimed to prevent an outright traditionalists victory' (Mokgoro, 1997, p. 1284). As far as the interim Constitution of 1993 was concerned, their efforts met with only limited success: in the end, it was tentatively decided that the extensive list or rights in the Bill of Rights would not bind citizens *horizontally*—in other words, apply to citizens in their private relationships—either in matters of customary law or common law. This was most decidedly a compromise, for liberal reformers sought to have constitutional rights apply not only vertically in the state's relationship to citizens, but also horizontally, in relations between citizens (Cheadle and Davis, 1997, p. 45). The issue of the Constitution's ambit of application subsequently became the focus of intense political and legal debate (Bennett, 1994), with the effect that the final Constitution allows for horizontal application of *relevant* individual rights, including the right of equality.

There is little doubt that without pressure from women's groups, the potential implications of protection for customary law for sex equality rights would not have received such direct attention.[8] Indeed, it was reported that 'the issue of

customary law under a new Bill of Rights caused a great deal of debate and delayed the constitutional discussions by four or five weeks' (Krikorian, 1995, p. 250). The political lobbying efforts of women activists was particularly intense around the CODESA talks leading up to the draft of the interim Constitution. The view expressed by women's rights proponents who intervened in the negotiations was that without limitation by the Bill of Rights, constitutional recognition of customary law would entrench African women's oppression (Kaganas and Murray, 1994, p. 20). The ANC's Women's League and the Federation of African Women were foremost among those advancing this argument (Venter, 1995, p. 7). Nor were women's activists convinced that the recognition of cultural rights was entirely necessary in the new South Africa, taking a more guarded view of these demands. Given the political alliance struck between traditional leaders and colonial administrators under apartheid, there were good reasons to be suspicious of claims to the autonomous authority of traditional law and culture. As Oomen (1998, p. 92) explains,

> It can be said that many 'traditional' structures have continued to exist for other reasons than merely the constitutional dedication to multiculturality. The absence of viable alternatives is one of those reasons, as [is] the political clout of traditional leaders. … The recognition of traditional leadership and customary law, presented as a prime example of South Africa's multiculturality, thus strongly resembles the recognition of these institutions under, and as a constituting element in, Apartheid.

Armed with their suspicion of the motives of traditional leaders and tribal chieftains who sought extensive protection for patriarchal customs and arrangements in the name of 'culture', women's groups stood united in their demand that the individual equality provisions in the Bill of Rights should take clear precedence. In April 1992, they formed the Women's National Coalition (WNC)—composed of representatives from all political parties—during the multi-party negotiation process in order to counter their exclusion from the negotiations. The opposition on the part of the WNC, the ANC's Women's League, and the African Women's Federation to the entrenchment of customary law was heard loud and clear. In response to the standoff between traditional leaders and women's rights activists, a committee of legal experts was appointed to devise a compromise that could assuage both sides. Despite much internal disagreement among the panel members, they managed to come up with a draft clause—clause 32—which would have qualified the recognition of customary law somewhat by ensuring that in the event that aspects of customary law were found to 'conflict with the principle of equality contained in the constitution, [a] court "could determine, to the extent that its jurisdiction allows, conditions on and a time within such rules and practices shall be brought in conformity with [the equality clause]" ' (Currie, 1994, p. 150). The so-called compromise solution suited no one, and was ultimately withdrawn. Once again, the decisive factor was the threat by traditional leaders to withdraw from the process entirely, to demand wider, unfettered protection for their cultural rights, and so to grind the constitutional talks to a halt.

The ANC Women's League—who thought clause 32 insufficient to protect women's equality rights—also attempted to have the clause removed (Albertyn, 1994, p. 60). Indeed, the fact that women's groups were essentially united in their call for limitations to the recognition of customary law was in itself no small accomplishment. Since white women are not subject to customary law, and enjoy protections under South African common law,[9] it was by no means a forgone conclusion that white feminist activists would lobby alongside black women on this cause, but women's solidarity strengthened the lobby effort in favor of equal rights. Albertyn (1994, p. 59) recounts the political mood:

> The claim made by all women's organizations was a simple one. It stated that equality was indivisible. All women should be able to claim equality through the Bill of Rights. To exclude customary law from the Bill of Rights was to exclude the most oppressed and marginalized groups, namely rural women. Thus not only should equality apply to all women but also it should trump claims to culture and custom that justified discrimination against women. The practical demand was for the removal of clause 32 and the insertion of an equality trump.

