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Who's Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom in South Africa

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ANC president Jacob Zuma married his fourth wife, Nompumelelo Ntuli, in a closely guarded, traditional Zulu ceremony in the rural village of Nkandla, in northern KwaZulu-Natal, yesterday.

At his KwaNdamala homestead behind green security gates local police barred the media and daring wedding crashers while bodyguards monitored the premises as Zuma, 65—an unashamed traditionalist, appeased his ancestors.

Inside, a handful of Zuma well-wishers, including SA Road link’s chief executive Alan Reddy and businessman Abdul Rahim Malek, witnessed the traditional ceremony.¹

Jacob Zuma’s wedding to his fourth wife in early 2008, provides an interesting starting point for a discussion on family law, equality and custom. As the leader of the governing political party in South Africa, the African National Congress (A.N.C.), his private and public activities are worthy of some
Consideration. As the quotation above notes, not only does his wedding confirm his credentials as a Zulu traditionalist, but his guests included non-Zulu leaders of the business community in South Africa—an indication of his prominence, not just within his tribal community, but also as part of the wider South African elite. The presence of these prominent South Africans signifies a certain degree of approval or acceptance of polygamy. Indeed, one of the A.N.C.'s most admired members, the lawyer, Phyllis Naidoo, has admitted to paying lobolo for Zuma's first wife, and other prominent business people have paid for his several weddings.

On the same day that Jacob Zuma was pursuing his fourth nuptials, one of South Africa's most prominent gay activists also tied the knot. Since the South African Constitutional Court has mandated the government to enact legislation that would recognize gay civil unions, South Africa has witnessed an increase in the number of "gay marriages." These developments are quite significant in a country where the human rights of gay men and lesbians have only officially been

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2 Jacob Zuma's public and private lives have been under intense scrutiny in the past few years, as he survived his dismissal as Deputy-President of South Africa and a rape acquittal (after a highly publicized case). He now faces a charge of corruption. Two of the major newspapers in South Africa have special reports on Zuma. See Jacob Zuma, Mail & Guardian Online: The Smart News Source, http://www.mg.co.za/specialreport/jacob-zuma (last visited June 21, 2009); SA Elections, http://www.saelections.co.za/ (last visited June 21, 2009).

3 Newspapers in South Africa reported that Jacob Zuma is planning to marry his fifth wife in a few months. See Zuma May Take Fifth Wife, NEWS24.COM, Feb. 17, 2008, http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2272263,00.html. Some have also added that in fact he also plans to marry a sixth wife, and that this has led to some controversy amongst his wives, particularly as to who would become the first lady if he is elected as President of the country. See Bongani Mthethwa & Subashni Naidoo, Jacob Zuma in for a bridal shower, TIMES (Johannesburg), Feb. 16, 2008, available at http://www.thetimes.co.za/News /Article.aspx?id=707756. South Africans go to the polls in April 2009. As leader of the African National Congress, Jacob Zuma is widely expected to become the President of South Africa.

4 Lobolo describes a man's obligation to pay cattle, horses, money, or other property to the father of his intended bride in consideration of their marriage. See T.W. BENNETT, A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA 195 (1991).

5 Id.


recognized in the past decade or so. The South African government, despite widespread homophobia in South Africa, has made a clear commitment to protecting the rights of gay men and lesbians.

It is the marrying of the traditional and the contemporary, and the constitutional endeavor to accommodate this reality that informs the analysis of polygamy in South Africa.

South Africa’s transition from an authoritarian apartheid state to one premised on democracy and human rights was of global significance and one that would have a profound impact on evolving perceptions of democracy and good governance in Africa. The promise of democracy, as encapsulated in South Africa’s expansive constitutional framework, one that embodied a range of civil and political rights, on the one hand, and social, economic and cultural rights, on the other, bode well for a continent beset by needless conflicts, widespread corruption, and seemingly intractable poverty. President Nelson Mandela, ushered in to lead this transformative project, embodied all the possibilities of this new “rainbow nation.” Most significantly, this transformative constitutional project mandated a rethinking of the public and the private, recognizing that disadvantage and discrimination are often embedded in private arrangements and private relationships.

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8 See South Africa to Legalize Gay Marriage, MSNBC.COM, Nov. 14, 2006, available at http://www.msnbc.msn.com/id/15714036 (stating that South Africa was the first in the world to adopt a constitution prohibiting discrimination based on sexual orientation).


11 As the Kenyan human rights scholar, Makau wa Mutua has noted:

The construction of the post-apartheid state represents the first deliberate and calculated effort in history to craft a human rights state—a polity that is primarily animated by human rights norms. South Africa was the first state to be reborn after the universal acceptance, at least rhetorically, of human rights ideals by states of all the major cultural and political traditions.

Makau wa Mutua, Hope and Despair For a New South Africa: The Limits of Rights Discourse, 10 HARV. HUM. RTS. L.J. 63, 65 (1997).


13 The Constitution Of The Republic Of South Africa [hereinafter ‘CONSTITUTION’] provides that “A Provision of the Bill of Rights binds a natural or a juristic person . . .” S. AFR. CONST. 1996 ss. 8(2) and “No person may unfairly discriminate directly or indirectly against anyone . . .” Id. ss. 9(4). In addition, the Constitution also provides that, “[I]n order to give effect to a right in the Bill [of Rights]. . .” the common law should be developed accordingly. Id. s. 8(3)(a). The Constitutional
Although off to a good start, the governing principles of the “rainbow nation” as embodied in the constitution, namely, dignity and equality, were soon to confront competing expectations as to the meaning and interpretation of these principles. These competing expectations surfaced in several contexts, but not unsurprisingly, became more apparent in the discussion around traditional law and gender equality.\textsuperscript{14} In this respect, the South African experience mirrors the situation in many countries in which the principle of gender equality appears to contradict cultural or religious norms regarding women’s role and status.\textsuperscript{15}

My paper will examine the evolution of South African legislation and constitutional jurisprudence in the face of competing imperatives, for example, between equality, legal pluralism, customary law/religious law, and the recognition of polygamy. I explore legislative attempts to regulate polygamous marriages through the Recognition of Customary Marriages Act\textsuperscript{16} (“the Act”), a statute designed to “transform spousal relations in customary marriages,”\textsuperscript{17} by providing for equality between the spouses, and by regulating all aspects of customary marriages, including their establishment, property relationships, and dissolution.\textsuperscript{18} This paper also examines the tensions between the principle of gender equality on the one hand, and the recognition of polygamy, on the other.\textsuperscript{19}

I. “COMPETING” NARRATIVES OF LIBERATION: AFRICAN NATIONALISM AND FEMINISM

The long history of colonialism and apartheid, and local and global efforts to eradicate apartheid meant that in the context of post-apartheid South Africa, the

\begin{footnotesize}
\textsuperscript{16} Recognition of Customary Marriages Act 120 of 1998.
\textsuperscript{17} Gumede (born Shange) v President of the Republic of South Africa & Others 2009 (3) BCLR 243 (CC) ¶ 32 (S. Afr.).
\textsuperscript{18} Id. at ¶¶ 3, 24, 32.
\textsuperscript{19} This paper refers only to indigenous marriages, and does not address legislative attempts to regulate religious, especially Islamic marriages. There have been attempts by the South African government to address marriages conducted by Islamic law, but draft legislation has not yet been passed by Parliament. See Rashida Manjoo, \textit{The Recognition of Muslim Personal Laws in South Africa: Implications for Women’s Rights} 3 (Harvard Law Sch. Human Rights Program at, Working Paper No. 08-21, 2007), \textit{available at} http://ssrn.com/abstract=1115987.
\end{footnotesize}
discourse of feminism or gender equality had to "compete" with other liberatory discourses, including anti-racism, African nationalism, and cultural nationalism. Indeed the issue of gender equality only surfaced after determined attempts by South African women to ensure that women’s issues would not be overlooked in the new democratic dispensation. The Constitution of South Africa, especially the Bill of Rights, mediates the challenges of the competing discourses of feminism and African nationalism by recognizing indigenous institutions, and prioritizing the principle of equality. In addition, the Bill of Rights places the eradication of discrimination on the grounds of race on the same constitutional footing as the eradication of discrimination on the grounds of sex and/or gender.

