

## ARTICLES

# THE NEW SOUTH AFRICAN CONSTITUTION: FACING THE CHALLENGES OF WOMEN'S RIGHTS AND CULTURAL RIGHTS IN POST-APARTHEID SOUTH AFRICA

*Christine Mary Venter\**

## I. INTRODUCTION

The debate over the role, content and scope of customary law in a post-apartheid South Africa can, in some respects, be viewed as a microcosm of the debate over cultural relativism. However, certain historical, practical, and contextual issues peculiar to the post-apartheid South African situation render the debate even more challenging and contentious. This paper will focus on identifying several of the areas and provisions of customary law which discriminate against women and contrasting these practices with the anti-discrimination clauses contained in the new South African Constitution. This paper will then posit how the divergent interests of cultural rights may best be reconciled with women's rights.

The challenge confronting the legislators and the judiciary in a new South Africa is reconciling these apparently conflicting, but arguably equally valid, legal premises. The challenge also involves a problem of discourse, as women's rights are often couched in western, individual-based rights language, while cultural rights, which are more community-based rights, do not translate well into this terminology.<sup>1</sup> In determining which of these rights, if any, should be afforded primacy, questions of international law, human rights and natural law come into play.

This article will also explore whether a commitment to natural law principles or international norms justifies the abrogation of those customary law provisions which are inconsistent with anti-discrimination principles. The issue of the legitimacy and authenticity of a customary law, which has been altered in order to eliminate provisions discriminatory to women, will also be canvassed.

The topics of debate raised here are important for several reasons. First, they serve to illustrate the differences and potential conflicts between a western and non-western approach to concepts such as rights and equality. Further, they highlight many of the divisions within present South African society, which, if not properly addressed,

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\* Supervising Attorney for Notre Dame Legal Aid; Associate Professor, Notre Dame Law School. LL.M., Notre Dame Law School, 1992; LL.B., University of Cape Town, 1985.

1. See MARY ANN GLENDON, *RIGHTSTALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 115 (1991) ("An implicit anthropology—an encoded image of the human being as radically alone and 'naturally' at odds with his fellows[—]" colors our discourse and makes it difficult to "take into account the sort of groups within which human character [is] formed.").

could impact on the future of post-apartheid South Africa both internally as well as in the sphere of international relations.

## II. A BRIEF HISTORY OF THE DEVELOPMENT OF CULTURAL RIGHTS

The concept of a people having a right to their culture developed in the wake of the French Revolution and was expanded upon in the aftermath of the two world wars. It was also, in part, a reaction to the colonial era.<sup>2</sup> This concept was at first often identified with a right to self-determination,<sup>3</sup> as is evidenced by the Charter of the United Nations which emphasizes the U.N.'s commitment to the concepts of equal rights and self-determination.<sup>4</sup> It appears that the U.N. envisaged such rights being achieved by "international cultural and educational cooperation," together with increased respect for "human rights and . . . fundamental freedoms."<sup>5</sup> The implication that the rights to self-determination and one's culture were necessary for human dignity was reflected in the 1948 U.N. Declaration of Human Rights, which provided in part that "[e]veryone . . . is entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."<sup>6</sup>

Similarly, the 1960 U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples affirmed that "[a]ll peoples have the right to self-determination; by virtue of that right they freely pursue their economic, social and cultural development."<sup>7</sup> The Declaration further hinted at the possibility that the right to culture included the right of a people to their particular system of law.<sup>8</sup> This right had already been specifically recognized in the 1957 International Labor Convention No. 107.<sup>9</sup> These sentiments were echoed and expanded upon in the 1967 International Covenant on Economic, Social and Cultural Rights,<sup>10</sup> and the International Covenant on Civil and Political Rights,<sup>11</sup> which recognized the right of the individual to take part in the cultural life of his or her particular ethnic, religious or linguistic group.

The concept of having a right to pursue one's culture, coupled as it was with an actual or implied reference to self-determination and freedom from colonial rule, not surprisingly, fell on fertile ground in Africa.<sup>12</sup> The concept was particularly appealing

2. Patrick Thornberry, *Self Determination, Minorities and Human Rights: A Review of International Instruments*, 32 INT'L & COMP. L.Q. 860, 869 (1989).

3. *Id.*

4. U.N. CHARTER arts. 1, 55.

5. *Id.* art. 55.

6. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

7. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4864 (1961).

8. *Id.* The Declaration provides that "all powers" should be transferred to the peoples of Trust and Non-Self-Governing Territories "to enable them to enjoy complete independence and freedom." *Id.* This would seem to imply the power to determine their own legal system.

9. The Convention was known as the ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal populations in Independent Countries. 328 U.N.T.S. 247. Articles 7 and 7.2 refer to the right of indigenous populations to retain their customary laws as long as such were not incompatible with the national legal system. This Convention has been discredited somewhat due to its references to "assimilation" and integration of ethnic groups. Its replacement, ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, was drafted in 1989 and also provides for the recognition of customary law in Article 8. It has not yet entered into force.

10. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967).

11. *Id.* at 52. It should be noted that the Covenant on Civil and Political Rights affords the right to ethnic, religious or linguistic minorities to enjoy their own culture, profess their own religion or use their own language. *Id.*

12. This is not to imply that the concept of self-determination necessarily originated in the west

in apartheid ruled South Africa primarily because it was seen as a right to freedom from the oppression of minority rule. By affirming the right to culture, and by linking it to some degree with self-determination, the international community effectively denounced the apartheid government's approach to cultural issues.<sup>13</sup>

In 1955, the Freedom Charter of the Congress of the People sought to give effect, within a South African context, to the rights to culture that were being developed in the international arena.<sup>14</sup> However, the Congress was ambivalent about whether the right to one's culture necessarily connoted the right of each tribal group within South Africa to self-development. Many members of the Congress believed that the unity of a future South Africa would be jeopardized if this concept was overemphasized, because it would lead to the fragmentation of the country.<sup>15</sup>

The concept of the right to culture, once rooted, was not so easily dislodged by vague definitions and disagreements as to its boundaries. The right was reaffirmed by the African National Congress in its "Revolutionary Programme" of 1969,<sup>16</sup> although this document indicated that the right of a people to their culture was to be construed within the framework of a unitary South Africa and not to be taken as a mandate to each tribe to pursue its own self-development in the form of secession.

### III. CULTURAL RIGHTS IN THE NEW SOUTH AFRICAN CONSTITUTION

Cultural rights have been clearly recognized by the new South African Constitution.<sup>17</sup> The Constitution expressly acknowledges the right of individuals to their culture<sup>18</sup> and language.<sup>19</sup> It further recognizes that cultural rights include the right to acknowledgment of traditional and indigenous legal systems. Thus, the role and authority

or with the U.N., merely that such concepts were publicly enunciated in the international forum through such medium.

13. The government's approach to the cultural issue had been to render lip service to the right to culture by instituting the policy of separate development. This had been accomplished largely by means of the creation of tribal homelands. Since the black population had no choice in how they were allocated to a particular homeland, the principle of self-determination was not adhered to. Culture was used merely as a convenient tool to further the aims of apartheid and as a means of denying South African citizenship to the black people. Such an approach was in marked contrast to the approach adopted by the international community, which saw culture as affirming the dignity of a people, and confirming their right to decide their own future. The concept, thus defined, appealed to, and was consistent with, the communitarian basis of African society which was predicated on the approach that the community should be responsible for all decisions affecting the group and the individual. This was so because the interests, well-being and development of an individual were best realized through participation in the life of the community.

14. The so-called Congress of the People was a delegation made up of various South African groups opposed to apartheid. Together they drew up a statement of aims and beliefs which was known as the Freedom Charter and became the credo of the African National Congress.

15. This hesitance to give too broad a definition to the right to culture is also reflected in the new Constitution which continually emphasizes a unitary South Africa. The A.N.C. probably has good cause to be hesitant as there are a number of parties in South Africa who have made a claim for secession based on culture. Inkatha, the Zulu party, is one such party.