The mobilization of women's groups during the 1990–1993 period was focused, then, on the issue of how best to protect the equality rights of all South African women under the new Constitution, particularly in light of the proposed recognition of customary law. Women were very poorly represented, however, in the multi-party CODESA negotiations beginning in 1990, much to the frustration of women's activists. In 1991, in response to protest at this exclusion, a Gender Advisory Group was established to ensure that the CODESA talks did not overlook gender issues. This group was instrumental in ensuring that sex equality and prohibition of sex-based discrimination were included in the interim Constitution (Wing and de Carvahlo, 1995, p. 77). Nor did women's groups demobilize once these partial concessions were won. At work on a Women's Charter in the negotiations period, the Women's National Council completed and released the document in 1994, and so were able highlight the various problems of the interim Constitution from the point of view of concerns about gender equality.[10] Finally, Article 119 of the interim Constitution established a Commission on Gender Equality, a governmental advisory commission whose work is ongoing.

The Current Constitutional Dilemma

The upshot of the political debate sketched above was that customary law was not specifically made subject to the Bill of Rights in the interim Constitution; instead, a weaker and rather circular stipulation was included in the 'Interpretation' section of the interim constitution. However, this was subsequently replaced by a much stronger limiting clause in the final 1996 Constitution, which is consequently much clearer on the subject of the relationship between equality rights and cultural rights. Equality heads the list of 'non-derogable rights'

appended to the Bill or Rights, and only with regards to sexual and racial equality. The interpretative section (section 39) at the end of the Bill of Rights accords priority to individual rights (including sex equality); section 39(2) states that 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights'. Moreover, the clause that acknowledges the validity of customary law states that such recognition is limited 'to the extent that [these other systems of law] are consistent with the Bill', thereby inviting limitation by the equality clause (section 9). And finally, section 39(1) states that 'When interpreting the Bill of Rights, a court, tribunal or forum' (b) 'must consider international law'.[11] Importantly, South Africa is a recent signator to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[12] However, South Africa is also signator to the Banjul Charter (1986), which does 'not incorporate CEDAW's provisions about eliminating customary practices which discriminate against women' (Venter, 1995, p. 18).

The consensus of legal scholars writing on this issue is that the 1996 Constitution clearly attributes greater weight to equality provisions than to the right to culture, or stipulates that the latter is limited by the former.[13] Initial interpretation by the courts, however, stands in striking contrast to this understanding. In *Mthembu v. Letsela and Another*,[14] a widow challenged the custom of male-only inheritance, and sought a ruling against this practice. Her argument—essentially a challenge against primogeniture—was unsuccessful, and the custom of male-only inheritance was upheld (Mokgoro, 1997). The judge claimed that this particular case hinged upon determining whether the appellant and her deceased husband were actually married, and that if they were, she would be protected as a widow by receiving the treatment due to her under customary law. His judgment took no account, however, of the failure of families to carry out this duty towards widows (see Fishbayn, 1999, p. 164).

In another case, one concerning Muslim family law—*Rylands v. Edros* (1997)—the appellant unsuccessfully sought to claim retrospective maintenance support from her husband (Fishbayn, 1999, pp. 160–63). While not directly relevant to the issue of customary law, the judge's ruling in this case was significant, for he 'interpreted the right to equality as the right of a cultural group to govern itself in accordance with its own system of private law without discrimination by the State'.[15] The claim that the right to enjoy one's culture is an absolute good, one not to be qualified or limited by equality provisions, could set the tone for subsequent court challenges. Moreover, there is some indication that the constitutional recognition of customary law and the right to culture could contribute to courts' assumption that unless specifically married under civil law, black Africans are taken to be bound willy-nilly by the customs and rules of customary law. Without clear evidence of a civil marriage, according to one government discussion paper, 'a court may apply the law that is consonant with [the appellant's] cultural orientation (as indicated by their lifestyles and other relevant factors) and with the rites and customs governing their marriage'.[16]

Since it is the role of the Constitutional Court and the High Courts to determine the appropriate interpretation of any ambiguous sections of the

Constitution, these early cases are not insignificant. The courts are giving close attention to the claims and concerns of traditional groups, dissenters within those communities, and the legal opinions of South African constitutional experts. However, to some extent judicial interpretations thus far have tended to reinforce the culture/equality dichotomy by framing the cases in terms of the friction between cultural traditions (including customary law) and individual equality rights. In a society in which cultural practices and constitutional norms are contested and in tremendous flux, it is surely unhelpful to treat culture and equality as fixed categories that signify irreducibly different or incommensurable goods.

