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## "Big Love"?:\* The Recognition of Customary Marriages in South Africa

Penelope E. Andrews

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# "Big Love"?\* The Recognition of Customary Marriages in South Africa

Penelope E. Andrews\*\*

## *Abstract*

*This Comment contextualizes the issue of polygamous marriages within the South African constitutional paradigm, one committed unequivocally to the principle of equality. This Comment analyzes how South African law, European in origin, had to incorporate the laws and institutions of indigenous communities within the national legal framework, as part of the overall transformative legal project underway in the country since 1994. By focusing on the Recognition of Customary Marriages Act, this Comment examines such incorporation, while questioning its effect on the overall project of constitutionalism, human rights, and equality.*

## *Table of Contents*

I. Introduction.....	1484
II. The Constitution and Gender Equality.....	1487
III. The Constitution and Traditional Law .....	1491
IV. Polygamy and the Recognition of Customary Marriages Act.....	1493
V. Obstacles to Women's Equality.....	1495
VI. Conclusion .....	1497

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\* The title of this Comment is taken from the popular television series, *Big Love* (HBO television broadcast 2006–2007).

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### I. Introduction

This Comment will examine customary marriages, mostly polygamous, within the South African legal framework. In particular, this Comment will focus on the Recognition of Customary Marriages Act,<sup>1</sup> a statute that purports to regulate customary marriages, including the establishment of such marriages, as well as their termination.

This Comment will contextualize the recognition of customary marriages within the broader democracy project in South Africa, especially the legal and constitutional transformation underway since the first democratic election in 1994. This Comment analyzes how the South African political and legal context had to shift from its anomalous status, as a European colony at the tip of the African continent, to a democratic African state, as a member of the wider community of African states.<sup>2</sup> Part of this paradigmatic shift included a somewhat ambiguous undertaking of incorporating the laws and institutions of indigenous communities within the national legal framework, while embarking on a purposive (modernist) project of constitutionalism and human rights.<sup>3</sup>

The European legal tradition, embodied in British and Roman-Dutch legal principles, processes, and institutions, has long been the mainstay of the South African legal system, with customary African law serving as the "stepchild" of the national legal framework.<sup>4</sup> However, the Constitution adopted in 1993, and later in 1996, reflected a compromise that brought indigenous law into the national legal framework.<sup>5</sup> Although equality is the preeminent principle in the

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1. Recognition of Customary Marriages Act 120 of 1998 (S. Afr.).

2. See ALLISTER SPARKS, TOMORROW IS ANOTHER COUNTRY 5–14 (1995) (describing how the political and legal shift in South Africa impacted that country's relationship with other African states).

3. See Victoria Bronstein, *Reconceptualising the Customary Law Debate in South Africa*, 14 S. AFR. J. HUM. RTS. 388, 388–89 (1998) (discussing the balance of cultural rights and equality within the South African Constitution); Yvonne Mokgoro, *Traditional Authority and Democracy in the Interim South African Constitution*, 3 REV. CONST. STUD. 60, 60 (1996) ("The issue of continued recognition and protection of the institution of traditional leadership and the role it will play in post-apartheid society was placed squarely on the agenda for constitutional reform in South Africa.").

4. See generally T.W. BENNETT, CUSTOMARY LAW IN SOUTH AFRICA (2004); MARTIN CHANOCK, THE MAKING OF SOUTH AFRICAN LEGAL CULTURE 1902–1936: FEAR, FAVOUR AND PREJUDICE (2001).

5. South Africa drafted its Constitution in two stages. See HASEN EBRAHIM, THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA 149–221 (1998) (discussing the constitutional drafting process). The first stage, an interim constitution, was finalized in 1993. *Id.* at 170. The second and final Constitution was adopted in 1996. *Id.* at 189. For further analysis of the South African Constitution, see generally THE POST-APARTHEID CONSTITUTIONS: REFLECTIONS ON SOUTH AFRICA'S BASIC LAW (Penelope Andrews & Stephen Ellmann eds.,

Bill of Rights—which provides that a law or policy contradicting such principle be deemed unconstitutional<sup>6</sup>—the Constitution also provides for the recognition of customary laws and institutions.<sup>7</sup>

This finely tuned constitutional compromise occurred against the backdrop of several decades of global human rights debates centering on a woman's right to equality, on the one hand, and the respect for cultural values and traditions on the other. Loosely termed the "universalism versus cultural relativism"<sup>8</sup> debate, the essence of this discussion was the apparent contradiction between two liberatory discourses, namely feminism and national liberation—the latter incorporating the principle of self-determination for indigenous peoples.<sup>9</sup> Feminist advocates and legal scholars also influenced a fairly vigorous jurisprudence around equality, advocating more for a substantive, as opposed to formal, equality.<sup>10</sup> South Africa was therefore in a unique position, as the last decolonized African country to benefit not just from fifty years of global human rights activism, but also from the lessons learned from other decolonized, particularly African, states.<sup>11</sup>

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2001) and RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER (David Van Wyk et al. eds., 1994).