My paper examines the regulation of African customary marriages within the overall context of political transformation and democratic nation-building in South Africa. The passage of the Act occurs against the backdrop of ongoing contestations about the meaning of the newly established democracy in the wake of centuries of colonialism and decades of apartheid. After the first democratic election in 1994, and the adoption of a comprehensive constitutional framework that included an expansive Bill of Rights, South Africans faced the task of creating a legal order consonant with the norms and values of an African state, underpinned by the principle of "ubuntu," and away from the hegemonic tendencies of the colonial legal framework.

The new constitutional framework embraced the vision of a pluralistic society that strives to incorporate historically marginalized legal systems and institutions, including those of indigenous and religious minorities, within the broader South African legal framework. This incorporation, at least at the theoretical level, represented the rejection of the legacy of colonialism and apartheid and an ethnocentric bias that had relegated indigenous laws and institutions as inferior

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20 I use the term "compete" very loosely here. The central idea is that the eradication of gender inequalities was secondary to the eradication of racial inequalities and authoritarianism. The issues are discussed in Penelope E. Andrews, The Stepchild of National Liberation: Women and Rights in the New South Africa, in THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW 326-358 (Penelope E. Andrews & Stephen Ellmann eds., 2001) (describing numerous efforts and the competition for attention from closely related social concerns).

21 See PUTTING WOMEN ON THE AGENDA (Susan Bazilli ed., 1991); see also THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE 64 (Sandy Liebenberg ed., 1995) (describing the specific efforts of South African women to encourage response to these issue under a democratic regime).

22 See infra notes 36-42

23 Andrews, supra note 21, at 335.


25 In S v Makwanyane 1995 (3) SA 391 (CC) at 446 (S. Afr.) the court explored the concept of ubuntu in some detail, explaining the interlocking and underlying humanity that underpins indigenous cultures.
partners in law and governance.\textsuperscript{26} For black women, such rejection was especially significant, since a combination of apartheid and indigenous law in many ways rendered them perpetual minors.\textsuperscript{27} The modernist project of constitutionalism and human rights in South Africa and the recognition of gender equality and cultural and religious rights signaled a commitment to full citizenship for South African women. This was notable for an African country at the end of the 20th century, illustrating how the embrace of a pluralistic model of constitutionalism provided an important symbolic and real possibility for democracy in Africa.\textsuperscript{28}

The South African Constitution, in spirit and in text, embraced the rights of all South Africans to practice their culture and religion.\textsuperscript{29} Successive colonial and apartheid governments had ambivalent and contradictory policies regarding indigenous law and indigenous institutions.\textsuperscript{30} However, the “Africanization”\textsuperscript{31} of the new constitutional state was a precondition for democracy, and a clear signal that South Africa would shed its colonial and apartheid past. But such derogation from the country’s ignominious past generated a challenge with respect to the embedding of equality as the signature constitutional principle. Simply put, how was the Constitution to balance, on the one hand, the constitutional commitment to equality, while on the other finally providing formal recognition to indigenous laws and institutions? Accommodating this apparent paradox was key—since indigenous laws and institutions had always been relegated to a secondary or

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\textsuperscript{26} The nefarious Black Administration Act 38 of 1927, now repealed, was designed to pigeonhole traditional leaders into disputes that rose only between black, and within a very narrow range of claims. See Martin Chanock, \textit{Law, State and Culture: Thinking about ‘Customary Law’ After Apartheid}, 1991 ACTA JURIDICA 52, 55–57.

\textsuperscript{27} See Andrews, supra note 24, at 1496 n.82.


\textsuperscript{29} By using the term “customary law” I am sweeping with a broad brush. Customary law is not a unified system of law, but instead refers to a largely heterogeneous, written and unwritten, formal and informal, systems of law. In the Recognition of Customary Marriages Act 120 of 1998 s. 1(ii), “customary law” is defined as “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.” (emphasis added).


\textsuperscript{31} Successive South African governments, and indeed the white population, had always regarded South Africa as a European country on the tip of the continent of Africa. The legal system, legal processes, the legal profession, and indeed the legal culture, had always been regarded as European, rather than African. The new democracy demanded a shift—a recognition that South Africa was an African country and formally engaged with the wider community of African states. See \textit{The Small Miracle: South Africa’s Negotiated Settlement} (Steven Friedman ed., 1994).
inferior place within the national legal framework.32 These were not mere theoretical considerations. The struggle for democracy in South Africa involved both the struggle for women’s equality as well as the struggle of African people for the renewal and re-establishment of indigenous laws and customs. These two “competing” struggles generated their own liberatory discourses of gender equality and Africanism.

Both discourses sought an end to a particularized hegemony, namely racism and apartheid, on the one hand, and patriarchy, on the other, although patriarchy took on an especially racialized form in apartheid South Africa.33 Often these discourses were framed in terms of a debate that sought to prioritize one over the other, or at least provide some clarity with respect to the meaning of equality.34 These debates were at their most fraught when it came to women’s human rights.35 This debate was one that had occupied human rights advocates for some decades, and had spawned a vast literature about the role and status of indigenous institutions in contemporary constitutional frameworks that valorize the principle of gender quality.

Termed “the relativism versus universalism debate,”36 it sought to highlight competing approaches to the recognition of indigenous laws and policies, particularly in the face of demands for gender equality.37 After several rather disappointing decades of post-colonial neglect of gender equality on the part of African governments, despite formal promises of equality, feminist advocates have been more vocal about the need to have a “zero tolerance attitude”38 to gender equality. They have eschewed “relativist” approaches that seek to give primacy to indigenous laws and policies even when such laws and policies violate the principle of gender equality.39 South Africa, so recently decolonized, could therefore benefit tremendously from the lessons generated by the “universalism versus relativism” debate, and the advocacy strategies for gender equality flowing

32 Id.
33 See (UN)THINKING CITIZENSHIP: FEMINIST DEBATES IN CONTEMPORARY SOUTH AFRICA 7 (Amanda Gouws ed., 2005).
34 See id. at 1–6.
35 See id.
37 See Howard, Group versus Individual Identity, supra note 36, at 177–78.
38 “Zero-tolerance” is a term coined by former Mayor Rudolph Giuliani, in an attempt to wipe out crime in New York. See ANDREA MCARDLE, INTRODUCTION TO ZERO-TOLERANCE QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 1, 12 (Andrea McArdle & Tanya Erzen eds.) (2001). McArdle & Erzen are editors, the book is a collection of pieces written by different authors.
39 See HOWARD, HUMAN RIGHTS, supra note 36, at 17–18, 51.
from such debates. But South Africa was also in an optimal position to forge a
direction that might incorporate the most effective human rights approaches, those
that did not merely pit the demands of African nationalism against gender equality,
but could rather develop a nuanced strategy that was mindful not only of the
historical legacy of the marginalization of indigenous laws and institutions, but
also the ubiquitous subjugation of women.40

In framing the fissures between the two discourses, namely African
nationalism and feminism, I am not suggesting a mere gender divide, namely, that
one is presumptively male, and the other female. In fact, in South Africa, lobbying
for the recognition of indigenous institutions was not just a male-only enterprise,
although it was largely so. And indeed, if one observes the support from Zulu
women for the acquittal of Jacob Zuma in his rape trial in 2006, one has to
conclude that significant numbers of Zulu women regard their traditional heritage
and identity as important.41 Conversely, the push for the absolute primacy of
equality, racial and gender, reflects not just the agitation of female advocates
(although their numbers were greater than men), but also men who were involved
in the constitution drafting process.42

This paper will suggest that the desired goal of equality in South Africa may
feature similarities with Western feminists’ notions of equality, but may not
necessarily embrace all of these notions. South Africa, I will argue, provides what
may be considered a third way of straddling the equality conundrum that has so
bedeviled feminist analyses and discourse in the past few decades.43

40 This nuanced approach has been advocated by several feminist scholars. See, e.g.,
AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND
WOMEN’S RIGHTS 22–25, 61–62 (2001); Judy Scales-Trent, African Women in France
Immigration, family, and Work, in GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL

41 For a discussion of the Zuma rape trial, see Penelope Andrews, Democracy Stops at
my Front Door: Obstacles to Gender Equality in South Africa, 5 LOY. U. CHI. INT’L L.
REV. 15, 18–21 (2007). I do not wish to simplify the contours of this issue. How, when,
and why ethnic identity surfaces as central or compelling markers of identity are best left to
anthropologists, sociologists, psychologists, or other scholars of demographics. I make
these statements based on empirical observations of a limited phenomena—in this case, the
Zuma rape trial.