Below, I sketch out an alternative approach to understanding the culture/equality problem, one that views the issue as a political, not an ethical, dilemma. A more adequate resolution to tensions between cultural recognition and sex equality, I argue, likes in inclusive and democratic political debate and decision-making. Constitutional challenges may play a role in this process, but cannot, I suggest, supplant it. By beginning from the norm of political inclusion and attending to the realities of vested interests and differential political power, it is possible to construct a fair dialogue among South Africans regarding the future relationship of customary law to sex equality protections.

A Political, Not Ethical, Problem?

To view the standoff between African traditionalists and gender equality proponents as generated by their commitments to deeply incommensurable moral principles and goods is to ignore the way that interests and power have shaped the debate to date. As noted earlier, the official code of customary law that was recorded by colonial administrators in the nineteenth and twentieth centuries reflected an especially patriarchal interpretation of local customs and arrangements. Such an interpretation was perhaps inevitable given that European officials desired to establish clear authorities in African communities to facilitate their own political and administrative ends, and also viewed authority and leadership from a patriarchal vantage point. As it happens, such an interpretation suited tribal leaders very well. Particularly in the twentieth century under the apartheid regime, local headmen and chiefs clung tenaciously to their positions of authority.[17] As Fishbayn (1999, p. 154) notes, 'traditional leaders in the "homelands" saw the delegation of power over African people to them as a means of retaining authority which was being eroded by migration away from rural areas'.

The prospect that customary law and traditional leadership might not be formally recognized in the new South African Constitution subsequently mobilized tribal leaders and their political supporters in the constitutional negotiations of 1990–1991. Both the Congress of Traditional Leaders of South Africa (CONTRALESA) and the Inkatha Freedom Party, closely linked with traditional leaders based in rural areas, pressed hard in negotiations to secure explicit recognition of cultural rights and respect for traditional forms of power. Once it was clear that the interim Constitution would protect customary law and practices, these same groups led the fight to prevent the equality provisions in the Bill of Rights from limiting either the application of

customary law or the scope of traditional leaders' power. The chiefs' desire to protect their own authority and power seemed to fuel these lobbying efforts much more than any belief in the inviolability of cultural autonomy or the sanctity of putatively African norms of patriarchy and community. Indeed, their particular opposition to constitutional rights that might in turn pose challenges to the custom of patrilineal succession of leaders and the traditional (local) court system—used to settle disputes about land and inheritance as well as areas of family law—spoke volumes about their priorities.

Throughout the transition to democratic rule, it was these politically charged issues of power and interests that were of greatest concern to traditional rulers. If customary law was to be viewed as subject to the equality provisions in the Bill of Rights, the patrilineal line of political succession of chiefs could be contested and possibly overturned. Opening up traditional leadership positions to election would have entirely changed the power base and authority of headmen and chieftains in ways unacceptable to traditional leaders. The issue of resources also loomed large: who would remunerate the chiefs if customary law and traditional leadership were not given formal constitutional recognition? (Previously, resources were transferred from the apartheid government.) And how would chiefs maintain their control of land resources, the key component to their power?[18]

Women's lobby groups also focused on issues of power, seeking to ensure that their comparatively marginalized perspectives were heard in the constitutional process. Their interests lay in the first instance in securing a political voice for women, who were all but excluded from the Kempton Park talks and the subsequent multi-party constitutional negotiation. This is why an ad-hoc Gender Advisory Group was formed in 1991 to furnish the all-party CODESA talks with policy guidance on issues of gender justice. It was also clearly the impetus behind the formation of the Women's National Coalition in April 1992. In addition to trying to block the attempts by traditional leaders to entrench customary law (with constitutional immunity) in the Bill of Rights, women's groups sought to reframe political debates about the nature of equality and the ambit of constitutional equality protections. The official version of customary law, they argued, reinforced patriarchal norms and deepened women's subordination and mistreatment by rendering 'the existing separation between the public and private spheres of life … more rigid' (Nhlapo, 1995, p. 162). Women's groups thus objected to the way in which customary law places women 'outside the law' in the sense of prohibiting women from holding or inheriting property or entering into contracts, and so leaving them vulnerable to multiple forms of oppression in their private lives.[19] They demanded that the new South African Constitution recognize the inextricable links between the public and private spheres in matters of justice and injustice, vulnerability and oppression. Women's interests, they insisted, lay in the political and constitutional recognition of the interrelatedness of formal law and private subjugation (at the center of which lay the vexed issue of customary law).[20]