6. See S. AFR. CONST. 1996 § 7(1) (declaring that the Bill of Rights "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom").

7. See Recognition of Customary Marriages Act 120 of 1998 § 1(ii) (S. Afr.) (defining "customary law" as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form the culture of those peoples").

8. See Abdullahi A. An-Náim, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES 19, 22–29 (Abdullahi Ahmed An-Náim ed., 1992) (defining cultural relativity and cultural universality).

9. See Abdullahi A. An-Náim, *Problems of Universal Cultural Legitimacy for Human Rights*, in HUMAN RIGHTS IN AFRICA 331, 339–45 (Abdullahi A. An-Naim & Francis M. Deng eds., 1990) (examining the cultural relativism debate in the context of human rights); see also RHODA E. HOWARD, HUMAN RIGHTS AND THE SEARCH FOR COMMUNITY 51–63 (1995) (criticizing cultural relativism on grounds that it "preserves male privilege at the expense of women's rights").

10. See Felicity Kaganas & Christina Murray, *Law and Women's Rights in South Africa: An Overview*, in GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER 1, 14–15 (Christina Murray ed., 1994) (noting a preference for advocating substantive change over formal equality among feminists seeking to eliminate women's disadvantages in society); see also Susan Bazilli, *Introduction to PUTTING WOMEN ON THE AGENDA* 20 (Susan Bazilli ed., 1990) ("Formal equality is worth little if it is not supplemented by affirmative action that will help to destroy the structures and behavior patterns created by centuries of gender oppression, of discrimination against women."); Sandra Liebenberg, *Preface* to THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE 6–7 (Sandra Liebenberg ed., 1995) (advocating for an approach that will "assist academics, activists and lawyers as they seek to ensure that the final South African Constitution offers women real tools of empowerment and not mere 'ropes of sand'").

11. See HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S

As the constitutional processes unfolded in South Africa, and as the Constitutional Court developed significant women's rights jurisprudence, it became increasingly clear that African women labored under a generally subordinated legal status.<sup>12</sup> African women were severely disadvantaged with respect to issues such as inheritance, child custody, guardianship, and access to property.<sup>13</sup> The South African Law Commission therefore embarked on a series of studies intended to address the disadvantages and discrimination of women within an indigenous legal framework.<sup>14</sup> One such study led to the proposal of, and finally, the adoption of, the Recognition of Customary Marriages Act.<sup>15</sup> This Act defines "customary marriage" as "a marriage concluded in accordance with customary law,"<sup>16</sup> and provides, inter alia, for the following:

- the recognition of customary marriages;<sup>17</sup>
- the articulation of the requirements for a valid customary marriage, including issues of consent;<sup>18</sup>
- the regulation of the registration of customary marriages;<sup>19</sup>
- the incorporation of equality, with respect to status and capacity, to partners in customary marriages;<sup>20</sup>
- the regulation of the proprietary consequences of customary marriages;<sup>21</sup> and

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POLITICAL RECONSTRUCTION 48–68 (2000) (describing the global community's impact on South Africa's political transformation during the late twentieth century).

12. See H.J. SIMONS, *AFRICAN WOMEN: THEIR LEGAL STATUS IN SOUTH AFRICA* 271–77 (1968) (describing a work environment that subordinated the rights of African women).

13. See *id.* at 187–270 (describing the legal disadvantages confronting African women).

14. See S. AFRICAN LAW COMM'N, *PROJECT 90, THE HARMONISATION OF THE COMMON LAW AND THE INDIGENOUS LAW: REPORT ON CUSTOMARY MARRIAGES 1–7* (1998) (describing the development and methodology of the Commission's study on customary marriages in South Africa).

15. See S. AFRICAN LAW COMM'N, *TWENTY-SIXTH ANNUAL REPORT* (1998), [http://www.doj.gov.za/salrc/anr/1998\\_ar.pdf](http://www.doj.gov.za/salrc/anr/1998_ar.pdf).

16. Recognition of Customary Marriages Act 120 of 1998 s. 1(iii) (S. Afr.).

17. *Id.* s. 2.

