

**Multiculturalism versus Women's Rights Conflicts: Intersectionality and the State
in South Africa**

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Abstract. Conflicts between multiculturalism and women's rights occur when minority group practices clash with the liberal rights of minority women. Theorists argue that liberal democracies ought to adopt just negotiating practices to resolve these conflicts; empiricists investigate how rights legislation for minority groups and women gets passed. Few scholars examine the origins of these conflicts, how they are reproduced, and their effects on minority women. Drawing on intersectionality theory I argue that multiculturalism versus women's rights conflicts are rooted in unitary rights (cultural rights, women's rights; not minority women's rights) and that these rights call up conflicts that entrench minority women's domination. The more that liberal democracies endorse unitary rights the more state elites address multiculturalism versus women's rights conflicts and institutionalize them throughout the state. As a result, minority women become the targets of state policy. Because they rarely have influence in liberal democratic politics, this means they become the objects of these conflicts instead of citizens claiming their rights. Hence unitary rights are complicit in perpetuating minority women's domination. Drawing on policy documents, newspaper articles, and 27 semi-structured interviews I probe the plausibility of these arguments in South Africa. I find that multiculturalism versus women's rights conflicts pervade state institutions and that women living under customary law have limited political influence over these conflicts. An intersectional approach to substantive political rights may offer resources for addressing these problems.

“The bridge I must be
Is the bridge to my own power”
Donna Kate Rushin, 1981
The Bridge Poem

Introduction

Since the 1980s liberal democracies have grappled with how to respond to multiculturalism, or the claim by minority groups to maintain their distinct way of life.¹ Multiculturalism raises a contentious set of problems when minority group practices obstruct the liberal rights of women in the minority group. Legislation addressing these problems does not end the conflict but works within it. One legislative approach protects minority practices from women’s rights. For example, the Hindu-dominated Indian state granted minority Muslims the right to adjudicate maintenance after divorce by retracting Muslim women’s rights to long term maintenance under the civil code. A second legislative approach advances women’s rights but can make common cause with racism and imperialism. Canada reinstated native status to women who married outside their group, but in doing so restricted the ability of all Native peoples to pass their status on to their children; that is likely to lead to their official extinction by the end of this century. A third legislative approach compromises on multiculturalism and women’s rights. When post-apartheid South Africa recognized the marriages of blacks living under customary law it not only ended customary marriage practices that required women’s legal minority,

¹ Liberal democracies have contested elections, full suffrage, limited fraud, and effective guarantees of civil liberties (Collier and Levitsky 1997)

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it also recognized polygamy.² Each legislative approach works within a unitary perspective (Hancock 2007, 64), meaning each treats multiculturalism versus women's rights conflicts as a clash between two separate rights claims.

Why legislation sometimes resolves unitary rights conflicts in favor of multiculturalism, sometimes in favor of women's rights, and sometimes promotes compromise is an important question. This paper asks a *prior* question: what are the origins of these conflicts and how do they get reproduced? Asking this question brings into view the effects of these conflicts on minority women. Answering it provides insights on how multiculturalism versus women's rights conflicts can be rejected, instead of negotiating them or passing legislation that is constrained by them. In the first half of the paper I draw on intersectionality theory to develop two arguments. The more liberal democracies commit to multiculturalism and women's rights the more they will identify these conflicts and institutionalize them in the state. As a result, state elites will decide the fate of minority women, entrenching their domination. The second half of the paper probes the plausibility of these two arguments in post-apartheid South Africa and finds that they are credible. I conclude by considering how an intersectional approach to substantive political rights might undermine these outcomes.

Theorists have worked extensively on multiculturalism, women's rights, and conflicts between them. Their work has had global impact because it has been disseminated through international rights documents, scholarly publications, and

² I use the term "black" to refer to three apartheid racial categories: black, coloured, and Indian. Approximately 86 percent of the South African population is black but the majority does not live under customary law. The minority living under customary law comprises approximately 17 to 18 million, equivalent to 34 to 36 percent of the population. Most live in rural areas where women significantly outnumber men because of male migratory labor. Customary law includes the legislation codifying it, case law developed by the Supreme Court and Black Court of Appeals, and unofficial, lived practices.

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advocacy groups.³ Some theorists have argued liberal democracies should celebrate minority group cultures, others argue women's rights trump multiculturalism. More recently theorists have recommended liberal democracies adopt rules to facilitate just negotiations between advocates of these two rights claims. In contrast, empirical scholars analyze why multiculturalism and women's rights claims spread across the globe, the varied state responses to these demands, and the tensions between advocates of culture and women's rights.⁴ This body of work has contributed to our understanding of multiculturalism, the passage of rights legislation, and conflicts that pit majority or minority practices against women's rights.⁵ However, it has neglected the origins and reproduction of these conflicts, and their effects on minority women.

Intersectionality theory offers a basis for theorizing these political dynamics. When liberal democracies endorse multiculturalism and women's rights they endorse a unitary perspective. These unitary rights address injustices perpetrated against minority groups and women, but do not sufficiently address the injustices perpetrated at their intersection. As a result, conflicts over minority women's rights emerge and are treated as multiculturalism versus women's rights conflicts. These conflicts need not persist.

Minority women can identify shared priorities that are distinct from unitary rights claims

³ Will Kymlicka's scholarship, activism on behalf of international recognition of indigenous rights, and recent United Nations recognition of these rights is perhaps the best known example, as well as work like Susan Okin's *Is Multiculturalism Bad for Women?* (1998) that circulates among feminist lawyers and academics throughout the global South.

⁴ Advocates of multiculturalism include Kymlicka (1995; 6/1/12 11:29 PM and Taylor (1994); feminist defenders of women's rights include Nussbaum (2000) and Okin (1998); theorists seeking accommodation include 6/1/12 11:29 PM and Deveaux (2006). Analysts of indigenous rights include Yashar (2005) and 6/1/12 11:29 PM; for women's rights see work by scholars like Htun (2003) and Waylen (2007). For empirical research that focuses on tensions between advocates of culture and women's rights see Basu (2003), Joireman (2007), Moors (1996), and Tripp (2002).