This challenge to the separation of public and private spheres met with predictable resistance in the South African constitutional debate. Cultural practices and arrangements in the private and domestic sphere typically play a role

in shoring up political relationships in the public realm, where vested interests and power once again prevail. Especially in traditional communities, the social and family relations of power in the private sphere are reconfigured and potentially destabilized by the introduction of changes in civil and common law and 'new' rights. This is why it should come as no surprise that 'the attempt to homogenize the status of women has thus encountered deeper resistance than the attempt to universalize gender-free rights' (Nathan, 2001, p. 256).

Such resistance should not, I suggest, lead us to conclude that there is no prospect of reconciling the conflicting claims of cultural traditionalists and proponents of gender equality. However, the reconciliation aimed for must be, I suggest, *a pragmatic and political one*, negotiated at the level of local practices. Such a pragmatic political approach stands in contrast to normative arguments that seek to resolve cultural tensions in strictly in favor of a liberal framework of individual rights or a human rights paradigm, including those that permit the occasional legal exception in order to accommodate benign cultural groups (such as Barry, 2001). Appeals to moral foundationalism, including to liberal and human rights, are of limited use in situations of cultural conflict such as that typified by the customary law debate in South Africa.[21] To attempt to discover overarching moral principles which could then trump contentious cultural norms and practices is at best an idealistic endeavor, and at worst a fundamentally misguided one. We ought to reject the expectation that tensions between cultural arrangements and sex equality can be resolved in favor of either human rights universalism or policies of cultural relativism, and instead seek reasonable and democratic *political* compromises among diverse communities.

Deliberation, Negotiation and Compromise

To claim that some cultural conflicts should be understood primarily as conflicts of political interests and power is not to dismiss the role of moral principles and norms altogether. Rather than appeal to contrasting norms and values to account for the conflict between traditionalists and women's rights advocates in South Africa, however, I argue that we should instead aim to identify norms that enjoy wide acceptance across the communities in question for the purpose of structuring a practical dialogue. Support for norms can be discerned in several ways, but it is important that the assent be actual and not assumed or hypothetical (for instance, as in the consent of ideally rationally moral agents). It is not expected that all citizens or communities should have identical understandings of the value of the norm in question; instead, they may (and probably will) have asymmetrical but overlapping understandings. These norms are then used as a guide for constructing the basis for a political dialogue and a process of resolution and compromise.

In South Africa, one obvious contender for a norm that enjoys asymmetrical but overlapping support is that of equality, but as the discussion of constitutional conflict showed, equality is too widely and variously interpreted in this society to be of much strategic use. Instead, another norm, that of political inclusion or political participation, can be used as the starting point for a dialogue

about possible solutions to the customary law dilemma. Political inclusion as both an ideal and a guide for political practice has particular resonance for South Africans. Its importance is reflected at all levels of political life, as evinced, for example, by demands for inclusion by different communities and lobby groups during the constitutional negotiations of the 1990s. By including and giving political voice to all groups with a stake in the customary law/gender equality dispute and permitting these deliberations to exert an impact on the legislative and policy resolutions of the issue, the broad outlines of a solution will emerge. This will surely be a compromise solution, one that can and probably should be renegotiated in the future, as social needs, cultural practices, interests, and political commitments evolve.

If the struggle between traditionalists and women's groups over the future status of customary law in South Africa is primarily a political one, reflecting different vested interests and forms and degrees of power, where might a potential resolution to the conflict begin? No longer seen as a matter of deeply conflicting moral values—or as a question of which principles ought to trump which—the gender/customary law debate could proceed as a dialogue between parties with competing and legitimate claims and interests. The kind of dialogue suggested by the anti-foundationalist, pragmatist perspective argued for here is directed towards securing concessions for parties whose interests may be deeply at odds. The ground rules of such a dialogue are not metaphysically grounded—they are not universalizable norms that rational agents could or would agree to, in Rawls' or Habermas' sense. Rather, they are more minimal requirements, designed to prevent the conversation from digressing into a contest of raw power and influence. Of use here is John Dryzek's idea of a 'discursive design' which is inclusive and informal, free of 'hierarchy and formal rules', but shaped by conversational conventions (Dryzek, 1990, p. 43). This model emphasizes the maximum inclusivity (no stakeholding parties are excluded) and, like my approach, insists that 'the focus of deliberations should include, but not be limited to, the individual or collective interests of the individuals involved' (Dryzek, 1990, p. 43).[22]