18. *Id.* s. 3.

19. *Id.* s. 4.

20. *Id.* s. 6.

21. *Id.* s. 7.

- the dissolution of customary marriages.<sup>22</sup>

In addition to outlining the substantive provisions of the Act, this Comment explains how these formal legal requirements impact the broader issue of women's equality. In particular, this Comment examines the Act in light of the various patterns of masculinities—a legacy of colonialism and apartheid that continues to characterize post-apartheid South African society<sup>23</sup>—and suggests ways that the polygamous arrangements permitted by the Act may create conditions for greater equality for women. Conversely, this Comment outlines the possible pitfalls of regulating a system that, despite its protections, may not lead to the desired outcome of women's equality.<sup>24</sup>

## II. *The Constitution and Gender Equality*

The South African Constitution embodies a clear commitment to gender equality. The founding provisions emphasize the values that underpin South Africa's democracy, including the principles of nonracialism and nonsexism.<sup>25</sup> Equality is the quintessential value, and the key provisions regarding gender equality are found in the Bill of Rights. The Bill of Rights contains a general commitment to equality before the law<sup>26</sup> and to equal protection of the law,<sup>27</sup> declaring that "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."<sup>28</sup> The prohibition on direct and indirect discrimination is an explicit recognition on the part of the

22. *Id.* s. 8.

23. See Penelope E. Andrews, *Learning to Love After Learning to Harm: Post-Conflict Reconstruction, Gender Equality and Cultural Values*, 15 MICH. ST. J. INT'L L. 41, 48 (2007) (describing the pervasiveness of masculinity within the South African culture).

24. For a thoughtful discussion of the impact of the Recognition of Customary Marriages Act, see Mothokoa Mamashela, *New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act*, 20 S. AFR. J. HUM. RTS. 616, 641 (2004) (concluding that the progress made by the Recognition of Customary Marriages Act was more illusory than real).

25. See, e.g., S. AFR. CONST. 1996 § 3(2) ("All citizens are equally entitled to the rights, privileges and benefits of citizenship; and equally subject to the duties and responsibilities of citizenship.").

26. See *id.* § 8(1) ("The Bill of Rights applies to all law and binds the legislature, the executive, and the judiciary, and all organs of state.").

27. See *id.* § 9(1) ("Everyone is equal before the law and has the right to equal protection and benefit of the law.").

28. *Id.* § 9(3).

constitutional drafters of the invidiousness and tenacity of institutionalized discrimination. This recognition reflects legal and political trends in liberal democracies where the principle of equality is centered in constitutional and legislative arrangements, namely, that "[t]he inclusion of both sex and gender as grounds for proscribing discrimination protects women from invidious discrimination based not only on biological or physical attributes, but also on social or cultural stereotypes about the perceived role and status of women."<sup>29</sup>

The Bill of Rights explicitly acknowledges the intersectionality of different grounds of discrimination.<sup>30</sup> Such an acknowledgment is crucial to redressing the discrimination confronted by black women who suffer multiple forms of discrimination.<sup>31</sup> In one of the earliest equality cases before the Constitutional Court, Judge Goldstone noted that there is often a complex relationship between specified grounds of discrimination, and that the temptation to force them into neatly self-contained categories should be resisted.<sup>32</sup>

An important provision in the Constitution, and one that potentially has the ability to solidify the constitutional commitment to gender equality, is the establishment of a Commission for Gender Equality,<sup>33</sup> a body empowered to promote, educate, monitor, and lobby for gender equality.<sup>34</sup> The Constitution

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29. Penelope E. Andrews, *The Stepchild of National Liberation: Women and Rights in the New South Africa*, in *THE POST-APARTHEID CONSTITUTIONS*, *supra* note 5, at 326, 335. The goals of nonsexism are promoted in other sections of the Bill of Rights not directly pertinent for this discussion. These include the right to bodily security and integrity, including reproductive rights. See S. AFR. CONST. 1996 § 12(2) ("Everyone has the right to freedom and security of the person, which includes the right to make decisions concerning reproduction; to security in and control over their body; and not to be subjected to medical or scientific experiments without their informed consent."). For an analysis of the constitutional commitment to equality, see Andrews, *supra* at 326.

30. See S. AFR. CONST. 1996 § 9(5) ("Discrimination on one or more of the grounds listed . . . is unfair unless it is established that the discrimination is fair.").