42 See Catherine Albertyn, Women and the Transition to Democracy in South Africa,
in GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER 39, 54–63 (Christina Murray ed.,
1994).

43 See Celina Romany, Themes for a Conversation on Race and Gender in
International Human Rights Law, in GLOBAL CRITICAL RACE FEMINISM: AN
Mohanty, Introduction to FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC
FUTURES xiii, xiii–xlii (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1997);
Agnes Calliste & George J. Sefa Dei, Anti–Racist Feminism: A Conclusion to a Beginning,
II. THE CONSTITUTION AND TRADITIONAL LAW

The colonial authorities always displayed a certain ambiguity towards African cultural norms and traditional law. On the one hand, they condemned practices like polygamy, complaining that the polygamous husband, "had too much land, leisure and sex. Instead of working for an employer, as was his proper destiny, he battened in ease on the labor of his wives. African women, said the colonists, were hardly better off than slaves."\(^4\)

On the other hand, the colonial authorities wished to preserve indigenous custom as a means of control and co-option/co-operation from indigenous leaders.\(^5\) This was particularly so when an increasingly urban African population began to challenge colonial laws and policies.\(^6\) This legal dualism became the basis of colonial, and later the apartheid government's system of judicial and tribal administrators. In short, this dualism became the "cornerstone" of the system of separate development and apartheid.\(^7\)

In light of the ambiguous approach to indigenous laws and institutions, the Constitution references the need for the recognition and incorporation of indigenous laws and structures in several significant ways. First, the Bill of Rights reifies the pluralistic character of the constitutional framework, while at the same time remaining faithful to the ideals of equality and dignity, the values that anchor the Bill of Rights. Section 30 provides that "Everyone 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 in the Bill of Rights."\(^8\) In addition, Section 31 of the Bill of Rights ensures that "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community— to enjoy their culture, practice their religion and use their language."\(^9\) This section also provides that legislation may be enacted that recognizes "marriages concluded under any tradition, or a system of religious, personal or family law,"\(^50\) provided such recognition does not

\(^5\) For a thoughtful analysis of the processes of control and co-option, see Mahmood Mamdani, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism 65–68 (1996).
\(^6\) Simons, supra note 44, at 42–43. As H.J. Simons notes: "Traditional leaders, the diviners, herbalists and chiefs, had lost ground to the new elite. Whites regretted the erosion of tribal discipline and the decay of customs that formerly kept young people in check. Tribalism acquired merit in the eyes of the administration." Id.
\(^8\) S. Afr. Const. 1996 s. 30.
\(^9\) Id. s. 31(1)(a).
\(^50\) Id. s. 15(3)(a).
contradict “other provisions of the Constitution.” These provisions arguably relate to issues of equality and non-discrimination. Reinforcing the freedom of association for all South Africans, the Bill of Rights further provides that those members of indigenous communities have the right “to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”

In addition to the rights found in the Bill of Rights, the South African Constitution explicitly recognizes and protects both the institution and the role of traditional leaders.

Section 211 specifically provides that traditional authorities in furthering customary law “may function subject to any applicable legislation and customs.” The Constitution also mandates courts of law to “apply customary law when that law is applicable, subject to the Constitution” and relevant laws that “specifically deals with customary law.”

To realize the multicultural goals promoted in the Constitution, and to ensure the pursuit and promotion of these rights, the Constitution sets up a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. With a directive to be “broadly representative of the main cultural, religious and linguistic communities” that make up the population of South Africa, as well as to “broadly reflect the gender composition” of the country, the Commission is constitutionally mandated to pursue a range of laudable goals. These include the goal “to promote and develop peace, friendship, humanity, [and] tolerance” among the various “cultural . . . communities, on the basis of equality, non-discrimination and free association.” The Commission also is empowered under the Constitution to engage in educational, research, lobbying, advisory, and other endeavors that affect “the rights of cultural . . . communities.”

The implementation and enforcement of these rights is bolstered by the constitutional requirement that the courts, including traditional courts, interpret these rights as to “promote the spirit, purport and objects of the Bill of Rights.” In addition, the rights embodied in the Bill of Rights are to complement “other rights or freedoms that are recognised or conferred by . . . customary law” with the

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51 Id. s. 15(3)(b).
52 Id. s. 31(1)(b).
53 Id.
54 Id. s. 211(2).
55 Id. s. 211(3).
56 Id. s. 185.
57 Id. s. 186(2)(a).
58 Id. s. 186(2)(b).
59 Id. s. 185(1)(b).
60 Id. s. 185(2).
61 Id. s. 39(2).
62 Id. s. 39(3).
caveat that the rights or freedoms encapsulated in indigenous law do not contradict those found in the Bill of Rights.63

Some feminist and human rights scholars and advocates have been reluctant to portray indigenous laws and institutions as antithetical to women’s rights, appreciating that the characterization of such a binary often downplays the significance of a rights culture that is located within indigenous laws and institutions.64 Unlike the dominant Western approach to rights discourse and practice, centered on the individual, in indigenous laws and practice, rights are often affiliated to communal interests. Some scholars have argued that the communal approach trumps individual rights and therefore subordinates those in the community, like women and children, who tend to be more vulnerable.65 In many ways, the South African Constitution attempts to reach a more contextualized approach to indigenous law, acknowledging its salience to the lives of indigenous communities, whilst at the same time recognizing that indigenous laws and institutions should not be immunized from the democratizing prerogatives and rights culture embodied in the Constitution.

In one of its earlier decisions, the Constitutional Court in effect noted that customary law, like the common law, was fluid and always evolving, and therefore capable of conformity with the Bill of Rights.66 In fact, Justice Sachs has noted that:

[W]e reject the once powerful common-law traditions associated with patriarchy and the subordination of servants to masters, which are inconsistent with freedom and equality . . . . I am sure that there are many aspects and values of traditional African law which will also have

63 Id.
64 See, e.g., T.R. Nhlapo, The African Family and Women’s Rights: Friends or Foes?, 1991 ACTA JURIDICA 135, 143–45 (arguing that African community values, as presently constituted, act to discriminate against women and children, but that “it would be perverse to argue for the abolition . . . of the role of the wider family and the community in marriage” because “[t]he positive aspects of [these] communal value[s] are too clearly demonstrated”).
65 See T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 5 (1995) (countering that “[i]t does not follow from an absence of rights that women and children were systematically abused, neglected or treated like chattels”); see also I. Currie, The Future of Customary Law: Lessons from the Lobolo Debate, 1994 ACTA JURIDICA 146, 151 (“[T]he constitutional protection of a right to ‘cultural life’ may require a court to take account of the structural complexities and social ramifications of . . . customs before considering their revision or abolition in the light of egalitarian principles.”); Nhlapo, supra note 64, at 143–45 (describing the discriminatory effect of African community values on women and children).
66 See Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) at 834 (S. Afr.) (noting customary law’s ability to “develop and be interpreted, to future social evolution”).
to be discarded or developed in order to ensure compatibility with the principles of the new constitutional order.\(^67\)

