

**AFRICAN CUSTOMARY LAW:  
A CONSTITUTIONAL CHALLENGE FOR GENDER EQUALITY**

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## **DECLARATION**

I, Anneline Michelle Govender, declare that this dissertation is my own work, and that all sources that I have used have been acknowledged by means of complete references. This dissertation is available for photocopy and inter-library loan.

**Anneline Michelle Govender**  
**Durban- September 1999**

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## 1. INTRODUCTION

The Constitution of the Republic of South Africa<sup>1</sup> has as its underlying ideal the concept of equality for all South Africans. Given this country's previous political and legal system of apartheid which was premised on the unequal distribution of resources, favouring the minority White population, it is easy to understand why equality is regarded as the cornerstone of this democracy.

However, in South Africa, the process of equality, especially for Black women is not simple. Because of our country's political history, many Black people want to defend their traditional values against Western influence. Hence, Black women are caught in the middle of a struggle between the feminist ideal of gender equality for all women and the strong pull toward a tradition which is inherently sexist.

Any proposal for reform has to be sympathetic to this fact and must work within this framework in order to meet the approval of the women to whom it applies. This article focuses on how this struggle may be overcome without the complete destruction of either ideal.

The first step to dealing with an analysis of gender equality and customary law is to recognise that the Constitution itself is manifestly contradictory. On the one hand, we have the right to equality being at the very heart of the constitutional order while on the other, there is a recognition of customary law which is inherently 'systematically discriminatory'<sup>2</sup>. The problem that we are confronted with is that our country is an African country and it would be unjust and indeed impossible not to recognise these foundations. Thus while the Constitution is the supreme law of the land<sup>3</sup> and all laws inconsistent with it are invalid, such an assertion may not be easily tenable when faced with customary law. Kerr points out that if customary law were to be changed to comply with the Constitution, then 85% of customary law would not survive.<sup>4</sup> Hence, this paper proposes a working model of how to create harmony between the two ideals.

## 2. CONCEPTUALISING CUSTOMARY LAW

Customary law is defined as 'the customs and usages traditionally observed among the

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<sup>1</sup> Act 108 of 1996

<sup>2</sup> V. Bronstein 'Reconceptualising the Customary Law Debate in South Africa' (1998) 14 *SAJHR* 388-410 at 392

<sup>3</sup> See section 2 of Act 108 of 1996

<sup>4</sup> A.J Kerr 'Inheritance in Customary Law under the Interim Constitution and under the Present Constitution' (1998) 115 *SALJ* 262-270 at 266

indigenous African peoples of South Africa and which form part of the culture of those peoples.’<sup>5</sup>

Kim Robinson<sup>6</sup> has argued that customary law is a corruption of indigenous law, made up of a compromise between Black power brokers and the dominant White power structure. The learned author is of the view that the incorporation of the indigenous law into a rigid and alien written regime of customary law distorted the concept of indigenous law and resulted in the following:

- i. The ultimate interpretation of these laws was shifted from the communities concerned to colonial and apartheid administrations; and
- ii. The oral, fluid and dynamic nature of indigenous law was destroyed.

She said,

*“If the purpose of Indigenous law is to reflect a living culture of African people, codified customary law cannot fulfil this objective because it freezes African life. Tradition is neither a stagnant concept nor are they maintained simply for the sake of traditions. Tradition has meaning and is retained because it provides continuity, is purposeful and represents the values of a people. As a result certain traditions are kept, others are cast off, others are altered as circumstances and perspectives change - all with the objective of serving the needs of the community. When laws that allegedly reflect tradition cease to be appropriate to peoples’ lives, they are obsolete and should be rejected.”<sup>7</sup>*

While this may be a legitimate argument, it does not address the fact that the majority of citizens in this country practice customary law in their daily lives. Hence, this assertion is unhelpful.