31. See Penelope E. Andrews, *Globalization, Human Rights, and Critical Race Feminism: Voices from the Margins*, 3 J. GENDER RACE & JUST. 373, 374–79 (2000) (advocating an approach that considers all forms of discrimination); Adrien K. Wing & Eunice P. de Carvalho, *Black South African Women: Toward Equal Rights*, 8 HARV. HUM. RTS. J. 57, 60–61 (1995) (discussing the multiple forms of discrimination faced by black South African women).

32. See *President of the Republic of S. Africa v Hugo* 1997 (6) BCLR 708 (CC) at 729 (S. Afr.) ("Each case . . . will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not."). Judge Goldstone further noted that "[a] classification which is unfair in one context may not necessarily be unfair in a different context." *Id.*

33. See S. AFR. CONST. 1996 § 187 (establishing the Commission for Gender Equality).

34. See *id.* § 187(1) (providing that the Commission "must promote respect for gender

also provides for a Human Rights Commission to promote and protect human rights.<sup>35</sup> The Bill of Rights is fairly expansive, incorporating generous provisions relating to legal standing and, arguably, laying the basis for class action litigation.<sup>36</sup>

The South African Constitution has been hailed as one of the most impressive documents for the wide range of rights protections it affords<sup>37</sup> and for its deep commitment, formally at least, to gender equality as evidenced by the expansive provisions alluded to above.<sup>38</sup> It protects the civil and political rights of women in all areas of life, including the public and private sphere.<sup>39</sup> Most significantly, it provides for an array of social and economic rights that

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equality and the protection, development and attainment of gender equality"); *id.* § 187(2) (empowering the Commission to "monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality").

35. *Id.* § 184; see also Penelope E. Andrews, *Striking the Rock: Confronting Gender Equality in South Africa*, 3 MICH. J. RACE & L. 307, 330 (1998) (noting that the incorporation of two human rights bodies in the Constitution, both ostensibly mandated to pursue equality, engendered some controversy among women advocates in the early stages of the constitutional drafting process). Those who supported a separate structure for women argued that only a distinctly gendered institution could effectively pursue women's rights and deal comprehensively with the eradication of sexism and patriarchy. *Id.* They feared that incorporating women's concerns within a broader human rights structure would marginalize women's issues and that the eradication of racism will take priority over the eradication of sexism. *Id.* On the other hand, those who advocated for the inclusion of gender issues in a broad human rights structure argued that women's issues are inevitably ghettoized when separated and that, in any event, for most black women, their subordination flows from the intersectionality of race, gender, class, and other indicators. *Id.* They also argue, compellingly in the author's view, that it is important that a body like the Human Rights Commission develop the capacity to fight women's subordination as part of a comprehensive and effective strategy to combat all kinds of discrimination. *Id.* at 330–31.

36. See S. AFR. CONST. 1996 § 38 (providing standing to bring claims for violations of protections established under the Bill of Rights).

37. See, e.g., Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 153 (1998) ("[The Constitution] intends not merely to proclaim democratic political rights but to commit the South African people to achieve a new kind of society in which people actually have the social resources they need meaningfully to exercise their rights."); Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise*, 16 S. AFR. J. HUM. RTS. 206, 211–12 (2000) ("South Africa is increasingly at the centre of the transnational exchange of ideas and experience about the rule of law and human rights and, as such, human rights scholars around the world can ill afford not to pay attention to developments there.").

38. See Mark S. Kende, *Gender Stereotypes in South African and American Constitutional Law: The Advantages of a Pragmatic Approach to Equality and Transformation*, 117 S. AFR. L.J. 745, 753 (2000) ("Unlike the South African Constitution, the US Constitution doesn't expressly prohibit sex or gender discrimination.").

39. See S. AFR. CONST. 1996 §§ 7–39 (enumerating a broad range of civil rights).



could potentially reduce or eliminate the more egregious aspects of the legacy of apartheid.<sup>40</sup>

The language in South Africa's Bill of Rights is particularly notable when compared to the constitutional protection of gender equality in the United States. The language suggests that discrimination against women is just as constitutionally suspect as discrimination on the basis of race.<sup>41</sup> This is no doubt a firmer stance than the approach of the American courts, where gender discrimination is subjected to intermediate scrutiny<sup>42</sup> and race discrimination is subjected to strict scrutiny.<sup>43</sup>

Since 1995, the Constitutional Court has had occasion to decide a considerable number of equality cases, several involving gender equality claims.<sup>44</sup> In these cases, the Court has elaborated at length about what equality means,

40. See Murray Wesson, *Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, 20 S. AFR. J. HUM. RTS. 284, 284 (2004) ("In 1996, South Africa took the bold step of including directly enforceable socio-economic rights in its new Constitution."); see also Penelope E. Andrews, *The South African Constitution as a Mechanism for Redressing Poverty*, in *DEMOCRATIC REFORM IN AFRICA: ITS IMPACT ON GOVERNANCE & POVERTY ALLEVIATION* 57, 59–60 (Muna Ndulo ed., 2006) (discussing the impact of social and economic rights established under the Constitution on South Africa's poverty problem).