In a more recent decision, the Constitutional Court, however, struck down a customary law of intestate succession, deeming such law contradicted the principle of equality.\(^68\)

III. THE CONSTITUTION AND GENDER EQUALITY

The South African Constitution outlines clearly a commitment to gender equality. The Founding provisions emphasize the values that underpin South Africa’s democracy, including the principles of non-racialism and non-sexism.\(^69\)

Equality is the quintessential value, and the key provisions with respect to gender equality are found in the Bill of Rights. The Bill of Rights incorporates equality as the primary right, providing an elaborate definition of equality, including that “everyone is equal before the law” and everyone “has the right to equal protection and benefit of the law.”\(^70\) In addition, the section outlining equality provides 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.”\(^71\)

The Bill of Rights “applies to all law,” thereby making no distinction between laws of a public nature, and those that govern private relations.\(^72\) This horizontal application of the Bill of Rights allows some possibilities for bringing private arrangements within the ambit of the Bill of Rights. This section is strengthened by the constitutional mandate that legislation, customary law and the common law, be interpreted in a way that furthers the “spirit, purport and objects of the Bill of Rights.”\(^73\)

The expansive nature of the Bill of Rights, including the proscription of both direct and indirect discrimination in the section on equality,\(^74\) has been heralded by feminist scholars who have argued for some time that structural discrimination can only be eroded by a clear commitment to a substantive, as opposed to a formal, 

\(^67\) S v Makwanyane 1995 (3) SA 391 (CC) at 518 (S. Afr.).
\(^68\) Bhe & Others v Magistrate, Khayelitsha, & Others 2005 (1) SA 580 (CC) at 585 (S. Afr.).
\(^69\) S. AFR. CONST. 1996 ss. 1–6.
\(^70\) Id. s. 9(1).
\(^71\) Id. s. 9(3).
\(^72\) See id. § 8(1).
\(^73\) Id. s. 39(2).
\(^74\) See id. s. 9.
equality.\textsuperscript{75} Indeed, the Constitutional Court has reiterated its commitment to a substantive equality in several of its judgments.\textsuperscript{76} Not only does the Constitution embody many transformative possibilities regarding equality for women, it also recognizes the intersectionality of many forms of discrimination, and particularly those that black women confront.\textsuperscript{77} Indeed, it has been argued that by treating the elimination of gender discrimination as just as urgent as the elimination of racial discrimination, the South African Constitution is a marked improvement to the approach taken in the American constitutional framework.\textsuperscript{78}

Several bodies are mandated in the Constitution to implement and enforce the human rights listed in the Bill of Rights. Of particular note, in the pursuit of women’s equality, is the establishment of a Commission on Gender Equality to “promote respect for gender equality,”\textsuperscript{79} and to “monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.”\textsuperscript{80} Another constitutionally mandated body to enforce equality is the Human Rights Commission, although arguably, because its reference is so broad, it may relegate the function of the pursuit of gender equality almost entirely to the Gender Commission.\textsuperscript{81}

The Bill of Rights also incorporates a range of rights to ensure that women are secure in their person and that they are shielded from violence, in both the public and private sphere.\textsuperscript{82} In addition, the Bill of Rights incorporate a range of socio-economic rights that arguably could go some way to redressing the marginalized economic status of women, thereby ensuring that whilst their civil and political rights are adequately protected in the Constitution, that the root causes of the


\textsuperscript{76} See Hugo v President of the Republic of South Africa & Another 1996 (4) SA 1012 (CC) at 1023 (S. Afr.); see also Fraser v Naude & Another 1998 (11) BCLR 1357 (CC) at 1360 (S. Afr.) (noting that the prospect of success via procedural means has to be weighed against “the interest of justice”).

\textsuperscript{77} The Bill of Rights provides that “[d]iscrimination on one or more of the grounds listed . . . is unfair unless it is established that the discrimination is fair.” S. Afr. Const. 1996 s. 9(5).

\textsuperscript{78} See Andrews, supra note 14, at 326–35.

\textsuperscript{79} S. Afr. Const. 1996 s. 187(1).

\textsuperscript{80} Id. s. 187(2).

\textsuperscript{81} The Human Rights Commission is established under Section 184 of the South African Constitution. See id. s. 184. I have described in an earlier article how the establishment of two bodies to implement human rights has generated a controversy amongst feminist advocates in South Africa. See Andrews, supra note 14, at 330–31.

\textsuperscript{82} S. Afr. Const. 1996 s. 12(1).
disadvantage and discrimination from which many women suffer from, namely poverty, are also addressed. 83

IV. THE CONSTITUTIONAL COURT AND GENDER EQUALITY

In a series of cases since its inception in 1994, the Constitutional Court has underscored the primacy of equality. 84 These cases include those involving the rights of HIV-positive persons not to be discriminated against in their employment; 85 the right of prisoners to vote; 86 the rights of unmarried fathers in relation to adoption of their children; 87 the rights of permanent residents not to be treated unfairly in comparison to citizens in the workplace; 88 the rights of homosexuals to engage in consensual sexual conduct; 89 and the rights of African girls and women not to be discriminated against under indigenous customary law. 90

In March, 2004, the Constitutional Court had occasion to consider a challenge to the legal principle of male primogeniture as it applies to the African customary law of succession, 91 the Intestate Succession Act, 92 and the Black Administration Act 93 and regulations flowing therefrom. The applicants in one case where the two

83 The Bill of Rights incorporates a range of socio-economic rights, including the right of access to housing, health care, and education. Id. ss. 26, 27, 29.

84 See, e.g., Hoffman v South African Airways 2000 (1) BCLR 1211 (CC) 1220–22 (S. Afr.) (providing the standard for evaluating allegations of inequality under the Constitution); President of the Republic of South Africa v Hugo 1997 (6) BCLR 708(CC) at 725–726 (S. Afr.) (finding that a Presidential Act that prima facie discriminates on the basis set forth in Section 8(2) is entitled to a presumption that the discrimination is fair by virtue of Section 8(4)); Brink v Kitschoof 1996 (6) BCLR 752 (CC) at 769 (S. Afr.) (permitting multiple grounds for alleging discrimination under Section 8(2)).

85 Hoffmann v South African Airways 2001 (11) BCLR 1211 (CC) at 1213–15 (S. Afr.).

86 August & Another v Electoral Commission & Others 1999 (3) SA 1 (CC) at 3 (S. Afr.).

87 Fraser v Naude & Another 1998 (11) BCLR 1377 (CC) at 1358–59 (S. Afr.).

88 Larbi-Odam & Others v MEC for Education (North-West Province) & Another 1998 (1) SA 745 (CC) ¶ 15 (S. Afr.).

89 National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 2000 (2) SA 1 (CC) at 23 (S. Afr.).

90 Bhe & Others v The Magistrate, Khayelitsha 2005 (1) SA 581 (CC), at 594–600, 621–22 (S. Afr.).

91 Id.; Shibi v Sithole & Others 2005 (1) SA 580 (CC) (S. Afr.); South African Human Rights Commission and Women’s Legal Center Trust v President of the Republic of South America and Minister for Justice and Constitutional Development 2005 (1) SA 580 (CC) (S. Afr.). The Court combined the three cases since they all concerned the question of intestate succession under African customary law. Bhe, 2005 (1) SA 581 (CC) at 593 (S. Afr.).