16. This document purported to describe how the provisions of the Freedom Charter should be given effect.

17. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (Act 200 of 1993) [hereinafter S. AFR. CONST.].

18. S. AFR. CONST. §§ 8(2), 31 ("Every person shall have the right . . . to participate in the cultural life of his or her choice.").

19. South Africa now has eleven official languages, whereas, prior to the enactment of the new Constitution, it had only two: English and Afrikaans. Further, section 3 of the Constitution urges respect for other languages and makes provisions for their use. S. AFR. CONST. § 3.

of traditional leaders has specifically been preserved,<sup>20</sup> and black South Africans will continue to have access to a customary law court of one form or another.<sup>21</sup>

However, the framers of the new Constitution have been reticent about elaborating on the extent and application of the right to culture and the ambit of customary law, therefore, it is unclear just what role will be played by customary law within the new legal system.<sup>22</sup> Their reticence is perhaps understandable, since an emphasis on cultural rights might lead to tribal groups like the Zulu attempting to pursue secession. Nonetheless, allowing cultural groups to practice customary law without any limitation makes a mockery of the protection that the Constitution affords women.

Adherents of indigenous legal systems may claim that they have a constitutional right to practice tribal law and customs as they see fit.<sup>23</sup> However, women have a constitutional right to be free from unfair discrimination on the basis of gender, therefore cultural practices should be limited by this precept.<sup>24</sup> The framers of the Constitution afforded the right to people to participate freely in the cultural life of their choice (without limitation), yet at the same time they aimed at eliminating gender inequities. Thus, by positing two apparently contradictory rights against each other and prescribing that neither of these rights may be infringed upon by any law,<sup>25</sup> the architects of South Africa's new Constitution have created an inherent contradiction.

#### IV. THE CONFLICT BETWEEN CULTURAL RIGHTS AND GENDER RIGHTS IN INTERNATIONAL DOCUMENTS

The inherent gender/cultural rights contradiction has previously manifested itself outside of South Africa in an even more obvious form. In 1981, the right to culture was firmly emphasized in the African Charter on Human and Peoples' Rights (the Banjul Charter),<sup>26</sup> which was drawn up by the Organization of African Unity (OAU). The preamble to this Charter urged the signatories to take "into consideration the virtues of their historical tradition and the values of African civilization, which should inspire and characterize their reflection on the concept of human and peoples' rights."<sup>27</sup> The Charter recognized the right of "all peoples" to their "economic, social

20. S. AFR. CONST. ch. 8.

21. Prior to the signing of the new Constitution, the authority of tribal courts to adjudicate cases between members of that particular ethnic group was recognized in the former homelands. It seems likely that these will continue to function as the new Constitution recognizes existing traditional leadership. Generally, appeal may be taken from such court to the lowest civil (municipal) court. In urban areas during the 1980s, the phenomena of "peoples courts" developed as an alternative to the mainstream legal system. These courts were created to respond to political needs as well as social and cultural needs, and they do not correspond exactly in structure or in their application of law to the traditional tribal court. They do in some cases follow customary law, although they cannot be strictly classified as "customary law" courts.

22. The Constitution provides that the customary law may not limit the rights set forth in the Bill of Rights. S. AFR. CONST. § 33(2). While providing for the recognition and maintenance of the role of traditional leaders and customary law, S. AFR. CONST. ch. 11, the Constitution is silent as to the precise role of customary law within the new legal system.

23. See S. AFR. CONST. § 8(2).

24. S. AFR. CONST. § 8(2).

25. S. AFR. CONST. § 33(2).

26. African Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5. [hereinafter Banjul Charter].

27. *Id.* I interpret this phrase as indicating that the framers of the Banjul Charter considered human rights to be culturally specific to some extent. This may be borne out by Article 61 which permits the African Commission on Human and Peoples' Rights to take into consideration for purposes of interpretation "African practices consistent with international norms on human . . . rights, customs

and cultural development with due regard to their freedom and identity.”<sup>28</sup> It further emphasized the duty of the State in the “promotion and protection of morals and traditional values recognized by the community.”<sup>29</sup>

The approach adopted by the OAU in the 1981 Charter was consistent with the African communitarian view which emphasizes the identity of the group.<sup>30</sup> Further, the premise that human rights may be culturally determined had some affinity with the principles of cultural relativism first publicly enunciated in an international forum by the American Anthropological Association in 1947.<sup>31</sup> The Association adopted the view that “standards and values are relative to the culture from which they derive.”<sup>32</sup> The members of the Association sought to argue that in view of this, what was held to be a “human right in one society might be regarded as anti-social by another people.”<sup>33</sup>

This basic premise, that all human rights may be culturally determined, was curiously recognized on an intellectual level, yet ignored in practice in both the international and the African documents mentioned above.<sup>34</sup> This is true despite the phraseology contained in the preamble of the Banjul Charter, which specifically affords recognition to this premise. If one examines the U.N. Declaration on Human Rights, which was promulgated shortly after the Anthropological Association’s brief on the issue of the non-universality of human rights, one notes that, despite the Association’s warnings, the Declaration purports to set forth a number of rights that are traditionally western in origin and depicts such rights as being of universal application.<sup>35</sup> Nevertheless, the Declaration acknowledges the importance of cultural diversity<sup>36</sup> without attempting to reconcile these apparently contradictory principles.

Similarly, one finds the Banjul Charter acknowledging the fact and upholding the principle that rights are developed in accordance with the mores of one’s particular community.<sup>37</sup> Yet at the same time the Charter adopts a number of so-called western rights, including women’s rights,<sup>38</sup> and incorporates them *verbatim*,<sup>39</sup> without apparently considering whether such rights are consistent with “the historical tradition and the values of African civilization.”<sup>40</sup> All the while, African leaders profess that western legal concepts may be inappropriate for, and inconsistent with, African legal principles.

The Banjul Charter incorporates the so-called civil and political rights that are predicated on the western concepts of individual liberty and equality.<sup>41</sup> These rights,

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generally accepted as law . . . .” *Id.* art. 61.

28. *Id.* art. 22.

29. *Id.* art. 17.

30. See Rose M’D’Sa, *Human and Peoples’ Rights: Distinctive Features of the African Charter*, 29 J. AFR. L. 72, 74 (1985).

31. American Anthropological Association, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 4 (1947).

32. *Id.* at 539-43.

33. *Id.*

34. See *id.*; Banjul Charter, *supra* note 26.

35. U.N. Declaration on Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

36. *Id.*

37. Banjul Charter, *supra* note 26, preamble.

38. *Id.* art. 18.

39. *Id.* arts. 2-18 (examples of so-called traditionally “western” rights).

40. *Id.* preamble.

41. See Banjul Charter, *supra* note 26.

because of their very emphasis on individual libertarian characteristics, may be foreign to the nature of true African law. A.J.G.M. Sanders argues that "[n]o command law—colonial or post-independence—has been able to fundamentally transform, let alone eradicate, what the people of Africa consider to be 'their' law."<sup>42</sup> The true essence of this law, Sanders goes on to assert, is its "communal/socialist nature, as distinguished from the individualistic/capitalistic character of the superimposed European law."<sup>43</sup> Yet the irony of a Committee which professes its devotion to, and has sworn to uphold, the African tradition of law, and which voluntarily assumes a tradition apparently contrary to this, appears to be lost on many African leaders. It is not surprising, however, that some confusion may result from such an approach.