41. See S. AFR. CONST. 1996 § 9(3) ("The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, [and] gender . . .").

42. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge . . . classifications by gender must serve important governmental objects and must be substantially related to achievement of those objectives.").

43. See *Korematsu v. United States*, 323 U.S. 214, 215 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny.").

44. See, e.g., *Bhe & Others v Magistrate, Khayelitsha & Others* 2003 (1) BCLR 27 (CC) at 28–29 (S. Afr.) (finding unconstitutional intestate succession determinations based on the principle of primogeniture); *Minister of Def. v Potsane & Another* 2001 (11) BCLR 1137 (CC) at 1155 (S. Afr.) (finding unconstitutional the impugned powers of military prosecutors under the Military Discipline Supplementary Act 16 of 1999); *Hoffman v S. Africa Airways* 2000 (11) BCLR 1211 (CC) at 1226 (S. Afr.) (finding an employer's refusal to hire an HIV positive applicant unconstitutional); *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at 290–91 (S. Afr.) (finding that government officials violated § 8(2) of the Interim Constitution by charging a flat rate for municipal services to a historically black township while charging a consumption-based rate to a historically white township); *Fraser v Naude & Others* 1998 (11) BCLR 1357 (CC) at 1360–61 (S. Afr.) (denying an appeal brought by a father seeking to secure his parental rights over a child born out of wedlock on grounds that it is not in the child's best interest); *President of the Republic of S. Africa v Hugo* 1997 (6) BCLR 708 (CC) at 745–46 (S. Afr.) (finding that a statutory provision allowing the president to commute sentences of mothers with small children, but not fathers in similar predicaments, constituted gender discrimination); *Brink v Kitchhoff* 1996 (6) BCLR 752 (CC) at 772–73 (S. Afr.) (striking down a statute which deprived some married women of the right to insurance benefits ceded to them by their husbands).

attempting to contextualize structural disadvantage and discrimination within the realities of contemporary South African society. In this endeavor, the Court has furnished a more substantive definition of equality, eschewing a mere formalistic one, focusing on disparate impact as opposed to equal treatment.<sup>45</sup>

### III. *The Constitution and Traditional Law*

In addition to the gender equality provisions in the Bill of Rights, the Constitution also protects traditional laws and institutions. Chapter 12 provides for the recognition of, and role of, traditional leaders. In particular, this chapter provides that "[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."<sup>46</sup> This section suggests that the principle of equality will supersede any aspect of traditional law that violates that principle.<sup>47</sup> Indeed, the Constitutional Court has reiterated the supremacy of the principle of equality in the face of an indigenous law that discriminated against women.<sup>48</sup>

Section 30 of the Bill of Rights states that "[e]veryone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."<sup>49</sup> Similarly, § 31 provides that persons "belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community to (a) enjoy their culture, practice their religion and use their language; and (b) form, join and maintain cultural, religious and linguistic associations and other organs of civil society."<sup>50</sup> These

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45. See Cathi Albertyn & Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, 14 S. AFR. J. HUM. RTS. 248, 250 (1998) (noting that the Constitutional Court rejected a formal understanding of equality "which ignore[d] concrete differences in a quest for equal treatment regardless of those differences" in favor of a definition "which [sought] to address and remedy material inequalities"); see also Pierre De Vos, Grootboom, *The Right of Access to Housing and Substantive Equality as Contextual Fairness*, 17 S. AFR. J. HUM. RTS. 258, 267 (2001) ("[T]he Constitutional Court has interpreted the right to equality to go far beyond a formal guarantee of equal treatment . . .").

46. S. AFR. CONST. 1996 § 211(3).

47. See T.W. Bennett, *The Equality Clause and Customary Law*, 10 S. AFR. J. HUM. RTS. 122, 123 (1994) ("[C]ustomary law falls under the shadow of a bill of rights—which was given pride of place in the Constitution—in particular under the shadow of a gender equality clause.").

48. See *Bhe & Others v Magistrate, Khayelitsha & Others* 2003 (1) BCLR 27 (CC) at 28–29 (S. Afr.) (declaring unconstitutional an act of Parliament that recognized discriminatory customary laws).