92 Intestate Succession Act 81 of 1987.

93 Black Administration Act 38 of 1927.
minor daughters of the deceased\textsuperscript{94} and in the other a sister of an unmarried deceased brother.\textsuperscript{95} All three applicants had been denied the right to be declared heirs; male representatives instead stood to inherit the property of the deceased.\textsuperscript{96} The other applicants were the Women’s Legal Center Trust, a women’s legal advocacy organization in Cape Town, and the South African Human Rights Commission, a state institution mandated by South Africa’s Constitution to pursue human rights in South Africa.\textsuperscript{97} Both parties intervened in the case to persuade the court that Section 23 of the Black Administration Act violated the South African Constitution by unfairly discriminating against women in that it violated their right to dignity and equality\textsuperscript{98} and by denying children their Constitutionally guaranteed protections to safety and security.\textsuperscript{99}

The two central issues in the cases were the constitutional validity of Section 23 of the Black Administration Act,\textsuperscript{100} which administered the intestate deceased estates of Africans. This section provided that “all movable property belonging to a Black and allotted by him or accruing under Black law or custom to any women with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.”\textsuperscript{101}

The second issue was a constitutional challenge to the principle of primogeniture.\textsuperscript{102} The thrust of this rule is that only a male who is related to the deceased may inherit in the absence of a will.\textsuperscript{103} Women may inherit when named in a will.\textsuperscript{104}

In practice this meant that generally it was the eldest son, or the father or male cousins and uncles who were entitled to become heirs.\textsuperscript{105} The principle mirrors

\textsuperscript{94} Bhe, 2005 (1) SA 581 (CC) at 594 (S. Afr.).
\textsuperscript{95} See id. at 597.
\textsuperscript{96} See id. at 598.
\textsuperscript{97} See id. at 599.
\textsuperscript{98} S. AFR. CONST. 1996 ss. 9–10.
\textsuperscript{99} Id. s. 28.
\textsuperscript{100} Black Administration Act 38 of 1927 s. 23.
\textsuperscript{101} Id. Section 23 also provided for other administrative matters regarding the administration of black estates. Id. This section in effect set up a parallel system of intestate succession for Black South Africans, some aspects of which mimic the Intestate Succession Act, the system set up for White South Africans. Compare id. with the Intestate Succession Act 81 of 1987 s. 1.
\textsuperscript{102} Bhe & Others v Magistrate, Khayelitsha, & Others 2005 (1) SA 580 (CC) at 593 (S. Afr.).
\textsuperscript{103} Id. at 617.
\textsuperscript{104} Id. at 615.
\textsuperscript{105} It is worth noting that these issues are not necessarily only those of affluent or middle class individuals. For example, the Bhe property consisted of a temporary informal shelter including the property on which it stood as well as miscellaneous items of movable materials. See Id. at 596.
other aspects of indigenous law in which women are treated as perpetual minors, always under the tutelage of a male.\textsuperscript{106}

The rationale underpinning the exclusion of women was based on the fact that:

(W)omen were always regarded as persons who would eventually leave their original family on marriage, after the payment of roora/lobola, to join the family of their husbands. It was reasoned that in the new situation—a member of the husband’s family—they could not be heads of their original families, as they were more likely to subordinate the interests of the original family to those of their new family. It was therefore reasoned that in their new situation they would not be able to look after the original family.\textsuperscript{107}

In its judgment the Court examines the place of indigenous law in South Africa’s constitutional framework, recognizing its importance in South Africa’s culturally diverse society, rendering it both subject to and protected by the Constitution, “accommodated, not merely tolerated”\textsuperscript{108} by South African law. Referring to the neglect of the positive aspects of customary law, including its inherent flexibility, its preference for consensus-seeking and co-operation and its “nurturing of healthy communitarian traditions,”\textsuperscript{109} customary law was nonetheless subject to the Bill of Rights.

Dealing with the constitutionality of Section 23 of the Black Administration Act, the Court held that in light of its history and context, the section is part of an Act which was a “cornerstone of racial oppression, division and conflict”\textsuperscript{110} and that South Africans will take years to eviscerate its legacy.\textsuperscript{111} The Court gave short shrift to the argument that Section 23 reflects the pluralist nature of South African society by giving recognition to customary law. The Court noted the racist and destructive roles in entrenching division and subordination—a role which “could not be justified in any open and democratic society.”\textsuperscript{112}

The Court examined the rule of male primogeniture and held that the rule unfairly discriminates against women and illegitimate children and declared it unconstitutional. Recognizing that such was, however, no longer the setting in which the rules existed, nonetheless, the communitarian context within which

\textsuperscript{106} It is not just widows, however, who are disadvantaged by the rule of male primogeniture. The rule discriminates against daughters, younger sons (since the eldest is deemed the heir), and extra-marital children. \textit{See id.} at 620.

\textsuperscript{107} \textit{Id.} at 646 (quoting \textit{Magaya v Magaya} 1999 3 L.R.C. 35 (Zimb.).)

\textsuperscript{108} \textit{See id.} at 604.

\textsuperscript{109} \textit{See id.} at 606.

\textsuperscript{110} \textit{See id.} at 612–13.

\textsuperscript{111} \textit{See id.} at 613.

\textsuperscript{112} \textit{See id.} at 616.
customary rules or succession developed, with its “safeguards to ensure fairness in the context of entitlements, duties and responsibilities” and its aim to “contribute to the communal good and welfare,” was noteworthy.  

The Court pointed to the ensuing hardship that results from the application of the rule “in circumstances vastly different from their traditional setting.” The Court in its judgment cited the importance of customary law in the organization of communal societies, whilst acknowledging both the changing nature of indigenous communities, particularly the role of urbanization in restructuring traditional relationships. The Court also recognized the evolutionary nature of indigenous law which continues to evolve and develop “to meet the changing needs of the community.”

In its remedy, the Court ordered that all intestate estates must now be administered under the Intestate Succession Act, thereby creating a non-racial uniform system across the country. The Court made the order retrospective to April 27, 1994, the day when the first Constitution of South Africa came into effect.

In a recent judgment, the Court had occasion to consider the constitutionality of a section of the Recognition of Customary Marriages Act that precluded wives in customary marriage entered into before the passage of the Act, from the benefits and protections offered in the Act. The disputed section of the Act provided that “the proprietary consequences of a customary marriage entered into” before the passage of the Act “continue to be governed by customary law.” While the property regime of marriages entered into after the promulgation of the Act was in community of property, marriages governed by customary law provided that the family head (the male), is the owner of all the family property, and has full control over such property. The applicant in this case, who had entered into a customary marriage in 1968, and therefore outside of the Act’s protections, and who had instituted divorce proceedings against her husband, claimed that the property regime of customary marriages violated her rights to equality under the

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113 See id. at 617.
114 See id. at 619.
115 See id. at 617–18.
116 See id. at 618 (quoting Alexkor Ltd & another v The Richtersveld Community & Others 2004 (5) SA 460 (CC) at ¶ 53 (S. Afr.)). This view reflects the holdings in courts in other parts of Africa. Id. at 650. For example, the Nigerian Court of Appeal struck down an Igbo succession rule which discriminated against women. Id. (citing Mojekwu v Mojekwu [1997] 7 N.W.L.R. 305 (C.A.) (Nigeria).
117 Id. at 659.
118 Id. at 631.
119 See Gumede (born Shange) v President of the Republic of South Africa & Others 2009 (3) BCLR 243 (CC) ¶¶ 2–3 (S. Afr.).
120 Recognition of Customary Marriages Act 120 of 1998 s. 7(1).
121 Gumede 2009 (3) BCLR 243 (CC) ¶ 3 (S. Afr.) (citing KwaZulu Act on the Code of Zulu Law 16 of 1985 s. 20).
Constitution.\footnote{122} A lower court had found in her favor, and the Constitutional Court confirmed that finding, holding that the impugned section of the Act, as well as the customary law provisions, “patently limits the equality dictates of our [the] Constitution.”\footnote{123} Writing for the majority, Justice Moseneke observed the “patriarchal domination over, and the complete exclusion of, the wife in the owning or dealing with family property unashamedly demeans and makes vulnerable the wife concerned and is thus discriminatory and unfair. It has not been shown to be otherwise, nor is there any justification for it.”\footnote{124}

These decisions discussed above suggest that the Constitutional Court, although mindful of the need to respect the cultural rights of all South Africans, are committed to ensuring that all members of indigenous communities enjoy those rights without distinction or discrimination.