Under customary law, women are subjected to the authority of a patriarch, moving from the control of their guardians to that of their husbands. The male head of the household represents the family and a woman cannot generally contract or litigate without assistance. Husbands’ control virtually all the family’s property while wives’ rights are confined to things such as items of a personal nature. Women cannot initiate a divorce process but must enlist the help of the bridewealth holder. Husbands’ on the other hand, may simply unilaterally repudiate their wives or if they wish to retain their bridewealth, can rely on specified grounds. Finally on divorce, the children “belong” to the husbands family.<sup>8</sup>

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<sup>5</sup> As defined in the Recognition of Customary Marriages Act 120 of 1998

<sup>6</sup> K. Robinson ‘The Minority and Subordinate Status of African Women Under Customary Law’ (1995)11 *SAJHR* 3 p457-476 at 460

<sup>7</sup> *Op cit*, n6 at 460

<sup>8</sup> F. Kaganas & C. Murray ‘Law and Women’s Rights in South Africa: An Overview’ in *Women and the Law* S. Jagwanth, PJ Schwikkard, & B Grant (eds) (1994) Human Sciences Research Council, Pretoria p1-38 at 17

Hence it is evident that customary law practices do by their very nature lead to severe inequalities between the sexes.

### 3. **THE RIGHT TO EQUALITY**

It can hardly be understated that due to South Africa's apartheid dispensation, equality is the cornerstone of this democracy. Reference is made throughout the Constitution of this basic right.<sup>9</sup>

Section 9 sets out the right to equality as follows:

*1) Everyone is equal before the law and has the right to equal protection of the law and benefit of the law.*

*(2) Equality includes the right to full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

*(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

*(4) No person may unfairly discriminate on any of the grounds listed in subsection 9(3). National legislation must be enacted to prevent or prohibit unfair discrimination.*

*(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

Albertyn and Kentridge<sup>10</sup> argue that when interpreting the equality clause, it is essential to read it as setting out a substantive concept of equality. They argue this based on the fact that:

*"...formal equality presupposes that all persons are equal bearers of rights. It ignores actual social and economic disparities between groups and individuals and constructs standards which appear to be neutral, but which in truth embodies a set of particular needs and experiences which derive from socially privileged groups. So a reliance on a formal notion of equality may actually exacerbate inequality. Substantive equality on the other hand, requires an examination of the actual social and economic conditions of groups and individuals in order to*

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<sup>9</sup> See for example the Preamble and sections 1, 36 and 39.

<sup>10</sup> Cited in S. Ngaba 'CEDAW: Eliminating Discrimination Against Women' (1995) 27 *Agenda* at 87

*determine whether the Constitution's commitment to equality is being upheld. Such an enquiry reveals a world of systematic and pervasive group-based inequalities, which need to be taken into account in the formulation of legal approaches to equality rights."*

### 3.1 **THE CONTENT OF THE RIGHT TO EQUALITY**

The three leading cases on the interpretation of the equality provision are *Hugo*<sup>11</sup>, *Prinsloo*<sup>12</sup> and *Harksen*<sup>13</sup>.

Govender<sup>14</sup> has extrapolated the relevant principles that derived from these judgements. An applicant who is relying on a violation of the equality clause must show three things:

- i. That the provision under attack differentiates between people, or categories of people, and that this differentiation is not rationally connected to a legitimate governmental purpose ( this is a section 9(1) inquiry), or,
- ii. That he or she has been unfairly discriminated against. If the differentiation is on one of the grounds specified in section 9(3), then discrimination is deemed to be established. If the differentiation is not on one of the specified grounds, then discrimination is only deemed to have taken place if, objectively speaking, the ground is based on attributes or characteristics which have the potential to impair fundamental dignity. If the discrimination is not on one of the specified grounds then the applicant will have to demonstrate unfairness by showing that the impact of the discrimination on him or her is unfair.
- iii. Even if the discrimination is found to be unfair, the measure may still be saved if it satisfies the requirements of the limitations clause, that is, if it is a law of general application and is reasonable and justifiable<sup>15</sup>.

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<sup>11</sup> *President of the Republic of South Africa v Hugo* 1997(6) BCLR 708 (CC)

<sup>12</sup> *Prinsloo v Van Der Linde and Another* 1997(6) BCLR 759 (CC)

<sup>13</sup> *Harksen v Lane NO and Others* 1997(11) BCLR 1489 (CC)

<sup>14</sup> K. Govender 'The Equality Provision, Unfair Discrimination, and Affirmative Action' (1998) 15(1) *Indicator South Africa* p79 - 84 at 79

<sup>15</sup> *Op cit*, n 13.