49. S. AFR. CONST. 1996 § 30.

50. *Id.* § 31.

rights, however, may not be exercised in a manner inconsistent with the principle of equality established in § 7(1).

The Bill of Rights provides for legislation that recognizes "(i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion."<sup>51</sup> Again, however, recognition of these systems may not conflict with the principle of equality. The Constitution also makes provision for a Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities<sup>52</sup> and exhorts that the composition of the Commission "broadly reflect the gender composition of South Africa."<sup>53</sup>

In addition to the substance of the rights promised in the Bill of Rights, the interpretation of these rights by courts, tribunals, and forums must comport with the Constitution's underlying ideals. Specifically, the Constitution provides that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."<sup>54</sup> Courts must consider international law and may consider foreign law.<sup>55</sup> This reference to international law has been particularly illuminating in several human rights cases in which the Constitutional Court has imported relevant international principles into its reasoning.<sup>56</sup> For example, in a case examining the issue of violence against women, the Court analyzed at length South Africa's international obligations to pursue equality for, and stem violence against, women.<sup>57</sup> Courts acknowledge rights and freedoms incorporated in legislation, common law, and customary law, unless they contradict the values inherent in the Bill of Rights.

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51. *Id.* § 15(3)(a).

52. *Id.* § 185.

53. *Id.* § 186(2)(b).

54. *Id.* § 39(2).

55. *Id.* § 39(1)(b)–(c).

56. *See, e.g., State v Makwanyane & Another* 1995 (3) SA 391 (CC) at 413–48 (S. Afr.) (weighing principles from foreign nations in analyzing the propriety of capital punishment); *see also Nat. Coal. for Gay & Lesbian Equal. & Another v Minister of Justice & Others* 1998 (12) BCLR 1517 (CC) at 1534–45 (S. Afr.) (analyzing the treatment of sexual orientation under the laws of various countries in deciding a sexual orientation discrimination case).

57. *See State v Baloyi* 2000 (2) SA 425 (CC) at 431–34 (S. Afr.) (referring to South Africa's obligation under international law to stem violence against women and discussing the Convention on the Elimination of All Forms of Discrimination Against Women and the Vienna Declaration on Violence Against Women). Writing for the Court, Justice Albie Sachs describes domestic violence as a gross violation of women's human rights. *Id.* at 441.

*IV. Polygamy and the Recognition of Customary Marriages Act*

The Recognition of Customary Marriages Act is an important milestone on the road to gender equality in South Africa, according parity to all marital regimes and providing broad protection to women in customary unions. The passage of the Act signifies another nail in the coffin of the legal dualism that characterized colonial and apartheid South Africa, and it gives effect to the constitutional vision of equality for all the legal systems, including indigenous law.<sup>58</sup> The Act repealed several laws that applied only to Africans in South Africa, laws that typified the pernicious legacies of colonialism and apartheid.<sup>59</sup>

The main purpose of the Act is to extend full legal recognition to marriages conducted according to indigenous law, particularly, to improve the position of women in those marriages and the position of children born therein.<sup>60</sup> If a person is a spouse in more than one customary marriage, the Act recognizes all of those customary marriages, including those conducted prior to passage of the Act.<sup>61</sup> The Act clearly sets out the requirements for the validity of a customary marriage, including a requirement that the parties to a customary marriage not be minors and that the parties consent to the customary marriage.<sup>62</sup> In addition, such marriage must be "negotiated and entered into or celebrated in accordance with customary law."<sup>63</sup> The Act requires parental or guardian consent where the prospective spouse is a minor and, in the absence of such consent, allows the prospective spouse to obtain permission from the Minister of Justice or a government official.<sup>64</sup> The Act is unequivocal about equality between the spouses:

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets

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58. Sections 30 to 31 of the Constitution guarantee the right to cultural pluralism. *See supra* text accompanying notes 49–50 (discussing the cultural protections embodied in the Bill of Rights).

59. *See* Recognition of Customary Marriages Act 120 of 1998 s. 12 (S. Afr.) (repealing sections of the Black Administration Act 38 of 1927, the Transkei Marriage Act 21 of 1978 (Transkei), the KwaZulu Act on the Code of Zulu Law 16 of 1985, and the Natal Code of Zulu Law, Proc R151/1987).

60. *See id.* s. 2 (validating indigenous marriages conducted under customary law).

61. *Id.* s. 2(3).

62. *Id.* ss. 3(1)(a)(i)–(ii).

63. *Id.* s. 3(1)(b).

