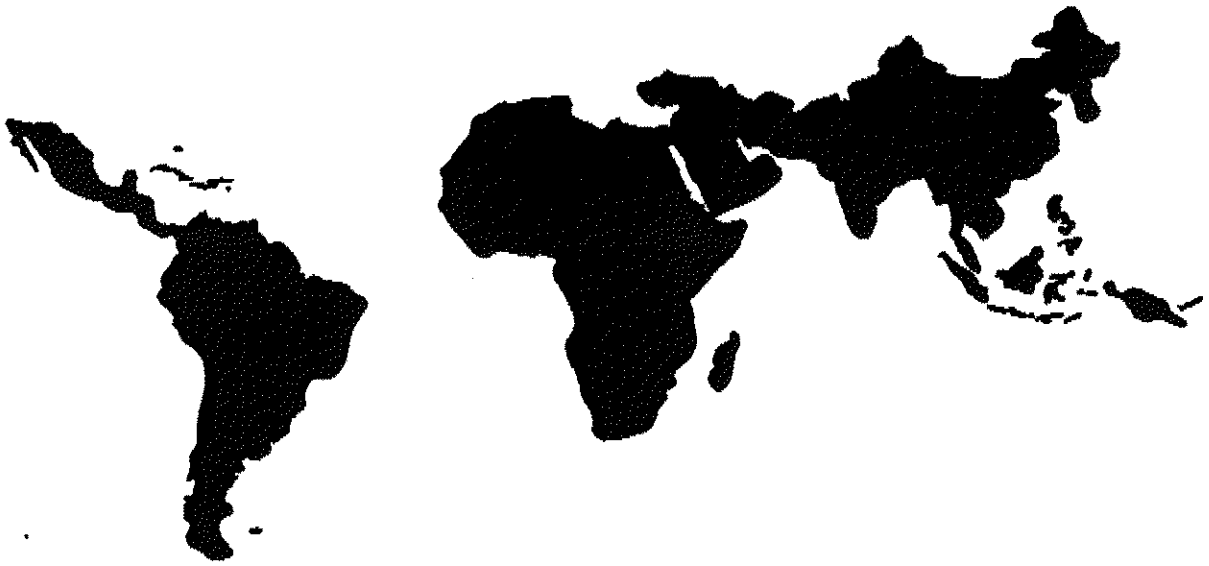
THIRD WORLD LEGAL STUDIES—1994-95

WOMEN'S RIGHTS AND TRADITIONAL LAW: A CONFLICT



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INDIGENOUS LAW AND GENDER IN SOUTH AFRICA: TAKING HUMAN RIGHTS AND CULTURAL DIVERSITY SERIOUSLY

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I. Introduction

The history of indigenous law in South Africa has been one of neglect, limited recognition and marginalization. Describing the phenomenon, TW Bennett says:

> It would be generous to attribute the want of attention to an unconscious neglect; it is more probably the result of a deliberate policy to exclude Africans from full participation in the South African legal system![1]

Both the colonial and settler states intervened in indigenous law only when such intervention was deemed necessary to control the African population or to advance some segregationist policy.[2] In addition to official inattention, indigenous law was shunned, ironically, by liberal anti-apartheid circles precisely because of its association in their minds with apartheid politics. This was so because when the state was not ignoring indigenous law, it was actively corrupting it (or dishonestly enlisting it as a justification) for its own separatist ends. The consequence of these factors was that the impression was created that South Africa has one system of "real" law—the Roman-Dutch and English common law—and some vaguely defined and unimportant code of conduct popular with the "natives." This attitude found its way into

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[1]TW Bennett, *A Source Book of African Customary Law for Southern Africa* (1991) Juta & Co, Cape Town, Preface, V.

[2]See for example the *Black Administration Act 38 of 1927* where, in addition to setting up a court hierarchy for African litigants, there were other provisions criminalizing certain types of conduct.

the law schools as well, where indigenous law is likely to be relegated to the "phantom zone" in the curriculum, as DP Visser[3] describes it.

The *Native Administration Act 38 of 1927*[4] consolidated the different approaches adopted by the provinces towards indigenous law and set up the "dual system" of laws that persists to the present day. The Act created a separate system of courts for Africans;[5] it established the Governor-General as "Supreme Chief of all natives in the Union"[6] and gave him authority to appoint and demote traditional leaders,[7] to deal with land[8] and to create tribes.[9] The Act also regulated the marriages of Africans, carefully distinguishing between a "marriage" (meaning a civil marriage) and a "union" (referring to African nuptials, not considered to be real marriages).

1986 saw the abolition of the Native Commissioner's Courts,[10] which had been established by the 1927 Act, in favor of a unified court hierarchy in which the Chiefs and Headmen's Courts (also recognized in the 1927 Act) now occupy the bottom rung in the legal hierarchy. In the meantime indigenous law had been codified in KwaZulu and Natal.[11] The *Law of Evidence Amendment Act 45 of 1988*,[12] provided that indigenous law was applicable in all the courts of the land, provided it was easily ascertainable.[13]

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[3]DP Visser "The Role of Legal Education in the Internal Conflict of Laws" in AJGM Sanders (ed) *The Internal Conflict of Laws* (1990) Butterworths Durban, 68.

[4]Now the *Black Administration Act*. See note 2 *supra*.

[5]Chapter IV.

[6]Section 1.

[7]Section 2(8).

[8]Chapter 3.

[9]Section 5(1)(a): "The Governor-General may define the boundaries of the area of any tribe and may from time to time alter the same and may divide any existing tribe into two or more parts or amalgamate tribes or parts of tribes into one tribe or constitute a new tribe, as necessity or the good government of the natives in his opinion require."

