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## Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism

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# Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism

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## **Abstract**

This Report represents the culmination of a year-long project undertaken by the Crowley Program in International Human Rights at the Fordham Law School to study issues surrounding women and customary law marriages in South Africa in light of its international legal commitments. This Report presents the findings of this research effort. Following this introduction, Part I of this Report describes South Africa's international and domestic legal obligations regarding culture and gender equality, particularly with respect to marriage, divorce, and family formation. Part I then sketches two distinct approaches to the tension between customary law and gender equality, both of which may be found in the domestic law regulating the family. Part II evaluates the effectiveness of the two approaches with reference to data collected in the course of several hundred interviews with South African men and women in May and June 2006. Part II also offers tentative conclusions and suggestions for reform.

## SPECIAL REPORT

# GENDER EQUALITY AND CUSTOMARY MARRIAGE: BARGAINING IN THE SHADOW OF POST-APARTHEID LEGAL PLURALISM

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### INTRODUCTION

Under colonialism and apartheid in South Africa, African customary law was recognized, or not, depending upon the extent to which recognition served the interests of the ruling white elite. With respect to the recognition of marriage, the history is mixed.<sup>1</sup> After experimenting with a policy of non-recognition,<sup>2</sup> the British eventually settled on a strategy of co-opting traditional leaders and empowering them with jurisdiction over civil disputes to be adjudicated according to customary law.<sup>3</sup> Yet, even this strategic recognition was grudging and always subject to the qualification that the law not be “repugnant to the general principles of humanity observed throughout the civilized world.”<sup>4</sup> This so-called “repugnancy clause” often came into play in the context of family law, specifically with respect to the recognition of potentially polygamous customary marriages and the payment of *lobolo* or “bridewealth.”<sup>5</sup> Although the secular colo-

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1. For an overview of the history of recognition of customary marriage in South Africa, see T.W. BENNETT, *CUSTOMARY LAW IN SOUTH AFRICA* 34-49 (2004).

2. *See id.* at 38, 190.

3. *Id.* at 38, 41. The move to codify customary law, especially in Natal, represented a conscious strategy by colonial authorities to retain control over the content of customary law even while ceding authority for its application to traditional leaders. *Id.*

4. *Id.* at 38.

5. *Id.* at 220-21 (defining *lobolo* as one of “various terms used to denote a transfer of property, preferably livestock, by a husband (or his guardian) to his wife’s family as

nial administration might have tolerated such marriages, pressure from religious interests led to sustained periods of non-recognition of African marriages in many areas, a policy that continued under apartheid.<sup>6</sup>

In the wake of South Africa's transition to democracy, this policy has changed. The new Constitution<sup>7</sup> enshrines rights to culture<sup>8</sup> and religious freedom,<sup>9</sup> and obliges courts to apply customary law where it is applicable. Indeed, the Constitution specifically mandates the enactment of legislation recognizing cultural and religious marriages.<sup>10</sup> At the same time, when "developing customary law," courts must do so in a manner that promotes the "spirit, purport and objects of the Bill of Rights."<sup>11</sup>

The South African Constitution is doubtlessly a victory for women,<sup>12</sup> in its explicit guarantees of non-discrimination on the basis of gender, sex, pregnancy, marital status, the right to be free from both public and private violence,<sup>13</sup> and the right to bodily and psychological integrity.<sup>14</sup> Yet, despite the triumph of equality at the constitutional level in South Africa, marriage is often the site of women's legal, social, and sexual subordination, as well as vulnerability to domestic violence and HIV/AIDS, all of which are exacerbated by poverty. Although it is well-known that South Africa faces one of the fastest growing rates of HIV/AIDS in the world, it is less widely known that women in South Africa are significantly more likely to be HIV-positive than men. For example, women in younger age groups are four times more

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part of the process of constituting a marriage" though qualifying the English translation to "bridewealth" (citation omitted)).

6. *See id.* at 43.

7. S. AFR. CONST. 1996.

8. *Id.* ss. 30-31.

9. *Id.* s. 15.

10. *Id.*

11. *Id.* s. 39.

12. *See* Catherine Albertyn, *Contesting Democracy: HIV/AIDS and the Achievement of Gender Equality in South Africa*, 29 *FEMINIST STUD.* 595, 595 (2003) ("A significant feature of this new democracy was the place it accorded women, envisaging a society in which there would be equality between women and men, and people of all races. This equality was not merely formal, but based upon an understanding of the need to remedy the injustices of the past and affirm women as full and equal citizens. In the words of its first president, Nelson Mandela, South Africa would not be completely free until 'women have been emancipated from all oppression.'").

13. S. AFR. CONST. s. 12(1)(c).

14. *Id.* s. 12(2).

likely to be HIV-positive than males.<sup>15</sup> Perhaps even more unexpected are findings that married women and women in long-term relationships run a greater risk of contracting HIV than unmarried women.<sup>16</sup> Similarly, endemically high rates of domestic violence suggest that married women or women in long-term relationships are a particularly vulnerable group.<sup>17</sup> South African women “who are in relationships with violent or domineering men are 50 percent more likely to contract HIV than women not involved in abusive relationships.”<sup>18</sup> In these circumstances, the difficulty women face in exiting marriage traps them in the sometimes life-threatening situation of exposure to compulsory sex in the context of HIV/AIDS, as well as to frequently severe, often equally life-threatening, domestic violence.<sup>19</sup>

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15. See UNAIDS, *Uniting the World Against AIDS: South Africa*, [http://www.unaids.org/en/Regions\\_Countries/Countries/south\\_africa.asp](http://www.unaids.org/en/Regions_Countries/Countries/south_africa.asp) (last visited May 6, 2007) (showing that of 5.5 million infected, 3.1 million were women aged fifteen and up). The statistics are severe, as “AIDS-related death rates are rising, with mortality among females aged 20–39 years more than tripling between 1997 and 2004 [while] over the same period, deaths due to AIDS-related conditions, such as tuberculosis, in the age group 25–29 years have increased six fold among females and tripled among males.” *Id.*; see also HUMAN SCI. RES. COUNCIL, *SOUTH AFRICAN NATIONAL HIV PREVALENCE, HIV INCIDENCE, BEHAVIOUR AND COMMUNICATION SURVEY 25 (2005)*, available at [http://www.nelsonmandela.org/images/uploads/SABSMM\\_II\\_HIV\\_Report\\_full\\_2005.pdf](http://www.nelsonmandela.org/images/uploads/SABSMM_II_HIV_Report_full_2005.pdf) (finding that young South African women are most at risk of being infected with HIV/AIDS (particularly those living in informal settlements in the poorer provinces of KwaZulu Natal and Mpumalanga), that young women are four times as likely to contract HIV/AIDS as their male counterparts within the same age group, and that *within the fifteen to twenty-four age group, women represent a striking eighty-seven percent of recent HIV infections*).

16. See INT’L WOMEN’S HEALTH COALITION, *WOMEN AND HIV/AIDS (2006)*, available at <http://www.iwhc.org/docUploads/WomenandHIVAIDS.pdf> [hereinafter *WOMEN AND HIV/AIDS*] (citing Kristin L. Dunkle et al., *Gender-Based Violence, Relationship Power and Risk of HIV Infection in Women Attending Antenatal Clinics in South Africa*, *LANCET*, May 1, 2004); Albertyn, *supra* note 12, at 597 (stating “[a]lthough physiology affects women’s greater risk of HIV transmission (women are said to be two to four times more susceptible than men), it is women’s lack of power over their bodies and their sexual lives, reinforced by their social and economic inequality, that makes them so vulnerable to contracting HIV/AIDS”).

17. South Africa has one of the highest rates of domestic violence in the world. See U.N. Division for the Advancement of Women, Expert Group Meeting, *Violence Against Women: Good Practices in Combating and Eliminating Violence Against Women*, Vienna, Austria, May 17–20, 2005, *Addressing Domestic Violence in South Africa: Reflections on Strategy and Practice*, available at <http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/vetten.vaw.pdf> [hereinafter *Addressing Domestic Violence*] (prepared by Lisa Vetten).

18. *WOMEN AND HIV/AIDS*, *supra* note 16.

19. *Addressing Domestic Violence*, *supra* note 17, at n.1 (“National figures for intimate femicide [men’s killing of their intimate female partners] suggest that this most lethal

The terms, both legal and social, upon which women enter and exit marriage help to constitute marriage as a site of women's vulnerability insofar as they inform a woman's calculus of whether to remain in a marriage and structure the alternatives to marriage.<sup>20</sup> A lack of access to legal institutions or knowledge of legal reforms,<sup>21</sup> and a socio-cultural context of male authority also constrain women's range of choices and bargaining power.<sup>22</sup> This combination of factors ultimately shapes women's limited autonomy within marriage, and their inability to bargain their way out of customary law marriage, despite the formal provision of judicial divorce in the Recognition of Customary Marriages Act ("RCMA"), which was enacted in 1998.<sup>23</sup>

This Report represents the culmination of a year-long project undertaken by the Crowley Program in International

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form of domestic violence is prevalent in South Africa. In 1999, 8.8 per 100,000 of the female population aged fourteen years and older died at the hands of their partners – the highest rate ever reported in research anywhere in the world. At present the true extent of sexual violence in South Africa is unknown. On the basis [of two respected South African statistical studies] it can be extrapolated that the 52,733 rapes reported by the [South African Police Service] in their 2003/2004 released data is more accurately calculated as falling somewhere between the region of 104,000 and 470,000 actual rapes having taken place." (citations omitted)). According to the organization People Opposing Women Abuse ("POWA"), one in four women are in an abusive relationship, and a woman is killed every six days by her intimate male partner in South Africa. POWA, Statistics: Women, <http://www.powa.co.za/Display.asp?ID=2> (last visited May 3, 2007).

20. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 968 (1979) ("Divorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law. The legal rules governing alimony, child support, marital property and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips—an endowment of sorts.").

21. See *infra* text accompanying notes 140-49. One interviewee stated: "Access to judicial institutions for enforcement of rights is still a big problem—the bulk of legal aid work is still criminal law. Even when people receive legal literacy there is still the next hurdle. What do you do with the information you now have?" Interview with Sibongile Ndashe, Women's Legal Centre, in Cape Town, Western Cape Province, S. Afr. (June 1, 2006).

22. Cheryl Gillwald, Deputy Minister for Justice and Constitutional Dev., Address at Workshop on Customary Marriages, Johannesburg, S. Afr. (June 21, 2002). This notion of "choice" was referred to by the Deputy Minister, who declared that "while it is government's duty to ensure that our people reap maximum benefit from the provisions of our legislation, it is the duty of each citizen to take control of his/her life and that of one's community by utilizing all the available legislation to its fullest. In other words, make rights real." *Id.*

23. Recognition of Customary Marriages Act ("RCMA") of 1998 s. 8(1).

Human Rights at the Fordham Law School to study issues surrounding women and customary law marriages in South Africa in light of its international legal commitments. The Fordham delegation was led by Professor Tracy E. Higgins and Ziona Tanzer, the 2005–2006 Crowley Fellow, and included Professor Paolo Galizzi, Professor Catherine Powell and eight second-year law students, Julie Ebenstein, Rachel Fink, I. India Geronimo, Brian Honermann, Carmela Huang, Caroline McHale, Deborah Mantell, and Scott Roehm. Prior to the mission, the delegation participated in an intense program of study throughout the academic year, including a seminar on human rights in South Africa led by Professor Higgins, Ms. Tanzer and Jeanmarie Fenrich, Executive Director of the Leitner Center for International Law and Justice. While in South Africa, the delegation met with lawyers, judges, legislators, government officials, local leaders, academics and ordinary South African women and men. The delegation conducted several hundred interviews.

This Report presents the findings of this research effort. Following this introduction, Part I of this Report describes South Africa's international and domestic legal obligations regarding culture and gender equality, particularly with respect to marriage, divorce, and family formation. Part I then sketches two distinct approaches to the tension between customary law and gender equality, both of which may be found in the domestic law regulating the family. Part II evaluates the effectiveness of the two approaches with reference to data collected in the course of several hundred interviews with South African men and women in May and June 2006. Part II also offers tentative conclusions and suggestions for reform.

## I. THE LEGAL FRAMEWORK

### A. *International Law*

#### 1. Gender Equality

International law does not weigh in on the question of recognition of marriage, allowing states to determine what constitutes a valid marriage according to domestic norms.<sup>24</sup> At the

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24. U.N. Committee on the Elimination of Discrimination Against Women, *General Recommendation 21, Equality in Marriage and Family Relations*, ¶ 13, U.N. Doc A/49/38 at 1 (1994) [hereinafter *General Recommendation 21*] (while “[t]he form and concept of the family can vary from State to State, and even between regions within a state, [w]hatever

same time, the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW” or “Convention”)<sup>25</sup> and the newly ratified Protocol to the African Charter on the Rights of Women in Africa<sup>26</sup> (“African Protocol” or “Protocol”) unambiguously require gender equality in both marriage and divorce. Both are concerned with material and socially normative aspects to gender discrimination, and provide for the right to be free from gender-based violence,<sup>27</sup> as well as the right to self-protection against HIV/AIDS.<sup>28</sup> South Africa has signed and ratified both CEDAW and the African Protocol.

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form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires”).

25. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1577 U.N.T.S. 3 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

26. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Sept. 13, 2000, OAU Doc. CAB/LEG/66.6 (2003) (entered into force Nov. 25, 2005) [hereinafter Protocol]. As of January 5, 2006, the countries that have ratified the Protocol are Benin, Cape Verde, the Comoros, Djibouti, The Gambia, Lesotho, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, South Africa and Togo, among others. *Id.*; see also African [Banjul] Charter on Human and People’s Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev.5, 21 I.L.M. 58 (entered into force Oct. 23, 1986) [hereinafter African Charter].

27. Committee on the Elimination of Discrimination Against Women, *General Recommendation 19, Violence Against Women*, U.N. Doc. No. A/47/38 at 1 (1992) [hereinafter *General Recommendation 19*]. In terms of General Recommendation 19 to CEDAW, “the Convention in Article 1 defines discrimination against women . . . [which] includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.” General Recommendation 19 finds that violence against women has great significance for women’s abilities to enjoy rights and freedoms on an equal basis with men. States are urged to ensure that in both public and family life, women will be free of the gender-based violence that so seriously impedes their rights and freedoms. This Recommendation also addressed the close connection between discrimination against women, gender-based violence and violations of human rights and fundamental freedoms. *Id.*; see also Protocol, *supra* note 26, arts. 4(1), 4(2)(e).

28. Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 15, Avoidance of Discrimination Against Women in National Strategies for the Prevention and Control of Acquired Immunodeficiency Syndrome (AIDS)*, U.N. Doc. A/45/38 at 81 (1990) [hereinafter *General Recommendation 15*]. The committee recommends that “programmes to combat AIDS should give special attention to the rights and needs of women and children, and to the factors relating to the reproductive role of women and their subordinate position in some societies which make them especially vulnerable to HIV infection.” See Protocol, *supra* note 26, art. 14(1)(d) (declaring “the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS”).

CEDAW requires that States take all appropriate measures to eliminate discrimination against women in all matters related to marriage and family relations, and in particular ensure that women have the same right to enter into marriage with “their free and full consent.”<sup>29</sup> Women must also enjoy the same rights and responsibilities as men during marriage and its dissolution.<sup>30</sup> In General Recommendation 21, the CEDAW committee stresses that, in the determination of marital property, financial and non-financial contributions should be accorded the same weight, and notes that:

[I]n some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets.<sup>31</sup>

CEDAW does not confine its concerns to the material aspects of discrimination, and requires states “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”<sup>32</sup> In addition, CEDAW requires governments “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and practices that are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”<sup>33</sup>

Although the Convention does not explicitly prohibit the practice of polygamy, according to General Recommendation No. 21: Equality in Marriage and Family Relations, issued by the CEDAW Committee, polygamous marriages contravene a woman’s right to equality with men, and “can have such serious emotional and financial consequences for her and her

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29. CEDAW, *supra* note 25, art. 16(1)(b).