Despite this apparent contradiction, the practice persists of incorporating western legal concepts and terminology in post-independence African law. Such a tradition is clearly illustrated by the number of African states which have adopted western-style Bills of Rights.<sup>44</sup> In spite of the checkered history of many of these Bills of Rights, South Africa has chosen to go in the same direction by incorporating a western-style Bill of Rights into the new Constitution. The fact that transplants in law, as in medicine, carry a high risk of rejection, apparently has not deterred the architects of the new South African Constitution from pursuing this course.<sup>45</sup>

#### V. THE SOUTH AFRICAN APPROACH: IN FAVOR OF GENDER EQUALITY?

The clashes in values and legal traditions that may arise when such a course is pursued is evidenced by the new South African Constitution and the Constitutional Principles.<sup>46</sup> Article XI of the Constitutional Principles provides for the protection of culture and language.<sup>47</sup> Article XII seems to acknowledge the communitarian nature of African law by providing for "[c]ollective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations."<sup>48</sup> Recognition of the African legal tradition is further made apparent by the explicit acknowledgment in Article XIII of the "institution, status and role of traditional leadership, according to indigenous law."<sup>49</sup> This Article further provides that "[i]ndigenous law, like common law, shall be recognized and applied by the courts, subject to the fundamental rights contained in the Constitution."<sup>50</sup> These principles are directly reflected in the Constitution which provides for the recognition of

42. A.J.G.M. Sanders, *Towards a People's Philosophy of Law*, 31 J. AFR. L. 38, 41 (1987).

43. *Id.*

44. The history of Bills of Rights in West Africa is discussed in B.O. NWABUAEZE, *JUDICIALISM IN COMMONWEALTH AFRICA* (1977). East African studies have been documented in J.P.W.B McAuslan, *The Evolution of Public Law in East Africa in the 1960s*, 1970 S. AFR. PUB. L. 1, 5-19.

45. Prior to the enactment of the new Constitution some debate had been devoted to the question of whether a post-apartheid South Africa should in fact adopt a Bill of Rights. See, for example, the Conference organized by the Civil Rights League at the University of the Western Cape in August, 1988. See also A.J.G.M. Sanders, *A Bill of Rights for South Africa*, 1986 S. AFR. PUB. L. 1, 1-8.

46. These principles were agreed to by the various political parties negotiating the new Constitution. They are attached to the new Constitution as Schedule 4, and it is specifically provided that, should the Constitution be amended, no provision may derogate from these principles. S. AFR. CONST. sched. 4 (Constitutional Principles).

47. S. AFR. CONST. sched. 4, art. XI.

48. S. AFR. CONST. sched. 4, art. XII.

49. S. AFR. CONST. sched. 4, art. XIII.

50. S. AFR. CONST. sched. 4, art. XIII.

traditional leaders and customary law in Chapter eleven. The Constitution moreover refers indirectly to communal ownership of land,<sup>51</sup> a common tradition in customary law, and to the rights of individuals to freely participate in cultural life.<sup>52</sup>

However, Chapter three of the Constitution, which is entitled "Fundamental Rights," is basically a western-style Bill of Rights couched in individual rights-based language. Since the Constitutional Principles provide that indigenous law is subject to the fundamental rights contained in Chapter 3,<sup>53</sup> and Section 33(2) of the Constitution further provides that "no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter,"<sup>54</sup> it is important to ascertain if the provisions of customary law are in conflict with the fundamental rights contained in Chapter 3.

One of the most often emphasized rights contained in the Chapter is the right of freedom from discrimination based *inter alia* on gender. This right is set forth in Section 8(2) of the Constitution, and the Constitution goes on to provide for affirmative action for "groups or categories of persons disadvantaged by unfair discrimination."<sup>55</sup> Gender equality seems to have been a primary concern of the framers of the Constitution. It is referred to three times in the Constitutional Principles,<sup>56</sup> and a Commission on Gender Equality has been created by Section 119(1) of the Constitution to promote gender equality and make recommendations to Parliament with regard to "any laws . . . which affect gender equality and the status of women."<sup>57</sup> This emphasis on the promotion of gender equality in the new South Africa is appropriate given South Africa's history as a sexist as well as racist society.<sup>58</sup> Pressure from women's groups, most notably the Women's League of the A.N.C., has pushed gender issues into the forefront of legal reform. The efforts of the Federation of African Women have also served to keep the focus on the issue of gender discrimination and its prevalence in customary law.

The position of women subject to customary law has become an extremely sensitive topic in recent times. Prior to embarking on this discussion of women under customary law, it should be noted that legislation which came into effect in South Africa in 1988 has sought, to some extent, to ameliorate the position of women subject to customary law.<sup>59</sup> However, in light of Sanders' comment, which essentially states that "command law" cannot change the nature of African law,<sup>60</sup> it seems appropriate to set

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51. S. AFR. CONST. § 28(1).

52. S. AFR. CONST. § 31.

53. S. AFR. CONST. sched. 4, art. XIII.

54. S. AFR. CONST. § 33(2).

55. S. AFR. CONST. § 8(3)(a).

56. S. AFR. CONST. sched. 4, arts. I, III, V.

57. S. AFR. CONST. § 119(3).

58. The common law legal system in South Africa, Roman Dutch law, sanctioned discrimination on the basis of gender. One example of this is the fact that a married woman was, until recently, considered a minor in the law.

59. Matrimonial Property Act 88 of 1984, 5 Juta's Stat. of S. Afr. 2-141 (1993) (incorporating Marriage and Matrimonial Property Law Amendment Act 3 of 1988) [hereinafter Matrimonial Property Act]. The legislation has attempted to accomplish this by providing that black women who marry after October, 1988, whether in accordance with civil law or customary law, shall be deemed to be married in community of property. The legislation also purports to abolish the "marital power" of the husband, thereby freeing black women from perpetual tutelage.

60. Sanders, *supra* note 42. If one looks at the example of the homeland of Transkei, where legislation was enacted purporting to abolish the minority status of women and making twenty-one the

forth the position of women prior to 1988.

## VI. THE POSITION OF WOMEN IN AFRICAN CUSTOMARY LAW

The position of women in African customary law could be generally characterized as being that of a perpetual minor subject to the guardianship and authority of her husband, if married, or her father.<sup>61</sup> A.C. Myburgh notes that there were some exceptions to this general rule,<sup>62</sup> but as these had been accomplished through prior colonial legislation, they will not be treated as significant for the purpose of this discussion.

As a result of her minority status within the community, a woman could not bring an action in her own name or be sued in her own name. Indeed, Emmet V. Mittlebeeler notes that it was common practice in pre-independence Zimbabwe when a woman was charged with a crime, at least until the 1960s,<sup>63</sup> to charge her husband jointly with the same crime.<sup>64</sup> The rationale behind such practice was that it was inconceivable that a woman would be acting of her own volition, without being coerced or directed by her husband. The inability of a woman to sue in her own name was reflected in the practice of a woman's father bringing an action for damages for the seduction of his daughter.<sup>65</sup> If any damages were awarded, they accrued to the father rather than to the woman herself.<sup>66</sup>

The position of a woman with regard to marriage was also somewhat circumscribed. It is debatable exactly how important the consent of the woman was to the marriage.<sup>67</sup> Previous to 1967, the bride's actual consent was not required, but this situation was changed by legislation, at least in the Natal Province.<sup>68</sup> Acquiescence (i.e. lack of visible protest), rather than actual consent, is probably accepted in practice today.<sup>69</sup>

African customary law generally does not consider a marriage wholly valid until the lobolo or "bride price" has been paid in full to the woman's father by the prospective husband.<sup>70</sup> Sometimes the marriage is even delayed until the lobolo has been paid, which may take a number of years.<sup>71</sup> This lobolo is given to the bride's family partly in return for the transfer of their authority over the woman to her husband's

age of majority for women, there has been little practical effect on the actual position of women. Women are still treated by their families/husbands as if they were minors.

61. See CHERYL WALKER, *WOMEN AND RESISTANCE IN SOUTH AFRICA* (1982).

62. A.C. MYBURGH, *PAPERS ON INDIGENOUS LAW IN SOUTHERN AFRICA* 79 *et seq.* (1990). Myburgh notes that in terms of legislation promulgated in Natal Province, South Africa, a spinster, widow or divorced woman may under certain circumstances be vested with the powers of a kraal head and treated as a major. See Proclamation No. R195, § 28 (1967) (Natal Province) [hereinafter Proclamation].