[10]By the *Separate Courts for Blacks Abolition Act 34 of 1986*.

[11]By the Natal and KwaZulu Codes: *Proc R151 of 1987* and *Act 16 of 1985 (Z)*, respectively.

[12]Section 1(1).

[13]This is an open invitation to apply the "official" version of customary law. See M Chanock, "State, Law and Culture: Thinking about 'Customary Law' after Apartheid," 1991 *Acta Juridica* 53.

With the introduction of the interim constitution[14] the situation is set to change drastically. The state can no longer ignore indigenous law which is recognized explicitly in the constitution. Such recognition is subject to other provisions of the constitution, especially those guaranteeing fundamental rights.[15] Thus in section 33(2) and (3), which set up the relationship between the fundamental rights and "any law" including indigenous law, it is provided that indigenous law may not limit a fundamental right; on the other hand the existence of a fundamental right does not imply the denial of any other rights or freedoms conferred by indigenous law "to the extent that they are not inconsistent" with Chapter 3. Section 35(3) stipulates that in interpreting indigenous law the courts should have regard to the spirit of the bill of rights and in section 126(1) provincial legislatures are given concurrent competence with Parliament to make law with regard to "indigenous and customary law."[16]

The explicit representation of the interests of traditional leaders in the constitution underpins the importance of indigenous law. Section 181(1) and (2) recognize traditional authorities which observe "a system of indigenous law," and renders that system subject to "regulation by law"; Section 182 entitles traditional leaders of communities "observing a system of indigenous law" to *ex officio* status in local government. Ensuring that such arrangements will be carried over into the final constitution, Constitutional Principle XIII[17] read with section 71(1)(a) stipulate that indigenous law (subject to fundamental rights and legislation) must be recognized together with the institution of traditional leadership based on such law. In addition,

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[14]Passed in 1993 as the *Constitution of the Republic of South Africa Act No. 200 of 1993* the interim constitution came into effect on 27 April 1994. It stipulates that a final constitution must be adopted by May 1996. The task is being undertaken by the 490 members of the House of Assembly and the Senate, sitting as the Constitutional Assembly.

[15]Chapter 3 contains a catalogue of the classical freedoms and entitlements of a democratic society including the rights to life, human dignity, freedom of conscience, religion, belief, opinion, expression, association, movement. This "bill of rights" and the constitution in general are to be enforced by a Constitutional Court established in terms of section 98 of the Constitution.

[16]The words "indigenous" and "customary" may be used interchangeably, but see below.

[17]Schedule 4 of the Constitution. The Constitutional Principles represent the political agreements concluded during the constitutional negotiations. In terms of these agreements the Constitutional Assembly in drawing up the final constitution cannot depart from the thirty-four Principles set out in the Schedule. They are the negotiated guidelines prescribing the form of the final constitution, are covering issues ranging from the shape of the civil service to the system of elections.

there is language in the interim constitution which protects the right of South Africans to participate in the language and culture of their choice.[18]

The cumulative effect of these constitutional provisions is clear. Of the three options theoretically open to the constitution-makers: to entrench customary law, to recognize customary law, or to abolish it,[19] the path that was followed was to recognize customary law in fairly strong terms. It is this author's contention that in view of Constitutional Principle XIII and the amendments to section 126, such recognition virtually amounts to entrenchment without requiring special majorities for alterations to the *status quo*.

The indigenous "package" thus has a very strong presence in the interim constitution; moreover, it has a guaranteed life in the final constitution. This is so despite language in the interim constitution subjecting indigenous law and culture to "fundamental rights," to "regulation by law" and to "values underlying an open and democratic society based on freedom and equality."[20] Indeed that is where the problem lies: the constitution does not provide any guidelines for the resolution of conflicts, should this clearly recognized system clash with the countervailing modern values found in the same document, especially in the bill of rights.

Many commentators have pointed out that the equality clause is set for a head-on conflict with indigenous law.[21] Equality and non-discrimination are specifically enshrined in section 8 of the Constitution in the following terms:

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[18]Thus section 31 acknowledges the right of people to their "cultural life"; Constitutional Principle XI (read with section 71(1)(a) requires the final constitution to promote and protect the diversity of language and culture; and the new Constitutional Principle XXXIV (inserted by *Act 2 of 1994*) acknowledges "the notion of the right of self-determination by any community sharing a common cultural and language heritage" (subject only to the right of "South African people as a whole" to self-determination).

[19]See C. Albertyn "Women and The Transition to Democracy in South Africa" 1994 *Acta Juridica* 39-63 at 57-60. Traditional leaders lobbied to entrench customary law, while women's groups advocated the abolition of the customary law.

[20]See Schedule 4 of the Constitution.

[21]See, for example, T.W. Bennett "Human Rights and the African Cultural Tradition" in W. Schmale (ed.) *Human Rights and Cultural Diversity*, Keip Publishing, Goldbach, Germany (1993) 269; T.W. Bennett *Human Rights and African Customary Law Under the South African Constitution*, Juta and Co., Cape Town (1995) 80; F. Kaganas and C. Murray "The Contest Between Culture and Gender Equality Under South Africa's Interim Constitution," *Journal of Law and Society* (1994) 409.

> (1) Every person shall have the right to equality before the law and to equal protection of the law.
> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture or language.

Given South Africa's history of division and cultural diversity, most challenges before the Constitutional Court are likely to arise from this section. This will be an unprecedented reckoning of indigenous law within the context of a written constitution and a bill of fundamental rights. The exercise will be a new experience for South Africans: courts, lawyers, policy makers and legislators will require guidance as to how to proceed. It is to that effort that the present paper seeks to contribute. But before that task is undertaken, closer attention needs to be paid to the phenomenon of indigenous law itself.