30. *See id.* art. 16(c).

31. *General Recommendation 21, supra* note 24, art. 32. The Committee also observes that often property accumulated during a de facto relationship is not treated in law on the same basis as property acquired during marriage and advises that “property law and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged.” *Id.* art. 16 (Comment 33).

32. CEDAW, *supra* note 25, art. 2.

33. *Id.* art. 5(a).

dependants that such marriages ought to be discouraged and prohibited.”<sup>34</sup> The Committee also finds that permitting polygamous marriages in accordance with personal or customary law violates the rights of women and breaches the provisions of Article 5(a) of the Convention.<sup>35</sup> In General Recommendation 21, the CEDAW Committee also states that States Parties should “resolutely discourage any notions of inequality of women and men” which are affirmed not only by laws, but by religious or private law or by custom.<sup>36</sup> Indeed, this recommendation notes that, although most countries report that national constitutions comply with CEDAW, “custom, tradition and [States’] failure to enforce these laws in reality contravene the Convention.”<sup>37</sup>

In November 2005, the newly ratified Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa entered into force, with South Africa among the first countries to ratify the protocol.<sup>38</sup> The legal framework of the Protocol is a reflection of the specific violations against African women, and, according to one advocate for women’s rights, represents “a decisive stage towards the rooting of a culture of respect and exercise of women’s human rights in African societies.”<sup>39</sup> In terms of this Protocol, States Parties are obliged to “combat all forms of discrimination against women through appropriate legislative, institutional and other measures.”<sup>40</sup> States must enact and implement measures prohibiting and curbing “all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women” and “take corrective action” in areas “where discrimination against women in law and in fact continues to exist.”<sup>41</sup> Article 5 further specifies these obligations to include the protection of women who are at risk of being subjected to harmful practices

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34. *General Recommendation 21*, *supra* note 24, art. 16 (Comment 14).

35. *Id.*

36. *Id.* art. 16 (Comment 44) (calling for “progress to the stage where reservations, particularly to article 16, will be withdrawn”).

37. *Id.* art. 16 (Comment 15).

38. *See* Protocol, *supra* note 26.

39. Women, Law, and Development in Africa [WiLDAF/FeDDAF], Today 25 November, 2005: Let Celebrate the Entry into Force of the Protocol to the African Charter on Human and People’s Rights Relating to Women’s Rights, Nov. 25, 2005, [http://www.wildaf-ao.org/eng/article.php3?id\\_article=636](http://www.wildaf-ao.org/eng/article.php3?id_article=636).

40. Protocol, *supra* note 26, art. 2(1).

41. *Id.* arts. 2(1)(b), 2(1)(d).

or all other forms of violence, abuse and intolerance.<sup>42</sup> The obligations on States are not confined to adopting legal reforms. Under Article 2(2), States Parties commit themselves to modify social and cultural patterns through public education, information, education and communication strategies, "with a view to the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women."<sup>43</sup> Article 12(b) obliges States Parties to eliminate all stereotypes in textbooks, syllabi and media that perpetuate discrimination.<sup>44</sup>

With respect to marriage, States Parties are obliged to ensure that men and women enjoy equal rights and are regarded as equal partners in marriage.<sup>45</sup> Appropriate legislative measures must guarantee the free and full consent of parties,<sup>46</sup> as well as the minimum age of marriage to be eighteen years.<sup>47</sup> Monogamy is to be encouraged as the preferred form of marriage, with the stipulation that women in polygamous marital relationships must be protected.<sup>48</sup> With respect to separation, divorce, and annulment of marriage, States Parties are bound to ensure that women and men have the same rights,<sup>49</sup> and that this adjustment of status is effected through judicial order.<sup>50</sup> In addition, women and men must have equal reciprocal rights and responsibilities towards their children<sup>51</sup> and an equitable sharing of joint property deriving from marriage.<sup>52</sup>

### B. *South African Law: The Rights to Culture and Gender Equality*

In a departure from the apartheid regime, the 1996 South

42. *Id.* art. 5(d).

43. *Id.* art. 2(2). In terms of Protocol art. 5(a), States Parties shall take all necessary legislative and other measures to eliminate such practices, including the "creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes." *Id.*

44. *Id.* art. 12(c) (obliging States Parties to take all measures to protect women, "especially the girl child from all forms of abuse").

45. *Id.* art. 6.

46. *Id.* art. 6(a).

47. *Id.* art. 6(b).

48. *Id.* art. 6(c).

49. *Id.* art. 7.

50. *Id.* art. 7(a).

51. *Id.* art. 7(c).

52. *Id.* art. 7(d).

African Constitution<sup>53</sup> expressly protects the rights to culture<sup>54</sup> and to religious freedom.<sup>55</sup> The Constitution requires courts to apply customary law where it is applicable “to the extent that [it is] consistent with the Bill [of Rights].”<sup>56</sup> As confirmed by the South African Constitutional Court, “[c]ertain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.”<sup>57</sup> Moreover, the South African Constitution assumes the enactment of legislation recognizing cultural and religious marriages.<sup>58</sup> When “interpreting any legislation” or “developing customary law,” however, courts must promote the “spirit, purport and objects of the Bill of Rights,”<sup>59</sup> which includes a robust set of individual rights, principal among them the right to equality.<sup>60</sup>

Domestic law in South Africa contains broad anti-discrimination provisions and specifically addresses the issue of gender discrimination. The South African Constitution expressly prohibits direct or indirect discrimination on the basis of gender, sex, pregnancy, or marital status.<sup>61</sup> It also secures the right to be free from “all forms of violence from either public or private sources”<sup>62</sup> and the right to bodily and psychological integrity, including the right to make decisions concerning reproduction.<sup>63</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act similarly prohibits gender discrimination, gender-based violence, and “any practice, including traditional, customary or religious practice, which impairs the dignity of women and un-

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53. S. AFR. CONST. 1996.

54. *Id.* ss. 30–31.

55. *Id.* s. 15. Section 15(1) provides that “Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”

56. *Id.* s. 39(3) (“The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”).

57. *Bhe v. Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) ¶ 41 (S. Afr.).

58. S. AFR. CONST. s. 15. Pursuant to section 15(3)(a)(i), “this section does not prevent legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law.”

59. *Id.* s. 39(2).

60. *Id.* s. 9(1)-(2).

61. *Id.* s. 9(3).

62. *Id.* s. 12(1)(c).

63. *Id.* s. 12(2).

dermines equality between women and men.”<sup>64</sup>

The South African Constitutional Court has developed a robust, nuanced conception of discrimination that is concerned both with the dignity of the individual as well as the impact of discrimination on already disadvantaged groups.<sup>65</sup> It has further interpreted the Constitution to impose positive duties on the state to respect, protect, promote and fulfill the rights in the Bill of Rights.<sup>66</sup> For example, in the landmark case of *Bhe v. Magistrate, Khayelitsha*,<sup>67</sup> the Constitutional Court ruled not only that the legal rule of primogeniture was unconstitutional as codified in the Black Administration Act, but that the customary practice of primogeniture was an unjustifiable violation of the right to

64. Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 s. 8. This section provides in full that:

Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including—

- a) gender-based violence;
- b) female genital mutilation;
- c) the system of preventing women from inheriting family property;
- d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
- e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
- f) discrimination on the ground of pregnancy;
- g) limiting women’s access to social services or benefits, such as health, education and social security;
- h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
- i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.

65. See *Nat’l Coal. for Gay and Lesbian Equality & Another v. Minister of Justice & Others* 1999 (1) BCLR 1517 (CC) (S. Afr.); *Harksen v. Lane & Others* 1997 (11) BCLR 1489 (CC) (S. Afr.); *President of the Republic of S. Afr. & Another v. Hugo* 1997 (6) BCLR 708 (CC) (S. Afr.); *Brink v. Kitshoff* 1996 (6) BCLR 752 (CC) (S. Afr.).

66. See, e.g., *Nat’l Coal. for Gay and Lesbian Equality & Another v. Minister of Justice & Others* 1999 (1) BCLR 1517 (CC) ¶¶ 60-61, 120-21 (S. Afr.); *Harksen v. Lane & Others* 1997 (11) BCLR 1489 (CC) at 1492-97 (S. Afr.); *President of the Republic of S. Afr. & Another v. Hugo* 1997 (6) BCLR 708 (CC) ¶ 29 (S. Afr.); *Brink v. Kitshoff* 1996 (6) BCLR 752 (CC) ¶ 42 (S. Afr.). In *Carmichele v. Minister of Safety & Sec. & Another* 2001 (10) BCLR 995 (CC) ¶¶ 33-35, 39, 57 (S. Afr.), the court held that it was under an obligation to develop the common law in cases of horizontal application of the Bill of Rights. Justice Ngcobo, in his dissenting opinion in *Bhe v. Magistrate, Khayelitsha*, interprets that obligation to extend to customary law. *Bhe v. Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) ¶ 148 (S. Afr.).

67. *Bhe*, 2005 (1) BCLR 1 (CC) (S. Afr.).

gender equality.<sup>68</sup>

C. *South African Law: Two Legal Approaches: Choice and Substantive Equality*

In recognizing both the right to gender equality and to culture (including the application of customary law), the South African Constitution, and to a lesser degree human rights law, set up a potential conflict in the context of customary marriage. Although the Constitution mandates the recognition of such marriages, any legislation providing for recognition must be measured against the requirements of the Bill of Rights. Given the patriarchal structure of marriage under African customary law, legal recognition must therefore entail a degree of regulation of the institution if it is to comply with the constitutional and international human rights mandate of gender equality.

This Section explores two possible approaches to resolving the tension between customary law and gender equality: Gender neutrality and choice/consent. Gender neutrality is simply the idea that the law and institutions sanctioned and constituted by it should be gender neutral. In order fully to reflect a commitment to gender equality, the concept of gender neutrality must be substantive, not merely formal. Thus, a facially gender neutral law that has the effect of furthering gender hierarchy would fail the neutrality test. For example, a gender-neutral recognition of polygamy (permitting multiple *spouses* rather than multiple *wives*) might nevertheless violate a substantive equality standard if the social framework permits only polygamy.

The "choice" or consent-based approach is premised on the idea that individuals may structure their lives in ways that are not gender neutral so long as the decision to do so is made freely and independently. This approach reflects the notion that the state has a limited role to play in regulating the private sphere of the family. It affords greater latitude to individuals to develop and maintain traditional ways of organizing their families and communities. So for example, polygamy would not be problematic under the choice paradigm so long as the polygamous marriages were a product of individual choice. At the same time, the consent model runs up against difficult issues of evaluating the

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68. *Id.* ¶ 91 ("The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution.").

quality of choice and the proper state regulation of power in the private domain.

Both gender neutrality and choice/consent are reflected in current legal developments concerning the recognition of customary marriage in South Africa. For example, in *Bhe*, the South Africa Constitutional Court embraced substantive gender neutrality when measuring the customary law norm of male primogeniture against the constitutional guarantee of gender equality.<sup>69</sup> The case involved a widow with two young daughters.<sup>70</sup> The husband had been a carpenter and Ms. Bhe was a domestic worker.<sup>71</sup> They were poor and lived in a temporary informal shelter in Cape Town.<sup>72</sup> Although the deceased had obtained a state housing subsidy that had allowed him to purchase the property on which they lived and to buy materials with which to build a house,<sup>73</sup> he died before the house could be built.<sup>74</sup> The estate consisted of the temporary shelter, where Mrs. Bhe continued to live with her youngest daughter, the land upon which it was built, the household chattel, and the building materials.<sup>75</sup> In setting the estate, the magistrate followed the Black Administration Act,<sup>76</sup> and invoked the relevant customary norm, the rule of male primogeniture.<sup>77</sup> Because the two children were daughters, the magistrate named the deceased's father as the heir and successor.<sup>78</sup>

To make a long and complex analysis rather short and simple, the Constitutional Court had relatively little problem concluding that the Black Administration Act was unconstitutional,

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69. *See generally id.*

70. *Id.* ¶ 13.

71. *Id.* ¶ 14.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *See id.* ¶¶ 15-16; Black Administration Act of 1927 s. 23 (repealed). The Black Administration Act of 1927 specified that the property of a Black (for which the Constitutional Court now substitutes African) who dies intestate shall devolve in terms of Black law and custom. *See id.* All other estates were governed by the Intestate Succession Act, which codified and updated common law rules for intestate succession, providing for inheritance by the surviving spouse and, importantly for this case, providing equally for all children regardless of birth order or the marital status of the parents. Intestate Succession Act 81 of 1987.

77. *Bhe*, 2005 (1) BCLR 1 (CC) ¶¶ 15-16.

78. *Id.*

as an overtly racist legacy of apartheid.<sup>79</sup> The Justices then confronted the question of whether customary law should nevertheless govern the disposition of the estate of its own force. As noted above, under the South African Constitution, courts must apply customary law when that law is applicable, subject to the Bill of Rights.<sup>80</sup> The Court then considered whether the applicable customary law principle of male primogeniture violated women's right to equality and to dignity. It concluded unanimously that it did and moreover that the violation could not be justified under the constitution's limitations clause.<sup>81</sup>

The justices were divided, however, as to the appropriate remedial approach. Ten of the justices agreed that, until the legislature resolves the question of the treatment of intestate succession under customary law in a way that is consistent with the

79. *Id.* ¶ 61. As Justice Langa explained:

Section 23 [of the Black Administration Act] cannot escape the context in which it was conceived. It is part of an Act which was specifically crafted to fit in with notions of separation and exclusion of Africans from the people of "European" descent . . . . What the Act in fact achieved was to become a cornerstone of racial oppression, division and conflict in South Africa, the legacy of which will still take years to completely eradicate.

80. S. AFR. CONST. ss. 30-31, 211(3). The Constitution provides:

Section 30 provides:

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 of the Bill of Rights.

Section 31 provides:

(1) Persons belonging to a cultural, religious, or linguistic community may not be denied the right, with other members of that community—

(a) to enjoy their culture, practice their religion and use their language; and  
(b) . . . . (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Section 211(3) provides:

The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

81. *Bhe*, 2005 (1) BCLR 1 (CC) ¶¶ 73, 95. Under the South African Constitution, once the Court concluded that the rule of male primogeniture was unfair discrimination on the basis of gender and therefore a violation of section 9(3) of the Bill of Rights, it had to consider further whether that violation could be justified under the limitations clause, section 36(1), in view of the customary successor's duty of support. With respect to this analysis, Justice Langa concluded simply that "the connection between the rules of succession in customary law and the heirs' duty to support the dependents of the deceased is, at best, less than satisfactory. . . . The heir's duty to support cannot, in the circumstances, constitute justification for the serious violation of rights." *Id.* ¶ 96.