V. GENDER EQUALITY AND POLYGAMY

In the opening pages of this article, I juxtaposed the wedding of Jacob Zuma to his fourth wife, with the wedding of a prominent gay couple. These twin matrimonial celebrations reflect the liberal ideology of the South African constitutional framework, and bode well for the toleration and acceptance of many private lifestyles and forms of family arrangements (at least at the formal level).

But arguably, the recognition of the rights of gay people to marry is somewhat different than the recognition of polygamy. The institution of polygamy is embedded in patriarchal traditions that raise profound questions about the volition of women who choose to enter into a polygamous arrangement.\footnote{125} Whether the exercise to marry a polygamous husband is a free choice or not, it is arguably circumscribed by economic pressures. The reality is that women’s continuing subordinate status in South Africa curtails the free exercise of her choice in a range of situations, including whom she chooses to marry.\footnote{126} While women continue to

\footnote{122}{In terms of the divorce degree, she was likely to receive only a very small portion of the marital property. See \textit{Id.} \S 2.}
\footnote{123}{\textit{Id.} \S 46.}
\footnote{124}{\textit{Id.}}
\footnote{126}{For a persuasive discussion on the many ways that polygamy violates a women’s right to equality, see Susan Deller Ross, \textit{Polygyny as a Violation of Women’s Right to Equality in Marriage: An Historical, Comparative and International Human Rights Overview}, 24 \textit{DELHI L. REV.} 22 (2002).}
earn less than men and are regarded in ways that reinforce stereotypes about their role and status, it is difficult to talk about free choice in choosing a spouse.

This paper seeks to locate the cultural practice of polygamy within a narrative of progress towards gender equality embodied in the South African constitutional framework. This paper suggests that although polygamy is discriminatory (it applies only to a male with several wives), that the legal regulation may in fact provide rights, albeit limited ones, for women in polygamous marriages. In addition, the legal regulation of customary marriages may lead to two contradictory consequences. For those who do not find polygamy objectionable, the Recognition of Customary Marriages Act may have the effect of mainstreaming a cultural practice that has historically been “othered” and viewed as “uncivilized.” Conversely, for those who oppose the practice of polygamy, legal regulation may in fact lead to the decline of the institution.

One of the most enduring narratives in the field of African legal history is the cementing of the subordinate status of African women through the imposition on colonial rule and in particular, indirect rule through the system of chiefs. In South Africa, Martin Chanock and H. J. Simons have written extensively of this process of subordination. In their scholarship they persuasively illustrate how colonial authorities, in the wake of growing urbanization and the need for labor, utilize traditional law and institutions to ensure social control, and thereby a steady stream of labor. Very often, the reification of traditional law on the part of the colonial authorities coincides with resulting disadvantage and discrimination for women. Despite the colonial trope of female subjugation, my paper attempts to unsettle some of the standard accounts by suggesting that women in polygamous marriages may attempt to exercise some agency and a level of autonomy over their sexuality. This paper suggests that even in a seemingly irredeemably patriarchal society like South Africa, that includes the institution of polygamy, women continue to exercise some autonomy and resistance, including seeking legislative protection. This private resistance on the part of women is difficult to measure empirically. It is easier to highlight women’s resistance to political repression, through, for example, mass protests like the anti-pass campaigns of the 1950s.

128 See supra notes 44–61.
129 Id.
130 See Chanock, supra note 26, at 58; Simons, supra note 44, at 60–65.
131 See Chanock, supra note 26, at 58; Simons, supra note 44, at 60–65.
132 For an account of women’s responses to polygamy, see Dominique Meekers & Nadra Franklin, Women’s Perceptions of Polygyny Among the Kaguru of Tanzania, 34 Ethnology 315, 315–29 (1995).
The account in this paper is one of contestation that attempts to contextualize women's resistance in the face of colonial and apartheid attempts to establish control. It also shows how women, through the choices they make, try to influence the substance and implementation of customary law. My paper suggests that it is not just customary law, but traditional social relations—now increasingly individualized—that may lead to greater equality for women.

In traditional African society polygamy was associated with affluence and status. It was largely viewed as a "stabilizing tool," because of its capacity to generate large families, which was seen as "a necessary social insurance." In addition, a man with many wives was an indication of his sense of social responsibility, and added to his social prestige. As one of Africa's prominent leaders, the late Jomo Kenyatta, noted:

In Gikuyu the qualification to hold a high office is based on the family and not on property. It is held that if a man can control and manage effectively the affairs of a large family, it is an excellent testimonial on his capacity to look after the interest of the tribe whom he will also treat with fatherly love and affection as though it were all part of his family.

These words may reflect the sentiments of a bygone era, but arguably they still resonate with notable sections of the African population in South Africa and elsewhere.

H.J. Simons, an earlier South African feminist, has noted that polygamy enabled all women to marry and bear children. This was no small consideration in societies where no individual, male or female, could live independently of a family, and there was no possibility of gainful employment outside of the household. Simons also observes that the monogamous marriage would have been lonely for women, and that polygamy enabled wives to share the burdens of household labor, child-bearing and child-rearing.

In the historical context where traditional households were self-sufficient and where families consumed what they produced, it is clear that important socio-

\[^{135}\] Id.
\[^{136}\] Id. at 85.
\[^{137}\] Id.
\[^{138}\] SIMONS, supra note 44, at 81–82.
\[^{139}\] Id. at 81–82; see also Rhoda Howard, Women's Rights in English-speaking Sub-Saharan Africa, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 46, 60 (Claude E. Welch, Jr. & Ronald I. Meltzer eds., 1984) ("From the woman's point of view, polygamy provides other women to share in child rearing, husband care, and possible economic ventures 

... ").
economic considerations supported the institution of polygamy. The question therefore arises whether polygamous unions comport with the contemporary realities of an increasingly urbanized South Africa, with a constitutional framework unequivocally committed to gender equality.

Some scholars have argued, for example, that polygamy degrades women and reduces them to a servile status. This is particularly the case of forced marriages, where young women are coerced by their families to marry powerful older men. Others have noted that the institution of polygamy has survived largely by force of habit and that it no longer serves a useful economic or social purpose. They observe that as the proportion of urbanized, educated and professional women increase that the incidence of polygamy will wane.

Ironically the Act may in fact contribute to a decline in polygamous unions. It is my contention that the safeguards for women in the Act, as well as the underlying principle of equality in South Africa’s Constitutional and legal framework, may in fact render polygamy an increasingly quaint, possibly obsolete institution. As mentioned earlier in this paper, polygamy thrived during an earlier socio-economic and political period, in societies that tolerated prejudiced attitudes towards women. In fact, in those societies such attitudes institutionalized women’s subordination in legal codes. The imperatives of equality may become harder to reconcile with an antiquated institution like polygamy, although Jacob Zuma’s example may contradict this observation.

The decline of polygamy as an institution may also be suggested from the approach embodied international human rights instruments. For example, the major women’s human rights document, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), specifically calls on governments “[t]o modify the social and cultural patterns of conduct of men and women” that are based on notions of the “inferiority or the superiority” of men.

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141 See, e.g., SIMONS, supra note 44, at 81.
142 See Howard, supra note 139, at 61–62. To a large extent, the Act recognizes these problems and therefore mandates that women must exercise free choice in choosing a marriage partner. Recognition of Customary Marriages Act 120 of 1998.
143 Kaganas & Murray, supra note 140, at 131.
144 See id.
147 Id. art. 5(a).
and women and that reinforces "stereotyped roles for men and women." CEDAW calls for the elimination of discrimination in marriage, and particularly that men and women are imbued with the "same rights and responsibilities during marriage and at its dissolution."