The actual ground rules of the political dialogue will change depending upon the concrete views and understandings of the participants, but as I discuss below, it is preferable that a non-participant arbitrator select the rules in concert with representatives of the different parties. But how to establish fair ground rules without reaching for moral and metaphysical justifications? One strategy that is intuitively appealing within a broadly democratic framework is the idea of beginning from *norms*—or procedures that reflect norms—*that conflicting parties already agree to*. A norm is selected for the simple reason that it will allow a political conversation to begin. Nor is it likely that participants will choose a norm of, say, coercion or selective exclusion, since they themselves are to be bound by the norm.

Notice that on the model proposed here, dialogue between dissenting parties begins from overlapping norms but *is not directed towards identifying shared norms* or towards achieving an overall normative consensus on values or even policy issues. This marks a key difference between a pragmatist-deliberative approach of the sort sketched here and models of public dialogue proposed by

discourse ethicists and some proponents of deliberative democracy. The actual agreement of the participants is needed in order to ratify those norms that provide the starting point for dialogue. Political inclusion is a widely shared norm in South Africa, although traditional leaders understand this differently than do liberal sex equality advocates. However, both groups share overlapping, though not symmetrical, understandings of the norm of inclusion, and this agreement provides a starting point for discussion. Similarly, participants need not agree on the actual application of the norm in question, in terms of procedures that are to guide deliberations. Once the initial norms and procedures are selected, a political dialogue directed towards practical negotiation and compromise can proceed.

Such a negotiation model for resolving legislative and policy conflicts disputes about cultural practices and liberal constitutional norms might make use of an arbitrator who can help determine which overlapping norms to foreground in the deliberation process. Such an arbitrator would be likely to be a representative of a government or semi-governmental regulatory body—for instance, a senior member of the South African Law Commission—but need not be. Equally possible is the prospect that an arbitrator would be a public figure who commands the respect of dissenting parties—a political figure, respected journalist, or even a religious leader with a reputation for fairness (for example, Desmond Tutu). The role of the arbitrator would vary depending on the dispute, but would minimally include the following:

(a) help to determine which norms enjoy overlapping (but likely asymmetrical) understanding and support in the diverse communities participating in negotiations;
(b) help to determine which practices and ground rules best reflect these overlapping norms, and works to implement these; and
(c) facilitate open deliberation between the participants and guides them towards a fair, negotiated compromise solution.

The idea of a third party who facilitates and guides open deliberation among participants to the discussion is also a feature of other discourse-based models of conflict resolution. Dryzek's idea of a discursive design, for instance, features a *mediator* who helps to construct a fair dialogue among participants and guides them towards some reasoned compromise. As Dryzek explains, 'the mediator can also take actions to reduce rigidities in the bargaining positions of adversaries, attempt to reconceptualize issues through reference to novel problem definitions or normative judgments, offer inducements to the parties involved, and oversee subsequent compliance with any agreements reached' (Dryzek, 1990, p. 45).[23]

The broad approach to democratic conflict resolution sketched here differs from other available models of public dialogue in its practical focus on the *concrete interests* of the participants. *Compromise*, not consensus, is goal of the approach developed here. Rather than guiding citizens so as to discover shared public norms, as Habermas's discourse ethics proposes (Habermas, 1993, 1998), we begin from asymmetrical but overlapping understandings of norms valued by the participants and seek to secure workable compromises and negotiated

solutions for concrete policy problems. Although my approach eschews direct reliance on formal norms of rationality and public reason, and does not explicitly endorse democratic norms as trumps, it by no means assumes a position of moral relativism. Rather, it entails a democratic and pluralist account of justice (see Deveaux, 2000b). Justice, on the view presented here, follows from the observance of fair and democratic procedures that enjoy legitimacy among the diverse participants to the practical dialogue.[24]