II. Indigenous Law: An Attempt at Definition

Sometimes termed customary law, indigenous law is the system of norms which governs the lives of millions of African people, particularly (but not exclusively) in the rural areas. It is a custom-based system and its legitimacy lies largely in its claims to a direct link with the past and with tradition. Nowadays it is accepted that indigenous law has undergone profound changes through various kinds of interaction with European culture and with both the colonial and apartheid states. The process has led to the growth of "official" customary law which consists of rigid rules, embedded in judicial decisions and statutes, which have lost the characteristics of dynamism and adaptability which distinguished African custom.

Iain Currie summarizes the process well when he notes:

> [I]ndigenous law had been corrupted into "customary" law, the product of a long history of collaboration between colonial administrators and indigenous elites and not the lived "folk" law it claimed to be. Translation, codification and the application of systems of precedent had created an ossified body of legal rules,

> reflecting the positivist proclivities of the institutions and personnel charged with the supervision of indigenous law.[22]

The important point about the participation of African elites in this process is also made forcefully by Martin Chanock, who writes of the "new" customary rules in these terms:

> ...these rules represented a staking out of positions by a particular section of African societies supported by the state. Customary law not only embodied a view of a dominant portion of African societies as to what the operative norms were, but also became, when transformed into enforceable rules of positive law, increasingly less "customary" in the face of economic and social transformation.[23]

African people, and African women in particular, were to feel the effects of these transformations in gender relations as well. Caught between the pressures exerted by colonialism on the pre-capitalist "sex-gender system"[24] and the latter's resistance of such pressures women came off the worst. Cherryl Walker noted:

> The incorporation of the indigenous people into the new social order involved their active engagement with the invasive forces of domination, as women and men struggled to defend their own interests and wrest what they could from the new opportunities and constraints.[25]

She concludes that in the political and economic transformation of the region "the organization of gender constituted a critical battleground:

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[22]Iain Currie, "The Future of Customary Law: Lessons from the Lobolo Debate," 1994 *Acta Juridica* 146-168 at 146.

[23]Chanock, M. op cit Note 13, 55.

[24]Cherryl Walker, "Women and Gender in Southern Africa to 1945: an overview" in C Walker (ed), *Women and Gender in Southern Africa to 1945* David Philip, Cape Town 1, citing Gayle Rubin's definition of the sex-gender system as "the set of arrangements by which a society transforms biological sexuality into the products of human activity and in which these transformed sexual needs are satisfied."

[25]*Ibid.* 2.

here not only men and women confronted each other, but also the colonizers and the colonized."[26]

The "customary" law which emerged was a customary law which had been absorbed by the state. "The state's production of a customary law was a fundamental and powerful intervention in the way in which African life could and would develop under white rule," says Martin Chanock, who concludes:

> African tribal authorities and family heads in the countries around South Africa, and inside it, needed the weight of state power to enforce the customary family law. *Without this power the practices of young men and women, of divorcees and widows, all of whom struggled against aspects of the maintained patriarchy, would be clearly visible as custom.*[27]

Because of the need in pre-capitalist societies for the "accumulation of people, rather than the accumulation of things,"[28] the control of women and their fertility assumed central importance. Characteristically, the vehicle for such control was marriage.

> [M]en exchanged cattle for women...[an exchange which]...was, however, conditional on the bride remaining obedient to her husband and proving fertile in the marriage. "[O]bedience" meant that the wife had to fulfill her function as an agricultural producer within her husband's homestead: "fertility" meant that she had to produce children whose labor would, in time, be used for the benefit of the homestead.[29]

Jeff Guy views this "cycle of production and reproduction"[30] as being at the heart of the region's pre-capitalist societies.

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[26] *Ibid.*

[27] Chanock op cit n.13, 55 (emphasis added).

[28] Jeff Guy, "Gender opression in Southern Africa's precapitalist societies" in C Walker op cit n.24 at 37, describing the situation in societies of simple technologies where the labour, mainly of women and juniors, provided not only day-to-day sustenance but also protected the elderly against old age poverty.

[29] *Ibid.* 39.

[30] *Ibid.*

III. Customary Law and Gender: Identifying the Problem

Guy confirms the view that the overriding value in the African family is reflected in the non-individual nature of marriage, sometimes called the collective or communal aspect of the marriage relationship. This notion embodies the idea of marriage as an alliance between two kinship groups for purposes of realizing goals beyond the immediate interests of the particular husband and wife. This does not mean that the two parties are unimportant, they are, but only as the point at which the two families, lineages or clans are joined for purposes which have community-wide significance.

The goals aimed at by this type of marriage can be summarized as procreation and survival. Both of these goals were essential for the well-being of the larger group in pre-industrial society; wives and children were an economic asset, and the rules that developed around them were part of a survival strategy. It is clear therefore, that the interests of the group were more important than those of the individual. However, in patriarchal societies, group interests are framed in favor of men, hence the first indication why inequality is such an enduring part of African customary systems.

It is in the field of family relations in which Africans construct the foundations of their social lives. Radcliffe-Brown's statement is as valid today as it was in 1950.

> For the understanding of any aspect of the social life of an African people—economic, political or religious—it is essential to have a thorough knowledge of their system of kinship and marriage.[31]

If that system masks inequality under the guise of group interests, women and children (lacking a say in the articulation of those interests) are certain to be disadvantaged.