Constitution, the Intestate Succession Act should govern.<sup>82</sup> They still had to do some redrafting so that the Intestate Succession Act could accommodate the practice of polygamy, though the Court was careful to reserve the question of its constitutionality.<sup>83</sup>

Justice Ngcobo alone dissented from the Court's decision to apply the Intestate Succession Act to estates previously governed by customary law via the Black Administration Act.<sup>84</sup> He argued that the Court had an obligation to apply customary law and to participate in the development of customary law in a way that was consistent with the Constitution.<sup>85</sup> Instead of striking down the rule of primogeniture altogether, he would have modified the customary law rule to preserve inheritance by the eldest child, though allowing female as well as male children to succeed to the position of family head.<sup>86</sup> This interpretation of customary law, in his view, would preserve the valuable function of the customary successor while eliminating the gender discriminatory aspects of the rule.<sup>87</sup>

Although differing in important ways, both symbolic and practical, the two approaches articulated in *Bhe* both embrace a norm of gender neutrality in matters of inheritance and succession. Significantly, no member of the Court was willing to accept an argument from custom as a justification for a gender-specific

82. *Id.* ¶ 117. The Intestate Succession Act provides a share for the surviving spouse but contemplates only one such spouse. See Intestate Succession Act of 1987. Justice Langa explained in his opinion how the Act should govern the distribution among two or more such spouses in polygamous unions. *Bhe*, 2005 (1) BCLR 1 (CC) ¶¶ 122-25.

83. See *id.* ¶¶ 122-25. The application of the constitutional principles of gender equality in *Bhe* seems to preclude the sanction of polygamy, a system under which men may have multiple spouses but women may not. Yet, the possibility remains that the Court might determine either that such discrimination is not *unfair* and therefore does not violate section 9 or that it comes within the scope of the limitations clause. The latter argument is strengthened by the fact that women in polygamous marriages may be made worse off by the denial of legal recognition to such unions. See RCMA of 1998; see also SA LAW COMMISSION PROJECT 90: THE HARMONISATION OF THE COMMON LAW AND THE INDIGENOUS LAW: REPORT ON CUSTOMARY MARRIAGES (1998) [hereinafter REPORT ON CUSTOMARY MARRIAGES].

84. *Bhe*, 2005 (1) BCLR 1 (CC) ¶ 139.

85. See S. AFR. CONST. s. 211(3) (obliging courts to "apply customary law when that law is applicable"); *id.* s. 39(2) (providing that ". . . when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights").

86. *Bhe*, 2005 (1) BCLR 1 (CC) ¶¶ 180-81, 183, 185, 187, 190-91.

87. *Id.* ¶¶ 221-23 (discussing the important role of the customary successor).

rule in this context. Rather, the justices read the constitutional guarantee of gender equality as requiring the legal displacement of settled expectations regarding inheritance under customary law in the name of gender neutrality.

The RCMA,<sup>88</sup> in contrast, is somewhat more accepting of gender hierarchy so long as it is a product of individual choice. The RCMA responds to the longstanding refusal of colonial and apartheid regimes to recognize fully marriages celebrated under African customary law. As such, it was intended to “bring to an end the tyranny of a dictatorial recognition of civil and other Eurocentric faith based marriages at the expense of marriages concluded in accordance with customary law.”<sup>89</sup> To this end, the Act recognizes two types of customary marriages: Those valid under customary law and existing prior to passage of the RCMA, and those entered into subsequent to the passage of the RCMA that comply with the Act’s requirements.<sup>90</sup> The Act also explicitly recognizes polygamous customary marriages, and does not subject customary matrimonial law to a repugnancy clause.<sup>91</sup>

This expanded recognition alone can be understood as improving the status of women in customary marriages because it allows married women (and widows) to invoke the power of courts to protect their legal rights and to ensure that their spouses meet their legal obligations. At the same time, recognition of such marriages grants legal sanction to an institution that is highly patriarchal. The RCMA attempts to mitigate this problem by ensuring that the participants enter the marriage by choice and, to a lesser degree, by regulating the institution directly to make it somewhat more egalitarian.

With respect to choice, the Act makes the consent of the parties themselves (as opposed to their families) a necessary element of customary marriage.<sup>92</sup> Additionally, the statute establishes a minimum age requirement for the parties to a marriage, though with the parents consent, the minimum age can be

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88. RCMA of 1998.

89. Cheryl Gillwald, Deputy Minister of Justice and Constitutional Dev., Keynote Address at the Launch of the Recognition of Customary Marriages Act, S. Afr. (Nov. 15, 2000).

90. See RCMA ss. 2(1), 2(2).

91. *Id.* ss. 2(3), 2(4).

92. *Id.* s. 3(1)(a)(ii).

waived.<sup>93</sup> The statute also alters, formally at least, the terms upon which the individuals may exit the marriage by providing that dissolution of a customary marriage will be on the same terms as civil marriage, including “irretrievable breakdown.”<sup>94</sup> Moreover, although traditional leaders are still empowered to attempt to resolve disputes prior to the dissolution of the marriage, divorce proceedings are to be regulated by state courts.<sup>95</sup> The changes in the terms of entry to and exit from customary marriage seek to ensure that individuals enter and remain in these relationships by choice.

In some respects, the RCMA also alters customary marriage in the direction of substantive equality or gender neutrality in that it provides that spouses will have equal legal capacity during the marriage and, perhaps more importantly, that the default presumption regarding property will be in community of property rather than separate property.<sup>96</sup> These are important changes that surely improve the status of women in customary marriages. At the same time, certain entrenched cultural practices limit the scope of these egalitarian reforms. For example, the RCMA makes no mention of *lobolo*, the practice of transferring wealth from the groom’s family to the bride’s family in recognition of the marriage agreement as a requirement of custom-

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93. *Id.* s. 3(3)(a).

94. *Id.* ss. 8(1), 8(2).

95. *Id.* s. (8)(1).

96. *Id.* ss. 7(1)-(2), 10(1)-(2). The text states:

7.(1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.

(2) 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 antenuptial contract which regulates the matrimonial property system of their marriage. . . .

10.(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No. 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.

(2) When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.

ary marriage.<sup>97</sup> This custom is very widely practiced across ethnic groups and enjoys widespread support.<sup>98</sup> It is also highly gendered and has important implications for the power dynamic within customary marriage discussed below. The RCMA formally consigns *lobolo* to the private sphere by declining to make it a requirement of customary marriage. Again, the statute treats it as a matter of choice.

In a more overt departure from gender neutrality, the RCMA gives legal recognition to polygamous unions for the first time.<sup>99</sup> In so doing, the language of the statute recognizes the gendered nature of the practice by using the terms “husband” and “wife” rather than the gender neutral term “spouse” when specifying the regulation of the practice.<sup>100</sup> Here the statute embraces neither the equality paradigm nor the choice paradigm in that it requires only that the existing wife be notified, not that she consent to the marriage.<sup>101</sup> The statute does attempt to protect her interests by specifying a change in the property regime and a division of existing property.<sup>102</sup> It also provides for judicial oversight, requiring a determination by the court that the interests of all parties will be protected in a subsequent marriage by the husband.<sup>103</sup>

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97. *Id.* s. 4(4)(a). The Recognition of Customary Marriages Act (“RCMA”) does provide for the recording of *lobolo* payments as an aspect of registration of customary marriages. *Id.*

98. *See, e.g.*, REPORT ON CUSTOMARY MARRIAGES, *supra* note 83, § 2.1.21 (stating “(t)he limits inherent in what the law can do to uplift and protect vulnerable parties in marriage suggested to the Commission that it would be inadvisable to ignore customary institutions. Thus, for instance, even if *lobolo* and polygamy seemed contrary to the ideal of spousal equality, they are so deeply rooted in the African consciousness that it would be impossible to enforce any prohibition.”); *see also* J.C. BEKKER & WILFRED MASINGHAM SEYMOUR, SEYMOUR’S CUSTOMARY LAW IN SOUTHERN AFRICA 151 (1989) (describing *lobolo* as “the rock on which the customary marriage is founded”).

99. *See* RCMA ss. 2(3)-(4).

100. *Id.* ss. 1(iv), 6.

101. *Id.* s. 7(4)(b).

102. *Id.* s. 7(7)(a)(i)(bb).

103. *Id.* s. 6.

II. MEASURING THE APPROACHES AGAINST THE  
CONDITIONS OF WOMEN LIVING  
UNDER CUSTOMARY LAW

A. *The Recognition of Customary Marriages Act and  
the Choice Paradigm*

1. Consent to Enter Marriage

The RCMA formally embraces the choice paradigm by making individual consent of the spouses the central element of marriage under the Act.<sup>104</sup> The statute would therefore not recognize a marriage entered into without the consent of both parties and thus, in theory, gives individuals the right to reject marriages they do not wish to enter.<sup>105</sup> This does not mean, however, that individuals have an unencumbered choice with respect to their marital partners, even under the statute. For example, the RCMA is less clear with respect to whether parental permission is required in addition to consent of the parties.<sup>106</sup> In the case of a minor, the Act expressly requires the consent of both parents, presumably in addition to the consent of the individual.<sup>107</sup> The statute might plausibly be read to mean that, in cases involving legal adults, parental permission is not required. At the same time, the Act specifies that the marriage must comply with customary law, which contemplates negotiation and agreement between the families.<sup>108</sup>

Even apart from the requirements of customary law incorporated by the statute, families exercise a great deal of practical control over the marriage decision. Indeed, interviews revealed that the involvement of the family is often a critical and even determinative factor in the marriage decision.<sup>109</sup> The most clear-cut example of family control is when the family enters into

104. *Id.* s. 3(1)(a)(ii).

105. *Id.*

106. *Id.* s. 3(1)(b) (stating only that, if under 3(1)(a) prospective spouses are both above the age of eighteen and consent to be married under customary law, "the marriage must be negotiated and entered into or celebrated in accordance with customary law").

107. *Id.* s. (3)(3)(a).

108. See BENNETT, *supra* note 1, at 195.

109. Interviews with women in the GaMatlala Community, in Limpopo Province, S. Afr. (May 24, 2006) ("The boy goes to his family and says he saw someone he likes. His family goes to the girl's family and makes a request for their son to marry the girl. A price is negotiated. If the girl says no to the marriage, they do not force her. She should be at least 18 years old to marry.").

marriage negotiations without the knowledge, much less the consent, of either individual. More commonly, the man will initiate negotiations with the woman's family and those negotiations will proceed without her involvement. Although some of the interviews done in urban areas suggested that now a woman can ask her parents to initiate marriage negotiations, she cannot initiate them herself.<sup>110</sup> Moreover, a significant number of women, particularly in rural areas, reported that when parents negotiated the marriage, the woman does not have a choice.<sup>111</sup> For example, Nomntukanti Mkwe, from Khayelitsha Township near Cape Town, told of having been promised that she would be allowed to complete her education prior to entering into marriage. Eventually, though, her mother succumbed to the pressure of the elders, and her marriage was arranged.<sup>112</sup> More rarely, we encountered marriage by abduction, where the man's friends abduct a potential wife and take her to the groom's parents home.<sup>113</sup> The following day, his family sends a message to her parents, informing them of her status and *lobolo* negotiations begin.<sup>114</sup> Neslina, another young woman from Khayelitsha Township, reported that she had refused a marriage proposal from the man and later was abducted from her home, while her parents watched helplessly.<sup>115</sup>

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110. *Id.*; see also Interview with Sma, in Mandini, KwaZulu-Natal Province, S. Afr. (June 17, 2006) (an educated woman describes the *lobolo* negotiations as such, "He sent his brother and his uncle to negotiate the *lobolo* with her father, but her father was not supposed to start the talks until her husband paid him R100 . . . the cattle-watcher waits above a tree and the husband/his representatives would have to negotiate with the watcher to get him down from the tree. The women are not part of the process, which is between the elders. Her father asked for 11 cows as well as a bicycle and a suit of clothing. He asked for 11 different things for all the men in her family; 15 blankets; 15 towels etc . . .").

111. See Interview with the Queen of the GaMatlala Community, in Kgoshigadi L.R. Matlala, Limpopo Province, S. Afr. (May 24, 2006) ("as a child, the woman takes direction from her parents").

112. Interview with Nomntukanti Mkwe, in Khayelitsha Township, outskirts of Cape Town, S. Afr. (June 2, 2006).

113. Interview with Shiela, in Khayelitsha Township, Western Cape Province, S. Afr. (June 2, 2006) (Shiela described being abducted by a group of her husband's friends when she was fetching water from the river in the Eastern Cape).

114. According to Nomntukanti Mkwe, the abduction would take place before the man went to his family. See Interview with Nomntukanti Mkwe, *supra* note 112.

115. Interview with Neslina, in Khayelitsha Township, Western Cape Province, S. Afr. (June 2, 2006). A variation of this version of marriage by "abduction" was described by a woman who had married into a chief's family. She recounted that she met the boy, then their families met, and only after the decision was made that the couple

Commonly, the family negotiations begin only after the couple agrees to marry.<sup>116</sup> This does not mean, however, that the marriage is a reflection of unfettered individual choice. The woman's family may effectively veto a proposal by demanding a *lobolo* payment that the man's family cannot make. Conversely, the man's family can block a marriage by refusing to pay the *lobolo* demanded. For example, in the Shembe community,<sup>117</sup> the man who wants to marry will approach the male teacher with a proposal and the male teacher will then consult the female teacher about the proposal. If they agree, the man and woman will talk, and their parents will negotiate the *lobolo*, with the standard being eight cows. Only if the *lobolo* is agreed upon will they be permitted to marry.

*Lobolo* thus emerges as the fulcrum for family control over marriage decisions: Agreement between the individuals is subject to an agreement between the families regarding the amount and terms of payment.

The cultural significance of *lobolo* in South Africa should not be underestimated. As an institution, *lobolo* is "central to the African conception of marriage,"<sup>118</sup> and its status is legally protected from a finding of repugnancy under the Law of Evidence Amendment Act.<sup>119</sup> A "typical contemporary explanation for

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will get married, does "the chief come to steal you. You spend ten days in a house without going out. After ten days I could leave, but I had no clothes on below my waist . . . until you get your period, you must do everything on all fours—cooking, sweeping . . ." Interview with anonymous member, African National Congress ("ANC") Women's League, in Makhado, Limpopo Province, S. Afr. (May 26, 2006).

116. See Interviews with women in the GaMatlala Community, *supra* note 109; see also Interviews with Residents, Kibi Town Hall Meeting, in Limpopo Province, S. Afr. (May 25, 2006).

117. See Interview with Edward Ximba, Executive Director of the Shembe Church, Durban, KwaZulu-Natal Province, S. Afr. (May 23, 2006).

118. BENNETT, *supra* note 1, at 220. Bennett describes *lobolo*'s durability, "whatever its social, economic and political functions," as it "has survived major transformations in the economy and society, not to mention the determined onslaught of missionaries, colonial governments and the courts," although it has changed "in form, composition, and function" (citations omitted). *Id.* at 223. "Whatever its social and economic disadvantages, however, very few people would be prepared to support" its abolition, as "[i]ts symbolic functions remain a powerful force" and "[e]qually important, today, is its function to mark marriages as distinctively African" (citations removed). *Id.* at 224.