South Africa: Applying the Norm of Political Inclusion

What would it mean to apply the model of negotiation and compromise to the dispute between traditional leaders and sex equality advocates in South Africa? I have argued that one norm stands out as readily accepted by all dissenting parties in the customary law debate, namely, that of *political inclusion*. This norm has special currency in the South African context given the history of systematic exclusion under apartheid and the lack of inclusive democratic structures; traditional leaders and women's rights lobby groups alike agree that political inclusion is a critical norm in the new, democratic South Africa. *Negotiation* and *compromise* are two other norms that have real currency in contemporary South African politics, as the political, ethnic, and religious pluralism of the country has demanded that these norms take precedent at every stage of the transition to democratic rule. While neither CONTRALESA nor the Women's League of the ANC were entirely satisfied with particular resolution reached in the debate over the formal constitutional status of customary law, they did agree to adhere to the norms of negotiation and compromise which underpinned this process.

If norms of political inclusion, negotiation and compromise were to be taken seriously in debates about the status and possible reform of customary law and used to structure a dialogue between the dissenting groups, what might transpire? In the first place, none of the groups with vested interests could be excluded from the dialogue, an improvement over past negotiations, in which power brokering politics led to the formation of tacit agreements between the ANC and CONTRALESA without contributions from women's rights lobbyists or legal reform groups. Moreover, making *explicit* the parties' commitment to the norm of democratic political inclusion would highlight the need for any political solution to reflect in some way the legitimate interests of the various participants. Rather than a zero sum game, such a dialogue would be conceived as one that will yield imperfect compromises through negotiation and concessions. Although a resolution to the dispute between traditional leaders and women's groups cannot be determined in advance of the dialogue, a compromise might well take the form of constitutional protection for a *revised* or reformed version of customary law, or else extensive reform of problematic features of customary law. The traditional leaders' lobby would prefer to protect customary law and traditional systems of leadership from formal limitation by the equality provisions in the Bill of Rights, but might be persuaded to agree to concessions demanded women's rights groups in return for continued recognition of structures of traditional authority.[25] Indeed, chiefs agreed to a number of such

concessions in consultations held by the South African Law Commission that yielded in the Customary Marriage Act of 1998 (see Deveaux, 2003).

Practical objections to this dialogue-based strategy abound, no doubt, and surely it will not yield easy resolutions. Yet if we are to avoid polarizing the so-called 'gender equality vs. cultural rights' debate, we must relinquish the framework that views the tensions in terms of deeply incommensurable moral values and principles. The future of customary law in South Africa is a political problem with a political solution. Given the context of social, cultural, and religious pluralism and the vastly different interests at stake, no particular solution will appeal to all participants in political deliberation. A democratic political compromise is, however, arguably the most viable and just response to such conflicts.

Notes

1. Research for this article was greatly aided by a Williams College 1945 World Fellowship faculty travel grant, which enabled me to conduct interviews with representatives of women's groups and legal reform associations, law scholars, and various government and officials in South Africa during January 2002.
2. Native peoples in Canada, for instance, have sought exemption from the Charter of Rights and Freedoms on the grounds that its sex equality protections could interfere with traditional aboriginal forms of government. I discuss this case in Deveaux (2000a).
3. Government of South Africa (1996), *Constitution of the Republic of South Africa*, Chapter 2 (Bill of Rights), section 9(3). With respect to culture, section 31(1a, 1b) of the Bill of Rights states that 'Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of their community, to (a) enjoy their culture, practice their religion, and use their language; and (b) form, join and maintain cultural, religious and linguistic associations and other organs of civil society'.
4. The South African Supreme Court of Appeal is to be distinguished from the Constitutional Court, which deals strictly with matters of constitutional interpretation.
5. Magardie (2000, p. 1). In the case in question, a widow challenged her father-in-law's right to inherit the property of her deceased husband, claiming that the law of male primogeniture 'was unconstitutional because it violated her right to gender equality'. The father-in-law claimed that 'no customary union in fact existed because her family had only paid a part installment towards her lobola (bridewealth)', an argument that the court accepted in ruling against the appellant.
6. The use of the term '*unfair* discrimination' in the Bill of Rights is specifically intended to ensure that affirmative actions schemes are not prohibited. In addition to employing this term, section 9(5) of the SA Constitution states that 'Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair'. Legal scholar Mark Kende notes that: 'By comparison [to the United States Supreme Court's constitutional jurisprudence] South African equality guarantees are remedial and presume correctly that the Apartheid regime oppressed certain groups. The societal baseline is presumed to be non-neutral. Affirmative measures are therefore equalizing, not preferential' (2000, p. 26).
7. Nor has this situation changed in the years since the 1993 interim Constitution and subsequent 1996 Constitution. As Oomen (1998, p. 88) notes, 'As the 1999 elections drew nearer, the ANC politicians seemed more and more hesitant to take a stance against traditional leadership, as this could cause traditional leaders, and their subjects, to break ranks and join the IFP or the new United Democratic Movement (UDM)'.
8. Albertyn (1994, p. 57) notes that while women's rights advocates were effectively marginalized from many aspects of the constitutional process, one area in which their voices were heard was on the issue of customary law, particularly on whether customary law should be subject to the provisions contained in the Bill of Rights.
9. See the discussion by Wing and Carvahlo (1995).
10. This was the second Women's Charter in South African history. The first Women's Charter was drawn up in 1954, a year before the ANC's 1955 Freedom Charter.