63. This was the case in Rhodesia under white rule. Such a rule is no longer applied in Zimbabwe.

64. EMMET V. MITTLEBEELER, *AFRICAN CUSTOM AND WESTERN LAW* 96 (1976).

65. T.W. BENNETT, *A SOURCEBOOK OF AFRICAN CUSTOMARY LAW* 248 (1991).

66. MYBURGH, *supra* note 62, at 48.

67. *Id.* at 85 (indicating that in practice the woman's consent was not necessary in that the lack of her consent was not considered a bar to the marriage).

68. Proclamation, *supra* note 62, § 1959 (requiring the bride to publicly declare that she freely consents to the marriage).

69. MYBURGH, *supra* note 62, at 86.

70. *Id.* at 83-84. If a couple lives together and has children prior to full payment of the lobolo, the wife's family may take custody of the children until the full amount of the lobolo has been paid.

71. *Id.* at 83.



family. The lobolo has traditionally consisted of the payment of five head of cattle,<sup>72</sup> but as an adaptation to modern conditions, their commercial value in money or in the form of other material goods is becoming accepted.<sup>73</sup> Should the marriage dissolve, and the woman return to her family, the lobolo, or a portion thereof, must generally be returned. However, allowances are made if the couple has children.<sup>74</sup>

Myburgh notes that at the marriage ceremony a woman is often shown a sjambok (a stiff whip) to signify her husband's authority and his right of chastisement over her.<sup>75</sup> The right of chastisement of a man over his wife during the period of the marriage is not merely symbolic.<sup>76</sup> A husband may physically discipline and chastise his wife for relatively minor infringements.<sup>77</sup>

The authority of the husband over his wife extends to members of the husband's agnatic group,<sup>78</sup> and the woman's father and family retain some authority over her as well.<sup>79</sup> If a woman's husband should die, the members of his family group can continue to assert their authority over the woman, requiring her *inter alia* to "till the soil," as well as cook.<sup>80</sup> One aspect of this authority is the right to require the woman to make her reproductive services available to a certain member of the group and bear his children; hence, the practice in some tribes of a deceased man's brother taking the woman as his wife.<sup>81</sup> The marriage, therefore, is not necessarily dissolved by the husband's death, as the wife may be required to remain with her former husband's group and bear children to a member of that group.<sup>82</sup>

As a person subject to permanent guardianship in one form or another, a woman may generally own no property in her own name.<sup>83</sup> All property acquired by her during the marriage accrues to her husband.<sup>84</sup> Several exceptions to this general principle have developed, largely through colonial legislation,<sup>85</sup> as well as the Matrimonial Pro-

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72. This is the practice for both the Xhosa and Zulu tribes of South Africa.

73. MYBURGH, *supra* note 62, at 84.

74. Under Xhosa law and tradition the wife's family may keep one head of cattle for each child that has been born of the union. Since the custody of the children traditionally goes to the husband on dissolution of the marriage, payment of lobolo represents a transfer of the authority over the children to the husband's family.

75. MYBURGH, *supra* note 62, at 79.

76. S.M. SEYMOUR, BANTU LAW IN SOUTH AFRICA 134, 230 (1967). The right of "moderate castigation" actually enhances the status of the male, as he is charged with exercising the group's authority over his particular family. *Id.*

77. An example of this occurred at a trial I attended in the Regional Court of Transkei in 1987 (the case is unreported). A man was charged with culpable homicide (manslaughter) in the beating death of his wife. The man's defense was that he had merely been exercising his customary law right to physically chastise his wife for being rude to his parents. His wife died during the course of the beating.

78. MYBURGH, *supra* note 62, at 79.

79. Such authority can consist of the woman's family disciplining her for misbehaving towards her husband's family group. See SEYMOUR, *supra* note 76, at 175. In addition, if a man misbehaves towards his wife in the presence of her family, the woman's father can seek redress from the husband for such behavior. See MYBURGH, *supra* note 62, at 85.

80. MYBURGH, *supra* note 62, at 81.

81. *Id.*

82. All children conceived in this manner are considered to be children of the deceased, particularly for purposes of succession. BENNETT, *supra* note 65, at 248.

83. MYBURGH, *supra* note 62, at 78. In addition, Myburgh notes that marital guardianship entitles the husband's agnatic group to the woman's earnings and her services, including her labor and her reproductive activity. *Id.* at 112.

84. *Id.* at 78.

85. See, e.g., Proclamation, *supra* note 62, §§ 28, 33, 36, 42; see also MYBURGH, *supra* note 62,

perty Act.<sup>86</sup> The position may, *de facto*, be somewhat different for women as they continue to move away from their families to the cities and enter the work force.

A woman subject to African customary law may also find herself in the position of not being her husband's only wife, as polygamy is practiced among many tribes in South Africa.<sup>87</sup> Junior wives do not have the same status as senior wives and primogeniture is given effect, in that the first born son of the senior wife will usually become head of the family group upon his father's death.<sup>88</sup> Although the fertility of a woman is not a requirement of a valid marriage,<sup>89</sup> the man may, in certain tribes, take another unmarried member of his wife's family in marriage for the purpose of bearing children (the so-called sororate union) should his wife be infertile.<sup>90</sup>

It is unclear at the present time what the exact impact of the Matrimonial Property Act will be on many of the institutions and procedures of African customary law. It is often the case that a couple will enter into a civil law marriage but still observe customary law procedures and institutions such as lobolo. As the Act purports to abolish the husband's marital power, it calls into question and perhaps undermines the whole institution of lobolo,<sup>91</sup> at least for those couples marrying under the civil law. As lobolo signifies, to some extent, payment by the husband to the woman's family in return for the transfer of their authority over her to the husband and his family, the significance of this procedure is diminished and perhaps rendered unnecessary by the abolition of the marital power.

It is unfortunate that this legislation, when adhered to, creates a situation where a woman can ostensibly escape from the authority of her group and perpetual minority, to some extent,<sup>92</sup> through civil marriage. Yet, the situation of a woman who does not marry, or who marries under customary law, remains unaddressed, as the woman will apparently remain subject to the authority of her family group and her husband's group.

Further, in providing that African women married under civil law will be deemed to be married in community of property, the Act has the effect of altering the customary law provision that a woman may not hold property in her own name. However, the position of a woman in a customary law union with regard to property rights remains unaffected. The Act purports to give some recognition to customary law unions in that it prohibits a man who is married under customary law from entering into a civil law marriage.<sup>93</sup> The Act, thus, essentially provides that women married pursuant to customary law will be excluded from the benefits of the civil law. Yet, several of its provisions impact on institutions associated with customary law.

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at 78. In the Zulu tribe, however, it is not unknown for a woman to own property. In addition, in an urban setting a working woman is likely to own property.

86. Matrimonial Property Act, *supra* note 59.

87. MYBURGH, *supra* note 62, at 83.

88. BENNETT, *supra* note 65, at 184.

89. MYBURGH, *supra* note 62, at 86.

90. BENNETT, *supra* note 65, at 240.

91. This is so, because lobolo signifies, in part, the transfer of authority over a woman from her father to her husband.

92. As was noted previously, a woman's family retains some authority over her, even if she is married.

93. See Matrimonial Property Act, *supra* note 55, § 1. A black man who wishes to marry under the civil law provisions must first declare that he is not already married under an existing customary law union. *Id.*

Such legislation which affects, whether incidentally or otherwise, certain aspects of cultural life without taking the whole picture into consideration, often creates more problems than it solves. This happens because it has the effect of rendering the position of an African woman with regard to her rights and duties in her community even more uncertain.<sup>94</sup> By doing so, it perhaps unintentionally undermines any grassroots movement from within the black community that might be attempting to alleviate the position of black women. It is difficult to focus on and address issues that are clouded by uncertainty.

Although this description of the position of women subject to African customary law does not purport to be a complete or exhaustive treatise on the matter, I believe that one can derive some insight from it on how customary law pertains to and affects women. The situation of women bound by these provisions should then be tested against the articles contained in international human rights documents and the new Bill of Rights to determine which right—gender equality or cultural rights—should be afforded primacy.