119. Law of Evidence Amendment Act of 1988 s. 1(1). Section 1(1) of the Law of Evidence Amendment Act provides:

(1) Any court may take judicial notice of the law of . . . indigenous law . . . Provided that [it] shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to

the practice” involves compensating the bride’s family for the loss of a daughter, reflecting “in large part the expenditure on her upbringing and education.”<sup>120</sup> It is also defended as a benign “language that the ancestors understand and bless.”<sup>121</sup> Nevertheless, it reflects an economic transaction between the families that constrains entry into marriage as well as the terms of the marriage itself. The payment of *lobolo* may create a sense of entitlement on the part of the husband and his family to the labor of the wife. Moreover, the threat of her family having to repay *lobolo* may discourage an unhappy or abused wife from leaving a marriage.<sup>122</sup> For example, as Nontsikelelo Tshongweni of Khayelitsha explained, “With customary law it depends on the family, your in-laws, your family does *lobolo* negotiations. It will be difficult to leave that marriage, difficult to go home because they will tell you to go back, because they paid. If you have a civil law marriage, you can go home and go to the court to get a divorce . . . when you have had enough.”<sup>123</sup> *Lobolo* payment may also encourage another traditional practice, marriage by substitution or “widow inheritance,” in which the widow is encouraged or forced to marry her brother-in-law. For example, “S,” a young woman whose in-laws attempted to substitute her brother-in-law for her deceased husband, reported that her in-laws made explicit reference to *lobolo*: Because the family had paid, she must remain with them.<sup>124</sup>

Marriages in which the negotiations take place without the knowledge, much less the consent, of the woman and sometimes the man, clearly do not satisfy the statutory requirement of con-

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declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

*Id.* This so called repugnancy proviso “is a clear reflection of the ethnocentric bias in South Africa’s legal system.” REPORT ON CUSTOMARY MARRIAGES, *supra* note 83, at 2.1.

120. BENNETT, *supra* note 1, at 224.

121. *Id.* at 224 n.312 (citing WHOOLEY IN VERRYIN, CHURCH AND MARRIAGE IN MODERN AFRICA 313 (1975)).

122. Interview with Sibongile Ndashe, *supra* note 21. This is the case in civil as well as customary law marriages.

123. Interview with Nontsikelelo Tshongweni, in Khayelitsha Township, Western Cape Province, S. Afr. (June 2, 2006); see Interviews with teachers in Keerom Village, in Limpopo Province, S. Afr. (May 23, 2006).

124. Interview with “S,” in Mandini, KwaZulu-Natal Province, S. Afr. (May 23, 2006). Another problem referred to in this regard is that when the successor takes over the role of husband he may infect the woman with HIV. Interview with Dumbisa, Masimanyane Women’s Support Centre, East London, Eastern Cape Province, S. Afr. (May 24, 2006).

sent. Nevertheless, the statutory consent requirement might be satisfied by the couples' agreement to the arrangement after the fact. Although recognition of such unions is perhaps desirable to protect the legal rights of the partners of an existing union, retroactive ratification of an arranged or coerced alliance undermines the value of the consent requirement as a means of ensuring individual choice. In all of these narratives, *lobolo*, and the process of its negotiation acted to legitimate an often non-consensual marriage. But the presence of *lobolo*, negotiated by the family, and from which negotiations the prospective bride was uniformly excluded, militates against the regime of "consent" envisaged and enacted by RCMA.<sup>125</sup>

## 2. Women's Status Within Marriage

With respect to women's status within marriage, the RCMA sounds both in choice and in substantive equality. Regarding the latter, the Act provides that a wife shall enjoy "on the basis of equality with her husband . . . full status and capacity."<sup>126</sup> Perhaps more importantly, the Act provides that, for marriages entered into after the Act, the default presumption regarding the status of marital property is that the marriage is in community of property.<sup>127</sup> This provision helps to ensure women's stake in property acquired through the economic partnership of marriage. The Act does allow an individual to opt out of community of property, here emphasizing choice over equality, but that option must be exercised in the form of an explicit ante-nuptial contract.<sup>128</sup>

Notwithstanding this statutory language providing for equal status for men and women within marriage, interviews revealed the persistence of a highly gendered division of labor and of power within marriage. As the Queen of the GaMatlala community in Limpopo Province explained, "The wife must respect the husband and bring him water. The man is the head of the household. The women remain in the house from sunrise to sundown."<sup>129</sup> Similarly, Edward Ximba, the executive director of

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125. Interview with Thandie Ndlebe, in Khayelitsha Township, Western Cape Province, S. Afr. (June 2, 2006).

126. RCMA of 1998 s. 6.

127. *Id.* s. 7(2).

128. *Id.*

129. Interview with the Queen of the GaMatlala Community, *supra* note 111.

the Shembe church in KwaZulu-Natal Province, explained that a wife's duties are to have sex, bear children, take care of the children, cook, and wash the white robes of her husband.<sup>130</sup> A husband, on the other hand, would never cook or clean; even if his wife is sick—in that case he would get another woman to help with the household.<sup>131</sup>

The link between *lobolo* and the conception of husband as head of the house<sup>132</sup> was also made: We were told that *lobolo* indicates that the wife must work for her husband since “nothing is for free.”<sup>133</sup>

In terms of decision-making authority, interviewees in both rural and urban areas reported that, under customary law, the wife cannot act without the husband's authority, even in his absence.<sup>134</sup> For example, a representative of the House of Chiefs in Makhado, commented that “at home, the husband is Jesus” and “women care for children, but husbands make the decisions about their education.”<sup>135</sup> This conception was often complicated by separate living arrangements, brought about by the migrant labor system and the dismantling of influx control restrictions in the 1990's, resulting in a depopulation of men from the rural areas.<sup>136</sup> Yet the husbands often expect rural wives to continue to perform the functions of a wife, even after long ab-

130. Interview with Edward Ximba, *supra* note 117.

131. Interview with women at Chief's house, in Makhado, Limpopo Province, S. Afr. (May 26, 2006) (“It is better to have one person above the other in the family. 50-50 would cause disagreements.”).

132. See RCMA s. 6. Section 6 provides 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, which is a remarkable reversal of decades of entrenchment of a minority status for black women. While the wording of the Act is particularly clear about the equal status and capacity of spouses with respect to the proprietary consequences of marriage, it is not as unambiguous on the “status” question of the conception of the husband as head of the home, and ultimately the sole holder of decision-making power in the family. Yet, the provision does operate in a context of a firmly entrenched norm of the husband as head of house.

133. Interview with the Queen of the GaMatlala Community, *supra* note 111 (explaining that “*lobolo* is to pay for the services and to please the family of the bride”). When the queen was married, every village had to contribute cattle as *lobolo*. *Id.*; see Interview with Neslina, *supra* note 115 (“If you don't like it, just swallow, because they paid *lobolo*, you have to obey.”).

134. Interview with women at Chief's house, *supra* note 131.

135. *Id.*

136. Interview with Patrick Pringle, Dir., Queenstown Rural Legal Ctr., in Grahamstown, S. Afr. (May 23, 2006).

sences, and many women found this to be particularly oppressive.<sup>137</sup>

This lack of decision-making power in the home means that women are excluded from commercial decision-making: "If decisions are made about family cows, none of the wives get involved."<sup>138</sup> It also extends to the area of sexuality, affording women little control over their own sexuality or the conditions of sexual intimacy, including condom use. As one representative of the Violence Against Women Network explained, "women have no ability to negotiate at home. The rule in our culture is that a woman can't ask her husband to wear a condom. She doesn't know how to approach her husband about it; it's a moral issue."<sup>139</sup>

Even interviewees who embraced the notion of gender equality in the workplace or political sphere were often adamant that at home the husband is still head of the household. For example, Chief Chabalala of the House of Chiefs of Makhodo explained that "50-50 gender equality applies to work, not to the home. At home the husband has the final say and the wife has to listen."<sup>140</sup> A member of the African National College ("ANC") Women's League noted the attitude that "men and women should not be equal in the family. Christ was the head of the church. Man must be the head of the family. Men should always have a higher status in the family. It is okay for women to be president, because that's intellectual."<sup>141</sup> This understanding of man as head of the household and a rejection of norms of equality in the home was echoed in many interviews with women themselves. For example, in GaMatlala, one woman explained that "in our homes the husband is master, we don't want to be in charge of the home."<sup>142</sup> Another added that "we agree that the

137. See Interview with anonymous advocate, Masimanyane Women's Support Centre, in East London, Eastern Cape Province, S. Afr. (May 24, 2006).

138. See Interview with Neslina, *supra* note 115.

139. Interviews with women in the GaMatlala Community, *supra* note 109; see Interview with representative, Violence Against Women Network, in Cape Town, S. Afr. (June 1, 2006). Teenage girls in Keerom Village commented, "our life orientation teacher won't answer a lot of specific questions we have regarding HIV. Our parents won't respond to questions about sex . . . who can we talk to?" Interviews with teenage girls, in Keerom Village, Limpopo Province, S. Afr. (May 23, 2006).

140. Interview with a Chief, House of Chiefs, in Makhado, Limpopo Province, S. Afr. (May 26, 2006).

141. Interview with anonymous member, ANC Women's League, *supra* note 115.

142. Interviews with women in the GaMatlala Community, *supra* note 109.

Constitution says that equality exists, but in our home we want to follow our customs.”<sup>143</sup> In rural Mandini, another woman explained that she does not believe in women’s equality and human rights, because “a man is a man. He’s the head of the household and nothing can change that. We discuss things, but the last word is by my husband . . . most women agree with me that men are superior and should have the power.”<sup>144</sup>

This notion of submission is perhaps most evident in the attitude towards an almost ubiquitous presence of domestic violence.<sup>145</sup> One interviewee in the Transkei described the situation with respect to domestic violence in this way: “This is the life we are living now. They beat you, and beat you, and beat you. And you cry, and you cry, and you cry. And you endure, and endure, and endure.”<sup>146</sup> This cultural injunction to endure extends from rural to urban geographies, so that when an urban woman is abused in Khayelitsha, the possibility of leaving the marriage is rarely considered.<sup>147</sup> Similarly, a female teacher at an initiation school for girls in Keerom Village explained the traditional acculturation of girls at such schools as involving “hit[ting] the girls so that when a man or husband does it later on, it won’t be the first time. They make us carry heavy bags on our backs to teach us that we should carry our burdens on our own.”<sup>148</sup> She explained that “in our culture, people don’t have rights. Instead, we have duties” and “if a husband hits a girl, the girl shouldn’t fight back and shouldn’t go to the police. We were also taught that if a man rapes you, you shouldn’t let anyone know . . . . Now girls in the state school are taught to fight back with rights.”<sup>149</sup>

The traditional, and still most common, manner of dealing with domestic violence, as with other family disputes, is through

143. *Id.*

144. Interview with Sma’s brother’s wife, in Mandini, KwaZulu-Natal Province, S. Afr. (May 23, 2006).

145. Eighty percent of rural women report being victimized by domestic violence. See Jennifer Podkul, *Domestic Violence in the United States and its Effect on U.S. Asylum Law*, 12 HUM. RTS. BRIEF. 16, 19 (2005).

146. Interview with community member, in Mbolompo, Umtata, Eastern Cape Province, S. Afr. (May 25, 2006).

147. See Interview with Dr. Lungiswa Mamela, Director, Violence Against Women Network, Cape Town, S. Afr. (June 1, 2006).

148. Interview with female teacher, in Keerom Village, Limpopo Province, S. Afr. (May 23, 2006).

149. *Id.*

the family circle of the husband. For example, in the rural community of Ngcengane, we were told that a headman will write a letter or call the relatives to discuss the matter. If the woman is not hurt badly, the matter will be resolved locally. The headman's court might fine the husband the sum of two cattle, which are then delivered to the woman's birth home, not directly to her.<sup>150</sup> Another interviewee, a member of the ANC Women's League, explained that "women go to the family first. But if he beats me too much, I would go to the chief. If it is not too much, I will just let it go. No one ever goes to the police."<sup>151</sup> In a number of communities, interviewees cited a basic principle that, if there is blood, they would go to the police. If not, they would negotiate within the community, without reporting it.<sup>152</sup>

Dr. Lungiswa Mamelolo, the Director of the Network on Violence Against Women in Cape Town, explained that some women believe that if her husband hits her, it is a sign that he loves her.<sup>153</sup> When asked about women's reluctance to go to the police, she explained that the approach of their organization is to focus on reconciliation and avoiding the police, noting that, if there is a protective order, the family may turn against the victim.<sup>154</sup> She added that if, after first discussing the problem with the family and the chief, they encourage her to report the violence, then she regards it as safer for her to contact the police because the family will then accept the protective order.<sup>155</sup>

The reluctance to report domestic violence stems from several sources, including the fear that the police will do nothing and that reporting abuse may exacerbate it. For example, one woman explained, "the police will chase the woman away, and then she doesn't have anyone to turn to."<sup>156</sup> Another worried that "if you walk to the police, your husband will catch you and beat you—you just have to swallow."<sup>157</sup> Indeed, one interviewee

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150. See Interview with anonymous woman, Community Meeting, in Ngcengane, S. Afr. (May 26, 2006).

151. Interview with anonymous member, ANC Women's League, *supra* note 115.

152. See *id.*

153. Interview with Dr. Lungiswa Mamelolo, *supra* note 147.

154. See *id.*

155. See *id.*

156. Interview with anonymous woman, Scenery Park Township's DV Counseling Center, in East London, Eastern Cape Province, S. Afr. (May 25, 2006).

157. Interview with anonymous woman, in Khayelitsha Township, Western Cape Province, S. Afr. (June 2, 2006).

reported that the police blamed her for the problem, asking, "Do you know what this will do to your marriage and children?"<sup>158</sup> Similarly, when women seek guidance from the church or traditional healers in situations of domestic violence, they are told that "if they were good, men would treat them well."<sup>159</sup> One *sangoma* (traditional healer, or shaman) interviewed in the urban township of Alexandria explained that, in cases of domestic violence, she would pray to determine what the cause of the problem is and would do a cleansing ritual on the woman to rid her of whatever was causing the man to abuse her.<sup>160</sup>

Some men, in particular some traditional leaders, described the rise in domestic violence not only as part of a transition still underway but also a reaction against constitutional rights, which are perceived to protect women and children, but not men. One male interviewee expressed it this way:

In 1994, women have rights, children have rights. And men do not! That has made this thing to become worse. The government tried to remove us from our existing culture, and introduce us to new systems of life. After the rights were given to women and children, then things go wrong. Women start to misbehave. After the introduction of those rights, they started to be disrespectful.<sup>161</sup>

Another male interviewee made the direct link between gender equality and divorce, commenting that "in our village it is foreign to consider men and women equal in the eyes of the law. Gender equality promoted by the Constitution creates problems in the family that can lead to divorce. Men feel their rights are being eroded . . . . Equality undermines the men's dignity."<sup>162</sup>

One interviewee observed that before the Constitution couples would resolve problems within the family, but now "if a woman is having an affair she goes straight to the magistrate and

158. Interview with Dr. Lungiswa Mamela, *supra* note 147.

159. Interview with Dr. Lydia Mafenya, Founder of Non-Governmental Organization, Final Network Against Family Violence, in Makhado, S. Afr. (May 26, 2006).

160. Interview with Justina, in Sangoma, Alexandria Township, Johannesburg, S. Afr. (June 2, 2006).

161. Interview with Subheadman, in Ngecengane Village, S. Afr. (May 26, 2006).

162. Interview with Paramount Chief, in Keerom Village, Barberton, Limpopo Province, S. Afr. (May 23, 2006). This sentiment, that men were now more oppressed than women, was frequently heard. *See* Interviews with residents, in Kibi Community, Limpopo Province, S. Afr. (May 25, 2006).

gets a protective order,” and “these protective orders are killing men because they cause the men to kill themselves. It has cost us many lives.”<sup>163</sup>

The strong cultural support for hierarchical gender roles within marriage, coupled with the notion that even physical violence must be endured, calls into question the effectiveness of the RCMA’s guarantee of equal legal capacity during marriage. As the next section suggests, the availability of judicial divorce for women married under customary law is intended to ensure that they remain in this hierarchical marriage structure by choice, but cultural norms also limit their ability to exit.

These interviews reflect a seemingly widespread opinion that domestic violence is caused or at least exacerbated by women’s insubordination. This insubordination, in turn, has resulted from women’s newfound legal equality under the RCMA and the Constitution.