⁵ Multiculturalism versus women's rights conflicts are distinct from culture versus women's rights conflicts. The former refer to minority group cultures; the latter refer to demands by members of majority groups who aim to impose their beliefs upon an entire society, such as Christian fundamentalists in the United States. I would like to thank Jennifer Rubenstein for pointing out this distinction.

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and reject multiculturalism versus women's right conflicts. This rarely happens. Why? I focus on two reasons that are directly connected to unitary rights. When liberal democracies endorse multiculturalism and women's rights they commit to legislative reform that extends unitary rights into the courts and the bureaucracy; they often also adopt an array of institutions dedicated to promoting each rights claim separately, such as gender commissions and reserved seats in the legislature for minority groups. In doing so they unwittingly extend unitary rights conflicts throughout the state and entrench a unitary perspective.

Second, contrary to assumptions that male cultural leaders are responsible for minority women's domination and that liberal rights are necessary to end it, I argue that liberal rights call up conflicts that perpetuate minority women's domination. Women situated at the intersection of race and gender face more complex forms of injustice than either minority men or majority women. This deep disadvantage means that even when unitary rights are implemented, minority women will rarely have the skills, experience, and recognition to capitalize on these gains. Instead, minority men and majority women will benefit most (e.g., Hughes 2011). If multiculturalism versus women's rights conflicts move into state institutions and minority women do not make gains in political influence, state elites will treat minority women as the objects of these conflicts rather than as political actors claiming their rights.

South Africa is an ideal case for investigating the effects of unitary rights. First, its celebrated constitution endorses both multiculturalism and women's rights, and it has institutions devoted to advancing both. If unitary rights contribute to multiculturalism versus women's rights conflicts it should be evident here. If not, the claim is unlikely to

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be plausible. Second, South Africa is not an easy case for establishing that unitary rights sustain minority women's domination. Unitary commitments have led state institutions to adopt affirmative action; poor, rural, black women are on the public agenda. Hence, if minority women lack influence in state institutions here, that would suggest similar outcomes in other liberal democracies as well. Using qualitative data -- including policy documents, newspaper articles, and semi-structured interviews -- I find evidence to support the plausibility of these arguments. Strong endorsement of unitary rights is associated with state actors who address multiculturalism versus women's rights conflicts and extend them across South African state institutions. Yet unitary rights commitments did not offer minority women influence in liberal democratic politics. In South Africa unitary rights address some injustices facing minority women, but they also call up multiculturalism versus women's rights conflicts and institutionalize them in the state, meaning state elites dominate minority women by deciding their fate.

Multiculturalism and Women's Rights

Political theorists have developed an extensive literature on multiculturalism and women's rights that address what liberal democracies should do about these conflicts and why they commit to these two sets of rights. This work presumes the existence of conflicts whose origins and reproduction I theorize in the next section. Nonetheless, it has played a central role in framing and characterizing multiculturalism versus women's rights conflicts, and in identifying the factors that lead to the adoption of unitary rights. Several works also point toward an intersectional approach by noting the domination of minority women, the centrality of state actors, and how minority women's shared priorities can transcend unitary rights conflicts.

The first iteration of multiculturalism called on liberal democracies to stop oppressing cultural groups and grant them recognition. Charles Taylor argues that culture is the fountainhead of individual identity and autonomy (Taylor 1994). Building on this claim Will Kymlicka contends that the liberal commitment to individual freedom requires liberal democracies to respect “societal cultures” that deviate from the majority (Kymlicka 1995) 83; 2007, 31). Multiculturalists thus embrace difference and urge liberal governments to protect minority groups. Feminist scholars like Susan Okin reject this logic, pointing out that male leaders in “societal cultures” are not democratically elected or accountable to women, advocate cultural rights to promote their own interests, and entrench gender inequality (1998). Feminists like Okin insist women’s rights trump the rights of minority groups.

A second iteration of this scholarship grappled with how to respond to the conflicts Okin identified. Many theorize how liberal democracies can facilitate negotiation over multiculturalism and women’s rights conflicts (Benhabib 2002, Deveaux 2005, Levy 2000, Mullally 2004, Parekh 2000, Rawls 1999). Although these scholars diverge in their sympathy for multiculturalism or women’s rights, most advocate a procedural approach in which the liberal state plays a “facilitative” role (Williams 2010, 1). At least two scholars in this iteration, Monique Deveaux (2006) and Sarah Song (2007), focus on minority women. Both note liberal democracies reify minority women, adopt coercive legal practices toward them, and have a history of contributing toward patriarchal group practices. To redress these problems Deveaux recommends that minority women’s voices be included in community discussions; Song recommends that liberal democracies support minority women’s participation in politics by “protecting

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their basic rights and liberties” (2007, 83). Deveaux thus points to the lack of minority women’s political agency in their groups and endorses deliberative democracy, while Song points to their lack of political agency in liberal politics and turns to liberal rights to remediate this problem. Together they raise the problem of minority women’s dual domination.

Empirical scholars interested in multiculturalism and women’s rights investigate why rights legislation gets passed and the political competition at work in these conflicts. Their work points to a number of factors that shape the adoption of unitary rights, including social movements, the openness and inclusiveness of the public sphere, institutional legacies that emphasize group difference, and transnational movements (e.g., Htun and Weldon 2010, Sieder 2002, Walsh 2011, Warren and Jackson 2002, Waylen 2007, Yashar 2005). Scholarship on multiculturalism versus women’s rights conflicts is dominated by feminists and highlights local support for women’s rights (to refute charges of imperial feminism), the power of minority leaders over minority women, the ethnocentric impulse driving public debate over multiculturalism versus women’s rights conflicts, and the marginalization of minority women in these debates. Most identify the state as a perpetrator of injustice through its refusal to endorse or implement rights (e.g., Bowen 2008; Merry 2006; Scott 2007, Tripp 2002).