In both *Prinsloo*<sup>16</sup> and *Harksen*<sup>17</sup> the court defined discrimination as “treating people differently in a way which impairs their fundamental dignity as human beings.” However, in order to successfully plead a violation of the equality clause, one has to establish that the discrimination is unfair.

This issue arose in *Hugo*<sup>18</sup>. The court had regard to the following factors:

1. The fact that the individuals discriminated against do not belong to a class which had historically been disadvantaged does not necessarily make the discrimination fair;
2. At the heart of the prohibition against unfair discrimination lies the imperative to establish a society in which all human beings will be accorded equal dignity and respect regardless of their membership to particular groups. The goal cannot be achieved by insisting upon identical treatment in all circumstances. The question is whether the overall impact of the measure furthers the constitutional goal of equality; and
3. In order to determine whether the impact is unfair, it is necessary to consider the following:
  - \*the group who has been disadvantaged;
  - \*the nature of the power in terms of which the discrimination is effected;
  - \*the nature of the interests which have been affected by the discrimination.

*Harksen*<sup>19</sup> provided further guidelines on what constitutes unfair discrimination:

- i. The position of the complainant in society and whether the complainant suffered from past patterns of discrimination;
- ii. The nature of the provision or the power and the purpose sought to be achieved by it. What must be considered is whether the primary purpose is to achieve a worthy and important societal goal which inevitably gave rise to the infringement;
- iii. The extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity.

Taking the guidelines of these cases into consideration, the present stance of customary law will be assessed with reference to the customary law of succession favouring male primogeniture and polygyny.

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<sup>16</sup> *Op cit*, n 12

<sup>17</sup> *Op cit*, n 13

<sup>18</sup> *Op cit*, n 11

<sup>19</sup> *Op cit*, n 13

#### 4. THE CUSTOMARY LAW OF SUCCESSION

Section 23 of the Black Administrations Act<sup>20</sup> generally excludes Black women from intestate succession. Customary law applies the system of male primogeniture, that is, the estate seeks a male heir, whether a descendent or parent or a grandparent. This section is problematic because it deprives female children and wives from inheriting where the deceased did not have a valid will.

The issue was brought to the fore in *Mthembu v Letsela and Another* 1997(2)SA 936(T) where the question that faced the court was whether this rule of succession unfairly discriminated between persons on the grounds of sex or gender and was thus in conflict with the equality clause.

The applicant was an adult Zulu woman who had entered into a customary marriage with the deceased. Her husband was killed, dying intestate. The applicant and their daughter lived in a house of which the deceased was the holder of a leasehold title. His father, the first respondent, then claimed that the house had devolved on him by virtue of section 23. Judge Le Roux<sup>21</sup> held

*“the devolution of the deceased’s property to the male heir involves a concomitant duty of support and protection of the woman ... to whom he was married by customary law and of the children procreated under that system and belonging to a particular house.”*

It was further said that a widow may not be ejected from the deceased’s homestead.

The judge then gave his reasons for the decision as follows:

*“ If one accepts the duty to provide sustenance, maintenance and shelter as a necessary corollary of the system of primogeniture ...I find it difficult to equate this form of differentiation between men and women with the concept of unfair discrimination as used in s8 of the [interim] Constitution...In view of the manifest acknowledgement of customary law as a system existing parallel to the common law by the Constitution ... and the freedom granted to persons to choose this system as governing their relationships (as implied by section 31) I cannot accept the submission that the succession rule is necessarily in conflict with section 8. Neither is it contrary to public policy or natural justice...”*

It is submitted that a dual system of law (as recognised by Le Roux J ) cannot work, for it creates among its citizens an imbalance of rights. What applies to one group does not apply to another. In this case, it differentiates between Black women and other women- creating more rights for the latter group and thus completely defeating the purpose of the right to equality.