### 3. Exit from Marriage

With respect to divorce, the RCMA equalizes women’s access to divorce and provides for a single, common law ground for divorce: irretrievable breakdown of the marriage. The Act also removes divorce from the jurisdiction of traditional courts.<sup>164</sup> Thus women, on an equal basis with men, may choose to exit a marriage and must do so in a forum that may more fully protect their rights in a post-divorce arrangement regarding custody and support.

These changes represent an important gain for women as measured against the customary law norm of very limited or no divorce. Customary norms and procedures, we were told, emphasize reconciliation between the parties rather than divorce. Although perhaps appealing in the abstract, this norm may sim-

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163. Interview with anonymous resident, in Kibi Community, Limpopo Province, S. Afr. (May 25, 2006); see Interview with the Queen of the GaMatlala Community, *supra* note 111 (“Domestic violence is common because people misinterpret the laws of this country. Everyone thinks they have the right to do whatever they want.”). The Queen in GaMatlala was also of the view that domestic violence is a consequence of these new freedoms. See Interview with the Queen of the GaMatlala Community, *supra* note 111.

164. RCMA of 1998 s. 8(5). Although the RCMA removes divorce from the jurisdiction of traditional leaders, the Act specifically provides that it should not be construed as “limiting the role, recognised in customary law, of any person, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by a court.” *Id.*

ply serve the objective of preserving for the husband's family both the labor of the wife and control of her children. Because customary law permits polygamy, the "no divorce" norm does not prevent the husband from creating for himself a new marital home. Thus, under customary law, a marriage that has "irretrievably broken down" may persist for the woman even while the man begins a new relationship.

The RCMA thus operates in the context of a cultural norm that discourages, if not prevents completely, the termination of marriage, though allowing "separation" to take place via non-judicial process.<sup>165</sup> We were informed that traditionally divorce for women was not an available option.<sup>166</sup> Indeed, a phrase exists that "the grave of a woman is at the husband's home."<sup>167</sup> The rituals and traditions in marriage are regarded as irrevocably changing a woman's status, with *lobolo* marking the absorbing of the ancestors into marriage. In order to escape a marriage, a woman had to flee and virtually excommunicate herself, often leaving her children behind.<sup>168</sup>

Although the RCMA removes divorce from the jurisdiction of traditional leaders, the Act specifically provides that it should not be construed as "limiting the role, recognized in customary law, of any person, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by a court."<sup>169</sup> Given their emphasis on reconciliation over divorce, retaining a role for traditional leaders as mediators in divorce may undercut the purpose of the statute to introduce the institution of judicial divorce into customary practice. Most of the traditional leaders interviewed reported that they would never counsel divorce,<sup>170</sup> but would advise instead "to put aside the

165. See Interview with Sibongile Ndashe, Women's Legal Centre, in Khayelitsha Township, Western Cape Province, S. Afr. (June 2, 2006).

166. Interview with Professor Chris Boonzaaier, Anthropologist, in Pretoria, S. Afr. (May 22, 2006). According to Boonzaaier, "the traditional way was that she would never leave, she was the property of her husband. *Lobolo* was because her family lost her labor and the womb of the woman. Children were for her husband and his people." *Id.*

167. Interview with anonymous student, in Keerom Village, Limpopo Province, S. Afr. (May 23, 2006).

168. See Interview with Professor Lesala Mofokeng, Senior Lecturer, Faculty of Law, University of KwaZulu-Natal, in Durban, S. Afr. (May 22, 2006).

169. RCMA s. 8(5).

170. According to his Majesty Kgoshi K.O Leboho, a husband and wife explain their stories to the chief, and he makes a final judgment. If the husband is wrong, he

guilty female and get married to another woman and at a later stage try to reconcile.”<sup>171</sup> According to the Ndebele King, when a marriage breaks down, the two families meet to try to solve the problem. The aim of this process is reconciliation, and “divorce is never an option we recommend.” It is for this reason that he is of the view that customary marriage is better, “because traditional courts never encourage divorce.”<sup>172</sup> According to the Shembe church, “there is no divorce permitted in Shembe because God said so and marriage lasts until death.”<sup>173</sup> Even if a couple separates, they are still considered married and any subsequent children born of other relationships will be cursed.<sup>174</sup> The GaMatlala Queen stated unequivocally that, with respect to marital disputes, “we have never failed to bring a man and a wife together.”<sup>175</sup> Indeed, the conception of non-termination of traditional marriage extends beyond death and often functions to prevent a woman from remarrying after the death of her husband.<sup>176</sup>

While the cultural injunction to remain married limits women, the traditional grounds for a husband to divorce his wife include if a woman is not caring for her husband, for example not cooking his meals and washing his clothes, and the woman’s grounds for divorce are if the man is not providing her with

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will impose a fine. But if the husband beats the wife, he gets sent to the magistrate or social worker or police station. Interview with his Majesty Leboho, Kibi Traditional Authority, in Limpopo Province, S. Afr. (May 25, 2006).

171. Interview with Paramount Chief, *supra* note 162.

172. Interview with Ndebele King, in Limpopo Province, S. Afr. (May 22, 2006). He adds that “if there is no blood spilled,” he tries to reconcile the couple, but otherwise he sends the case to the Magistrates court. *Id.*

173. Interview with Edward Ximba, *supra* note 117.

174. *See id.*

175. Interview with the Queen of the GaMatlala Community, *supra* note 111. She adds that “if they cannot reconcile, they send the man to the magistrate in order to make him pay maintenance.” *Id.* As an indication that law reform has to some degree permeated practice, one interviewee lamented that the government is undermining custom and destroying culture; where there is a marital dispute, the couple is supposed to call a close relative, an uncle or the father’s brother. Previously, the wife would go straight to the chief to resolve problems, now they go straight to the magistrate. Interview with anonymous resident, in Kibi Community, Limpopo Province, S. Afr. (May 25, 2006).

176. Interviews with women in the GaMatlala Community, *supra* note 109. *See* Interviews with residents, Kibi Town Meeting, *supra* note 116; Interviews with women from ANC Women’s League, in Makhado, Limpopo Province, S. Afr. (May 26, 2006).

food.<sup>177</sup> More significantly, men do not need the assistance of the institution of divorce, since they are free to enter into subsequent additional marriages and informal relationships, while a woman who “leaves” is virtually excommunicated. She also risks losing custody of her children, since according to customary law, the children remain at the home of the father’s family, because they “belong to the father.”<sup>178</sup>

#### 4. Polygamy and the irrelevance of Divorce for Men

Polygamy is part of customary law, and under the RCMA, now officially sanctioned by the South African government. Section 7(6) of the RCMA recognizes and attempts to regulate the practice of polygamy by providing that a husband in a customary marriage “who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.”<sup>179</sup> The provision stipulates that, where the existing marriage is in community of property, “the court must terminate the matrimonial system which is applicable to the marriage and effect a division of the matrimonial property;” it must also ensure an equitable distribution of the property and “take into account all the relevant circumstances of the family groups which would be affected if the application is granted.”<sup>180</sup> The court has wide powers to alter the terms of the contract, to “grant the order subject to any condition it may deem just” or refuse the application if “the interests of any of the parties involved would not be sufficiently safeguarded.”<sup>181</sup>

Although the legal framework attempts to regulate polygamy and protect the financial integrity of the first wife, the RCMA stops short of ensuring the first wife consents before allowing a man to take subsequent wives. Rather, the statute merely requires that the current wife or wives be joined in a

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177. See Interview with Professor Maituffi, Member of South African Law Commission, in Pretoria, S. Afr. (May 22, 2006).

178. See Interview with M. Similo, Subheadman, in Ngecengane Village, Eastern Cape Province, S. Afr. (May 26, 2006). Similarly, according to the Subheadman, “she will leave them, and if they are small she can take them but must bring them back.” *Id.*

179. RCMA of 1998 s. 7(6).

180. *Id.* ss. 7(a)(i)-(iii).

181. *Id.* ss. 7(b)(i)-(iii).

property dissolution process if the marriage is in community of property.<sup>182</sup> Moreover, the statute provides no penalty or enforcement mechanism for the failure to seek this judicial process before a man enters into subsequent marriage contracts.

In our interviews, we were told that custom permits a man to marry as many women as he can afford to support,<sup>183</sup> and that customary law does not require him to obtain the consent of the first wife.<sup>184</sup> According to one Subheadman in Ngcengane Village, “[c]ulturally it is allowed that a man may have as many wives as he can afford. You do not need to have any concern from the first wife, because of the way it is being done. If he needs children and the other wife bears seven, he’ll go find a wife to bear him three more to make the 10 he wants.”<sup>185</sup>

With the urbanization of South Africa, the practices surrounding polygamy have changed. Since industrialization, apartheid’s migrant labor policies forced men into the cities, where they then married second wives. This was confirmed by interviews with the Master of the High Courts Office, who said that in almost every probate case there is both an urban and a rural “wife.”<sup>186</sup> Moreover, some women in the urban areas were more legally sophisticated than those in traditional rural communities and insisted on civil marriages, which, prior to the RCMA, would trump any previous customary marriage.<sup>187</sup> Upon the death of her husband, the rural wife would discover not only that the second wife existed but that her own marriage was voided by the subsequent marriage under civil law.

We also heard variations of this narrative in which the urban educated wife was ignorant about her husband’s decision to marry a second wife in his village because his family did not think that the urban wife would fulfill traditional functions. “S,” a young university educated woman, who is a member of the Shembe church, described how she met her husband at univer-

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182. *See id.* ss. 6-8. Section 8 stipulates that “all persons having sufficient interest in the matter, and in particular the applicant’s existing spouse or spouses and his prospective spouse, must be joined in the proceedings.”

183. *See* Interview with M. Similo, Subheadman, *supra* note 178.

184. *See id.*

185. *Id.*

186. Interview with employee, Master of the High Courts Office, in Pretoria, S. Afr. (May 29, 2006).

187. *See* Interview with Ndebele King, *supra* note 172.

sity.<sup>188</sup> He paid *lobolo*, and they underwent the traditional church ceremony. Three months into her marriage, her husband developed tuberculosis, and ultimately died a few months later. At the funeral, she discovered that her husband had paid *lobolo* for a second rural woman, whom his parents had approved. She said that, although she understood the possibility that her future husband might marry additional women, she thought this should be done openly, with him seeking her consent. “S” told us that she had been taught that polygamy would ensure that her husband did not have multiple girlfriends in secret, and also would protect her from contracting HIV/AIDS, since her husband would not sleep around.<sup>189</sup>

In the village where “S” comes from in rural Kwazulu-Natal, the practice of polygamy is common. Indeed, in interviews there, we were informed that polygamy is not only practiced, but “on the increase.”<sup>190</sup> It is encouraged by community leaders as a mechanism to prevent husbands having girlfriends, to prevent the spread of disease and the orphaning of children.<sup>191</sup> Edward Ximba, leader of the Shembe church in Kwazulu-Natal, informed us that the practice of polygamy is prevalent and encouraged, with the husband being advised to marry up to four wives if he can afford it.<sup>192</sup> According to Ximba, polygamy is of practical import in the Church, since when a first wife is menstruating, she is not allowed to cook for her husband and so he must turn to his other wife. Ximba added that bigamy is very common since there are fewer males than females; however, for a man to have more than two wives is unusual.

In interviews in Limpopo and the Eastern Cape, we were more frequently informed that polygamy was no longer commonly practiced because of the difficulty of supporting more than one wife.<sup>193</sup> Nonetheless, leaders considered it not only le-

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188. Interview with anonymous follower, “S,” of Shembe Church, in Durban, KwaZulu-Natal Province, S. Afr. (May 23, 2006).

189. *Id.*

190. Interview with Professor Lesala Mofokeng, *supra* note 168.

191. See Interview with Nkosi Mdebanzeta, in Richmond, Northern Cape, S. Afr. (May 24, 2006) (who is himself in the process of marrying a third wife).

192. Interview with Edward Ximba, *supra* note 117. He himself has two wives, one of whom is a fashion designer and the other a school teacher. *Id.*

193. See Interview with the Queen of GaMatlala Community, *supra* note 111; see also Interview with Ndebele King, *supra* note 172; Interview with Dr. Lydia Mafenya, *supra* note 159.

gitimate but a marker of status to be engaged in by chiefs and government ministers. One interviewee remarked, "as far as consent goes, even if the first wife says no, the man will do it anyway. And the government allows that because even the top officials in the government have customary marriages."<sup>194</sup>

Other interviewees suggested that the reasons for the decline in polygamy were not merely economic but rather reflected the emergence of a different conception of marriage. According to one male interviewee, an urban single father, the practice of polygamy was about status, and was incompatible with love.<sup>195</sup> A similar sentiment was expressed by the Paramount Chief in Keerom Village, who explained that although polygamy is not often practiced in his area, the chiefs always have multiple wives, and can marry as many wives as they can afford.<sup>196</sup> He stated that in addition to the economic reasons for marrying only one woman, there is also the importance of companionship, "a man and woman can enjoy more each others' company if they are in a monogamous marriage. Polygamy also causes more divorces because a man pays more attention to one woman and this causes tension and divorces."<sup>197</sup> Yet another traditional leader explained that a chief may marry five wives and other men may marry multiple wives if they can afford to support them, but he has only one wife, because, "I am running away from my culture. I don't want to have more than one wife, although my culture would let me do it."<sup>198</sup> Similarly, he did not marry within the royal family, because "I liked a Venda woman, so I married her."<sup>199</sup> These counter-narratives perhaps suggest the development of a more egalitarian conception of customary marriage.

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194. Interview with anonymous resident, Scenery Park Township's DV Counseling Center, in East London, Eastern Cape Province, S. Afr. (May 25, 2006).

195. Interview with a driver, in Durban, KwaZulu-Natal Province, S. Afr. (May 24, 2006).

196. See Interview with Paramount Chief, *supra* note 162.

197. *Id.*

198. Interview with his Majesty Leboho, *supra* note 170.

199. *Id.* We heard a similar sentiment from an 80 year old woman, living in rural KwaZulu-Natal Province, who explained that when she got married it was common for men to have more than one wife, but that she did not expect it to happen to her. Her husband did not ask her permission before marrying a second wife because she had already told him that she did not want it. Her father only had one wife, her mother, but in this town, he was in fact the only man with one wife. She says that she assumes that this meant that her father really loved her. Interview with anonymous woman, in Mandini, KwaZulu-Natal Province, S. Afr. (May 23, 2006).

Regarding women's attitudes toward polygamy, interviews revealed almost universal opposition to the practice. Many women interviewed knew about their husband's intention to marry again, and felt helpless to do anything about it, although it was decidedly something they did not want.<sup>200</sup> One elderly woman explained, "If the husband takes another wife, the first wife has to accept it. None of the first wives liked it. There was nothing they could do about it."<sup>201</sup> She explains that "these days there are civil marriages, however even though they only have one wife in name, they have girlfriends," and "no matter what you call it, it is the same thing."<sup>202</sup> Other women stated unequivocally that polygamy is widely practiced in traditional villages, even if the first wife does not want her husband to marry again.<sup>203</sup>

Although some interviewees, notably men, stated that consent was required prior to taking on an additional wife, the form of consent they envisaged was merely formal, and could not impede any subsequent marriage. One traditional leader, who was reasonably well-informed about legal developments, explained that he was in the process of taking a third wife, and that although he believed that the law may require him to get the consent of his other wives before taking a third wife, if they refuse, he will "remind" them that when he married them he did not ask for consent.<sup>204</sup> Similarly, in Limpopo, the King of Ndebele, explained that the first wife must be consulted when the husband wants to marry a second wife, and, although she can refuse to consent, this does not prevent the second marriage.<sup>205</sup> He later added that in the event that the wife refuses to consent, "the court will look to the contents of the wife's rejection for a reason, such that the husband is currently unable to support his family."<sup>206</sup> After this interview, the king's co-coordinator, a woman, said she wanted to laugh during this discussion because in her experience the woman never consents to the husband's taking on additional wives.<sup>207</sup>

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200. See Interviews with women from ANC Women's League, *supra* note 176.