Because marriage is a tool in service of purposes much broader than the immediate interests of the couple, there are certain

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[31] AR Radcliffe-Brown, "Introduction" in AR Radcliffe-Brown and D Forde (eds), *African Systems of Kinship and Marriage*, Oxford University Press, London (1950) 1.

consequences that flow from this arrangement, which can be illustrated by some examples:

(i) The need to procreate leads to a complex of rules relating to barrenness. The sororate, for instance, covers the situation where a younger sister is required to take the place of a wife who is unable to produce children. The levirate may be invoked in the case where a man dies before he has fully exploited the procreative capacities of his wife: he can have children fathered for him (more properly, for his family) by a relative.[32]

(ii) The same view of marriage countenances child betrothal and "forced marriage." Unfortunately, it countenances attitudes towards nubility which sometimes clothe the taking of sexual liberties with the very young with some measure of acceptability. The respect-for-elders ethic and the ability of the perpetrator to plead customary rights such as his preferential claim to young sisters and cousins of his wife, combine to render this issue notoriously resistant to penetration by the "white man's laws" of sexual propriety.[33]

(iii) It may also be argued that a marriage where most important aims are external to the parties involved, where men acquire rights over women and children but not vice versa, and where these rights are secured by the movement of cattle, has a direct bearing on the perpetual minority of women. This in turn surely has a bearing on chastisement and physical violence in general, the position of widows, and the sometimes dehumanizing bereavement rituals and mourning taboos to which they may be subjected.

Therefore, it is family law that has to be scrutinized. But notions about the family are so deeply embedded in African society that one must make the distinction between pre-colonial customary law and what is applied today, sometimes called "official" customary law.

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[32]Nhlapo, T. *Marriage and Divorce in Swazi Law and Custom*, Websters, Mbabane, Swaziland (1992) 76.

[33]Nhlapo, T. "The African Family and Women's Rights: Friends or Foes," *Acta Juridica* (1991) 135 at 138. On the effects of 'respect for elders' or consent to sexual intercourse by young girls, see A.K.A. Armstrong "A Note on Several Aspects of Rape in Swaziland," 19 *Comparative and International Law Journal of Southern Africa* (1986) 474.

A. Consequences of "Official" Customary Law

(1) Patriarchy

African law and custom had always been pervaded by the principle of patriarchy, the superior status enjoyed by all senior males in society. With the distortion of some customs and practices over the years, rules were entrenched which affirmed this principle, even where the original custom had either been relatively egalitarian or restricted by checks and balances in favor of women and the young.[34]

(2) Strengthening the Public/Private Divide

Distorted customary law also solidified the separation between the two spheres of life, public and private. Enthroning the head of household as the only true person in law, the holder of family property and civic status, rendered the children, wives, unmarried sons and daughters in his household invisible in a social and legal sense. This facilitated the division of labor which identified men with the public sphere (chieftainship, politics, judicial work) and women with the domestic sphere.[35]

(3) Women as "Outlaws"

Legislating these misconstructions of African life had the effect of placing women "outside the law." Identifying the head of household as the only person with property-holding capacity without acknowledging the rights of wives, for instance, to security of tenure on (and use of) land was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when in the pre-colonial context everybody under the household-head was a minor (including unmarried sons, and even married sons who had not yet established a separate residence), had a profound and deleterious effect

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[34]Armstrong, Alice et al "Uncovering Reality: Excavating Women's Rights in African Family Law," 7 *International Journal of Law and the Family* (1993) 314 at 324-8.

[35]*Ibid.*

on the lives of African women. They were deprived of the circumstances in which the subtle interplay of social norms enabled them to manipulate the rules to their advantage, and yet they were not brought within the protections of the formal legal order. They became truly "outlaws."[36]

Therefore, even as one views with sympathy African notions of family (an institution noted for its traditional solidarity and supportiveness) one must realize that contemporary reality favors a certain cynicism about what purports to be customary law today. Protection from these distortions masquerading as African custom is imperative, especially for the weaker members of society, namely women and children.

Thus I have outlined only broad categories, to show the nature of the problem in the abstract. Any enumeration of specific problems relating to women and customary law would include:

- land tenure
- administrative justice
- chiefs' courts
- freedom of movement
- property-holding capacity
- political rights

Family law alone generates a vast array of problem areas, which include:

- marriageable age
- grounds for divorce
- lobolo
- polygamy
- legal capacity
- personal status
- maintenance

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[36]May, Joan, *Zimbabwean Woman in Customary and Colonial Law*, Mambo Press, Gweru, Zimbabwe (1983) 40. Citing the dictionary meaning of "outlaw" as "a person deprived of the protection of the law." May observes: "The far-reaching social changes since the beginning of the colonial period...have to a large extent destroyed the flexibility of the village system, and women now find themselves as virtual "outlaws" without formal or judicial rights in a formal society which puts these at a premium."

- custody and guardianship

The primary problem for women is that customary law, as it functions today, is fundamentally incompatible with section 8 of the interim constitution—the equality and non-discrimination clause.[37]

IV. Customary Law and the Bill of Rights: What Next?

The points raised earlier demonstrate that customary law poses some problems for gender equality; what legal system does not?[38] In the South African constitutional context, the problem is two-fold: the operation of customary law practices in a society where equality and non-discrimination are guaranteed rights, and the recognition of cultural diversity itself as a protected value in the constitution. Therefore practices and rules that contradict the equality argument may simultaneously stake a strong claim to protection under the culture argument. The feminists and the traditionalists are vindicated: the fears that had mobilized each group during the constitutional negotiations were well founded.

Because the constitution offers no guidance as to how these conflicts might be resolved, we have to consider a range of possible approaches. One set of alternatives, exemplified by the work of Christina Murray and Felicity Kaganas,[39] and Cathi Albertyn,[40] would have explicit language in the Constitution stating that in the

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[37]It may be incompatible with other provisions as well, but whether it survives or dies will depend largely on the outcome of the "one-on-one" clash with the notion of equality.