Some empirical scholarship, however, points toward an intersectional approach by recognizing the central role of the state in these conflicts and the potential for minority women to transcend a unitary rights framework. First, several studies on the passage of gender legislation in countries with conservative *majority* cultural groups indicate that conflicts often involve competition between cultural leaders and state elites. When

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Catholic religious leaders in Latin America and Poland or tribal leaders in the Maghreb were aligned with state elites few advances in women's rights occurred (Htun 2003, Charrad 2001, Walsh 2011). Yet, when state elites aimed to undermine the power of these leaders they promoted women's rights. Their activism suggests that state elites may play a central role in multiculturalism versus women's rights conflicts as well.

Second, minority women can develop shared priorities that transcend multiculturalism versus women's rights conflicts. For example, R. Hernandez Castillo analyzes how minority women in Chiapas, Mexico successfully articulated a set of demands known as the Revolutionary Charter during a regional indigenous uprising in the mid-1990s. With support from liberation theology activists and feminists, militant minority women spent a decade mobilizing at the local, state, and national levels, formed a national coalition, and re-conceptualized their traditions. They then wrote a charter demanding their rights from the Mexican government *and* indigenous communities that insisted on autonomy for Zapatistas and autonomy for Zapatista women. According to Castillo:

They claim from the state the right to cultural differences, and within their communities they work to change the traditions which they consider to infringe their rights. Their struggle is not for the recognition of an essential culture, but for the right to reconstruct, confront, or reproduce that culture not on the terms established by the state, but on those set out by their own indigenous peoples with the framework of their own internal pluralisms (2002, 394-395).

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Echoing feminists in liberation struggles across the globe, indigenous women in Mexico seized the political opportunity that the uprising opened to challenge colonization and patriarchy in their communities simultaneously.⁶ This is not to suggest that minority women will all agree on one course of action or must pursue cultural recognition and women's rights simultaneously.⁷ Women are not a preconstituted, unitary group (Mohanty 1988), hence they do not have a common identity or "objectively given" interests (Weldon 2011, 442). The basis of their organizing and the priorities they identify will vary. However, because minority women occupy a social location that is distinct from minority men and majority women they can identify shared priorities that are not contained by a multiculturalism versus women's rights framework. Scholarship that highlights the dual domination of minority women, that finds political competition with state elites can be central in these conflicts, and that minority women can identify priorities by working outside this unitary framework, point toward an intersectional approach.

Intersectionality

Intersectionality provides tools for analyzing how multiple oppressions, such as race, class, and gender, emerge and interact. This section explains the constructionist approach informing intersectionality and develops an argument about the role of unitary rights in the construction and maintenance of multiculturalism versus women's rights

⁶ Monique Deveaux 6/1/12 11:29 PM discusses a similar situation in which native women in Canada wanted both a constitutional guarantee to indigenous self-government and a guarantee that indigenous autonomy would not trump gender equality. As Anne Phillips notes, "this was not the choice on offer" in the 1990s, although future deliberations did include it 6/1/12 11:29 PM.

⁷ Even when minority women's groups are divided over the policy solution for a particular issue, they can still identify shared priorities for state action. See Bassel and Emejulu (2010, 526-7).

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conflicts. I then explain why unitary rights can become obstacles to remediating intersectional injustice, and conclude by formalizing these two arguments as hypotheses and operationalizing them.

Surprisingly, few scholars have applied intersectionality to multiculturalism versus women's rights conflicts. To be sure, scholars recognize that intersectionality is useful when addressing competing oppressions (Hanock 2007). While some expose the ways democratic institutions contain intersectional claims, for example by addressing minority cultural differences while ignoring social and economic discrimination (Bassel and Emejulu 2010), others study the applicability of intersectionality to public policy (Hanivsky and Cormier 2011, Reingold and Smith 2012), or the outcomes of policies that purport to recognize intersecting inequalities (Kantola and Nousiainen 2009, Lombardo and Verloo 2009). A few acknowledge the relevance of intersectionality for multiculturalism versus women's rights conflicts. For example, Sirma Bilge draws on intersectionality to theorize the agency of veiled Muslim women; Anastasi Vakulenko argues that the European Court of Human Rights ignores intersectionality when ruling on Muslim women wearing headscarves (Bilge 2010, Vakulenko 2007). I apply intersectionality to the conflict itself.

Intersectionality emerged out of the experiences of women of color in the United States who argued that attacking racism *or* sexism was insufficient for redressing their complex forms of oppression. Feminist theorists of color like Kimberlé Crenshaw (1989) and Patricia Hill Collins (1990) argue behavioral, institutional, and structural processes position individuals in social locations marked by multiple forms of oppression and power (e.g., wealthy black women). Intersectionality thus displaces unitary identity

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claims that privilege one form of oppression over others (King 1988). I focus on minority women not because this is an identity group that has been misrecognized or because they are the group most in need of remediation, but because minority women are at the center of pressing unitary rights conflicts that ignore intersectionality.

The constructionist approach at the core of intersectionality shifts attention away from identity politics and toward social locations that are constituted by multiple, intersecting forms of oppression. Scholars of women and politics use the word gender to signal how individual behaviors, institutions, and structures (e.g., political and economic systems) map inequalities onto bodies (Beckwith 2005, Htun 2005) legitimizing women's subordination to men. I adapt the term "peoplehood" from Rogers Smith (2003) to signal the same process for minority cultural groups. Smith uses this word to signal imagined communities that impose binding obligations and duties on their members. Here, peoplehood refers to how individual behaviors, institutions, and structures map inequalities of power onto imagined communities with binding obligations and duties to legitimize racist and imperial policies against minority groups.⁸ An intersectionality approach to multiculturalism versus women's rights conflicts thus starts with the idea that social locations are produced and reproduced.

Although few scholars analyze the production of *gendered peoplehood*, many who analyze gender or peoplehood focus on states (Figure 1, left). As Deborah Yashar explains, "insofar as states are the prevailing political units in our world and insofar as they extend/restrict political citizenship and define national projects, they institutionalize and privilege certain national political identities" (2005, 5-6). Scholars like Anthony

⁸ Smith defines peoplehood as forms of imagined community that imposes binding obligations and duties on its members.