201. Interview with anonymous woman, *supra* note 199.

202. *Id.*

203. See Interview with women from ANC Women's League, *supra* note 176.

204. See Interview with Nkosi Mdebantzeta, *supra* note 191.

205. Interview with Ndebele King, *supra* note 172.

206. *Id.*

207. See Interview with Ndebele King's Co-ordinator, in Limpopo Province, S. Afr. (May 22 2006).

The notion of requiring a formalistic conception of consent was also described in the context of the Shembe church, which provides as part of intricate procedures for dispute resolution “an important rule that the first wife must consent to a future marriage.”<sup>208</sup> If she withholds consent, then she will be interviewed by the priests, and she can call witnesses to corroborate her reasons for refusal. If however the reason for the refusal is jealousy, then the marriage will go forward, since this is not considered a good reason to refuse consent. If the reason for the refusal is that the husband beats his first wife, or cannot provide for her, then the husband “must get his things in order before taking a second wife.”<sup>209</sup> In practice, we were told, women often refuse consent, but the majority of refusals are based upon “jealousy.”<sup>210</sup>

Polygamy and its legitimation occur against the background of multiple informal relationships, or “girlfriends.” In some religious communities, married men’s relationships with “girlfriends” are discouraged but generally tolerated. In other communities, they are fully accepted or at least regarded as inevitable.<sup>211</sup> At the same time, despite their ubiquity, the understanding of these relationships varies. According to some, it is a reflection of women’s disempowerment. As one male interviewee explained:

Here customary law exists, even though we live in these times, and we don’t live in rural areas. Our forefathers had twenty wives and twelve huts. Each wife would have one hut, and his hut would be in the centre. We as men still think that it is right in today’s generation. We have about five girlfriends. Men think it is right, but women think it is wrong. But women can’t do anything because they do not work, they are not educated enough to talk for themselves.<sup>212</sup>

According to the Subheadman in Ngcengane, girlfriends and informal relationships cannot be avoided, but the girlfriend is told to be respectful of the wife’s territory.<sup>213</sup> Another male inter-

208. Interview with Edward Ximba, *supra* note 117.

209. *Id.*

210. *Id.*

211. *See id.*

212. Interview with anonymous man, Scenery Park Township’s DV Counseling Center, in East London, Eastern Cape Province, S. Afr. (May 25, 2006).

213. *See* Interview with M. Similo, Subheadman, *supra* note 178.

viewee noted that an informal relationship is not dissimilar from a marriage, imposing obligations on the man: "If a man stays with a woman for three months that becomes a customary marriage in a way. You cannot just throw the woman out. If she goes to the police, they will say you cannot kick her out because she is your wife."<sup>214</sup>

Married women often regard girlfriends as equally or perhaps more threatening than subsequent wives.<sup>215</sup> Dr. Mamela, Director of the Violence against Women Network, explained that "every day married women risk death [in the form of AIDS/HIV], because we didn't know our husbands were cheating and did not want to lose the marriage."<sup>216</sup> In Ngcengane Village, one woman explained, "I am grieving. A man was womanizing, sleeping with so many women in the area, and [his wife] killed herself. She was so fed up, she took poison and died. . . . The pain we are living in being caused by men is too much for us."<sup>217</sup>

The preponderance of female-headed families in South Africa is, in part, a product of social tolerance of these informal relationships. These range from long-term relationships of dependence that are nevertheless legally unrecognized, to something more fleeting but also often resulting in children. In either case, the woman lacks legal protection. One woman who lived with a man for nineteen years, but did not marry him, explained that because he was unemployed, she did everything to support the man and the children.<sup>218</sup> When he got sick, she had to pay the bills. Ultimately, when he died, "the family went to court to open a file."<sup>219</sup> When asked about the RCMA, the wo-

214. Interview with anonymous woman, Scenery Park Township's DV Counseling Center, in East London, Eastern Cape Province, S. Afr. (May 25, 2006).

215. *See, e.g.*, Interviews with residents, Scenery Park Township's DV Counseling Center, in East London, Eastern Cape Province, S. Afr. (May 25, 2006). The problem of incest and sleeping with children was frequently raised. *See id.*

216. Interview with Dr. Lungiswa Mamela, *supra* note 147.

217. Interview with anonymous woman, in Ngcengane Village, Eastern Cape Province, S. Afr. (May 26, 2006). This point came up again in a meeting with a young man named Buhle, from a men's advocacy organization for women's rights, who commented that there is a high rate of suicide among women, in his opinion, because families will protect their sons more than their daughters. Interview with Buhle, Men for Change, in Eastern Cape Province, S. Afr. (May 25, 2006).

218. Interview with anonymous woman, Scenery Park Township's DV Counseling Center, in East London, Eastern Cape Province, S. Afr. (May 25, 2006).

219. *Id.*

man responded, “The law does not help anyone.”<sup>220</sup> She explained, “I don’t see the use of the law, marriage certificates, customary marriages, nobody can control this. We had feelings for each other, and, when he passed away, his family jumped for all these things. All these years they did not wonder if he was happy, what he was doing, but they jumped for their child’s things when he was dead.”<sup>221</sup>

A counter-narrative to polygamy as a reflection of male power is the characterization of it as a response to male disempowerment. For example, an interviewee in Makhado explained that women are supporting their families financially, and that men “feel bad about this” and consequently move “off to the city and get new wives.”<sup>222</sup> In the urban township of Alexandria another woman informed us that her husband, who is dependent on her, threatens that he will acquire girlfriends.<sup>223</sup> Although polygamy was once a marker of wealth, the economic disempowerment of men may have created a crisis in masculinity to which functional polygamy through girlfriends responds.

## B. *Bhe and the Substantive Equality Paradigm*

### 1. Substantive Equality in Marriage

Whatever the current function of polygamy, the practice is uniformly unpopular among women. Its continuing existence both reflects and reinforces their relative lack of power in customary marriage.

In contrast to the choice paradigm reflected in the RCMA, the Constitutional Court in *Bhe* embraced a standard of substantive equality, deeming unconstitutional the customary law norm of male primogeniture.<sup>224</sup> Under the choice paradigm, the Court might have regarded the deceased’s decision to forego the testamentary process in *Bhe* as evidence of a voluntary embrace of the customary framework, just as the RCMA presumes choice

220. *Id.*

221. *Id.*

222. Interview with women, House of Chiefs, in Makhado, Limpopo Province, S. Afr. (May 26, 2006); see Interview with Ayesha, Focus Group, in Durban, S. Afr. (May 24, 2006) (“most women are not married and are breadwinners; they believe that they have everything when they have a job and children”).

223. Interview with anonymous woman, in Alexandria Township, Johannesburg, S. Afr. (June 2, 2006).

224. *Bhe v. Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) ¶¶ 95-97 (S. Afr.)

on the part of the individuals entering a customary marriage.<sup>225</sup> Because the deceased could accomplish the same result (succession by the eldest male) by means of a will,<sup>226</sup> the private choice

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225. Recognition of Customary Marriages Act (RCMA) of 1998 s. 3(a)(ii) (listing “consent to be married to each other under customary law” as a core requirement for the validity of a customary marriage); see *Bhe*, 2005 (1) BCLR 1 (CC) ¶ 132. Justice Ncobo reasoned: “And, as the Deputy Chief Justice acknowledges, there is a substantial number of people whose lives are governed by indigenous law and who would wish to have their affairs to be governed by indigenous law.” *Id.* (citing Deputy Chief Justice: “There is a substantial number of people whose lives are governed by customary law and their affairs will need to be regulated in terms of an appropriate norm.”). Further, Deputy Chief Justice Langa wrote: “The determination of the choice of law rule which regulates the circumstances in which indigenous law is applicable involves policy decisions. In particular, it involves a decision on the criteria for determining when indigenous law is applicable. There is a range of options in this regard. The choice of law may be based on, among other things, agreement, the lifestyle of individuals, the type of marriage, the nature of the property such as family land, justice and equity, or a combination of all these factors.” *Id.* ¶ 225; see also MC Schoeman-Malan, *Recent Developments Regarding South African Common Law and Customary Law of Succession* 27-28 (paper presented at XVIIth AIDC Congress of Comparative Law, July 2006), available at [http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2007x1x\\_Schoeman\\_Malan\\_art.pdf](http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2007x1x_Schoeman_Malan_art.pdf). (“Although the legislature repealed the BAA and then proceeded to effect minor amendments to the relevant legislation (the Administration Act) in order to give effect to the judgments regarding the unconstitutionality of certain principles, the current situation regarding customary law of succession and inheritance remains unsatisfactory and inadequate to the extent that there is no proper legislation in place and there might be millions of black people who prefer a choice of law rule. The judgments which recognised gender equality and equal shares for all children in cases of black intestate estates, are welcomed.” (citations omitted)).

226. See generally Wills Act of 1953, amended by Law of Succession Amendment Act of 1992. This brought about fundamental changes to both the Intestate Succession Act as well as the Wills Act. The Wills Act and common law (also known as civil law) prevail before the amendments. See MC Schoeman-Malan, *supra* note 225, at 8-9. Schoeman explains that:

The law of testate succession is found in the Wills Act and common law principles. The common law of testate succession is based on the principle of freedom of testation. In terms of section 25(1) of the Constitution – . . . [n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. The provision guarantees the right to private property and it includes the right to dispose of one’s property. The institution of succession is thus guaranteed. *It allows individuals to dispose of their property to whomever they want to. According to this principle, testators are free to dispose of their assets regardless of the interest of intestate heirs.* Effect will not be given to testamentary provisions if compliance with such provisions are *contra bonos mores* or against public policy. Some limitations are recognised that are based, in general, on economic or social considerations. The limitations on freedom of testation can be reconciled with the fundamental rights in section 36 of the Constitution. A complete disinheritance would be respected subject to a dependant’s claim for maintenance. It seems though that the Bill of Rights might have an influence on the principle of freedom of testation. A condition linked to a consideration mentioned in section 9(3) of the Constitu-

to allow property and authority to pass according to customary law could have been seen as not implicating constitutional norms of gender equality at all.

The Court in *Bhe* did not even consider this approach. Instead, the Court divided between applying the gender-neutral statutory scheme and developing the customary rule to conform to gender equality.<sup>227</sup> The Court was unanimous on the point that the constitutional guarantee of gender equality was inconsistent with a customary standard that treated men and women differently for the purposes of succession.<sup>228</sup> Moreover, it held that, in the context of intestate succession, the traditional rule could not be justified as a limitation on the constitutional guarantee.<sup>229</sup> The substantive equality standard embraced by the Court in *Bhe* thus represents an alternative to the choice paradigm of the RCMA for analyzing not simply inheritance but the overall structure of the family under customary law, including marriage and divorce.

Applying the substantive equality standard articulated by the Court in *Bhe* to the recognition and regulation of customary marriage, the most important questions arise in the context of *lobolo* and polygamy. As already noted, the RCMA treats *lobolo* as a private transaction, not as a requirement of a valid customary marriage.<sup>230</sup> As such, and notwithstanding its gendered nature, *lobolo* might be understood not to implicate the guarantee of gender equality. At the same time, as discussed above, the *lobolo* transaction has a profound effect on the economy of customary

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tion could be declared invalid. In terms of section 9(3) and 9(4) no person may directly or indirectly discriminate unfairly against anyone on the basis of considerations which include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age and culture. (emphasis added) (citations omitted)

*Id.*

227. *Bhe*, 2005 (1) BCLR 1 (CC). Chief Justice Chaskalson and Justices Madala, Mokgoro, Moseneke, O'Regan, Sachs, Skweyiya, Van der Westhuizen and Yacoob concurred with Deputy Chief Justice Langa's judgment. Justice Ngcobo wrote a separate opinion dissenting in part, concurring in part. *Id.*

228. *See id.* ¶ 91.

229. *See id.* ¶ 92. The Constitution provides that ". . . when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." S. AFR. CONST. s. 39(2).

230. RCMA of 1998 s. 4(4)(a) (stating that "[a] registering officer must, *if satisfied that the spouses concluded a valid customary marriage*, register the marriage by recording the identity of the spouses, the date of the marriage, any *lobolo* agreed to and any other particulars prescribed" (emphasis added)).

marriage and the power dynamic between the families and the spouses themselves, an effect that reinforces the subordinate position of customary wives.<sup>231</sup>

Assuming this is this case, the customary practice of *lobolo* (and the RCMA's implicit embrace of it) might be challenged as unconstitutional in several ways. First, although the RCMA itself does not cite *lobolo* as an element of a valid customary marriage, it does suggest that marriages entered into after the Act comes into force must comply both with the RCMA and with customary law.<sup>232</sup> Specifically, the Act states that "a customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognized as a marriage."<sup>233</sup> Thus, the marriage must be valid under customary law *and* comply with the Act in order to be recognized. Insofar as the payment of the agreed upon *lobolo* determines, in part, the validity of the marriage under customary law,<sup>234</sup> the RCMA arguably incorporates this requirement into the statutory definition of customary marriage.<sup>235</sup> The payment of *lobolo* by men for women can thus be criticized as facially discriminatory and therefore unconstitutional under *Bhe*.

The implication of such a holding would not be the wholesale elimination of *lobolo*.<sup>236</sup> Rather, the Court might simply determine that the payment or nonpayment of *lobolo* would not be

231. See BENNETT, *supra* note 1, at 224 (referring to the "old theme: lobolo leads to the subordination of women" (citations omitted)); *Id.* at 231 ("[f]rom the patriarchal structure of society, it follows that women may neither receive lobolo for their daughters nor be sued for payment" (citations omitted)); see also *supra* text accompanying notes 118-25.

232. See RCMA s. 7(5) (stating "Section 21 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984) is applicable to a customary marriage entered into after the commencement of this Act in which the husband does not have more than one spouse").

233. *Id.* s. 2(2).

234. BENNETT, *supra* note 1, at 234 (explaining that "[c]ustomary law does not lend itself to setting clear and unambiguous rules for defining marriage. Given the frequent need in modern society to fix marital status, however, it is hardly surprising that the courts chose to treat lobolo as an essential requirement for marriage. The delivery of cattle is a physical fact that might be expected to bring clarity to an otherwise uncertain state" (citations omitted)).

235. See BENNETT, *supra* note 1, at 236 ("No mention is made in the Recognition of Customary Marriages Act, at least in the sections specifying the requirements for marriage. By implication, it is now a contractual accessory to marriage. Lobolo is not without significance, however, for payment or agreement will serve to typify a union as a customary form of marriage." (citations omitted)).

236. See *supra* note 119 (explaining the "repugnancy proviso" in application of the Law of Evidence Amendment Act of 1988 s. 1(1)).

relevant to the determination of the validity of a customary marriage. In other words, the underlying customary norm requiring the payment of *lobolo* could be deemed unconstitutional in the same way the intestate succession norm was in *Bhe*.<sup>237</sup> Following such a ruling, the payment or nonpayment of *lobolo* might be offered, at most, as evidence on the question of the parties' intent. Moreover, the courts might decline to enforce a contract for the payment of *lobolo* or to order the return of *lobolo* upon the dissolution of the marriage.