[38]"The Roman-Dutch law has been bedevilled by the marriage in community of property for many years. In this type of marriage the husband acquired the marital power over the person and property of his wife, with devastating results on her *locus standi in judicio*, her legal capacity to contract and her ability to make decisions in relation to property. The last vestiges of this power were removed only recently, with the passage of the *General Law Fourth Amendment Act 132 of 1993* and even so, doubts remain about some of the remnants of the marital power. See June Sinclair "Family Rights" in Van Wyk *et al* (eds) *Rights and Constitutionalism* (1994) Juta Cape Town 520-21. The point is that even when criticism of the marital power was at its most vociferous, no suggestion was ever made that the whole of Roman-Dutch law should be abolished as a result. The problem was felt to be one which could be solved once the political will to enact the necessary legislation was there. It is a point worth bearing in mind in addressing calls for the abolition of customary law.

[39]"The Contest Between Culture and Gender Equality Under South Africa's Interim Constitution" (1994) *Journal of Law and Society* 409-431 at 417.

[40]"Women and the Transition to Democracy in South Africa," 1994 *Acta Juridica* 39-63 at 59-60.

event of a conflict between culture and the equality clause, the latter should prevail. In the absence of such language, Kaganas and Murray argue convincingly that "the Constitution as a whole is founded upon and informed by the principle of equality"[41] and that "the equality provision should override cultural claims and...cultural practices should be subject to it."[42]

An opposing school of thought, reflecting the traditionalist stance adopted by chiefs at the Multiparty Negotiating Process, still hopes for a final constitution in which customary law will operate outside of the bill of rights. The chances of such a provision being inserted into the constitution are slim. At the other extreme, calls for the total abolition of customary law are occasionally heard.[43] The whole debate is overheated due to the strong emotional waves that are generated by discussions of culture. The following summary by T W Bennett encapsulates this:

> By implicitly recognizing customary law, and at the same time prohibiting gender discrimination, the Constitution has brought about a head-on confrontation between two opposed cultures—admittedly a confrontation that has long been gathering force. Because African culture is pervaded by the principle of patriarchy...the gender equality clause now threatens a thorough-going purge of customary law. And it is tempting to dramatize this threat, to portray human rights as the harbinger of western neo-imperialism and to represent customary law as the shield of an endangered indigenous culture. Such imagery encourages one to think that conflicts will be overwhelming and irreconcilable; but if a working relationship between conflicting norms is to be found, a less polemical approach must be found.[44]

It is the attempt to find that "working relationship" which takes up the rest of this paper. For the attempt to be meaningful, it is important that it should shift the terms of the debate away not only from the polemic described by Bennett, but also from a mindset which seems to

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[41]Op cit n.39, 416.
[42]*Ibid.* 417
[43]See n.47 below.
[44]TW Bennett, "The Equality Clause and Customary Law" (1994) 10 *South African Journal of Human Rights* 122-130 at 123.

be no different today from that which characterized the colonists and missionaries of over a century ago.[45]

V. Customary Law and Human Rights: Reconstructing the Debate[46]

It is possible to detect in the present debate some worrying tendencies which apparently seek to seize the opportunity offered by constitution-making to entrench a value system based on "universal" norms even in the face of strong misgivings from ordinary South Africans.[47] This is a trend that has the potential for greater social division than is commonly realized. I have written elsewhere[48] that it would be a mistake in the South African context to allow the debate to deteriorate into "European" versus "non-European" finger pointing. Whilst this may be inevitable in view of our grim history of racial hostility, the post-apartheid reality is that it would be shortsighted to let it happen.

There are good reasons why South Africans must modernize; there are equally good reasons why many African people expect their culture to receive more, not less, respect in the new South Africa. South Africans should therefore embark upon the renegotiation of a new

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[45]Martin Chanock op cit n.13, 53 makes the point that there is a striking similarity between the present debate over customary law and the controversies of the "great turning-point" of 1927. The point is echoed by Iain Currie op cit n.22, 152, who argues that "there is every reason to expect that current debate will take the shape of past controversies."

[46]The phrase is inspired by Chanock's section, *ibid.*, entitled "Constructing the Debate."

[47]The cautious tone of the statement is simply dictated by the fact that this is not an easy allegation to establish by hard evidence. Personal experiences as a technical adviser in the service of the Constitutional Assembly (a task which involves total immersion in the submissions sent by private individuals, political parties and other organizations), and a general monitoring of trends in the media (editorials, letter columns, radio and television talk shows) leave one with a distinct impression of a society visibly beginning to divide along lines determined by allegiance to one or other of the cultures commonly described as "Western" and "non-Western." The tone of the arguments suggests a growing impatience on the part of the Westerner with the non-Westerner's slowness in embracing "progressive" norms. Such attitudes have been in evidence mostly in the debates about abortion, corporal punishment in schools, traditional leadership and marriage laws.

[48]T Nhlapo, "Culture and Women Abuse: Some South African Starting Points" (1992) 13 AGENDA 5-13; "Women, Culture and a Bill of Rights in South Africa" in V Maphai (ed) *South Africa: The Challenge of Change* (1994) SAPES Books, Harare 184-201.

value system; such an exercise demands that the competing cultural packages start out as at least notionally equal.

Over the years African values in mainstream society have been conspicuous by their absence.[49] The reasons have had more to do with ignorance, arrogance and paternalism on the part of the colonial and, later, the apartheid authorities than with any inherent moral defect in the indigenous world-view. The latter is simply a world-view born of a particular set of historical, economic, political and environmental circumstances and is capable of adaptation and development.