64. *Id.* ss. 3(3)–(4).

and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.<sup>65</sup>

Mindful of the need to protect women against unlawful property deprivation, the Act also provides for an automatic community property regime, but allows the spouses to enter into an antenuptial contract that serves to regulate the matrimonial property.<sup>66</sup> The Act also stipulates that a husband in a customary marriage "who wishes to enter into a further customary marriage with another woman" must apply for court approval of a written contract to "regulate the future matrimonial property systems of his marriages."<sup>67</sup> All of these provisions reflect the formal commitment on the part of the legislature to ensure equity for all wives in customary marriages.<sup>68</sup>

The Act provides that a customary marriage can only be dissolved by a court decree on the ground of irretrievable breakdown, protecting wives in these marriages against desertion.<sup>69</sup> Despite the gender equality implications in the Act, the most contentious aspect for women advocates is the recognition of polygamous unions. Polygamy has always been a source of controversy in feminist legal theory.<sup>70</sup> Its unequal status, namely that the "benefit" of multiple marriages accrues only to men, as well as its symbolic manifestation of patriarchy, is a cause for concern for advocates committed to gender equality.<sup>71</sup> The drafters of the statute took account of the controversy, but in weighing the patriarchal tendencies of the practice of polygamy against the need to protect women and children in polygamous unions, decided to go

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65. *Id.* s. 6.

66. *See id.* s. 7(2) ("A customary marriage entered into after the commencement of this Act . . . is a marriage in community of property . . . unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.").

67. *Id.* s. 7(6).

68. *But see* Mamashela, *supra* note 24, at 641 (cautioning that the Act's property protections may be illusory for the majority of women).

69. *See* Recognition of Customary Marriages Act 120 of 1998 s. 8(1) (S. Afr.) ("A customary marriage may only be dissolved by a court or by a decree of divorce on the ground of the irretrievable breakdown of the marriage.").

70. For a comprehensive debate on the issues, see generally FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES (Mai Yamani ed., 1996); HAIDEH MOGHISSI, FEMINISM AND ISLAMIC FUNDAMENTALISM: THE LIMITS OF POSTMODERN ANALYSIS (1999); and Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 HUM. RTS. Q. 136 (1997).

71. Polygamy has been defined as "the practice or custom according to which one man has several wives (distinctively called *polygyny*), or one woman several husbands (*polyandry*), at the same time. Most commonly used of the former." 12 OXFORD ENGLISH DICTIONARY 59 (2d ed. 1989).

the statutory route.<sup>72</sup> In addition, the passage of the Act, as mentioned previously in this Comment, was recognition of the centrality of indigenous law in the lives of a large number of black South Africans and the need to respect a system of law so historically marginalized.<sup>73</sup>

Some feminist advocates have argued that because more African couples are entering into monogamous civil marriages, the incidence of polygamy will decline. Moreover, they have argued that as women have access to economic opportunities, polygamy may become less attractive, especially in an increasingly urbanized society.<sup>74</sup> They contend:

The permeation of Western values such as individualism and the importance attached to the notion of personal property; education; urbanization; the dislocation of the family as a result of migrant labour; the reduction, with the prevalence of waged work, in the significance of the family as the site of economic relationships; the desegregation of conjugal roles; . . . have all contributed to a transformation.<sup>75</sup>

To this list of societal changes can be added the effect of the HIV/AIDS epidemic in South Africa and a renewed examination of polygamous arrangements.<sup>76</sup>

### V. Obstacles to Women's Equality

Despite the several protections in the Act, the goal of equality for women in these arrangements may indeed be elusive for women if certain structural obstacles to gender equality continue. Some of these obstacles are implicitly

72. See Recognition of Customary Marriages Act 120 of 1998 s. 2(3) (S. Afr.) ("If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognized as marriages."); *id.* s. (2)(4) ("If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act . . . are for all purposes recognized as customary marriages.").

73. See Felicity Kaganis & Christina Murray, *Law, Women and the Family: The Question of Polygyny in a New South Africa*, in AFRICAN CUSTOMARY LAW 116, 199 (T.W. Bennett et al. eds., 1991) (noting that the colonial authorities regarded polygamy as "a heathen practice, confined to the unenlightened").

74. See *id.* at 131 ("[C]hanges in social and economic conditions have diminished the utility and attractiveness of polygyny, particularly in urban areas.").