In recognizing and regulating polygynous marriages, the RCMA adopts neither the "choice" paradigm nor the "equality" paradigm. As noted above, the consent of the existing wife or wives is not required in order for an additional marriage to be recognized under the Act.<sup>238</sup> Instead, notice to the wife or wives is required together with a modification of the property arrangement and the order of a court.<sup>239</sup> Moreover, the language of the RCMA is gender-specific on its face, making reference to "husbands" rather than spouses.<sup>240</sup> The statutory language thus accurately reflects the gendered nature of polygynous marriage in South Africa: It is polygyny, not polyandry.

Under the substantive equality standard articulated in *Bhe*, the RCMA's treatment of polygyny is almost certainly unconstitutional insofar as it recognizes polygynous marriages involving multiple wives but not multiple husbands.<sup>241</sup> Moreover, even if

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237. The court could find the underlying norm strictly incompatible with the firm, broad guarantees boldly established in the Bill of Rights, buttressed by grave doubts that leaving "piecemeal" development of this aspect of customary law to the courts would be sufficient protection requiring "more direct action to safeguard the important rights that have been identified." Beyond violating section 9(3) of the Constitution (guaranteeing equality), there is a very similar argument to be crafted that *lobolo* is like intestate succession: "a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order." *Bhe v. Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) ¶ 91 (S. Afr.). Here as well, the result could be argued "that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom. *Id.* ¶ 95.

238. See RCMA s. 7(4)(b).

239. See *id.* ss. 7(6)-(9).

240. See *id.* ss. 1(iv), 6.

241. See *id.* s. (7)(6) ("A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages." (emphasis added)).

the statute were written in facially neutral language, the fact that customary law and social practice permit polygyny and proscribe polyandry would create constitutional problems by virtue of the statute's incorporation of customary law standards.<sup>242</sup> The constitutionality of the statute would therefore rest on whether the use of gender-based classifications could be justified under the limitations clause. Here the Court might conceivably determine that women in polygynous marriages would be made worse off if those marriages were not legally recognized. This analysis would depend, however, on a balancing of the interests of women currently in polygynous marriages against unmarried women or women in monogamous marriages who would be made worse off if their husbands took a second wife. Whether women as a whole would be better off is unclear.

## 2. Legal Change and the Persistence of Customary Practices

Were the Constitutional Court to adopt these arguments and find that the practices of polygyny and *lobolo* are unconstitutional, the question remains whether the decisions would have any impact in the short or even medium term on the lives of individuals governed by customary law. Following the *Bhe* decision, our interviews with South African lawyers and representatives of non-governmental organizations working on gender equality issues suggest that, as of May 2006, the case had had virtually no impact even on the adjudication of disputes concerning inheritance rights.<sup>243</sup> Although legal services organizations had begun to conduct training sessions for lawyers and magistrates on a limited basis, many estates were still administered informally by family members or traditional leaders in rural and semi-urban communities where knowledge of the *Bhe* decision was virtually nonexistent.<sup>244</sup> As a practical matter, this means

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242. *See id.* s. 2(1) ("A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognized as a marriage.").

243. *See, e.g.*, Interview with Professor R.B. Mqoke, Rhodes University, in Grahamstown, S. Afr. (May 23, 2006) ("The government has failed to explain the changes that have taken place. Nothing has been done. People live as if there were no *Bhe*. People don't know about it.").

244. *See, e.g.*, Interview with Patrick Pringle, *supra* note 136 ("It is interesting that even the paralegals were unaware of the judgment. Where there is awareness, there has been almost a paralytic effect. . . . Magistrates don't know how to do it. Paralegals don't even know about it. There is not even resistance, just ignorance.").

that a widow's access to her deceased husband's home and property depends on the inclinations of the male heir.<sup>245</sup> If that heir is her son, she will likely remain in her home. If the heir is another male relative, she may well be evicted from the property, particularly if she has no children of her own.<sup>246</sup> In short, looking beyond the decision itself to consider the conditions on the ground suggests that very little power has been redistributed as a result of the Constitutional Court's decision.

The same would likely be the case with *lobolo* and polygamy. Were the Court to deem the practice of *lobolo* constitutionally problematic, making it irrelevant to recognition and rendering the contracts unenforceable by courts, the practice would nevertheless likely continue, recognized and enforced by traditional leaders. Although formally unregulated and private, the *lobolo* transaction would continue to have a significant impact on the marriage economy and the gendered power dynamic within customary marriages. Moreover, the exclusion of *lobolo* payment as a means of establishing the existence of customary marriage might have the unintended consequence of making more difficult the proof of the existence of such marriages when they are not recorded. Without such proof, widows may find it even more difficult to assert their claims to marital property.

With respect to polygyny, a finding that the RCMA is unconstitutional would simply return polygynous customary marriages to the pre-recognition status quo, under which women in such marriages had difficulty claiming their property rights and enforcing the marital obligations of their spouses. Were the legislature to proscribe polygyny more formally by statute, the practice would likely persist informally, leaving women in such relationships even more vulnerable.

The resistance of customary practices to legal regulation

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245. See BENNETT, *supra* note 1, at 335 (noting "the heirs must be male, partly because only men have the legal powers necessary to run a family's affairs, but also because the bloodline is traced through males").

246. Bennett observes that the widow's right to maintenance depends on her willingness to remain on the homestead and that the successor has no right to eject her. See BENNETT, *supra* note 1, at 347–48. He concedes, however, that "compliance with support obligations depends, in the first instance, on harmonious relationships." *Id.* at 349. The vulnerability of the widow was confirmed by our interviews. See, e.g., Interview with Mbolompo community member, *supra* note 146 (noting that "it does happen that the widow does not get what is due her—if the woman has no children and the husband had a concubine who bore children").

stems in part from the very wide acceptance—if not endorsement—of such practices by people living under customary law. Approximately twenty million South Africans live under traditional authority in rural areas.<sup>247</sup> In urban areas, though formally under the jurisdiction of district courts and municipal and state authority, most African people still consider themselves living within the fold of tradition.<sup>248</sup> Among these groups, and especially in the wake of apartheid, customary practices such as *lobolo* are regarded as a source of authentically African culture and tradition.

Moreover, even when criticism or dissatisfaction of such practices exist, individuals may have quite limited access to information regarding their rights or to courts capable and willing to enforce those rights. For example, despite the fact that RCMA erodes the jurisdiction of chiefs and traditional leaders with re-

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247. See Interview with Professor Chris Boonzaaier, *supra* note 166. According to Bennett, “[a]pproximately 18 million people (about 40 per cent of the South African population), are subject to traditional rule.” See BENNETT, *supra* note 1, at 111. Despite the fact that the RCMA erodes the jurisdiction of chiefs and traditional leaders with respect to both issues related to marriage and divorce, and domestic violence, there is both Constitutional and legislative recognition of traditional leaders. See S. AFR. CONST. s. 211; Traditional Leadership and Governance Act of 2003; see also Municipal Structure Act of 1998.

248. In late 1999, it was estimated that customary law “is probably the only form of justice known to many South Africans” and that “about half the population lives in the countryside where traditional courts administer customary law in over 80 per cent of villages.” Ferial Haffajee, *South Africa: Blending Tradition and Change—Legal System*, UNESCO COURIER, Nov. 1999, available at [http://findarticles.com/p/articles/mi\\_m1310/is\\_1999\\_Nov/ai\\_57829786](http://findarticles.com/p/articles/mi_m1310/is_1999_Nov/ai_57829786). These courts, “which are also found in some urban townships, deal with everyday disputes like petty theft, property disagreements and domestic affairs - from marriage to divorce and succession” and “[j]ustice is swift and cheap as the courts are run with minimal formalities and charge less than a dollar for a hearing.” *Id.* Their importance extended from their proximity to people without “money or time to travel to town for formal courts” to the fact that “judges use everyday language, and the rules of evidence allow the community to interject and question testimonies.” *Id.* Important dialogues and disagreements around gender had already begun:

Yet the system is not without its critics - namely women, who are barred from serving as judges and often discriminated against as litigants. Paradoxically, women’s groups, under the umbrella of the Rural Women’s Movement, have been in the vanguard of efforts to recognize customary law and adapt it to post-apartheid society. Discussions about ways of elevating customary law are intertwined with debates on making it gender-neutral. Three issues top the agenda: traditional marriages, inheritance rights and the status of traditional courts.

*Id.*

spect to marriage, divorce, and domestic violence,<sup>249</sup> interviews

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249. See RCMA of 1998 s. 7(4)(a) ("Spouses in a customary marriage entered into before the commencement of this Act may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage or marriages."); *Id.* s. 7(6) ("A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages."); *Id.* s. 8(1) ("A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage."). For an assessment of how much power chiefs retain, however, see Jo Beall, *Asset of Liability? Traditional Authority and the Pursuit of Livelihood Security in South Africa and Afghanistan* (London School of Economics, Arusha Conference – New Frontiers of Social Policy: Development in a Globalizing World, Draft Working Paper 2005), available at <http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/assetorliability.pdf>. Beall writes:

South Africa's transition to democracy from the early 1990s was accompanied by a continental revival or reinforcement of 'traditional rule' and an increase in the salience of customary practices. This trend has been referred to as 're-traditionalisation' in a context where customary institutions were substituting for fragility and failure on the part of states. Hence, in its negotiations with traditional leaders or chiefs, the nascent South African democracy was caught up in a wider drift towards the resurgence of tradition. This is not altogether surprising given that South Africa is as rich in institutions founded on customary practice as many other African countries. Nor is it without precedent if viewed both in historical and contemporary comparative perspective that traditional authorities in South Africa are competing for authority with the country's new liberal democratic institutions. What was not foreseen, however, was that South Africa's new democracy led by an African National Congress (ANC) government would adopt such a conciliatory approach towards chieftaincy in South Africa, even at the expense of hard won liberal democratic principles.

*Id.* at 8 (citations omitted). Other laws have entrenched the chiefs power:

Efforts by the post-apartheid government to confine the chiefs to a symbolic, advisory and developmental role has been consistently contested by traditional leaders themselves, and nowhere more vigorously than in KZN [KwaZulu-Natal]. This has seen the ANC government make subsequent concessions towards chieftaincy, often prior to elections, that have given rise to two pieces of legislation that has significantly entrenched the power of the chiefs. In 2004 the Traditional Leadership and Governance Framework Act (TLGFA) was passed providing for traditional councils to operate within and alongside other local government structures. Section Three of the Act states that 'traditional communities' must establish these councils which in turn must comprise 'traditional leaders and members of the traditional community selected by the principal traditional leader concerned in terms of custom.' Where the old tribal authorities exist, established in terms of the Bantu Authorities Act of 1951, they are simply to be converted into traditional councils. What this means in effect is that legislation introduced in the 21st Century will give perpetual life to apartheid institutions created by the much-hated Bantu Authorities Act.

When viewed in conjunction with the Communal Land Rights Act (CLRA) passed at the same time, the power of traditional authorities becomes more

revealed that individuals resolve the majority of family disputes through mediation within or among family groups.<sup>250</sup> Even urban communities often establish informal structures of dispute resolution, rather than approaching a magistrate's court.<sup>251</sup> In our interviews in areas outside the jurisdiction of traditional leaders, interviewees spoke of approaching social workers to resolve disputes, or as one group of women put it, they are "led by the municipality, so the mayor is their leader."<sup>252</sup>

These informal dispute mechanisms, in turn, are often structured in a way that tends to undercut women's power. First, when confronted with marital conflict, the norm is for the couple to turn to the husband's family.<sup>253</sup> In most communities, family mediation emphasizes the goal of reconciliation and the desirability of resolving the dispute within the family. Although the process is most often an informal one, women are commonly forbidden from speaking at these meetings. For example, one interviewee in rural Mandini described how her husband had abandoned her for a second wife, and the husband's family met to decide her fate. Although her future and that of her children

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starkly evident. The CLRA protects the right of traditional authorities to control communal land tenure systems, through power over communal land administration ceding to traditional councils (CLRA, Section 22(2)), thus entrenching the power of traditional authorities over their mainly but not exclusively rural subjects. . . .

However, the price to be paid for political expediency has been high. Displeasing the chief could potentially render an individual or a family homeless or without a livelihood, opportunities for patronage abound, while women are particularly vulnerable under a customary system in which they have curtailed rights and no access to communal resources outside their relationship with a father, male sibling or husband.

*Id.* at 11-12 (citations omitted).

250. At least one traditional leader observed that it is the families and not the chiefs that are the true locus of control and most resistant to change. *See* Interview with Nkosi Mdebanzeta, *supra* note 191; *see also* Interview with the Queen of the GaMatlala Community, *supra* note 111 (observing that while she tries to resolve disputes, ultimately it is the "parents who decide").

251. *See* Interview with Professor Maituffi, *supra* note 177 (stating that "wherever you find Africans, this is what they do").

252. Interview with members Agnes, Ilda, and Catherine, ANC Women's League, *supra* note 176.

253. SA LAW COMMISSION REPORT: PROJECT 90: CUSTOMARY LAW: REPORT ON TRADITIONAL COURTS AND THE JUDICIAL FUNCTION OF TRADITIONAL LEADERS § 2.3 (2003) [hereinafter REPORT ON TRADITIONAL COURTS] (stating that "in many traditional communities the practice is that claims or complaints start at the level of the family council" and that "[i]f a matter is not resolved at that level, it is taken to the headman who, together with his advisors, attempts to dispose of the matter").

were at stake, she was not permitted to participate in the discussion.<sup>254</sup>

If the family is unable to resolve the dispute, the ward headman may convene a more formal proceeding, perhaps involving advisors and sometimes the broader community.<sup>255</sup> Although experts in customary law, ward headmen generally lack formal training and may have no understanding of constitutional principles, much less constitutional case law.<sup>256</sup> Typically, the family head initiates the case in the traditional court.<sup>257</sup> Although the woman may have the right to appear in this court, she will likely not be permitted to speak on her own behalf, whether or not she is the one raising the problem.<sup>258</sup> One

254. See Interview with anonymous woman, *supra* note 199.

255. See R.B.G Choudree, Traditions of Conflict Resolution in South Africa 15-18 (1996) (unpublished LL.M. dissertation), available at [http://www.accord.org.za/ajcr/1999-1/accorder\\_v1\\_n1\\_a2.pdf](http://www.accord.org.za/ajcr/1999-1/accorder_v1_n1_a2.pdf).

256. Interview with Chief, in S. Afr. (May, 2006). The Chief decided how many ward courts there are, and there are both opening and closing fees to be paid. *Id.* According to Professor Maituffi, 80 percent have a standard one education (general education and training from nine school grades). See Interview with Professor Maituffi, *supra* note 177.

For an analogous argument, see S. AFR. LAW COMM'N, DISCUSSION PAPER 82 ON TRADITIONAL COURTS AND THE JUDICIAL FUNCTION OF TRIBAL LEADERS 5-6 (1999), available at [http://www.doj.gov.za/salrc/dpapers/dp82\\_prj90\\_tradl\\_1999.pdf](http://www.doj.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf):

The argument regarding suitability is that traditional leaders are not necessarily proficient in the law whether customary or, with respect to their criminal jurisdiction, common law or statutory law. If this is true, it is prejudicial to litigants and to the credibility of the whole justice system. The other argument is that the lack of legal qualifications makes the presiding chiefs and headmen unsuitable for a judicial role as envisaged by section 174 (1) of the Constitution which states that "Any appropriately qualified woman or man who is a fit and proper person, may be appointed a judicial officer." It is arguable that traditional leaders are *prima facie* proficient in the customary law which they administer in their courts and are therefore "appropriately qualified to adjudicate in matters of customary law." However, the same cannot be said of their knowledge of the common law or statutory law. There is thus merit in the argument that they are not qualified to adjudicate in matters relating to common law and statutory criminal law and that they should not have jurisdiction over such matters.