The political danger that lurks in the current debate is the possibility of a backlash from some African quarters, which might take the form of withholding recognition and therefore legitimation of both the process of constitution-making and its substance.[50] A blind and hegemonic push for uniformity around a non-African standard would simply fuel resentments that have been simmering since colonial times.

There is a way out of the dilemma. What is required is an imaginative fusion of South Africa's diverse[51] world-views with the aim of enriching the social, political and legal culture. In that fusion, a clear commitment to human rights (as enunciated in the constitution) must be matched by a demonstrated[52] commitment to cultural diversity as well. This can be achieved when we learn to call for the abolition of certain cultural rules and practices only when they are

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[49]From the overwhelmingly wide usage of English Christian names to the lasting popularity of American imagery and art in the media and in entertainment, South Africa has been and continues to be very Westernized.

[50]There is already evidence that the largest organization of traditional leaders, CONTRALESA, is unhappy not only at the speed with which the government is pushing towards local elections in rural areas, but also at the failure to set up the Council of Traditional Leaders as provided in the Constitution. This is the body that should be ratifying all decisions taken at the Constitutional Assembly regarding traditional leaders: that it does not yet exist puts a question mark over the decisions so far taken.

[51]In a paper on African customary law it obviously makes sense to emphasize the African world-view. It must be pointed out, though, that Muslim, Hindu and other cultural and religious interests have exactly the same claims to consideration in the constitution-making process. It is hoped that the case-study chosen to illustrate this paper's proposals, the question of polygyny, will highlight issues that go beyond African customary law.

[52]The public relations benefits of being seen to take African cultural practices seriously should not be underestimated. Since the processes of modernization in the past have not showed much respect for the African viewpoint, today's reformer needs to demonstrate a break with that old tradition. This is what I have referred to elsewhere as "disinfecting the platform from which we wish to launch social criticisms." AGENDA op cit n.40, 11.

harmful and not merely *unfamiliar* or *inconvenient*. I will attempt to make the point by using polygamy as an illustration.

VI. Living with Polygamy[53] in a Non-Sexist Democracy

From the earliest times of contact between Europeans and indigenous African societies, the former made clear their abhorrence of polygamy.[54] Believed to be incompatible with the Christian form of marriage, polygamy was condemned by missionaries and colonial officials alike. An 1872 Commission on the Laws and Customs of the Basotho[55] heard the following evidence from missionaries:

> Cattle-marriages mean polygamy, they mean systematic sensualism and immorality.[56] Take them away, and the whole fabric is broken in pieces, —the native heathen custom becomes meaningless, —polygamy becomes impossible, —woman is emancipated, —virtue, truth and honor cease to be empty names.... If we wish to reconstitute the family on the Christian mode...there must be no compromise with this embodiment of evil, this traffic in souls, this chain of bondage....

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[53]This is an unnecessarily "high risk" example: one could have chosen a subject such as *lobolo* (bridewealth) which is attended by far less emotion and passion to illustrate the point. The justification is that it is precisely the "high risk" example which pushes the argument to its limits. Urging an accommodation of polygyny among people who abhor the institution will at least test how close the society is to taking cultural diversity seriously.

[54]We confine our discussion to polygamy, the type of marriage where a man marries more than one woman; polyandry, the system allowing a woman to have more than one husband, is not addressed except in passing.

[55]The Commission was set up by the Cape Government; its deliberations are cited in SM Poulter *Family Law and Litigation in Basotho Society* (1976) Clarendon Press Oxford 65.

[56]It is sometimes not fully appreciated that, in European eyes, the most objectionable aspect of polygny was not gender inequality in the abstract: it was the "easy sexual access" or "promiscuity" that was presumed to be the reason for existence of the institution. In short, polygyny *embarrassed* white people, many of whom were steeped in the repressed sexual morality of Victorian England where, historians tell us, it was common to cover the legs of tables and chairs in order to protect the mind from salacious thoughts. Cherryl Walker, decrying the dearth of research into how the sex-gender system of the nineteenth century was fashioned, noted: "The interaction of the values imported mainly (but not exclusively) from Victorian England with those of already established Dutch-speaking communities, in a backward, racially stratified society, remains an under-researched subject." *Op cit*, n.21 at 11. Under these circumstances it is genuinely difficult to take European criticisms of polygyny from a *moral* standpoint seriously.

Welsh[57] cites the views of one colonist who believed that polygamy

> destroys all love between man and wife—it encourages war as a means of procuring cattle to pay for the panders to their lust[58] and idleness; and by a fearful destruction of life, brings about an inequality of the sexes.

Others describe polygamy as a gross evil, akin to "habitual murder or slavery."[59]

Contemporary writers, while less ethnocentric in attitude and strident in tone, remain uneasy about the institution, arguing that it reflects obvious inequality between men and women. Alternatively, they assume its unsuitability in a "modern" democratic state is self-evident, and, consequently, that it cannot survive a bill of rights. Albie Sachs[60] who typifies this view, favors the "universalization of certain family-law concepts, permitting a broad degree of freedom to pursue religious and cultural practices, but laying down certain common norms," one of which should be monogamy.

Torquil Paterson,[61] writing on the difference between a common law marriage and a customary "union," shares Sachs' view. Applauding a trend in judicial decisions which moved the two kinds of marriage closer together he concludes:

> If customary unions are to be recognized, then a *quid pro quo* will be necessary to ensure that customary unions conform to some of the formalities and legal incidents of the common law marriage, particularly with respect to polygamy.

He gives no reason for this conclusion except that it

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[57] D Welsh *The Roots of Segregation: Native Policy in Colonial Natal 1845-1910* 2ed (1973) OUP Cape Town 69.