## VII. THE DEFICIENCIES OF THE CUSTOMARY LAW APPROACH TO WOMEN

The nature of this enterprise is made more difficult by the fact that the communitarian nature of African law implies that rights inure to the group or the community rather than the individual. Thus, an attempt to determine whether a legal system, which is not predicated on individual rights, violates the rights of certain individuals within the community may be seen to be inherently contradictory. It further smacks of the western bias that African countries often assert. Yet, it is a valid enterprise and a valid approach for the following reasons:

1. Certain of the rights which attach to the group in African culture find expression through individuals, who represent such rights on behalf of the group. The fact that only certain individuals can represent particular rights on behalf of the group and that gender plays a role in determining who gets to represent those rights is significant for the purpose of this study.

2. Due in part to the influence of colonial law, some individual rights are recognized by customary law.<sup>95</sup>

3. The very people who endorse the values of African tradition and civilization have also seen fit to incorporate individual-based, westernized rights and duties into their legal systems, both in the guise of Bills of Rights and through their ratification of international documents which assert such individual rights. By recognizing rights that inure to the individual rather than the community, and incorporating those rights into the legal framework, the leaders of new African governments have opened themselves and their legal systems up to criticisms based on a western concept of law that they often disclaim.

The position of women in society *vis-a-vis* these points will now be examined below.

One may derive some insight into the position of women by examining which individuals under African customary law may represent rights on behalf of the group.

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94. It is not surprising that the practice of apartheid and the myriad laws created under the apartheid system that impacted adversely on black people have tended to make the black population wary of the law.

95. MYBURGH, *supra* note 62, at 81.

It is clear, from even a cursory examination of the situation, that the individuals who represent such rights are usually men, most often the male head of the agnatic group. Myburgh argues, however, that a woman's right to share in the personality of her group is "apparent from her power to take an active part in steps to obtain redress when she or a woman of her group is the victim of a delict such as seduction, or an accusation of misconduct with her father-in-law."<sup>96</sup> The woman's so-called active role, however, often amounts to being permitted to partake of the beast that is taken from the wrongdoer and slaughtered.<sup>97</sup>

Myburgh further argues that a woman can exercise the group's authority in another way, by offering herself in marriage to the member of another group.<sup>98</sup> He adds the rider, however, that such an offer of marriage must be made with the consent and approval of the woman's group, which seems to negate the argument that such action is indicative of any authority on the part of the woman.

Myburgh's arguments in this regard seem to be reinforced by the studies of Seymour,<sup>99</sup> who concurs with Myburgh that a woman is not excluded from participating in the joint personality of the group or from exercising certain rights pursuant to such participation. The rights that a woman can exercise, however, are closely circumscribed and limited to the situations described above. Myburgh acknowledges that a group member's right to participate in the rights of the group "corresponds . . . to his or her competencies."<sup>100</sup> These "competencies" depend on "the factors by which persons are placed in different status classes, viz mental and physical maturity, sex, marriage and rank."<sup>101</sup> Myburgh cites several examples of different rights being vested in various members of the agnatic group. He notes, for example, that only a husband and no other members of the group may take action for adultery in respect of his wife.<sup>102</sup> A man represents the group in respect of any actions concerning his particular family, and it is the men that take the actual action in cases involving defloration.<sup>103</sup> Women may participate in such action in that they are permitted, because of their roles as keepers of the virtue of the young girls, to partake of the beast that is taken from the perpetrator as reparation for a seduction.<sup>104</sup>

When one considers the different ways in which various mature adult members of the group participate in, and represent the rights of the group, it is clear that, aside from the question of an individual's maturity (i.e. majority), an individual's sex is the deciding factor in allocating the representation of rights. By virtue of their gender, women are denied the possibility of representing the group rights in many areas. It appears, arguably, that the agnatic head of the group may be the only individual who could properly be described as having full personality rights or, at least, full representative rights. A woman, again on the basis of gender, is generally barred from becoming head of the agnatic group in most African tribes.<sup>105</sup> Women are thus, arguably,

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96. *Id.* at 79.

97. SEYMOUR, *supra* note 76, at 111.

98. MYBURGH, *supra* note 62, at 79.

99. SEYMOUR, *supra* note 76, at xix, 330-332.

100. MYBURGH, *supra* note 62, at 78.

101. *Id.*

102. *Id.* at 48.

103. *Id.*

104. *Id.*

105. *Id.* at 79.

denied the expression of full rights of personality. Aside from the issue of full personality rights, the position of women cannot be said to be one where full respect for their dignity as human beings is honored. As is evidenced by the earlier description, women are subject to physical chastisement and perpetual guardianship in one form or another on the basis of their gender. A woman's participation in the group is at the level of a subordinate. Such treatment does not evidence a community where women are accorded the opportunity to develop fully as human beings and appears to clearly contravene the provisions of Section 8(2) of the new Constitution.

The exclusion of women from personality rights, as well as the opportunity for full development, is also found in those instances where customary law has adopted the notion of individual rights. As noted above, these rights have become part of the body of customary law largely through legislation created by a white government. Nevertheless, it is significant to note that this legislation tends to bear out the apparent customary law tradition of only according males full rights. Examples of such legislation include Section 27 of Proclamation No. R195 from 1967 which applies only to the Natal Province, and which provides that males shall be considered majors on attaining the age of twenty-one (21).<sup>106</sup> This violates both international principles and the Constitutional principle of equality before the law.<sup>107</sup> It should be noted that Section 38 of the same Proclamation provides that a man will still remain subject to the kraal head in all matters relating to the kraal.<sup>108</sup> In certain cases individual rights have been granted to divorced or emancipated women through legislation.<sup>109</sup> It is not clear in practice how the concept of emancipation is accepted and acted upon in African societies. M'D'Sa notes that exclusion from the community, which is what emancipation effectively accomplishes, is usually considered the most severe punishment.<sup>110</sup> Thus, the practice of emancipation is probably limited to instances where the community no longer desires the woman to be part of its group.<sup>111</sup> In such cases it could be argued that the full personality rights that a woman may receive on emancipation are not accorded to her out of respect for her dignity as a human being.

As noted above, African society tends to place more emphasis on the community than the individual. This approach results in variations in the way that concepts such as rights and freedoms are applied. As M'D'Sa puts it, "although the struggle for human dignity remains universal, it may be argued that the African people have to respond to these challenges in their own way."<sup>112</sup> M'D'Sa's argument, which appears to be a restatement of the theory that human rights may be culturally diverse, is not borne out in practice. The fact that African societies continue to ratify international documents which couch rights in terms of individual, rather than group, rights and indeed couch their own rights-related documents in such terms, belies the cultural diversity argument. While not denying the validity of M'D'Sa's approach, I would argue that the fact that African societies accept the concept of "the struggle for human dignity," as

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106. Proclamation, *supra* note 62, § 27.

107. S. AFR. CONST. § 8(2).

108. Proclamation, *supra* note 62, § 38; *see also* MYBURGH, *supra* note 62, at 79.

109. *See* Proclamation, *supra* note 62, §§ 28, 42.

110. M'D'Sa, *supra* note 30, at 77.

111. In Zimbabwe, the Age of Majority Act of 1981 has sought to emancipate women with limited success. Women do not want to claim emancipation because they are then excluded from their community.

112. M'D'Sa, *supra* note 30, at 74.

defined in international documents such as the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, as well as the U.N. Charter,<sup>113</sup> imposes on them a certain obligation to ensure its respect, despite cultural differences. The dignity of women is not being accorded respect by African customary law, as long as they are barred from fully participating in the group. This approach could be said to have been accepted by the A.N.C., who has proclaimed their support of women's rights,<sup>114</sup> and their commitment to the elimination of discrimination against women.

The notion of dignity carries some connotations of an equality of respect in that, as Weinreb puts it, "every person who is a member of a community . . . is to be treated as a person, neither more nor less."<sup>115</sup> It is clear that under African customary law, a woman's position within the community is not on par with a man's position and that on the basis of her sex she is treated as somewhat less than a person. Myburgh notes that marriage enhances a man's status in that he becomes responsible for the affairs pertaining to his family.<sup>116</sup> While a married woman may be accorded more token respect than an unmarried one, her actual position and status cannot be said to have been elevated. Indeed, in light of the fact that she is subject to being physically chastised by her husband and subject to the additional authority of her husband's group, as well as that of her own group, it would not be an overstatement to say that her situation has deteriorated.