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<sup>20</sup> Act 38 of 1927

<sup>21</sup> At 945

Teson makes an apt observation by saying:

*“There is nothing, for example, in the nature of a third world woman that makes her less eligible for the enjoyment of human rights ....than a woman in a Western democracy.”*<sup>22</sup>

Justice Le Roux then went further and differentiated between Black people living in rural areas and those living in urban areas. He said,

*“In rural areas [my emphasis] where this rule most frequently finds its application, the devolution of the deceased’s property onto the male heir involves a concomitant duty of support and protection of the woman or women to whom he was married by customary law...”*<sup>23</sup>

It is submitted that such a differentiation would not pass constitutional scrutiny as it would then not be a law of general application. In this vein, Kerr pointed out that the rule will be the same in rural and urban areas “wherever those within its compass may live”.<sup>24</sup>

The case went on appeal in *Mthembu v Letsela and Another 1998(2) SA 675 TPD*. Unfortunately, Mynhardt J did not offer a significantly different judgement. In reaching his decision, the judge based his argument completely on the rules of customary law. Mynhardt J dodged the proverbial “flying bullet” by holding that the development of the customary law rules of succession is a matter best left to Parliament.<sup>25</sup> This outlook is problematic. The courts are meant to be the watchdogs of our justice system and if they ignore this duty then the democracy that the constitution seeks to uphold will fall. If laws are unfair, they must be rejected by the courts.

Despite the holdings of these courts, it is submitted that when pitched against the test of equality, section 23 will not pass constitutional scrutiny.

#### 4.1 APPLICATION OF THE TEST OF EQUALITY

The three issues are:

4.1.1 Does the provision differentiate between people or categories of people? If there is a

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<sup>22</sup> Cited in T.R Nhlapo ‘The African Family and Women’s Rights: Friends or Foes’ (1991) *Acta Juridica* p135-146 at 141

<sup>23</sup> At 945 E-G

<sup>24</sup> *Op cit*, n 4 at 264

<sup>25</sup> This view is supported by Maithufi who said that while the decision was to be welcomed, “it reads like a riddle” and the court seemed hesitant to reach a decision. See I.P Maithufi ‘The Constitutionality of the Rule of Primogeniture in Customary Law of Intestate Succession’ (1998) 61 *THRHR* 142-147 at 146-147

differentiation, is it rationally connected to a legitimate government purpose?

4.1.2 Is the discrimination unfair?

4.1.3 Application of the limitation clause.

4.1.1 Section 23 states that Black women are excluded from intestate succession. *Prima facie*, there is a differentiation based on gender as Black men are entitled to inherit by intestate succession. It is submitted that this differentiation has no legitimate purpose as it is based on the customary system of male primogeniture in terms of which the estate seeks a male heir. Such a system reflects the patriarchal need to keep women subordinate to men. It serves no purpose in law as there is nothing inherent in the character of a Black male that makes him a better party to own property over a Black woman.

4.1.2 The discrimination between men and women is automatically unfair as it is on a specified ground in terms of section 9(3) of the final Constitution, that is, gender.

4.1.3 In assessing reasonableness and justifiability, one must judge the provision in the context of customary law. The practice itself seeks to elevate the status of the male in the family while keeping the female status to that of a minor<sup>26</sup>. The aim of section 23 seems to be to increase the wealth and status of the male heir and to keep the females in the family dependent and subservient. In this light, there is no reasonable justification for the provision and may not be saved by the limitation clause.

The essence of the right to equality as stated in the trilogy of leading cases is that of human dignity. There is no doubt that in *Mthembu's case*, the applicant's dignity was being infringed when the court forced her to live with and be under the care of people who did not want to support her or her daughter. Black women have historically been discriminated against and this should not be allowed to be perpetuated in the constitutional era. To allow such would be to undermine the integrity of our Constitution.

Thus, it has been established that the customary law of succession discriminates unfairly against Black women. So what next? Does the court then declare the practice invalid and leave it to the traditional leaders and those practising the custom to deal with or is there an alternative?

It is submitted that if the provision were declared invalid in the face of resistance from Black women who still want to practice customary law, then this too would deprive them of their right to equality as we would then be imposing our choices on them. To overcome this consideration, it is submitted that every custom that affects the life of a Black women should only be enacted if her consent is attained.