[58] It is interesting to note that, again, lust appears before inequality in the list of objections. See n.48.

[59] Cited in A Hastings *Christian Marriage in Africa* (1973) Holcen Street Press London 15.

[60] See, for example, "The Constitutional Position of the Family in a Democratic South Africa" in A Sachs. *Protecting Human Rights in a New South Africa* (1990) OUP Cape Town 64 at 72.

[61] "Is there still a difference between the common law marriage and the customary union?," 109 (1992) *South African Law Journal* 21.

> would be detrimental to the law if too many exceptions to the common law are created so as to cloud the underlying reasons for not recognizing customary unions.

These views are not without their defects. They range from the unquestioning belief of the missionary and the colonist in the superiority of Christian values and nineteenth century West European sexual morality, to the modern reformer's failure to explain *why* monogamy is necessarily superior to polygamy. The problem of the former group was racism; the problem of the latter is an incautious human rights advocacy sometimes based on unwarranted assumptions.[62]

A preferable approach is the one adopted by Felicity Kaganas and Christina Murray in their important article *Law, Women and the Family: the Question of Polygamy in a new South Africa.*[63] Proceeding from an explicitly feminist standpoint, the authors set out to analyze the institution of polygamy to find out whether it is "fundamentally incompatible with a democratic social order and, more specifically, inevitably...oppressive to women."[64] They analyze the many reasons given for the belief that polygamy denies equality to women and find that the only one that is really about polygamy is the right of the husband to [unilaterally] introduce more wives to the household, while the wife cannot introduce more husbands. In other words, the man "has many opportunities to marry while each wife may have only one, shared husband."[65]

Kaganas and Murray dismiss the argument that "there is something inherently unequal in a family structure which comprises one man and many women" as dubious,[66] pointing out that the "apparently symmetrical relationship of one woman to one man" may not

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[62]See T Nhlapo, "Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lessons from the South african Constitutional Debate," *International Journal of Law and the Family* 9 (1995) 208-225 on the problems surrounding human rights advocacy in non-Western cultural contexts.

[63](1991) *Acta Juridica* 116-134.

[64]*Ibid.* 119.

[65]*Op cit* n.55, 127. Many of the other objections relate to the institution of customary marriage in general.

[66]*Ibid.*

necessarily be the *only* formula guaranteeing equality within marriage.[67] As for the "one man, many women" format being a violation of the right to equality they comment: "But one can hardly suggest seriously that feminist objections to polygamy would be addressed if women were given the same opportunities as men to accumulate spouses."[68]

Their conclusion that,

> The treatment of women as property, sexual stereotyping and domination are not limited to polygamy, nor are they practices that can be shown to be inevitable in polygamy[69]

leaves the impression that an honest effort has been made to understand the institution in a deep sense, and to subject its elements to serious, dispassionate scholarly analysis. The immediate offshoot of such an approach, in South Africa's culturally diverse circumstances, is to invite proponents of polygamy and other neutral observers (who may nevertheless have been irked by superficial condemnations of the institution) to engage the views expressed with equal seriousness. The conditions for a *real* debate are fulfilled. The way is open to a productive discussion of the issues and the usual non-debate, characterized by evangelizing on the one hand and instinctive defensiveness on the other, is avoided.

There is a way in which South African society, across the ethnic spectrum, can be persuaded that the energy expended in fulminating against polygamy amounts to "much ado about nothing." In the first place, though polygamy remains problematic from a gender relations perspective,[70] the case for the full recognition of customary marriage is now so uncontested[71] that recognition may have to come *in spite of*

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[67] *Ibid.*

[68] *Ibid.*

[69] *Op cit* n.63, 128.

[70] Kaganas and Murray identify *patriarchy* and not polygamy as the culprit but make the point that polygamy plays an important supportive role, facilitating "stereotyping and the objectification of women to a greater extent that monogamy does" (128, 134).

[71] See for example, TW Bennett *Human Rights and African Customary Law* (1995) Juta Cape Town 114: "A nation dedicated to eradicating discrimination and to encouraging cultural pluralism should offer all marriages equal recognition, an obligation which is implicit in the constitutional right of all South Africans to participate in the culture of their choice." See also Paragraph 11.2 of the South African Law Commission's *Report on Marriages and Customary Unions of Black Persons* which stated bluntly that "the

polygamy rather than contingent upon monogamy. The state's duty to uphold fundamental rights is clear; the question whether polygamy (as opposed to other forms of marriage) violates those rights is, to my mind, unresolved.

Apart from the concern expressed by Kaganas and Murray that *symbolically* polygamy has become so associated with the oppression of women that its retention may be incompatible with a social order in which the liberation of women is a recognized goal,[72] there does not appear to be any compelling single ground for its abolition. There are legitimate misgivings, in the same way that there are legitimate misgivings about the income tax system or the high divorce rate in civil marriage. Since people in general seem willing to live with the latter concerns, it would require persuasive arguments to justify targeting an African practice for abolition on the basis of misgivings, however legitimate.

The point can be put in another way. To every argument against polygamy there is an equally plausible response. To the objection that the man has a right, not shared by the woman, to introduce other wives into the household unilaterally the response is that the consent of the first wife to such a move should be made a mandatory requirement.[73] This would come as no surprise to those peoples, like the Zulu and the Swazi, where in ideal custom such consent was always an essential aspect. Other arguments are simply weak, such as the objection that a woman who has to share a husband is deprived of love and therefore disadvantaged. That that might well be the case in a society in which romantic love (and particular modes of expressing it) are highly valued; we have no right to assume that this is true of all societies on earth. Ware is correct when she points out that "whether one considers that

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customary marriage should be recognised as a marriage and not merely as an institution of customary law."