Not only is it patently clear to those who have been schooled in a western tradition of law that the provisions which place women in such a position are unacceptable, this assessment is further concurred with by women who have been raised under the African tradition of law. The Woman's Federation of South Africa, a multiracial group with many black members, opposed the maintenance of customary law as a valid legal system on the grounds that it discriminated against women.<sup>117</sup> Moreover, Article 8 of the Final Resolution of the All Africa Law Conference held in Swaziland in October, 1981, provided that "[a]ny rule, institution or custom which degrades a woman or fails to accord her the fundamental rights belonging to every individual is repugnant to justice."<sup>118</sup> In particular, the Conference called attention to the injustice of indigenous and received laws which deny women equality of recognition and treatment in the field of marriage and property rights.

If one examines the position of women subject to African customary law against a natural law framework, it becomes clear that certain provisions of African customary law are unacceptable, because they do not afford the individual true recognition of, or respect for, her dignity as a human being. The individual is therefore denied the full

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113. It should be noted that the present South African Government has not ratified these two covenants, although it has ratified the U.N. Charter. It is expected, however, that a future South African government will ratify these documents together with the Banjul Charter.

114. The A.N.C. made this a non-negotiable point in negotiations for a new Constitution for South Africa. Their commitment to the principle is reflected in the Constitution and in the creation of a new Ministry of Women's Affairs in Nelson Mandela's government.

115. LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 167 (1987).

116. MYBURGH, *supra* note 62, at 81.

117. See The Charter of the Women's Federation (FedSAW) (clause entitled "Equality For Women" which provides that the members of FedSAW will struggle for the removal of laws and customs that deny African women the right to own property and which seeks to enforce upon them the status of a minor) [hereinafter FedSAW Charter].

118. See Conference Report, 25 J. AFR. L. 59 (1981).

opportunity to develop within her community. This is contrary to the principles underlying natural law, as well as a deontologically based approach to human rights. John Finnis argues that the "vice of discrimination" which is marked by "group bias, [and] denial of equal concern and respect" evidences a "failure of distributive justice."<sup>119</sup> Natural law is predicated on a belief, as Finnis submits, "that every human being is a locus of human flourishing which is to be considered with favor in him (sic) as much as in any one else."<sup>120</sup> Weinreb concurs in noting that, "The most general basis for a substantive principle of equality among human beings is simply their humanity. All people ought to be treated alike in some respects, . . . because they have specifically human characteristics in common."<sup>121</sup> The equality that Weinreb and Finnis refer to, and which is demanded by distributive justice, is apparently an equality of respect or concern. As Rodes puts it, "[d]istributive justice calls for an equal allocation among the members of the community of the benefits and burdens of those projects which the community undertakes."<sup>122</sup> It would appear that African women have more than their fair share of the burdens and substantially less of the benefits.

Weinreb's and Finnis' formulations are consistent with one of the earliest characterizations of natural law offered by Cicero in *De Republica*.<sup>123</sup> Cicero argued that natural law was of "universal application"<sup>124</sup> and that one should not look outside of oneself for "an expounder or interpreter of it,"<sup>125</sup> as there is no human being who "cannot attain to virtue."<sup>126</sup> The fact that each individual was seen as capable of acknowledging and interpreting the law of nature for himself or herself, and aspiring to virtue through such interpretation, indicates that natural law is predicated on the principle that each individual should be afforded equal opportunity to develop as a human being. This is shown in Cicero's belief that "no single thing is so like one another, so exactly its counterpart as all of us are to one another."<sup>127</sup> Based on our common humanity, Cicero argued that "we are so constituted by Nature as to share the sense of justice with one another"<sup>128</sup> (i.e., an awareness of the need for distributive justice based on an acknowledgment of the equality of each person's ultimate worth). Weinreb concludes that "universal natural law left no room for the . . . inequality of persons."<sup>129</sup>

It may be argued that it is unfair to assess the practices of African customary law against a natural law framework which is essentially, once again, of western origin. However, the fact that natural law theories may have originated in the west does not make them less valid. Moreover, there are some marked similarities between the society within which Roman law operated at the time of Cicero, and the society within which African customary law operates today. This is particularly true if one considers the fact that both societies were/are patriarchal and founded on the agnatic group. Both

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119. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 223 (1980).

120. *Id.* at 221.

121. WEINREB, *supra* note 115, at 167.

122. ROBERT E. RODES JR., *THE LEGAL ENTERPRISE* 159 (1976).

123. MARCUS CICERO, *DE REPUBLICA*, bk. III.

124. *Id.* at 32.

125. *Id.*

126. MARCUS CICERO, *DE LEGIBUS*, bk. I, at 30.

127. *Id.* at 29.

128. *Id.*

129. WEINREB, *supra* note 115, at 43.

strongly emphasized the role and importance of custom. In fact, Cicero even questioned the "worth of human life," unless it was "woven into the lives of our ancestors by the records of history."<sup>130</sup> Further, both societies found themselves in a state of transition, coming into contact with other cultures, and being forced to question the position of women within their respective communities.<sup>131</sup> Thus, considering the origins of natural law, to examine the way in which African customary law affects women against a natural law framework, is not entirely inappropriate.

Moreover, as argued above, African customary law and its adherents have accepted some rights terminology into their legal framework. As Finnis notes, modern usage of claims of right are consistent with a natural law tradition, as "not only does rights-talk keep justice in the foreground of our considerations," but it also provides "a usefully detailed listing of the various aspects of human flourishing and fundamental components of the way of life in community that tends to favour such flourishing in all."<sup>132</sup>

Whether one assesses customary law against human rights instruments, which emphasize the concept of the dignity of the individual, or against natural law, which espouses the principle of giving everyone his or her due,<sup>133</sup> it is clear that customary law comes up short when it comes to affording women the opportunity to develop fully within their society. Finnis argues for a "conception of human good, according to which a person is entitled to equal concern and respect."<sup>134</sup> He further makes the point that "a community is in bad shape in which that entitlement is denied."<sup>135</sup> The fact that many African societies are inadequate in this area has not gone unnoticed by the societies themselves.<sup>136</sup> This would appear to bear out Margaret Mead's observation that when two cultures come into contact they tend to extract from one another those features which are most conducive to the development of human dignity.<sup>137</sup>

### VIII. WILL SOUTH AFRICA FAVOR GENDER EQUALITY OVER CUSTOMARY LAW?

It is clear that the framers of the Constitution anticipated that customary law, which discriminates against women, as argued below, would have to bend to those provisions of the Constitution which prohibit gender discrimination. This is illustrated by the fact that Article 181(2) provides that "indigenous law shall be subject to regulation by law,"<sup>138</sup> and that Article 33(2) provides that no law shall limit any of the fundamental rights contained in Chapter three.<sup>139</sup> Moreover, the Commission on Gender

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130. *Id.*

131. See CICERO, *supra* note 123, at 17. Cicero decries the Voconian Law, which was a law restricting the amount of money that a woman could receive through inheritance. *Id.* Cicero noted in respect of this law: "that law, passed for men's advantage, is full of injustice to women." *Id.* Similarly, in the Preamble to the Charter of the Federation of South African Women, it is noted that the "status of women is a test of civilization." See Fedsaw Charter, *supra* note 117, preamble.

132. FINNIS, *supra* note 119, at 221-222.

133. *Id.* at 223 (concurring with the writings of Plato, Cicero and St. Augustine).