If we were to apply this model to the facts of *Mthembu* then, on the death of her spouse, the wife would have two choices: Either she could choose to inherit the estate or, she could agree to the

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<sup>26</sup> See s11(3)(b) of the Black Administrations Act, *op cit*, n 20

system of male primogeniture and live with and be supported by her husband's family. If this proposal is used then Black women will not always be denied the right to own or inherit property. The same principles would apply to the daughters who stand to inherit from their parents.

Some may argue that such a choice is superfluous as who would choose not to own property if the choice arose? It is submitted that if the conditions were such that the wife had a good relationship with her in-laws and they could continue to live together in harmony, then the wife may agree to follow the custom. In fact, if she does not work and needs to be supported financially by her in-laws, there is a greater chance that she will agree to the custom. If on the other hand, the husband wants his property to devolve according to customary law, then such an agreement should be made at the wedding ceremony of the couple.

It is submitted that such a model can work in all areas of customary law. To illustrate, a quick example in the contentious area of polygyny will suffice.

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## 5. **POLYGyny**<sup>27</sup>

Polygyny has never been recognised in the South African legal system despite the fact that it is a practice of the majority of its citizens. In *Ismail v Ismail*<sup>28</sup> the Appellate Division held that Islamic marriages, being potentially polygynous, were contrary to public policy and therefore invalid. More recently, in *Kalla v The Master*<sup>29</sup> the court observed, in passing, that polygynous or potentially polygynous marriages may contravene the gender equality principle embodied in the Constitution and was therefore "as unacceptable to the *mores* of the new South Africa as they were to the old."<sup>30</sup>

With the recognition of the importance of African values and a tolerance thereof by the government, in *Ryland v Edros*<sup>31</sup> the court said that the views of only a particular sect of the community could not make a practice offensive to public policy. The court held that in order for a contract to be viewed in such a light, this value must be shared by the community at large.<sup>32</sup> Hence the court held that the consequences flowing from a customary marriage, including the position on divorce, could still be enforced.

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<sup>27</sup> Since the writing of this article, the Recognition of Customary Marriages Act 120 of 1998 has come into operation. This Act has accorded recognition to polygynous marriages in terms of South African law.

<sup>28</sup> 1983 (1) SA 1006 (A)

<sup>29</sup> 1994 (4) BCLR 79(T)

<sup>30</sup> At 270G

<sup>31</sup> 1997(2)SA 690(C)

<sup>32</sup> At 707 G-H

However, the triumph was short-lived as can be seen in *Amod v Multilateral Motor Vehicle Accident Fund*<sup>33</sup> where Meskin J held that the court does not have a general power to develop the common law in terms of section 39(2). Rather, it can only develop the common law to promote the spirit, purport and objects of the Bill of Rights on those occasions when the legislature does not give effect to the right in question. The Judge held that while there was a duty of support that arose from Islamic marriages, it was not within the court's power to alter the existing common law by eliminating from it an already existing law. This was the duty of the legislature. Therefore, a widow's legal duty of support arose only out of a lawful marriage. He could not alter the *status quo* by finding that such a duty arose out of an unlawful marriage. Therefore, the MMV was not legally liable to compensate the widow for loss of support.

Clearly we see that the courts have had a lot of trouble dealing with polygyny and its consequences. This difficulty has led to many injustices where women who were married by customary tradition and thereafter, fulfilled the role of wife as in all civil marriages were deprived of the recognition of this. Such non-recognition had a variety of disadvantages to the members of such a family, for example, because they were largely unprotected by the law, they were accorded with very few rights. Thus:

- Spouses had no claim of support from each other. In *Ismail*<sup>34</sup>, Judge Trengrove refused to recognise the validity of a Muslim marriage because it had the potential of being polygynous (although it in fact was not). Thus, Mrs Ismail was refused the payment of maintenance.
- Children are illegitimate<sup>35</sup>
- there are no rights of succession between spouses on intestacy<sup>36</sup>
- Spouses are competent and compellable witnesses against each other<sup>37</sup>

The debate about whether polygyny is in fact discriminatory continues with various respected writers believing that it does not in itself lead to inequalities. For example, well known feminist writers Kaganas and Murray<sup>38</sup> put forth an extremely compelling argument advocating this view. Rather, they argue that the inequalities within the marriage reflect more on the oppressive patriarchal nature of the customary marriage than the polygyny itself.