Similarly, the Universal Declaration of Human Rights in its Preamble refers to the "dignity and worth of the human person and the equal rights of men and women ..." The International Covenant on Civil and Political Rights provides that states "shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and its dissolution." It seems therefore apparent that at the international level, at least, the institution of polygamy is hard to justify in the face of a formal commitment to gender equality.

The Recognition of Customary Marriages Act purports to provide a measure of protection for women and to ensure a somewhat conditional equality. But these protections may not be effective in the context of entrenched patriarchal attitudes in South Africa, and in light of several impediments that continue to thwart the quest for gender equality. One impediment is continued economic inequality and a persistent poverty.

Despite admirable economic gains for women in the new constitutional dispensation, black women still labor under enormous disadvantages. They are the least educated, still work disproportionately in menial and unskilled labor, and are still subject to widespread discrimination based on a combination of their race, gender, class, and geographical location.

In one particular area, namely the HIV/AIDS epidemic, poverty has severely impacted on women's human rights, and accounts for the disproportionate impact of the epidemic on women. The fact that polygamy legitimizes a man’s ability to have more than one sexual partner, does not mean that the capacity of wives in

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148 Id.
149 Id. art. 16(1)(c).
polygamous relationships to demand that their husbands engage in safe sex practices is strengthened by legislative oversight of such marriages.\textsuperscript{156}

Another impediment to equality that women experience relates to the extraordinarily distressing levels of private violence that women are subjected to, systematically, and with apparent impunity.\textsuperscript{157} I have argued elsewhere that this violence is triggered and reinforced by several interlocking layers of masculinities that make legal protections alone somewhat ineffectual.\textsuperscript{158}

The law may in fact protect women in polygamous unions, but is this sufficient to eliminate underlying notions about women's subordinated status and role in society?

VI. POLYGAMY AND THE RECOGNITION OF CUSTOMARY MARRIAGES\textsuperscript{159}

As mentioned earlier, successive colonial administrations and the apartheid government regarded polygamy as "a heathen practice confined to the unenlightened."\textsuperscript{160} The issues of polygamy and its continued existence therefore provided the post-apartheid government with the opportunity to either abolish the practice of polygamy outright, or to bring the practice in line with the new constitutional dispensation. The government chose the latter.\textsuperscript{161}

As the Bill of Rights has increasingly affected many areas of South African law, it has also begun to affect family law, and particularly the rights of women in marriage. Until fairly recently, women in African customary unions had scant legal protection, particularly if their husbands embarked on a subsequent civil law (Christian) marriage.\textsuperscript{162} Under the now repealed Black Administration Act, the later marriage automatically extinguished the first.\textsuperscript{163}

The Recognition of Customary Marriages Act represents an attempt by the South African government to deal with the anomalous situation of women in

\textsuperscript{156} See id. at 18 (discussing the difficulty women have convincing their male partners to use condoms during sexual intercourse).


\textsuperscript{159} For an earlier version of this discussion, see generally Andrews, supra note 24.

\textsuperscript{160} Kaganis & Murray, supra note 140, at 119.

\textsuperscript{161} For a critique of the Act, see D.I. Chambers, Civilizing the Natives: Marriage in Post Apartheid South Africa, 129 DAEDALUS Fall 2000 at 101, 111–21.

\textsuperscript{162} See id. at 102–04; Black Administration Act 38 of 1927 s. 22(7).

\textsuperscript{163} To cure the inequity in this situation, in 1988 the Black Administration Act was amended to preserve the property rights of women in customary unions. Specifically it provided that the marital rights of women in customary unions were not affected by subsequent civil marriages. See Marriage and Matrimonial Law Amendment Act 3 of 1988.
customary unions being outside the ambit of formal protections provided to women who are married according to civil law. The passage of the Act also satisfied the South African government’s obligations under international law, including CEDAW,\textsuperscript{164} the African Charter on Human and Peoples’ Rights,\textsuperscript{165} including the Protocol of the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa,\textsuperscript{166} and the International Covenant on Civil and Political Rights.\textsuperscript{167} Indeed, in the Preamble\textsuperscript{168} to the Act, several goals are articulated, including one that provides for the “equal status and capacity of spouses in customary marriages.”\textsuperscript{169} In a purposive break from the colonial and apartheid past, in which customary law was relegated to a place of legal insignificance, the Act repeals several colonial and apartheid-era laws that pertained only to the Black population.\textsuperscript{170} As Deputy-Chief Justice Moseneke recently noted in relation to the Act:

It [the Act] represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages .... entered into in accordance with the law and culture of the indigenous African people of this country. Past courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary “unions.”\textsuperscript{171}

\begin{footnotes}
\item[168] See id. at art. 3 (“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”).
\item[169] Recognition of Customary Marriages Act 120 of 1988 Preamble (emphasis added).
\item[171] Gumede (born Shange) v President of the Republic of South Africa & Others 2009 (3) BCLR 243 (CC) ¶ 16 (S. Afr.).
\end{footnotes}
It is difficult to assess the impact of the Act on the principle of gender equality. The Act places customary marriages on the same footing as those that pertain to civil (Christian) marriages. This formal recognition of customary marriages gives effect to the spirit and intent of the Constitution, namely, to ensure that “everyone has the right” to engage “in the cultural life of their choice.”172 In essence, the dominant approach of the constitutional framework is one of legal parity between the various cultural and religious norms, but always with an eye to the maintenance of equality, despite the recognition of such legal parity. In addition, the Act does not just suggest a nod to gender equality, but by repealing the many racially discriminatory laws173 that only Africans were subjected to under colonialism and apartheid, the Act also confirms the commitment to racial equality.174

But one could read into the provisions of the Act a commitment to gender equality. By providing full recognition to customary marriages, it may arguably improve the status of wives within these marriages.175 The Act explicitly incorporates the principle of equality between the spouses, stating that:

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 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.176

The legacy of unequal control and acquisition of property for women in customary marriages no doubt prompted the drafters of the Act to ensure that women would not continue to be deprived of the right to control and own property. The Act therefore provides that a customary marriage “is a marriage in community of property and of profit and loss between the spouses,”177 but the Act makes provision for the spouses to enter into an ante-nuptial contract that “regulates the matrimonial property system of their marriage.”178

173 These laws were the Natal Code of Law, Proclamation R151 of 1987, the KwaZulu Act on the Code of Zulu Law, Act 16 of 1985, the Transkei Marriage Act 21 of 1978, and the Black Administration Act 38 of 1927.
175 This may be so despite the argument about the wider issue of polygamy, namely that the institution is symbolic of patriarchy.
176 Recognition of Customary Marriages Act 120 of 1998 s. 6.
177 Id. s. 7(2).
178 Id. s. 7(2). This section provides that: “A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an
The Act provides that a husband in a customary marriage “who enters into a further customary marriage with another woman” must apply to a court to “approve a written contract” to “regulate the future matrimonial property system of his marriages.” These provisions found in the Act reflect a clear desire on the part of the legislature to ensure that wives in customary marriages are afforded a range of protections that previously they had been denied, and consequently to ensure a baseline equity during the subsistence and conclusion of a customary marriage.

The Act sets out certain conditions to validate customary marriages, including that the parties to the marriage not be minors, and that full consent is given to the marriage. The Act further requires that customary marriages must be “negotiated and entered into or celebrated in accordance with customary law.” Where the prospective spouse is a minor, the Act provides for the consent of parents or guardians, and in the absence of such parental or guardian consent, the Act provides for permission to be obtained from the Minister of Justice and Constitutional Development, or a government official.