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Marx (1998), Mahmood Mamdani (2002) and Paul Brass (1997) have made their careers investigating how political elites in the US, Brazil, South Africa, Rwanda, and India harness state power to produce and reproduce peoplehood to justify the concentration of material resources, status, and political power in elite hands. Similar work by gender scholars like Mala Htun (2003), Lisa Brush (2003), and Georgia Duerst-Lahti and Rita Mae Kelly (1995) analyze how reproductive policies, the sexual division of labor, and procedures within liberal democratic institutions construct the binary man/woman and naturalize sex inequality.

If states play a central role in the construction and maintenance of social locations, then, as Courtney Jung points out in her assessment of multicultural claims, “the appropriate question...is not ‘how can democratic governments accommodate the pre-existing and deeply held cultural commitments of their citizens?’ but instead ‘how should democratic institutions process the political claims that arise to protect and contest the exclusions and inclusions set in place by the modern state itself?’” (2007, 21). This constructionist approach explains why minority and women’s rights are appealing. Peoplehood and gender signal injustice perpetuated or permitted by states; unitary rights claims demand state action to end these injustices.

Figure 1 about here

Intersectionality theorists have long recognized that liberal states can remediate injustice by granting citizens new rights (Figure 1, center). Crenshaw emphasizes “the transformative potential that liberalism offers” as “it remains receptive to some

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aspirations that are central to black demands; rights may also perform an important function in combating the experience of being excluded and oppressed” (Crenshaw 1996, 110-111). Unitary rights performed this function in the United States, providing a basis for political mobilization that significantly expanded the legal claims that blacks and women can make. Yet, as Crenshaw notes, when liberal democracies fail to recognize intersectionality their efforts to ameliorate harm are likely to be “ineffective” for those situated at the intersections (1989, 360), meaning that they have limitations. To resist these limitations Crenshaw recommends that activists (and presumably liberal democracies) attend to the multiple differences within groups by viewing them as “coalitions;” for example, by treating minority groups as coalitions of minority men and minority women (1989, 377). I argue that a unitary perspective to human rights hinders this reorientation.⁹

An intersectional analysis reveals the mechanisms through which unitary rights become limitations to liberalism’s transformative agenda. Multiculturalism or women’s rights address a singular identity: a minority group or women, respectively; each treats one group as primary, and each presumes internally “shared political goals” by virtue of their group identity.¹⁰ This generates conflicts similar to those that Crenshaw urged women of color in the U.S. to reject: absent intersectionality, women of color could embrace racial power or women’s liberation. As a result, they were accused of collaborating with white power or sexism. Minority women today face a similar conflict.

⁹ Although the Beijing Platform for Action does acknowledge that women face “multiple barriers to their empowerment and advancement because of such factors as their race, age, ethnicity, culture, religion, or disability, or because they are indigenous people (1996, 32), and the UN Declaration on the Rights of Indigenous Peoples mentions the importance of women’s rights (2007, Article 21), neither document provides a name for any type of intersectional rights, uses the term intersectionality, or discusses the rights of minority women.

¹⁰ These three points draw on Hancock’s typology that contrasts a unitary analysis with an intersectional one (2007).

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They can embrace family, faith, and tradition or women's rights. As a result, they are accused of collaborating with retrograde patriarchs or imperial feminists. These conflicts not only shape the lived experiences of minority women, their activism, and political preferences (King 1988); they also shape liberal democratic politics.

When liberal democracies endorse unitary rights they commit to legal reform that engages the courts and the bureaucracy; many also establish institutions for disadvantaged groups. These institutions do not treat minority groups or women as diverse "coalitions" with multiple interests or conceptualize them as social locations. On the contrary, the legal process incentivizes state actors to define each group narrowly and essentialize them. That makes it difficult for state actors to address those situated at the intersection. If minority group women lack political influence over public policy, they become objects of contention in a conflict between minority group leaders and women's rights advocates. Intersectionality and its constructionist foundations thus suggest two hypotheses about the origins and reproduction of multiculturalism versus women's rights conflicts (Figure 1, right).

H1: The more that liberal democracies commit to multiculturalism and women's rights, the more multiculturalism versus women's rights conflicts will be institutionalized in the state.

H2: The more multiculturalism versus women's rights conflicts move into state institutions, the more minority women become targets of state policy. If they are also marginalized in liberal democratic politics, these conflicts deepen their domination.

As liberal democracies increasingly endorse unitary rights they unwittingly institutionalize multiculturalism versus women's rights conflicts in the state. State elites

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will identify, define, and prioritize the issues to be adjudicated in multiculturalism versus women's rights conflicts. The conflicts will spread across state institutions and expand to encompass a wide range of issues, from disagreements over the leadership of a gender ministry, to bureaucratic battles among agencies over institutional purview and funding, to constitutional court cases. Group essentialism will also intensify. Legislators will reify minority groups and women by invoking unitary rights in debate; justices and bureaucrats will reify them by defining who is a minority member or woman, and who is not.

Because state elites and rights advocates will be legally required to accept the legitimacy of unitary claims, state actors tasked with adjudicating these conflicts will need to explain how their decisions support both sets of rights. These processes will increase the salience of unitary rights, making it difficult to conceive of minority groups or women as coalitions or social locations, or to imagine intersectional claims like those made by the women of Chiapas.

H2 expects that when these conflicts are centered in liberal states, and minority women are marginalized in liberal politics, these conflicts perpetuate minority women's domination. As multiculturalism and women's rights conflicts move into the state three sets of actors are likely to influence public policy: state elites seeking to shore up their support or undermine their opponents, and professional advocates of multiculturalism and of women's rights pursuing similar goals. Minority women will rarely be among them because as intersectional citizens facing multiple forms of injustice they will have fewer skills, experience, and are less likely to be viewed as legitimate political actors (Petersen and Parisi 1998; Hawkesworth 2003). Yet as multiculturalism versus women's rights conflicts become institutionalized in the state, minority women will become the targets of

state policy. Hence the domination of minority women will deepen, regardless of the legislative approach that the state takes, because they will lack the political agency to shape those outcomes. In sum, the more liberal democracies commit to unitary rights the more multiculturalism and women's rights conflicts move into the state; and the more that minority women are marginalized in liberal democratic politics, the more these conflicts will entrench that domination.