*Id.* (citations omitted).

257. See Interview with Professor Douffie, in S. Afr. (May 2006).

258. See Interview with Paula Moabelo, in GaMatlala Community, Limpopo Province, S. Afr. (May 24, 2006). While in Mbolompo Village, our translator noted that "sometimes women are not comfortable . . . to talk, especially when in the presence of men, they are afraid to talk. Men do not want to talk to women like me, that I am not showing respect by being too talkative." Interview with Pinkie, Translator and Advocate from Transkei Land Service Organisation ("TRALSO"), in Mthatha, Eastern Cape Province, S. Afr.

headman explained that he enjoys some discretion on this point: "In this part of the court women are not allowed to speak but the headman can allow it."<sup>259</sup> Recognizing the general norm of gender equality, he added, "According to the new legislation, [women's participation] is allowed but they don't here because of custom."<sup>260</sup>

If the dispute still remains unresolved, the issue can be referred to the Chief's Court.<sup>261</sup> These courts are more formal, though they are not generally governed by fixed procedural rules nor do they yield a record of the proceedings.<sup>262</sup> The process is inquisitorial rather than adversarial, and lawyers are generally barred from official participation. Instead, the chief takes responsibility for questioning and cross-examining witnesses.<sup>263</sup> Although women generally do not participate in a formal way in this process, we were informed that women sometimes serve as advisors to the chief. Moreover, interviews revealed that many chiefs are themselves qualified lawyers and may issue written judgments.<sup>264</sup>

Although claimants are not required to resort to traditional mediation and adjudication before approaching the magistrate's court, most do.<sup>265</sup> Indeed, only after these courts fail to resolve an issue does the party typically turn to the formal legal system.<sup>266</sup> Moreover, although the data is quite limited, resort to

259. Interview with M. Similo, Subheadman, *supra* note 178.

260. *Id.*

261. See REPORT ON TRADITIONAL COURTS, *supra* note 253, § 2.3 (stating that "[i]f it is still not resolved, the matter is taken on appeal to the chief" and that it is "from the chief's court that the case is normally appealed to the Magistrate's court." (citations removed)).

262. See *id.* § 4.1.

263. See Hallie Ludsin, *Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of its Customary Law*, 21 BERKELEY J. INT'L L. 62, 71 (2003).

264. See Interview with Professor Maituffi, *supra* note 177.

265. See Choudree, *supra* note 255, at 13-14. "Traditional courts have a major advantage in comparison with other types of courts in that their processes are substantially informal and less intimidating, with the people who utilise these courts being more at ease in an environment that is not foreboding. . . . The headmen or chiefs who preside over traditional courts are generally charismatic and familiar with the populace that use the courts, are revered to an extent that judges are not, are wont to play an active role in the proceedings and are not shy to suggest mediation at almost any point in the proceedings in matters susceptible to that form of resolution." *Id.*

266. See *id.* at 16-17. For example, in Pedi tribal law, "the majority of disputes are resolved through the mediation process within or between family groups . . . [i]n fact, the latter is the principal vehicle for settling disputes outside the official courts." *Id.* [I]t becomes "obvious that only the more serious and complicated cases are referred to

national courts seems to happen in only a very tiny fraction of cases.<sup>267</sup> This may be due to lack of access due to geographic constraints, lack of resources, and/or lack of information. Some interviewees also suggested that resort to the magistrate's court would be regarded by the community as inappropriately bypassing the authority of traditional leaders.<sup>268</sup>

The general acceptance of customary legal norms coupled with the lack of access to formal legal institutions make customary law especially resistant to change, even in the face of a clear constitutional mandate. Indeed, the quite limited impact of the *Bhe* decision suggests that neither the choice model nor the equality model is likely to succeed in modifying the patriarchal structure of customary law without significant cultural change having taken place. A central question, therefore, is whether law and legal institutions have a significant role to play in effecting cultural change.

### C. Cultural Norms and Institutions—Changing the Baseline

A conclusion that might be drawn from the preceding analysis is that legal reform, whether originating from judicial decision or legislative action, is likely to have only a limited effect on traditional cultural practices, particularly in rural areas. Yet although this might be true of legal reform viewed in isolation and over the short-term, our research suggests that, when coupled with broader reform effects, a legal commitment to equality can alter gender relations within families and communities. Although our interviews were limited and anecdotal on this ques-

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the official courts . . . however, that serious efforts are made to settle disputes out of court and matters may be postponed so that the parties involved can secure the assistance of yet more relatives to assist them." *Id.* (citations omitted).

267. *See id.* at 16. These courts are readily accessible, serve towards restoring and binding the relationship between traditional people and are highly visible with a transparent decision-making process in which there is community participation.

268. *See* Interview with Patrick Pringle, *supra* note 136; *see also* Interview with Professor Chris Boonzaaier, *supra* note 166. Professor Bonzaaier said that he was part of a study conducted in the mid 1980's, where out of 1,792 cases which were settled at the ward courts, only four went to the magistrates' court for appeal. Of those not settled, 192 went before the chief, and only four to the magistrate's court. *Id.* Another interviewee said nothing has changed since this project was conducted. Interview with Professor Maituffi, *supra* note 177. Similarly a village subheadman told us that there were no appeals from his court to a magistrate's court because "not a single person came out of this court here with an unsatisfactory feeling." Interview with M. Similo, Subheadman, *supra* note 178.

tion, we detected what might be described as a shift in the power balance that the interview subjects themselves linked to constitutional change. For example, M. Similo, the Subheadman for the Ngecengane Community in the Eastern Cape, explained to us that “the problem” began in 1994, “when the new government took over, when a woman has rights, a child has rights. Men do not have . . . . After rights were given to women and children, this is when women started to misbehave.”<sup>269</sup> Similarly, a man from the Kibi Community in the Limpopo province explained, “You speak of gender equality but it is now the men who are oppressed. . . . This is because of the Constitution.”<sup>270</sup> The Paramount Chief of the Keerom Village in Limpopo Province explained, “Gender equality promoted by the Constitution creates problems in the family that can lead to divorce. . . . Equality undermines men’s dignity.”<sup>271</sup>

Over the course of more than one hundred interviews conducted over a two week period, we interviewed a significant number of men from diverse geographic locations and cultural affiliations who reject the legitimacy of the constitutional principle of gender equality, and, perhaps more importantly, regarded that principle as threatening not merely their own power but the cultural and moral foundations of their social structure. On one hand, one could interpret this evidence as reflecting the “thinness” of South Africa’s constitutional project in the face of widespread cultural resistance. On the other hand, one might also read it as an indication of the Constitution having affected some measure of cultural change. To the extent that men were complaining that their relative status had changed by virtue of the Constitution’s recognition of women’s right to equality, some shift in power must have taken place. This reading is confirmed by the few women who also spoke to the issue. Like the men, they described a change, though perhaps not so much a gain in their own power but an opening, a destabilization of men’s power.<sup>272</sup> They understood that the Constitution somehow

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269. Interview with M. Similo, Subheadman, *supra* note 178.

270. Interview with anonymous man, in Kibi Community, Limpopo Province, *supra* note 163.

271. Interview with Paramount Chief, *supra* note 162.

272. For example, when asked about changes since the new Constitution, Elizabeth Moabelo, a woman in her sixties from the GaMatlala Community in Limpopo explained, “We now understand that there is equality but we don’t forget our culture.

meant that they should be treated differently, that they should not be subordinate to men, whether or not they could claim those rights in a direct and meaningful way.<sup>273</sup>

The degree to which constitutional change or, for that matter, statutory change as effected by the RCMA, will have a significant impact upon gender hierarchy within marriage will depend upon the improvement of access to justice, broadly speaking. For many people who, whether by choice or by necessity, continue to rely upon traditional forums for the resolution of disputes, this access to justice will depend upon the commitment of traditional leaders to constitutional and statutory norms of gender equality. Such a commitment, in turn, could encourage a broader community-wide embrace of gender equality within marriage.

One way that such a commitment among traditional leaders might be cultivated is to include traditional forums more formally within the court system.<sup>274</sup> Such a move would give legiti-

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Sure we are equal but we still respect what we've been taught." Interview with Mrs. Elizabeth Moabelo in the GaMatlala Community, *supra* note 109.

273. Cladice Motona, a seventy-one year old woman from the GaMatlala Community in Limpopo state simply, "Men don't beat women as much anymore." Interview with Cladice Motona in the GaMatlala Community, *supra* note 109.

274. REPORT ON TRADITIONAL COURTS, *supra* note 253, § 2.3 (emphasizing that "[t]here are many headmen who have not been granted jurisdiction to hold courts in their areas under existing legislation" who "nevertheless hold what may be termed 'headman's fora or tribunals,'" and that "[t]hese tribunals resolve disputes and if they are unable to resolve them they refer the disputants to the chief's court with the necessary jurisdiction." It is "proposed to recognise these headmen's fora as formal courts at the first or primary level."). The development of customary law might gain purchase through recognizing that "[t]he administration of justice in rural South Africa is predominantly carried out by chiefs' courts, which administer justice largely on the basis of customary law," as well as the fact that "[t]here is a need to consolidate the different provisions governing these courts and to modernize them so that their operation is in conformity with the principle of democracy and other values underlying the Constitution." *Id.* § 1.

Yvonne Mokgoro gave an interview at the time of her appointment to the Constitutional Court, in which she discussed the importance of looking:

[A]t an enhanced role that traditional courts can play in a future judicial system as a form of lay participation looking at the current role and functions that customary law courts play within traditional societies. The informal court system, the adjudication process which focuses on reconciliation and where in customary law systems the win-lose situation of the adjudication process is absent, and the fact that ordinary people form part of the adjudication or adjudication structure, and I also looked at the infamous community courts and suggested that maybe we would need to look at those despite the controversy that surrounded them around the 1980's, look at them, revisit them and try to

macy and respect to traditional authorities while potentially fostering a productive and educational interchange among traditional and civil courts on matters of statutory and customary law.

Such a strategy is not without important limitations. When asked about the inclusion of traditional authorities in the court system, some interviewees warned that chiefs “speak in two-voices.”<sup>275</sup> Another expressed concern over the lack of women among traditional leadership, noting that the women who are in power positions within the chieftaincy, “are just kinds of window-dressing.”<sup>276</sup> Other critics noted that the traditional leadership had been heavily implicated in the Apartheid regime and, as a result, did not enjoy the widespread trust of the people. Corruption was also a concern. For example, one interviewee commented that “[m]ost [traditional leaders] look after their own interests and can be bought off with money and gifts,”<sup>277</sup> Another commented that unless someone had made a “contribution” the “King doesn’t have to do [the] customary marriage.”<sup>278</sup> Some interviewees reported that, even in domestic violence cases, if the woman had not made a contribution, “leaders will not listen to your case and you will be sent to the police station or your family.”<sup>279</sup>

Another problem with the strategy of incorporating tradi-

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extract the positive aspects of those community courts because they were seen as community courts, they were owned by the community and the communities saw those courts as their courts and this is what we need to do with the South African judicial system. Get the community, the people, to own the system and understand it and perhaps if we do that with modified customary law courts, modified community court system and try to take those positive aspects make them part of our judicial system and then we will be able to involve society in our judicial system and they will be able to identify with the system and maybe in a way reinject that legitimacy and trust in the judicial system.

Judicial Service Commission Interview with Prof. Yvonne Mokgoro, Centre For Constitutional Analysis, Human Science Research Council, (Oct. 5, 1994), <http://www.concourt.gov.za/text/judges/transcripts/yvonnemokgoro.html>.

275. Interview with Sibongile Ndashe, *supra* note 21.

276. Interview with Professor T.W. Bennett, University of Cape Town, in Cape Town, S. Afr. (June 2, 2006).

277. Interview with Tshepo Khumbane, rural community development worker, in Jakkalsdams, Limpopo Province, S. Afr. (May 22 2006) (commenting that she thought it was particularly bad for chiefs to be involved in divorce cases, since they usually favor men); *see* Interviews with women in the GaMatlala Community, *supra* note 109.

278. Interviews with Linki Maremana and Charlotte Moabe, GaMatlala Community, *supra* note 109.

279. *Id.*

tional decision makers into the formal court system is the resistance shown by such leaders to changes in legal standards. For example, some traditional leaders were aware of the RCMA provisions but regarded the constitutionally-inspired reforms as undermining traditional cultural norms. The Ndebele King in Limpopo, for example, lamented that the Constitution had removed power from traditional leaders, leaving only "customary law marriages and minor assaults" within his jurisdiction.<sup>280</sup> Another interviewee echoed the sentiment that government is undermining custom and destroying culture, noting that "where there is a marital dispute, the couple is supposed to call a close relative, an uncle, or the father's brother. Previously, the wife would first go to the chief to resolve problems, now they go straight to the magistrate."<sup>281</sup>

Finally, ignorance about the impact of national law on custom is still widespread. For example, Queen Kgoshigadi L.R. Matlala explained that "the Constitution does not interfere with customary law," and noted that, in her community, the most common cases the traditional courts hear are domestic violence cases.<sup>282</sup> In Ngecengane Village, the Subheadman claimed that only criminal matters "and rape" are outside the jurisdiction of tribal authorities.<sup>283</sup> He added that "all cases related to customary law must be resolved at this court, including any community feud that has nothing to do with blood." With respect to customary marriage, "all people getting married or intending to get married must follow this. The principle of this court is that *lobolo*, the exchange of cattle between two families, is controlled in this court. When someone takes the cows out of this community, they are supposed to come before this court."<sup>284</sup>

In contrast, some traditional leaders saw themselves as a point of connection between the national or regional government and their communities.<sup>285</sup> His Majesty Kgoshi KO Leboho,

280. Interview with Ndebele King, *supra* note 172. He sees over a thousand cases a year and says that the Constitution is nullifying custom. *Id.*

281. Interviews with Counselor, Kibi Community, in Limpopo Province, S. Afr. (May 25, 2006).

282. Interview with the Queen of the GaMatlala Community, *supra* note 111. The Queen of the GaMatlala Community rules over 49 villages with 185,000 inhabitants.

283. Interview with M. Similo, Subheadman, *supra* note 178.

284. *Id.*

285. See Interview with Professor Maituffi, *supra* note 177 (who explained that although most traditional leaders were not in favor of their recommendations, in

Kibi Traditional Authority,<sup>286</sup> observed that, in the new South Africa, traditional leaders are not as widely considered as they were in the past, but that they still have an important role to play. He regards his role as “explaining the Constitution to the people in order to enlighten them and advising them on where to go and how to pursue a problem.”<sup>287</sup> He added that the leadership of the national government now realizes that it cannot control the community without the help of traditional leaders.<sup>288</sup>

### CONCLUSION

The persistence of customary practices in the face of statutory and constitutional reforms together with the continuation of traditional institutions, especially in rural areas, suggest that meaningful reform of customary marriage will depend on the support of traditional authorities. Whether premised on individual choice or substantive equality, such reform measures will succeed only when women have meaningful access to information and to forums in which their claims will be fairly adjudicated. In the short and even medium term, this may entail the enlistment and education of traditional leaders who wield important influence over the customary law of marriage and its dissolution.

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KwaZulu-Natal, one of the most rural groups of all stated that all along they had been preparing for this reform).

286. Interview with his Majesty Leboho, *supra* note 170. He rules over thirteen villages with thirty headmen.

287. *Id.*

288. *Id.*