75. *Id.*

76. See Alan Whiteside, *The Economic, Social, and Political Drivers of the AIDS Epidemic in Swaziland: A Case Study*, in THE AFRICAN STATE AND THE AIDS CRISIS 97, 110 (Amy S. Patterson ed., 2005) (noting that polygamy is a cultural practice that plays a role in the spread of HIV).

recognized in the Constitution, as outlined above, so that the issue is not one of legislation, but rather of enforcement. The first obstacle to women's equality is widespread poverty. For a large portion of the South African female population, poverty continues to stifle the possibilities that the Constitution promises through its extensive socioeconomic rights provisions.<sup>77</sup> Poverty also contributes to the disproportionate impact of the HIV/AIDS epidemic on women.<sup>78</sup> For example, the ability to prevent HIV infection, as well as to access treatment for HIV/AIDS, is extremely limited for women who are economically dependent and therefore powerless.<sup>79</sup> In addition, their dependency and powerlessness render them unable to negotiate safe sex practices with their partners, who may have several other sexual partners.<sup>80</sup>

The second impediment to women's equality continues to be widespread violence, both in the public and in the private sphere.<sup>81</sup> Although the South African government passed legislation to deal with the problem, cultural attitudes that fuel violence continue to abound.<sup>82</sup> The Constitutional Court has delivered two impressive judgments that examine violence against women and, in both, the Court has clearly articulated the issue of violence against women as one of gender equality.<sup>83</sup>

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77. See DEBBIE BUDLENDER, *WOMEN AND POVERTY IN SOUTH AFRICA* 2–3 (2003), <http://www.genderstats.org.za/documents/WomenandPoverty.pdf> (last visited Oct. 19, 2007) (suggesting that poverty restrains the ability of women to stand up to abuse or to assert their rights because of economic dependence on men) (on file with the Washington and Lee Law Review).

78. See Lesley Doyal, *HIV and AIDS: Putting Women on the Global Agenda*, in *AIDS: SETTING A FEMINIST AGENDA* 11, 17 (Lesley Doyal, Jennie Naidoo & Tamsin Wilton eds., 1994) ("The growing numbers of women with HIV and AIDS are concentrated in the poorest countries . . .").

79. See *id.* at 14–18 (suggesting that women's economic dependence on men may inhibit their ability to prevent or treat HIV infection).

80. See *id.* (providing anecdotal accounts of women forced to tolerate infidelity because of financial dependence on their husbands).

81. Notably, the South African Constitution provides for protection from such violence. See S. AFR. CONST. 1996 § 2(12) (providing that "[e]veryone has the right to freedom and security of the person, which includes the right . . . to be free from all forms of violence from either public or private sources").

82. See Penelope E. Andrews, *Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law*, 8 TEMP. POL. & CIV. RTS. L. REV. 425, 433, 437–39 (1999) (discussing the cultural and political causes of violence against women). Although violence against South African women has many causes, "a significant factor has been the traditional reluctance of the police to deal constructively with crime." *Id.* at 433. In addition, the patriarchal indigenous systems of law, "which rendered women perpetual minors, always under the tutelage of a male," left women vulnerable to violence. *Id.* at 439.

83. See, e.g., *Carmichele v Minister of Safety & Sec. & Another* 2001(10) BCLR 995 (CC) at 1016–17 (S. Afr.) (suggesting that the protection of women's equality requires the

Finally, cultural attitudes generated by the range of masculinities in South Africa continue to impede women's equality in both the public and the private domain. These cultural patterns raise questions about the interplay of law and culture and, particularly, how effective legal change is in the face of cultural intransigence.<sup>84</sup> In the final analysis, despite these many extra-legal obstacles to women's equality, the Constitution provides a framework for challenging such obstacles.

### *VI. Conclusion*

The constitutional protection of women's rights, as well as the constitutional recognition of the institutions and structures of traditional law, involves a series of balancing tests that raise perennial questions about the role of law in pursuing equality, as well as respect for the many ways that citizens enjoy and practice their cultural norms and values. In South Africa, there remains a distance between the lofty ideals of the Constitution and the reality of people's lives. However, the evolution of a new legal culture cognizant of underlying African communitarian values and judicious of women's rights will be a challenging endeavor. The Recognition of Customary Marriages Act represents one of those endeavors. It may not be a panacea for all the problems of discrimination and disadvantage that women experience in customary marriages, but it does signify that they deserve statutory protection to ensure equality, as mandated by the Constitution.

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protection of women from violence).

84. See KRISTINA A. BENTLEY, *WHOSE RIGHT IT IS ANYWAY?: EQUALITY, CULTURE AND CONFLICTS OF RIGHTS IN SOUTH AFRICA* 15–19 (2003) (noting that new provisions of African law can conflict with the norms of patriarchy).