11. 'Interpretation of Bill of Rights', section 39(1, 2, 3), *Constitution of the Republic of South Africa*.
12. South Africa signed CEWAW on 29 January 1993 and ratified it on 15 December 1995. Source: <http://www.un.org/womenwatch/daw/cedaw/states.html>.
13. See, for instance, Fishbayn (1999, especially pp. 157–8) and Mokgoro (1997, especially p. 1287). Additionally, a recent government discussion paper on customary law insists that the equality provisions in the Constitution trump the protection of cultural rights. Traditional leaders, the paper states, invoke their cultural rights as protected by sections 30 and 31 of the Constitution in order to justify the exclusion of women from leadership positions. But they do so without warrant for, as the authors go on to argue: 'It is clear that the provisos to sections 30 and 31 make the right to culture subject to the equality clause which suggests that the exclusion of women from membership of traditional courts is unconstitutional'. See *The Harmonisation of the Common Law and Indigenous Law* (Pretoria, South African Law Commission, 1999, p. 5).
14. 1997 (2) SA 936 (CC), cited in Mokgoro (1997, p. 1286).
15. Fishbayn (1995, p. 161). As she goes on to note, the judge 'never took the further step, explicitly contemplated by the constitutional provisions permitting the recognition of systems of personal law, of determining that such recognition is consistent with the other rights in the Constitution, including the rights of women to equality under family law'.
16. Cited in Oomen (1998, p. 96). Oomen cites a discussion paper by the South African Law Commission, whose findings were subsequently incorporated in the *Recognition of Customary Marriages Bill 120/1998*.
17. Oomen (1998, p. 92) points out in her discussion of the colonial fostering and manipulation of traditional African structures of power that 'many of South Africa's 800 traditional leaders were created by the bureaucracy, in order to suit the Apartheid need for co-operative chieftancies'.
18. As Oomen notes (1998, p. 89), 'By far the largest part of the land in the former homelands, which in themselves cover about thirteen percent of the South African territory, is communal property. Traditional leaders are still responsible for the allocation of this land … [O]pponents point out how easy it is for chiefs to abuse this function'.
19. As Nhlapo (1995, p. 162) explains, 'The identification [within the official code of customary law] of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion'.
20. For a good discussion of the public/private issue in connection with South African politics, see Romay (1996, especially pp. 870–76).
21. Here, I echo the pragmatist skepticism about the tradition of morality grounded in foundationalist claims about truth, rationality, and knowledge. See especially Rorty (1982, 1998).
22. Whereas Dryzek insists that 'complicity in state administration should be avoided' (p. 43), the model sketched out here does not view state involvement as problematic, provided the deliberation process remains open and inclusive. As I suggest below, it may well be that the arbitrator of the dialogue is a representative of a government agency.
23. Note that Dryzek uses the term mediator, not arbitrator. He rejects the idea of arbitration on the grounds that it suggests that a scenario in which 'the third party reaches a verdict' (p. 46). Although I do not envision a mediator or arbitrator *imposing* a compromise solution that parties reject, I want to leave more room for the facilitator to direct the process of conflict resolution more than does Dryzek.
24. Nor does my approach entail a commitment to cultural relativism, which is ill-equipped to supply strategies for negotiating power relations between dissenting and hegemonic factions of communities. For a good discussion of this structural oversight on the part of cultural relativism, see Nathan (2001, especially pp. 358–59).
25. Personal communication, Likhapa Mbatha of the Center for Applied Legal Studies, University of the Witswaatersrand, Johannesburg (interview, 25 January 2002).

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