To operationalize these hypotheses I define multiculturalism versus women's rights conflicts as two unitary claims that cannot be fulfilled without constraining the other. I assess the first dependent variable, the degree to which these conflicts are institutionalized in the state, using two indicators. The first indicator addresses the pervasiveness of the conflict throughout state institutions. The second addresses the role state elites play in the conflict by asking: to what extent do state elites identify and define the conflict? To what degree do they prioritize the issues to be adjudicated?

- High levels of institutionalization mean all three branches of government and institutions tasked with advancing these two sets of rights will be involved in the conflict. High levels of essentialism mean these institutions will refer to minority groups and women as distinct, homogenous groups. State elites will also identify and define the conflict, determine the priority issues to be adjudicated, and explain the relationship between these two sets of rights.
- Moderate levels mean one or two branches of government and at least one of the institutions tasked with advancing these two sets of rights will be involved. Moderate levels of essentialism mean these institutions will treat minority groups and women as distinct but internally diverse. State elites will participate in

identifying and defining these conflicts, setting priorities, and debating the relationship between these two sets of rights.

- Low levels mean only those institutions dedicated to multiculturalism and women's rights will be involved, state elites will treat these groups as intersecting and internally diverse. Civil society will identify and define the conflict, prioritize the issues to be adjudicated, and minority women will be at the forefront of the debate.

To assess state support for unitary rights claims, the independent variable that is hypothesized to cause the above outcomes, I examine the country's formal commitments to multiculturalism and women's rights. High-level commitments require constitutional endorsement and constitutionally mandated institutions in the state dedicated to advancing both sets of rights. Moderate levels require legal endorsement and legally mandated institutions in the state dedicated to both. Low levels require legal endorsement.

The second dependent variable, minority women's political domination, refers to their ability to publicly express shared priorities and influence public policy.

- High levels of domination in liberal democratic politics means that minority women will rarely speak about their shared priorities in public and will have little to no influence on public policy.
- Moderate levels of domination mean that minority women will convey some of their shared priorities in public, and that occasionally some state actors will listen and indicate that they have been heard.
- Low levels of domination mean that minority women will be prominent public speakers conveying their shared priorities and demanding public policy

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change, like the women in Chiapas. Further, state elites will listen and respond by referring to those priorities in their decision-making.

The variable hypothesized to cause these outcomes is the institutionalization of multiculturalism versus women's rights conflicts in the state, operationalized above. To probe the plausibility of these hypotheses I turn to South Africa.

Research Design and Methods

South Africa is a liberal democracy and has a near 20-year history of accommodating cultural difference and addressing sexism. Black South Africans living under customary law are a national minority commonly referred to as ethnic or indigenous. I focus on a national minority with its own personal law to assess multiculturalism versus women's rights conflicts at their most intractable. National minorities are preferable to immigrants because conservative parties often challenge the citizenship status of immigrants, questioning whether they are even entitled to unitary rights. National minorities with their own personal law are common in post-colonial states and among countries with indigenous peoples; these personal laws pose significant challenges for resolving multiculturalism and women's rights conflicts.

South Africa has adopted state institutions dedicated to advancing multiculturalism and women's rights and has an impressive array of legislation striking down discrimination on the basis not only of race, but also on the basis of culture and sex. It is thus an ideal case for probing the effects of unitary rights. If multiculturalism versus women's rights conflicts are not institutionalized across the South African state, *H1* is unlikely to be confirmed elsewhere.

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South Africa is not an easy case for the second hypothesis as its political institutions are open to diverse participation. Unlike many liberal democracies the dominant party has its roots in a liberation movement that overthrew white hegemony, and it endorsed non-sexism and non-racism prior to taking power. It also has a vibrant civil society with NGOs devoted to multiculturalism and women's rights. The country has eleven official languages. Chiefs frequently hold political office, the post-apartheid parliament boasts 45 percent women as the result of a voluntary African National Congress (ANC) party quota, and the bureaucracy and judiciary adopted affirmative action. Further, the apartheid legacy and widespread public awareness of the intersections of race, class, and sex mean South Africans are attentive to the injustices facing poor, rural, black women. If minority women are not engaged in shaping public policy over multiculturalism versus women's rights conflicts in South Africa, this is likely to be true elsewhere.

In the next section I analyze the plausibility of my hypotheses, focusing on the Recognition of Customary Marriages Act (RCMA) of 1998. Although other South African legislation addresses multiculturalism versus women's rights conflicts, the RCMA was the first to be addressed by the post-apartheid state and has not been contested in the courts, meaning it is one of the least contentious. That makes it a challenging case for *H1*: if the least contentious piece of legislation draws multiple state institutions into multiculturalism versus women's rights conflicts then it is likely that more contentious bills did the same.¹¹ The RCMA is also a challenging case for *H2* as it

¹¹ Legislation advancing women's rights includes the Labour Relations Act of 1995, Choice on the Termination of Pregnancy Act of 1996, Violence Against Women Act of 1998, and the Promotion of Equality and prevention of Unfair Discrimination Act of 2000. Recent legislation expanding chiefly power include the Traditional Leadership and Governance Framework Act of 2003, Communal Land Rights Act

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was passed four years after the transition to democracy when women's organizations were relatively strong and the government open to participatory politics (Walsh 2011).¹² As the RCMA was passed when minority women were most able to express their priorities and influence public policy, a confirmation that minority women were marginalized in this conflict would suggest that their marginalization in other multiculturalism versus women's rights conflicts has been pervasive.

Data sources include government and nongovernmental organization (NGO) reports, print media, secondary sources, and 27 semi-structured one-hour interviews conducted in 2011 (several earlier interviews were conducted in 2003 and 2010). All interviews were based on purposeful sampling of scholars, lawyers, bureaucrats, politicians, activists, and NGO professionals. Earlier interviews focused on women's rights; the 2011 interviews focused on multiculturalism with select updates from women's rights informants.