The Act imposes a duty on the parties to a customary union to register their marriage within twelve months of the marriage, and provides that if a registering officer doubts the validity of a customary marriage, he or she may refuse to register such marriage. The Act also provides that “any person who satisfies a registering officer that he or she has a sufficient interest” in the marriage may “enquire into the existence of the marriage.” The Act also provides that failure to register does not affect the validity of the marriage. It is unclear why the Act imposes a duty, and then in the same section directs that failure in carrying out such duty does not affect the validity of the marriage. This section provision may reflect a recognition of the reality that a larger proportion of customary marriages occur in the rural areas, where the parties to such marriages may be unfamiliar with the requirements of the Act as a result of distance and illiteracy.

179 Id. s. 7(6).


181 Recognition of Customary Marriages Act 120 of 1998 s. 3(a)(i)–(ii).

182 Id. at s. 3(1) (b).

183 Id. s. 3(3)(a)–(b).

184 Id. s. 4.

185 Id. s. 4(5)(a).

186 Id. s. 4(9).

187 This consideration also appears to underlie the issue of determining the age of a minor. The Act provides that: “If the age of a person who allegedly is a minor is uncertain
Although the Act seems to envisage a man with one or more wives, some provisions of the Act suggest that women may in fact embark on more than one union with a man. For example, the Act states that a man and woman who are in a customary marriage may marry each other in a civil ceremony under the “Marriage Act” if neither of them is a spouse in a subsisting customary marriage with any other person. With the recognition of gay civil unions, questions may also arise about the validity of gay polygamous unions.

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. Bringing customary marriages into the mainstream of family law, the Act provides that the dissolution of customary marriages is governed by the Mediation in Divorce Act and the Divorce Act.

Despite the commitment to gender equality in most of the provisions of the Act and its putative protection for wives in these unions, for feminist advocates the most contentious aspect is the recognition of polygamous unions. The issue of the legal recognition of polygamy has always been a difficult one for women advocates to address. It is hard to argue that the institution of polygamy does not discriminate against women. As I have mentioned earlier in this paper, international human rights law has persistently recognized the equal treatment of men and women in marriage, and it is hard to argue that polygamous unions actually reflect such equal treatment. In addition, the symbolism of polygamy, with its apparent benefit to males, and the arguable reification of patriarchal norms, does not comport with societies that have made a formal commitment to equality, like South Africa. Interestingly, Judge Posner has weighed in on the issue of polygamy, raising several arguments against the practice. One such argument is that polygamy limits the freedom of contract for women, because “[i]n most polygamous cultures a woman cannot make an enforceable contract to be a man’s wife or is in dispute, and that person’s age is relevant for purposes of this Act, the registering officer may in the prescribed manner submit the matter to a magistrate’s court . . . which must determine the person’s age . . .” Id. s. 5(2).

188 Id. at s. 10 (1) (citing Act 25 of 1961, as the “Marriage Act”).
189 Id. (emphasis added).
190 Id. s. 8(1).
192 Divorce Act 70 of 1979.
193 See supra text accompanying notes 72–74.
194 For a comprehensive debate on the issues, see generally FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES (Mai Yamani ed., 1996) (introducing Islamic feminism by examining the history of Islamic laws, identifying obstacles to gender equality, and highlighting the organized feminist movements in the Muslim world); Eva Brems, Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse, 19 HuM. RTS. Q. 136 (1997) (arguing that feminism and cultural relativism share common grounds and could work together).
only wife . . . ." 196 Another argument is that it "undermines companionate
marriage" in several ways, including more repression of women, increasing "the
agency costs of marriage," and encouraging greater promiscuity in the wider
culture. 197

Polygamy, when considered in light of other indigenous family law
institutions, such as lobolo, 198 the levirate 199 and the sororate, 200 raises troubling
questions about the patriarchal underbelly of indigenous law. These institutions,
individually and in combination, suggest that men are still considered the
breadwinners and dominant partners in marital relationships. They therefore belie
the formal commitment to gender equality as outlined in the Act.

In South Africa, this situation rests uncomfortably with the overall context of
constitutional democracy and gender equality. Indeed, a recent Constitutional
Court challenge to a section of the Act that allowed the property consequences of
indigenous marriages entered into prior to the promulgation of the Act, to stand,
was thrown out as violating the equality provisions of the Constitution. 201 The
impugned provisions meant that wives in customary marriages were subjected to
the marital power of the husband, and could not hold or manage property. Writing
for the majority, Deputy Chief-Justice Moseneke observed that such a property
system "strikes at the very heart of the protection of equality and dignity" 202 of the
Constitution, and that it should therefore be rejected, since "the government has
advanced no justification for the discrimination." 203

Whether polygamous unions will decline or not based on these assessments is
yet to be seen. The reality is, however, that polygamy is practiced fairly widely,
and that legal protection for women in polygamous unions is vital.

196 Id. at 253.
197 Id. at 255–60 (noticing that "wives in a polygamous system have more incentive to
engage in extramarital sex than wives in a monogamous system. A related point is that the
legion of young bachelors that a polygamous system creates increases the demand for extramarital
sex on the part of men as well as of women . . . .").
198 See supra note 4.
199 See BENNETT, supra note 4, at 126–28 (explaining that under the levirate, when a
woman's husband dies, she is obliged to marry one of her deceased husband's brothers or
other male relatives).
200 See id. (explaining that under the sororate, when a man's wife dies while she is
still of child bearing age, he was given one of his deceased wife's unmarried sisters or
other female relative in marriage).
201 See Gumede (born Shange) v President of the Republic of South Africa & Others
2009 (3) BCLR 243 (CC) ¶ 49(S. Afr.).
202 Id. ¶ 36.
203 Id. ¶ 49.
By recognizing the reality of polygamous unions, the South African legislature gives effect to its constitutional promise of allowing everyone to practice the culture or religion of their choice. For a pluralist constitutional democracy, such latitude is crucial. But such recognition also suggests that the South African government is not prepared to make the hard choices that are necessary to ensure that the pursuit of gender equality is not derailed. Even though the Act is a celebration of cultural diversity, it also reflects a continued reticence about gender equality. As I’ve tried to argue in this paper, while polygamy may still be fairly widely practiced in South Africa, indeed, the President is a polygamist, it is hard to make the argument that polygamy comports with gender equality.

The recognition and celebration of South Africa’s many cultural and religious communities should not detract from the reality that the Constitution has centered equality and dignity as primary values. The substance and symbolism of polygamy is hard to square with gender equality and dignity for women. The Recognition of Customary Marriages Act as a practical matter has the possibility of providing considerable protections for women in polygamous marriages. The Act represents a justifiable practical decision on the part of the legislature. But the protections found in the Act are merely a palliative for the underlying realities that pressure women into relationships that provide them with very limited choices, and that arguably erode the benefits of dignity and full citizenship that they are entitled to. At some point in the future, South Africa’s image as a progressive democracy with an admirable Constitution will be questioned in light of the continued toleration of a patriarchal institution like polygamy.

I started this article with reference to Jacob Zuma’s fourth marriage in order to highlight the acceptance of the practice of polygamy, as well as the coexistence of this practice in a society that also allows same-sex unions. In the last month I’ve traveled to South Africa and had occasion to informally speak with a few indigenous chiefs. What I’ve discovered is a very healthy dialectic about the place of indigenous laws, customs and institutions within the broader constitutional framework. This dialectic involves local communities, their leaders in the Congress of Traditional Leaders of South Africa, the national parliament, and the courts, specifically the Constitutional Court, and it is one that may ensure that the character and substance of indigenous laws will evolve in ways that honors the spirit of the Constitution.

These issues are discussed in a thoughtful manner in Nelson Tebbe, Inheritance and Disinheritance: African Customary Law and Constitutional Rights, 88 J. RELIGION 466, 472–93 (2008) (presenting in depth discussion about the effort made in South Africa to harmonize the Constitutional commitments to both individual rights and African culture).