134. *Id.*

135. *Id.*

136. See *supra* notes 117-18 and accompanying text.

137. MARGARET MEAD, *NEW LIVES FOR OLD* (1956).

138. S. AFR. CONST. § 181(2).

139. S. AFR. CONST. § 33(2). The history behind the anti-gender discrimination clauses also bears this out. The A.N.C. Women's League struck a deal with the Executive Committee of the A.N.C. at the party's convention in July, 1991. The terms provided that the A.N.C. promise to make gender



Equality has been charged with making recommendations to Parliament on laws which affect gender equality and the status of women.<sup>140</sup> The problem is that Article 8(2) also preserves the right to one's culture, in providing that there shall be no discrimination on the basis of culture.<sup>141</sup> The framers of the Constitution apparently did not contemplate there being a conflict between the right to freedom from discrimination based on gender, and freedom from discrimination based on culture.

If one examines Article 33(2) carefully, it provides that not one of the fundamental rights may be limited by any law.<sup>142</sup> This terminology encompasses the right not to have one's culture, and arguably one's customary law system, limited by any legislation. Thus, it appears that even if it is determined that customary law contravenes the Constitution by discriminating against women, arguably no change may be made to customary law, because to do so would be to contravene the rights of customary law adherents to their culture.

Customary law adherents may even claim that their legal system does not *unfairly* discriminate<sup>143</sup> against women, because it is not predicated on the individual but on the community. Since it is the community or group that is important and not the individual, the fact that women do not bear the rights on behalf of the group is more incidental and not "unfair." The rights of women are protected by their membership in the group. However, because of the recent emphasis placed on women's rights and gender equality it is unlikely that this argument would be successful. This is particularly true because the present government is loath to place too much emphasis on cultural rights for fear that this will lead to demands for secession by groups like Inkatha, the Zulu Nationalist party, and because the legitimacy of freedom from gender discrimination has at last been acknowledged in South Africa.

The problem of determining which rights should be accorded preference is compounded by the affirmative action provisions of the Bill of Rights and the reference to interpreting the Chapter in accordance with international law and foreign case law. Given that customary law adherents have seen their law interfered with and corrupted by both the colonial and apartheid governments, an argument could be made that customary law adherents fall under the provisions of Article 8(3)(a). This Article, the affirmative action clause, applies to groups "disadvantaged by unfair discrimination."<sup>144</sup> One could well take the position that by subjecting customary law to the repugnancy clause,<sup>145</sup> and by limiting the jurisdiction of the chiefs and tribal courts, the colonial and apartheid governments unfairly discriminated against customary law adherents as a group. Arguably, proponents of customary law would now be entitled to special protection and advancement as a group, thereby enabling them to keep their system of customary law intact. It is my opinion that, should this argument be ad-

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equality a non-negotiable item in the negotiations for the new Constitution.

140. S. AFR. CONST. § 119(3).

141. S. AFR. CONST. § 8(2).

142. S. AFR. CONST. § 33(2).

143. S. AFR. CONST. § 8(2) (stating explicitly that "[n]o person shall be *unfairly* discriminated against . . ." and implying that some forms of discrimination may not be unfair).

144. S. AFR. CONST. § 8(3)(a).

145. The repugnancy clause was a principle used by colonial governments to guide them in limiting the recognition of customary law. Basically, it provided that customary law would be recognized in transactions between blacks as long as it was not contrary to natural justice or repugnant to morality. The use of the repugnancy clause resulted in customary law being reinterpreted by colonial rulers.

vanced, it would fail on the grounds of legislative intent,<sup>146</sup> in that it was the intent of the framers of the Constitution to prohibit gender discrimination, no matter what its form. The problem is compounded, however, if South Africa looks to international law or foreign case law on this topic.

Article 35(1) of the Constitution provides that a court may give regard to public international law and comparable foreign case law in interpreting the rights contained in the Bill of Rights.<sup>147</sup> As argued above, public international law has not itself clearly resolved the conflict between cultural rights and women's rights. A clear statement favoring women's rights over cultural rights was only made recently in the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>148</sup>

Article 5 of the Convention provides that State Parties shall take all appropriate measures:

(a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.<sup>149</sup>

The Convention also calls on states to accord all women equality before the law,<sup>150</sup> including full *locus standi*.<sup>151</sup> Member states are further encouraged to take appropriate measures to eliminate discrimination against women in all matters related to marriage and family relations.<sup>152</sup> It is significant to note that, despite the fact that CEDAW entered into force some five years prior to the Banjul Charter,<sup>153</sup> the drafters of the Banjul Charter did not incorporate CEDAW's provisions about eliminating customary practices which discriminate against women.

## IX. EXAMPLES PROVIDED BY FOREIGN CASE LAW

Pursuant to section 35(1) of the Constitution, the courts may consider foreign case law, as well as, international law when interpreting the rights set forth in Chapter Three of the Constitution. Thus, South Africa may look to her neighbors for a lead. The problem is not only that international law is confusing but that foreign case law does not seem to provide any clearer precedent. The recent *Otieno* case<sup>154</sup> in Kenya and the *Unity Dow* case<sup>155</sup> in Botswana illustrate that other African states have experienced problems in resolving the conflict between cultural rights and women's rights.

In the *Otieno* case, the wife of S.M. Otieno, a prominent Kenyan lawyer, who died in 1986, sought to bury her husband's body near where they had spent their mar-

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146. H. R. HAHLO & ELLISON KAHN, *THE SOUTH AFRICAN LEGAL SYSTEM AND ITS HISTORY* 365 (1968) (legislative intent is a permissible manner of interpreting statutes under South African law).

147. S. AFR. CONST. § 35(1).

148. Convention on the Elimination of All Forms of Discrimination Against Women, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/36 (1980), reprinted in 19 INT'L LEGAL MATERIALS 33 (1980) (entered into force Sept. 3, 1981).

149. *Id.* art. 5.

150. *Id.* art. 15(1).

151. *Id.* art. 15(2), (3).

152. *Id.* art. 16(1).

153. The Banjul Charter entered into force on October 21, 1986.

154. See John W. Van Doren, *Death African Style: The Case of S.M. Otieno*, 36 AM. J. COMP. L. 329 (1988).

155. Attorney General v. Unity Dow, Civ. App. No. 4/91 (Bots. App. Ct. June 3, 1992) (opinion of Ammissah, J.P.).

ried life together.<sup>156</sup> Her late husband's brother, a prominent member of the Luo Clan, sought to have Otieno's body buried near the ancestral home. As the place and manner of burial is extremely important in African customary law, Otieno's brother had the support of an active Luo Clan organization. The case was a clear illustration of the clash between women's rights and cultural rights. While the Kenyan Constitution contains clauses which prohibit discrimination on the basis of gender, the customary law of succession requires that the deceased be buried by his male relatives. The Court of Appeals essentially found that there was an exception to the anti-gender discrimination clauses of the Constitution where the customary law of burial was concerned.<sup>157</sup> It, therefore, found that Otieno's brother had the right to bury Otieno, despite the fact that Otieno was not an adherent of customary law and had chosen to marry his wife in a civil law ceremony, rather than according to customary law. Customary law rights were thus preferred over gender discrimination claims in this case.

In the Botswana case of *Attorney General v. Unity Dow*,<sup>158</sup> claims based on gender discrimination were not as easily dismissed as in the *Otieno* case, and the ruling of the Appeals Court advanced the cause of women's rights. Despite this ruling, the fact that many gender discriminatory laws remain in Botswana is disquieting.<sup>159</sup> In *Unity Dow*, a Botswana attorney brought a gender discrimination claim based on the fact that the Botswana Citizenship Act grants citizenship to children of Botswana men who are married to non-citizens but not to children of women married to non-Botswana citizens.<sup>160</sup> Although the Botswana High Court upheld Dow's claim, the Deputy Attorney General made the logical argument that the state sanctions sexual bias, because it permits other discriminatory laws to exist in the form of customary law. During the appeal, the Deputy Attorney General argued that the people of Botswana were entitled to determine their own norms, which did not have to include, and traditionally did not include, gender equality.<sup>161</sup> He further argued that the fact that customary law, although apparently discriminatory, is still adhered to by a large number of the population, and is sanctioned by the state as a valid legal system, indicates that the state condones and supports gender discrimination.<sup>162</sup> Although the Appeals Court ultimately found in favor of Unity Dow in holding the Citizenship Act to be unconstitutional, the Court stressed that the judgment did not mean that other discriminatory laws were necessarily unconstitutional.<sup>163</sup>

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156. Van Doren, *supra* note 154, at 338.