Although I sought information about customary marriage reform and its implementation, many informants insisted on discussing the relationship between minority rights and women's rights more broadly. I created a "contact summary" (Miles and Huberman 1994, 51), coded this discussion, the topic that triggered it, whether the informant was a bureaucrat or civil society actor, and degree of understanding of intersectional oppression. In addition to research memos and interim case summaries, I also charted types of constructionist and intersectionality theory, and diagrammed the

of 2004, Land Use Management Bill, and Traditional Courts Bill. Some analysts argue that the chiefs have more power today than under apartheid (Ntsebeza 2005; interview with Lisa Vetten, Researcher and Policy Analyst, Tshwaranang Legal Advocacy Centre, July 22, 2011, Johannesburg).

¹² This timing means that affirmative action in the bureaucracy and the courts was less advanced than in the legislature and cabinet. This early period is nonetheless preferable because it is the period when political actors had maximum autonomy from the ANC.

causal claims in the empirical literature on both. The results led me to a focus on state institutions and unitary rights.

To maximize internal validity I checked secondary sources with informants, drew on multiple secondary sources, and triangulated newspaper articles. Given space restrictions I usually cite just one source. Statistical data is drawn from expert sources; I discuss data collection limitations where relevant. During my field research I took reflective notes on race, class, and gender bias. For example, as a white American woman I found that white South Africans often assume I share their political commitments, which span a considerable range. In addition to my interview queries about funding, linkages between state and civil society institutions, and organization publications, I also noted institutional functionality (e.g., material support and staff diversity). Many informants knew one another or were familiar with their organizations, facilitating cross-checking of informant reputations and institutional capacity.

To maximize external validity and establish causality requires comparative analysis. This paper does not do this; instead it engages in theory building by drawing on intersectionality to develop two arguments about multiculturalism and women's rights conflicts and then probes their plausibility in post-apartheid South Africa.¹³

Unitary Rights Commitments in South Africa

During the transition negotiations (1990-1994) South Africans wrote a new constitution and adopted a series of unitary rights and institutions that demonstrate a high-level commitment to both multiculturalism and women's rights. In 1990, pervasive

¹³ "Plausibility probes are preliminary studies on relatively untested theories and hypotheses to determine whether more intensive and laborious testing is warranted" (George and Bennett 2004, 76).

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violence and political and economic crisis convinced President F.W. de Klerk of the apartheid National Party (NP) to unban opposition parties, release all political prisoners, and begin negotiations with the opposition. Through a series of negotiating forums political leaders debated the terms of the transition and wrote an interim constitution. In 1994 South Africans handed Nelson Mandela the presidency in the country's first non-racial elections. Two year later the post-apartheid state approved the final constitution, which endorsed multiculturalism and women's rights.

The conflict between women's organizations and minority whites backing the chiefs drove the endorsement of these two separate rights. Women's organizations triggered the process. The Women's National Coalition (WNC) held meetings with over two million women, including minority women, and wrote a women's charter that included the demand that women's rights trump customary law (Women's Charter 1994, Article 9). A number of chiefs rejected these demands, most notably Chief Nonkonyana, who argued that, "as a traditional leader he did not want equality for women."¹⁴ When that objection floundered, the chiefs, banking on the support of the NP and their ability to deliver the votes of their subjects, insisted that a subsection be added to the Bill of Rights guaranteeing the preservation of customary law. This created the unprecedented possibility that customary law would be recognized in the Bill of Rights along with a clause guaranteeing gender equality.

Women's rights advocates determined to contest chiefly power and secure the primacy of legal equality for all South African women. They presented a series of submissions to the Technical Committees demanding that equality trump tradition. Characterizing the chiefs' tactics as a bid for domination over poor, rural, black women

¹⁴ Carmel Rickard, "Equality for Women? No Thanks," *Sunday Times*, 8 August 1993.

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and branding customary practices as patriarchal, women's rights advocates protested outside the negotiating chambers, wrote editorials, and debated chiefs on television and radio.¹⁵ During the penultimate debate in the negotiating assembly ANC delegate Stella Sigcau, daughter of a prominent chief, staunchly defended women's rights over cultural claims. She publicly disparaged polygamy and women's legal minority, declaring, "...we want to eradicate customs that are blatantly discriminatory."¹⁶

Women's rights advocates carried the day: the Bill of Rights explicitly recognized gender equality but not customary law:

Everyone is equal before the law and has the right to equal protection and benefit of the law (s 9 (1)) [and] the state may not 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 (s 9 (3)).

The equality clause in the South African Constitution (RSA 1996) thus promises all citizens legal equality and endorses affirmative action for members of disadvantaged groups.

Although the chiefs were on the defensive at the transition negotiations and lost ground during the writing of the final constitution, they won important concessions. The interim and final constitutions recognize cultural, religious, and linguistic differences. The interim constitution of 1993 recognizes chiefly power

¹⁵ Interview with Sheila Camerer, member of the NP Bill of Rights Technical Committee at the Multi-Party Negotiating Process, Johannesburg, July 11, 2003.

¹⁶ See for example, "Objects? No—Sigcau," *Sowetan*, November 28, 1993, and as quoted in Winnie Graham, "Women's Struggle Still Far from Over," *The Star*, December 7, 1993.

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and customary law. It granted chiefs the right to “continue to function...in accordance with the applicable laws and customs, subject to any amendments or repeals of such laws and customs” (RSA 1993, s 181(1)). Chiefly sovereignty was protected until municipal elections would be held in 2000, and both constitutions promise that “traditional leadership” and customary law will be “recognized,” albeit subject to the constitution, and that the courts must apply customary law where applicable (Constitutional Principle XIII; Ch. 12). The final constitution’s commitments to customary law were weaker: it used words like “may” instead of “shall,” and dropped the language of protection. Although customary law is subject to the provisions of the constitution, which includes the equality clause, constitutional commitments to culture and the chiefs meant that wherever gender equality clashed with customary law the former could only be secured proactively, through legislation, bureaucratic decision-making, and court cases.