It is argued by the authors that within the male-centred family structure polygyny, at least provide women with informal opportunities to attain some measure of autonomy. Thus, it allows

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<sup>33</sup> 1997(12) BCLR 1716(D)

<sup>34</sup> *Op cit*, n 28

<sup>35</sup> See *Kaba v Ntela* 1919 TS 964 and *Docrat v Bhayat* 1932 TPD 125

<sup>36</sup> *Mthembu v Letsela* 1997(2)SA 936(TPD)

<sup>37</sup> See *Nalana v Rex* 1907 TS 407 and *S v Johardien* 1990(1) SA1026 (C)

<sup>38</sup> C Murray and F Kaganas 'Law, Women and the Family: The Question of Polygyny in a New South Africa' (1991) *Acta Juridica* p116-134 at127

co-wives to share the domestic and farm duties and free the women to engage in economic activities while at the same time providing companionship and reducing the sexual demands on each wife and enables them to space their children.

Taking this argument into consideration, it is respectfully submitted that when measured against the criteria used for the equality test, such argument cannot prevail. The test of equality is essentially based on the ideal of upholding human dignity. The writer has had some contact with women involved in polygynous marriages and from this experience can point out that these women do in fact compete for their husbands attention and financial resources. There is no sisterly friendship and children born of these unions are also competitive. In time, all involved become bitter and resentful.

Armstrong *et al*<sup>39</sup> hold the same views. They argue that in polygynous marriages, the husband has a duty of support towards more than one spouse while the wife has a duty of support to only one husband. With regard to the power relations between the spouses, there is clear inequality since the wives must share the husband's resources and attention and have competing interests with regard to these. Thus, polygyny encourages competition rather than solidarity.

Perhaps what may have been a valid argument in the past has changed with time. With the advance of migrant labour and urbanisation of cultures, emphasis on the extended family has waned. Thus, where one man has more than one wife, each wife has her own home and operates independently of the other. This then leads to constant battle for a husband who cannot be in two places at one time and his financial resources have to stretch to accommodate more.

**5.1 APPLICATION OF THE TEST OF EQUALITY**

5.1.1 It has no rational connection to any present day customary practice.

5.1.2 There is unfair discrimination on the ground of gender as only men are allowed to marry more than once. However, this is not the issue. More than that, Black women who marry by customary law do not have any choice in the matter. If the husband wants a second wife, he can get one despite any concerns of the first wife. Hence, the husband may start treating the first wife and her children differently, perhaps not supporting her financially or not giving them any attention. Thus the rights of the first wife as accorded to women in civil marriages do not apply.

5.1.3 It cannot be saved by the limitation clause because in the present day, there is no reasonable or justifiable explanation for it.

Although the incidence of polygyny is declining, it is recognised that many Black people still retain a strong allegiance to tradition. Therefore, they are more likely to campaign for its retention because of the threat to their cultural heritage rather than any interest they may have in the

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<sup>39</sup> A. Armstrong *et al* 'Uncovering reality: Excavating Women's Rights in African Family Law' (1993) 7 *International Journal of Law and the Family* at 336

practice itself.

It must be recognised there are some women who would honestly not mind if their husband's take several wives. On the other hand, there will also be women who really do not want to share their husbands. If polygyny is to survive as a tradition and be part of a constitutional South Africa this must be recognised. All Black women should be given a voice on what should be done with regard to the tradition. 30/10

Various ideas have been suggested on how to deal with the issue of polygyny. Maithufi<sup>40</sup> is of the view that the nature of the marriage, whether polygynous or monogamous should not be used as the criteria for non-recognition. He suggests that what must be determined is whether the community within which that marriage occurs regards it as legally binding. Bronstein<sup>41</sup> advocates the idea of 'intra-cultural conflict' as a way of transcending the entire customary law/gender equality debate. She writes,

*"The fight is no longer between culture and equality. Rather it is between two different interest groups battling to retain/change power relations within their very culture - a culture which is constantly evolving."*

Using this formulation the wife, seen as an equal partner in the marriage, should have the power to 'veto' her husband's future marriages. If the first wife's refusal causes a divorce then the husband is the one at fault. He should forfeit *lobolo* and take other fault-related consequences.