157. *Id.* at 341-42.

158. Civ. App. No. 4/91.

159. See, e.g., Administration of Estates Act, Cap. 31.01, Para. 28(5) (permitting women to administer an estate only with the permission of their husband); Deeds Registry Act, Cap. 33.02, Para. 18(4) (preventing immovable property from being registered in the name of a woman married in community of property); *Unity Dow*, Civ. App. No. 4/91, at 88 (stressing that the Court was only deciding the issue of the validity of the Citizenship Act and not other acts which discriminated against women, and that by finding the Citizenship Act unconstitutional it was not necessarily finding other discriminatory acts unconstitutional).

160. See Michael P. Seng, *In a Conflict Between Equal Rights for Women and Customary Law, the Botswana Court of Appeal Chooses Equality*, 24 U. TOL. L. REV. 563, 568 (1993).

161. Nina Shapiro, *Test Case: Bias Ruling May Lead to Challenging Other Laws*, CHI. TRIB., Sept. 15, 1991, at A1.

162. *Id.* It is estimated by the Botswana government that there are currently at least twenty-five major statutes that condone gender discrimination. See Maureen O'Neil, *African Women's Groups Gain Strength*, THE GAZETTE, Dec. 1, 1991, at B2.

163. *Unity Dow*, Civ. App. No. 4/91, at 88.

A recent case in Zimbabwe, which has ostensibly committed itself to outlawing gender discrimination against women, whether in the common law or customary law, is also extremely troubling. The *Chapusa* case involved the customary law right of chastisement of a husband over his wife.<sup>164</sup> Laimon Chapusa and his wife were out drinking at a beer hall when Mr. Chapusa ordered his wife to return home to make supper for their three children.<sup>165</sup> His wife refused to comply with his order so Mr. Chapusa struck her.<sup>166</sup> They both returned home where the argument continued.<sup>167</sup> Mr. Chapusa repeatedly beat and struck his wife with a stick for her rudeness and neglect of duties.<sup>168</sup> Mrs. Chapusa died from the injuries that she suffered.<sup>169</sup> Mr. Chapusa pled guilty to culpable homicide in her death but was sentenced to a fine of only \$250.<sup>170</sup> The judge was apparently sympathetic to Mr. Chapusa's mitigating evidence that his wife had been rude and neglected her duties and that Mr. Chapusa simply exercised his marital authority in striking her.<sup>171</sup> This is not the only Zimbabwean case where judges have shown themselves to be sympathetic to the position of customary law adherents at the expense of women.

In the case of *Jenah v. Nyembe*<sup>172</sup> the Zimbabwean Supreme Court held that the proprietary consequences of African marriages (i.e., marriages between two black people) would be governed by African customary law, regardless of whether the parties marry under the African Marriages Act (customary law) or the Marriage Act (civil law).<sup>173</sup> Under customary law, all property acquired by a woman during the marriage accrues to her husband, with the exception of property owned by the women for purely ceremonial purposes. In effect, the courts are giving legal sanction to a property system that is inherently unfair to women. Although this situation has been redressed to some extent by the Matrimonial Causes Act,<sup>174</sup> which provides that a court may order an equitable distribution of property between the spouses on dissolution of marriage,<sup>175</sup> the position of a woman is not protected during the marriage; she is essentially deemed to be without property interests. This approach undermines any commitment to uphold the rights of women and does not provide an example to South Africa of how to advance women's rights.

The problems confronting African countries which are trying to eliminate discrimination against women while preserving a system of customary law are numerous. The difficulties are compounded by the fact that the approach often taken smacks somewhat of the colonial law approach, which recognized customary law in certain areas, provided it was not "repugnant to justice."<sup>176</sup> Moreover, judges in many African coun-

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164. See Vicki Finkel, *Zimbabwe: What is a Woman's Life Worth: Just \$125 in Court*, INTER PRESS SERVICE, Sept. 27, 1989.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* The fine was \$250 Zimbabwean dollars, approximately worth \$125 U.S. dollars at the time.

171. *Id.* The judge determined that the wife had been "asking for trouble in behaving as she did."  
*Id.*

172. SC 49/86 (Zimb. 1986).

173. *Id.* at 3 (opinion of Justice Gubbay).

174. Matrimonial Causes Act, No. 33 (1985).

175. *Id.* § 7(1)(a).

176. See *Chiduku v. Chidano*, 1922 SR 55 (holding that "[t]he only question is whether the cus-

tries do not come from legal traditions which have advanced or upheld women's rights. Therefore, education, both of judges and customary law adherents, is required.

#### X. THE FUTURE OF CUSTOMARY LAW IN SOUTH AFRICA

South Africa faces many of the same problems as Zimbabwe regarding societal resistance to change. The vast majority of South African judges are white males, raised in a legal tradition which, like customary law, has been slow in affording women equal recognition.<sup>177</sup> A sensitivity, both to women's issues and to customary law, is necessary for women's rights to be advanced and upheld, as well as for the rights of customary law adherents to their legal system to be recognized. Neither of these characteristics has been displayed by the South African judiciary in the past. The situation will require judges to be trained in customary law to ensure that the system is disrupted only minimally when gender equality is enforced. Despite training judges in this area, it is debatable whether adherents of customary law will observe new legislation and judicial pronouncements aimed at ensuring gender equality.<sup>178</sup> Education and an awareness of gender related issues will have to be fostered in customary law adherents in order for customary law to be rid of gender discrimination.

Whether customary law can successfully make the transition to a modern society is unclear. Much readjustment is required. It is also unclear whether customary law will have much application in the modern world outside the sphere of family law and land tenure. It could be argued that customary law's emphasis on reconciliation could be of great benefit to an emerging South African society, if it could successfully make the transition into the general legal system. One of the problems, as Margaret Mead has noted in her anthropological studies, is that societies who are forced to incorporate some foreign provisions of a socio/legal system often undermine the credibility of their own system.<sup>179</sup> Mead finds that such societies often abandon their own culture and, instead, adopt the new system in its totality.<sup>180</sup>

The integration of customary law into a post-apartheid legal system requires a delicate balancing act. The legitimate interests of a community in preserving and determining their own standards must be counterbalanced by the compelling interests of women in being afforded the opportunity to develop in society without invidious legal restrictions based on gender. A customary law that has been forced to assimilate anti-gender discrimination norms into its legal system, because of civil law legislation, can no longer be said to necessarily represent the norms and mores of its adherents, unless they voluntarily make gender equality one of their new mores. A spirit of tolerance, an emphasis on education, and time are necessary for the recognition of the valid aspirations of women to be assimilated into this tribal society. Perhaps the emphasis on problem solving through reconciliation, which is one of the most attractive features of customary law, will be its saving grace. If women are able to communicate their aspi-

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tom . . . is repugnant to natural justice or morality . . . whatever those words mean").

177. Until 1984 and the advent of the Matrimonial Affairs Act, married South African women were still regarded as minors by the law and were subject to their husbands' marital power.

178. Brenda Grant & Pamela Schwikkard, *Peoples Courts?*, 7 S. AFR. J. HUM. RTS. 307 (1991) (suggesting that judgments of the colonial courts were often disregarded by adherents of customary law, because they were seen as having no legitimacy and often did not accord with customary law principles).

179. MEAD, *supra* note 137, at 248.

180. *Id.*

rations to their society, and that society, in the spirit of reconciliation, is able to adjust its traditions and institutions to acknowledge those aspirations, cultural rights and women's rights may be reconciled. As William Godwin so aptly put it, "Every community of men, as well as every individual, must govern itself according to its ideas of justice. What I should desire is not by violence to change its institutions, but by reason to change its ideas."<sup>181</sup>

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181. MITTLEBEELE, *supra* note 64, at 1 (quoting Godwin).