The final constitution mandates institutions in the state to implement its commitments to multiculturalism and women’s rights (Ch. 9). It recommends provincial houses for traditional leaders, a national council of traditional leaders (s 212; Act 108), and the creation of the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities (RSA 1996, Ch. 12). A Commission on Gender Equality (CGE) tasked with evaluating bias in legislation and promoting legislation that advances women’s interests as mandated to counteract the power of the national council of traditional leaders (Albertyn, Goldblatt, Hassim, Mbatha, and Meintjes 1999, 93).¹⁷ Constitutional delegates approved these institutions expecting that

¹⁷ Additional gender institutions adopted by the post-apartheid state through 2009 included an Office on the Status of Women (OSW) and a Parliamentary Joint Monitoring Committee on the Improvement of the

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they would engage in multiculturalism versus women's rights conflicts. Indeed, chiefs contested the erosion of their power and demotion of customary law immediately. Thus, in the process of committing to high levels of support for unitary rights, South Africans generated multiculturalism and women's rights conflicts, that would continue to be fought out through constitutionally-mandated state institutions dedicated to advancing both sets of rights.

The Recognition of Customary Marriages Act

Did these high levels of support for both sets of rights generate and reproduce multiculturalism versus women's rights conflicts throughout the new democratic state? To answer this question I turn to the RCMA and investigate: 1) the extent to which branches of government and institutions tasked with advancing these two sets of rights were involved in the conflict, 2) the extent to which they essentialized these two groups and 3) the extent to which state elites identified and defined this conflict, prioritized the issues to be adjudicated, and explained the relationship between these two sets of rights. I find high levels of state elite involvement that cuts across all branches of government and includes all constitutionally mandated institutions tasked with advancing these rights; high levels of essentialism; and state elites dominating the process throughout. I begin with a brief overview of the RCMA.

The RCMA explicitly fulfills the goals of multiculturalism by recognizing customary marriage. The Act also takes important steps to improve the rights of women living in customary marriages. It unequivocally ends women's legal discrimination by

Quality of Life and Status of Women (JMC). The former was dissolved with the establishment of a Ministry of Women, Children, Youth and the Disabled, and the latter was reformed as a parliamentary committee for this ministry.

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stating both spouses have “equal status and capacity,” and guarantees women the right to own and inherit property by declaring that all customary marriages subsequent to the promulgation of the act are in community of property (RCMA 1998, s 6 and s 7(2)).¹⁸

Women have the ability to acquire and dispose of property, enter into contracts, and litigate under their own power. *Lobola* (a form of bridewealth) is permitted but not legally binding. The RCMA discourages formal and informal polygamy by requiring the consent of all spouses, prioritizing the wishes of individual women over their families, and valuing women’s wishes equally with those of men, but it does not outlaw them.¹⁹

Basic requirements of the Act ensured that its implementation would involve the other two branches of government. It requires the registration of customary marriage, a court application for additional spouses, a division of marital property at each subsequent marriage, and a court divorce to ensure a legal record of a couple’s marital status (RCMA 1998, s 7 and 8). The Act places these powers in the civil as opposed to customary courts. As Victoria Bornstein notes, the RMCA leaves “the courts with the task of protecting the interests of women” (Bornstein 2000, 562). To protect these interests, the Department of Home Affairs would first need to routinize customary marriage registration (which it did not do).²⁰ The RCMA thus drew the civil courts and Department of Home Affairs into the conflict.

¹⁸ Couples married before this date had to formally apply for a change in their marital status for this rule to apply to them. Analysts have argued this provision contravenes the equality clause in the constitution (Mameshela 2004; Zimmerman 2001).

¹⁹ Approximately 7 percent of African women reported living in formally polygamous marriages just prior to the passage of the RCMA (Budlender, Chobokoane, Simelane 2004, 17). Budlender et. al. warn statistics on South African marriage are generally unreliable, not least because the word for “woman” and “wife” in many South African languages is the same. Informal polygamy is common, as men married under customary marriage in rural areas migrate to urban areas for work and marry urban women under civil law while remaining married to their rural wives.

²⁰Confirmed by a number of informants, including Jennifer Williams of the Women’s Legal Centre, Cape Town.

The passage of the Act did not, however, shift the conflict out of the legislature. The RCMA does not mention the lack of magistrate courts in rural areas, does not mention funding, does not address the need for legal training of magistrates or lawyers, and does not discuss the need to educate those living in customary marriages about their new rights. The Portfolio Committee on Justice acknowledged these problems before the bill was passed. Although all of these problems have not been resolved, the legislature has added schedules as well as an amendment to the Act in 2009. Thus all three branches of government remain involved in addressing customary marriage.

Just as legislation extended this multiculturalism versus women's rights conflict to the courts and the bureaucracy, the process leading to its passage also drew these institutions into the conflict. Indeed, the impetus for the legislation began with the courts. Immediately after the transition to democracy conservative justices determined to secure the interests of whites as cultural minorities upheld discriminatory customary laws denying women maintenance, property, and inheritance rights, and protected a husband's marital power over his wife.²¹ The ANC dominated-government was faced with white justices upholding African customary law, echoing the apartheid era when whites political elites deliberately reified ethnic differences among blacks to justify the creation of separate homelands ruled by chiefs beholden to the NP. In response, the ANC claimed the mantle of multiculturalism. It charged the South African Law Commission (SALC) with establishing a committee to recommend public policy reform on customary law through a process of research and community consultation.²²

²¹ Professor Thandabantu Nhlapo chaired the committee. For a discussion of several conservative court decisions during the 1990s see Fishbayn (1999).

²² Advocates of women's rights had attempted to raise the issue of customary marriage earlier on the grounds that it violated women's rights, but to no avail (Albertyn et al 1999, 94-95).