[72]Kaganas and Murray *op cit* n.63, 129.

[73]Where we "mistrust" the woman's consent because we are worrying that it is unlikely that it was either free or informed, we should mistrust consent in relation to a civil marriage as well. Both marriages operate in a male-dominated world and we have no way of quantifying the true effects of social and financial pressures on anybody's decision to get married. Moreover, as Kaganas and Murray observe on this point, "But this means that the problem lies in the society in which polygyny is practised rather than the institution itself" (128).

women who have to share a husband are underprivileged depends on the value placed upon husbands."[74]

In the final analysis the issue revolves around a willingness to live with the practices of "others" which are unfamiliar or seen as abhorrent. In political terms, the time has passed when "public policy...[was]...equated with the policy of the dominant white group and the teachings and/or cultural habits of the disenfranchised majority...[were]...largely ignored."[75] In the leading case of *Seedat's Executors v The Master (Natal)* the court held that no country was obliged to recognize a legal relationship that was "repugnant to the moral principles of *its people*"[76] and accordingly declared a potentially polygamous Muslim marriage contracted abroad to be invalid in South Africa. Whatever the learned judge conceived of as the "country's people" in 1917, today the net would be cast somewhat wider in describing the "people" whose morality was being considered in making public policy decisions.

Scant attention has been paid to the glaring inconsistency that could result if the South African parliament recognized the customary marriage and attached the condition of monogamy to such recognition. Trends in family law suggest that the concept of "family" is undergoing profound changes and is the subject of scrutiny and challenge in the Western world.[77] Divorce, single parenting, cohabitation have all become commonplace over the last thirty years. Emerging pressures on the "traditional" concept of the family include pressures from same-sex couples to marry, to adopt children and generally to be treated as families. These trends are not far-fetched in relation to South Africa.[78]

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[74]H Ware, "Polygyny: women's views in a transitional society, Nigeria 1985" (1979) 41 *Journal of Marriage and the Family* 194.

[75]Alick Costa, "Polygamy, other personal relationships and the Constitution," *De Rebus* (December 1994) 915-916.

[76]1917 AD 302 at 307-8 (emphasis added).

[77]See A Glendon *The New Family and the New Property* (1981) Butterworth & Co, Canada.

[78]A report in the Sunday Times newspaper of 13 August 1995 told the story of a homosexual couple who were granted the right to adopt a child in Gauteng, on the basis of the non-discrimination provisions in section 8 of the Constitution. Chanock *op cit* n.12, 65 says: "Family law in the western world has increasingly been moving in the direction of closing the gap between legally formed marriages and *de facto* relationships." See also A Costa *op cit* n.67, who argues for the legalization of the marriages of homosexuals.

Would it not be the supreme irony if, under the pressure of trends from the First World, we were seen to be moving towards greater flexibility in our conception of family forms, but remained resolutely judgmental in respect of an indigenous form in which a man could have more than one spouse? Given the fact, noted by Kaganas and Murray, that such a relationship could be perfectly consensual (where the agreement of the other wives has been obtained), the state's refusal to grant it at least equal consideration with emerging forms of familial organization would be very revealing as to which value system was considered to be "irrelevant" in South Africa.[79]

VII. Conclusion

This paper has attempted to demonstrate that a commitment to human rights can go hand in hand with a commitment to cultural diversity. The argument advanced is that there are good practical reasons why, despite the unequal influence of the two world-views (Western and African), a notional equality should be attributed to both, as a starting point. Not to do so has the potential of opening old wounds by failing to acknowledge past interference in the culture of South africa's indigenous population.

It is suggested further that the ideal of gender equality need not be compromised in the process. Where cultural practices compete for

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[79]I sometimes suspect that the problem is one of perceptions socialized into us from birth: it seems "natural" to picture a cosy family named Smith in suburbia, with Mr and Mrs Smith running a warm and loving home in which they are raising happy, contented and well-adjusted future citizens. For some reason, the image falls to pieces when we are asked to picture a cosy rural homestead where Mr Dlamini or Mr Mokoena and two wives live and work in a warm and loving environment, raising happy, contented and well-adjusted future citizens. We dismiss out of hand the possibility that many ordinary, productive South Africans can truthfully say: "I grew up in a polygynous household and to me it was perfectly normal. I had two mothers and therefore twice the care and attention. As children we moved freely between two 'houses'; it does not seem to have done us any permanent harm." The problem is that, when we feel moved to make comparisons, we do not compare apples with apples. We tend to put up a good civil or Christian marriage against a bad customary marriage, as if "goodness" in the latter category is not possible until those marriages acquire some recognizably western characteristics. The same reason blinds us to questions of divorce in civil marriage (see CMR Dlamini, "The Role of Customary Law in Meeting Social Needs" (1991) *Acta Juridica* 71-85 at 76, who refers to it as "serial polygyny"). From the deafening silence on the subject of divorce and remarriage one must assume that this raises no moral questions, while sharing a home with several spouses does. Dlamini is correct when he notes that such blatantly selective morality is "puzzling" to many Africans.

public acceptability, the decision to prefer one over the other should not depend on an assertion of the moral superiority of the value system of a particular group in society.

The sensitive issue of polygamy was used in this essay because of its emotive value. If the practice can be confronted, and a conclusion reached that despite perceived abhorrence, the case for its abolition has not been made, then we are closer to internalizing an important lesson in democracy, namely, that the constitution protects our right not to be *oppressed* or *ill-treated*, not necessarily our preference not to be *embarrassed* or *inconvenienced* by the behavior of others.