It is submitted, with respect, that these suggestions are not tenable for the following reasons: If we were to accept the *mores* of the community as the defining trait of a marriage, then those marriages that took place in tribal villages and rural areas will most probably be recognised while those that take place in the urban suburbs will probably not be accepted. Furthermore, this outlook does not deal with the issue of a constitutional contradiction between the equality provision of section 9 and the right to practice customary law. If we were to accept Bronstein's suggestion, then we will be redefining the divorce law in South Africa where the element of fault is no longer part of the criteria.

Hence, borrowing from Bronstein, it is suggested that it should become law that before a man enters into a second marriage the consent of the first wife must be attained. Furthermore, men should only be eligible to take second wives if they meet certain criteria, for example, a particular financial income in order to be responsible for two households. These laws could operate along similar lines as the maintenance laws in South Africa where, on divorce, the husband must pay a set amount for the maintenance of his wife and children<sup>42</sup>. This would ensure that both

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<sup>40</sup> I.P Maithufi 'Possible Recognition of Polygamous Marriages' (1997) 60 *THRHR* 695-699 at 698

<sup>41</sup> *Op cit*, n2 at 403

<sup>42</sup> This would of course be subject to the fact that the couple are still married and the husband still retains his role in the household.

households receive adequate care. If at any point the first wife decides that the relationship is not working, then she should be entitled to a divorce with maintenance, the option of custody of her children and, as suggested by Bronstein<sup>43</sup> the husband must forfeit the *lobolo* payment.

The legislature must make a decision regulating polygyny once and for all. Does South Africa recognise the institution or not? The way the law stands currently, we are neither here nor there which gives rise to uncertainty and frustration. Clearly, the decisions of the courts' thus far have been unsatisfactory. Women in customary law marriages perform the same duties and fulfil the same expectations as women in civil marriages, so why should their rights differ? It is understandable why the legislature has been hesitant to deal with this issue. It is likely to give rise to public outcry whichever way it is decided.

## 6. CONCLUSION

The Constitution as a whole is founded on and informed by the principle of equality. Thus, it would be meaningless if customary law were permitted to trump equality in the guise of tradition and culture. Our country is in a state of fluctuation and therefore, now is the time to effect positive changes into our law. The writer submits that a complete overhaul of the customary law is required to align it with the gender equality clause.

In this regard, Kaganas and Murray<sup>44</sup> say that to challenge patriarchy, women must be empowered. They suggest education in order to widen their options. A good example of this was illustrated by the South African Law Commission<sup>45</sup> survey which showed that the greatest rejection of polygyny occurred among those with post-school qualifications while those with standard one or lower qualification objected the least. Similar research in other countries reflect the same conclusions.

In particular, with regard to marriage, it is suggested that pre-marriage counselling should be made compulsory for all couples in order to make them aware of their rights within the marriage. This would circumvent the problem of women entering the marriage ignorant of the changing laws.

Political organisation and the support of community structures were also noted. Community education is imperative if there is to be a reshaping of valued traditions into workable principles in the contemporary society. The reality is that South Africa is very much a part of the Western world despite being a third world country and if traditions are to survive, they have to make accommodations for the fact that its people have changed. Black people have changed. Black

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<sup>43</sup> *Op cit*, n2 at 409

<sup>44</sup> *Op cit*, n38 at 134

<sup>45</sup> 'Report on the Marriage and Customary Unions of Black People' (1985) Working Paper 10 at para 10.5.11

women have changed. Traditions and social norms are circular concepts which can only work if they continue to reflect each other. In this light it must be recognised that customary law can only survive constitutional scrutiny if it can be moulded to accommodate the changes in and the needs of our society.

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