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In 1996, before community consultation began, SALC's Project Committee on the Harmonisation of the Common Law and Indigenous Law (HCLIL) published an Issue Paper defining the problem and outlining priorities that became core elements in the RCMA. The Committee identified the conflict, defined it, determined the priority issues that the legislation would address and explained the relationship between multiculturalism and women's rights. Although the problem from the vantage point of the ANC was about political competition with the NP over the chiefs, it was politically advantageous for the Committee to define the problem as a multiculturalism versus women's rights conflict.

SALC argued that while aspects of customary marriage conflicted with international agreements and constitutional commitments to gender equality, it was important to be sensitive to the legacy of white rule that had maligned indigenous marriage practices. At the time of the democratic transition South Africa was the only country in the region that did not recognize customary marriage. Scholars and lawyers involved in the negotiations over customary marriage emphasized that their central purpose was to "restore dignity" to Africans whose marriages had been denied legal recognition since the colonial era.²³ Although the Issue Paper acknowledged that customary law did not accurately reflect current practices, was a product of colonial history, and had changed over time, SALC nonetheless justified the recognition of customary marriage on the basis of valued, long-standing practices, thus essentializing African culture (HCLIL 1996). The Paper referred to women's rights in the constitution and described women living under customary law but did not disaggregate the latter by

²³ Rashida Manjoo, "Developments in Women's Human Rights in South Africa," February 11, 2010, Charlottesville, Virginia. Cathi Albertyn, personal email communication.

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type of marriage or otherwise (it did so for men) (HCLIL 1996). This selective essentialism guided the Committee's priorities: customary marriage would be given full legal recognition, a ban on polygyny was deemed impractical, and lobola would be optional (HCLIL 1996). Once these decisions were made the Committee consulted with civil society about whether customary law should be recognized within a single or dual legal system.

After this first round of community consultation the Committee published a Discussion Paper recommending the recognition of customary marriage, a dual legal system, the continuation of polygyny, and raised for debate whether lobola should be retained as a legal practice or social convention (Albertyn et al 1999, 101). In short, the Paper sustained the Committee's original priorities. The final report and draft Bill the Committee submitted to the Minister of Justice in 1998 did the same (both agreed that lobola should be retained as a social convention). A number of government departments, such as the Departments of Land Affairs and Welfare and Population and Development responded to the Paper, confirming that the conflict pervaded a range of state institutions. The relevant constitutionally mandated bodies, the Commission on Gender Equality and the six Councils of Traditional Leaders, also provided feedback (103). The process leading to the draft Bill thus supports the first hypothesis: a high commitment to unitary rights was associated with high institutionalization of multiculturalism versus women's rights conflicts in the state. Did this institutionalization of the multiculturalism versus women's rights conflict also entrench minority women's domination?

The South African Law Commission's review process included two opportunities for community consultation and in both rounds advocates of women's rights involved minority women; thus minority women were not totally excluded from the process.²⁴ The ability of minority women to develop and convey their shared concerns to state institutions was nonetheless constrained as SALC had identified and defined the problem as well as the priority issues, women's rights advocates were working within that framework, and rural women's groups were in disarray.

Few organizations in civil society responded to the Committee's White Paper and Discussion Paper because "the technical, legal and academic nature of the debate" made it inaccessible (99). Only a handful of women's organizations lobbied SALC, and only two were minority women's organizations: the Rural Women's Movement and Hlomekhusasa (99, fn 97). The Centre for Applied Legal Studies (CALC) worked with the RWM to promote a uniform marriage law that would privatize traditional practices, discourage polygyny, and protect women and children in polygynous marriages.²⁵ This advocacy was informed by a small amount of research and several earlier workshops with RWM members indicating opposition to polygyny and support for inheritance reform and civil law marriages (99-100).

CALC was the only organization that consulted minority women's organizations and its efforts are praiseworthy. However, like many groups, the RWM collapsed after

²⁴ Chiefs also participated in the SALC review. Their views were canvassed at workshops, a round table, and through responses to SALC discussion papers. Most supported the legal recognition of customary marriage but were "suspicious" of a number of proposed reforms, including their loss of adjudicatory power to magistrate courts. They argued women's rights were emblematic of alien Western values and opposed equality between spouses (Albertyn et al. 1999, 103).

²⁵ Likhpatha Mbatha, a member of CALC who attended a number of meetings with minority women, recalls that at one event a large group of women enthusiastically chanted their demands to end polygyny while a small group of women in polygynous marriages huddled in the background. Her conversation with this group informed the position taken by women's organizations on polygyny. Interview with Likhpatha Mbatha, Gender Research Project, Johannesburg, July 9, 2003.

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1994 when its leader, Lydia Kompe, became a Member of Parliament.²⁶ The remnants of the organization provided a small space for professional women's rights advocates to engage with women living under customary law and develop a plan for action. The RWM engaged in consciousness-raising, prepared position statements for the smattering of provincial workshops organized by SALC, and conveyed these views to the Committee with the legal assistance of CALS. This process does not match the process exemplified by the vibrant coalition of indigenous women in Chiapas. CALS and the remaining RWM activists not only lacked the extensive organizational capacity that indigenous women in Mexico built, they lacked the political opportunity that an uprising brings. Hence the RWM and CALS worked within a multiculturalism versus women's rights framework delineated by state elites who used the logic of unitary rights to redress a political problem.

In South Africa, unitary rights led to the institutionalization of multiculturalism versus women's rights conflicts in the state. State elites worked with chiefs and professional advocates of women's rights to determine what rights women living under customary law would have. In short, the impressive unitary rights granted by the new constitution were insufficient for minority women, who lacked political influence over public policy. Absent substantive political rights, CALS worked with a small group of minority women to convey their priorities to SALC. Although the core elements of the draft Bill remained unchanged, and CALS reports that minority women were unhappy that the Committee endorsed a dual rather than single legal system, SALC did not ignore these women entirely. The draft Bill included two recommendations made by CALS: that customary marriages should be in community of property and that the courts should

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divide the matrimonial estate whenever a man took an additional wife (104). Together, CALS and the RWM ensured that minority women's marginalization in the new democracy was not total.

Conclusion

To be completed.

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Figure 1. Intersectionality and the State

