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Constitutional Exclusion and Gender in Commonwealth Africa

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Abstract

Part I of this article briefly describes customary law and explores the effect of colonialism on legal pluralism and the region's early post-colonial constitutions. Part II describes the structure and content of constitutional clauses that exclude personal law and customary law from constitutional non-discrimination protection. Part III briefly examines international and regional human rights law and offers a pragmatic conclusion that countries must eliminate exclusionary clauses in order to conform to human rights commitments. Part IV provides a theoretical justification for eliminating exclusionary clauses from these constitutions. This section builds upon feminist theory and dialogic constitutionalism to argue that countries should eliminate constitutional exclusionary clauses in order to dismantle the faulty public/private dichotomy and provide a voice for women in constitutional debates over the normative content of customary law. Finally, Part V assesses alternatives for judicial intervention once the exclusionary clauses have been eliminated through constitutional amendment. This part explores a number of strategies courts might employ in interpreting personal and customary law in light of constitutional equality guarantees, ranging from less interventionist to more interventionist. These intervention strategies include limited intervention, in which customary law is largely left to evolve on its own; formalist intervention, in which gender equality rights clearly trump rights to custom or vice versa; and activist intervention, in which courts must balance gender equality rights with rights to custom. This article proposes a rights-balancing approach that values both culture and equality rights. Recent jurisprudence in South Africa illustrates the promise of a type of rights balancing that I call "weighted balancing." Eliminating exclusionary clauses and encouraging courts to balance relevant rights is the only way to facilitate a constitutional dialogue that will ultimately determine the normative content of constitutional equality guarantees as applied to personal and customary law.

ARTICLES

CONSTITUTIONAL EXCLUSION AND GENDER IN COMMONWEALTH AFRICA

*Johanna E. Bond**

INTRODUCTION

Multiculturalism has long been considered inimical to gender equality.[1] In the last two decades, many proponents of multiculturalism and feminism have perpetuated a dichotomous approach to identity in which an equality-minded, rights-seeking woman could not meaningfully enjoy membership in a cultural community.[2] This misguided, unitary understanding of the self would require such a woman to exit from her familial or cultural community, often at great personal cost, to fulfill her individual right to equality.[3]

In recent years, however, feminists and multiculturalists alike have begun to explore what it means for women to redefine cultural norms in ways that are consistent with equality principles.[4] Around the world, women are exploring new ways to interpret old texts and challenging traditional or customary in-

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1. *See, e.g.*, David M. Smolin, *Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender*, 12 J.L. & RELIGION 143, 152 (1996) (discussing a recent human rights document that creates a clear conflict between "human rights norms and the religious and cultural practices of the majority of humankind."); *see also* Tracey E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 125-26 (1996) (arguing that insights from anti-essentialist theory help to negotiate a middle path between universalism and relativism or multiculturalism and feminism).

2. *See* Susan Moller Okin, *Is Multiculturalism Bad for Women, in* IS MULTICULTURALISM BAD FOR WOMEN? 7, 10 (Joshua Cohen et al. eds., 1999).

3. *See* SEYLA BENHABIB, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA 101 (2002) ("There is little doubt that women's concerns and the status of the private sphere expose the vulnerability of multicultural arrangements and reveal the unjust moral and political compromises, achieved at the expense of women and children, upon which they often rest.").

4. *See id.* at 104 (stating that various plights of women and children can be

stitutions to conform to gender equality norms.[5] As such, they have rejected the notion that they must choose between their identity as gender equality-seeking individuals and members of cultural communities. Understandably, they want both.

To challenge and redefine cultural norms from *within* a cultural community, women must have opportunities to engage with the authoritative sources of cultural meaning.[6] In some societies, this engagement will take the form of feminist academics who dedicate themselves to reinterpreting traditional religious dictates.[7] In others, the effort may entail extensive grassroots consciousness-raising concerning women's status within the community.[8] Ideally, women will use multiple points of access to engage with and interpret cultural meaning.

In parts of Commonwealth Africa, however, feminists face severe structural impediments to any systematic engagement with traditional custom and culture. These structural impediments have an unlikely source. They are firmly embedded in constitutional text. The constitutions of a handful of countries in the African Commonwealth contain provisions that specifically exclude family and customary law from constitutional nondiscrimination protection. In other words, a woman may invoke constitutional equality guarantees but only if the contested issue does not concern "marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description."[9] The exclusion of family law from the constitution can have a devastating effect on women in those

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"avoided, in theory as well as in practice, by modifying our understandings of culture; rejecting cultural holism . . . .").

5. *See, e.g.*, Ran Hirschl & Ayelet Shachar, *Constitutional Transformation, Gender Equality, and Religious/National Conflict in Israel: Tentative Progress Through the Obstacle Course, in* THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 205 (Beverley Baines & Ruth Rubio-Marin eds., 2005) (examining the progress of Israeli women in advancing the gender equality agenda through constitutional jurisprudence and legislative initiatives).

6. *See* BENHABIB, *supra* note 3, at 104 (suggesting that we have "more faith in the capacity of ordinary political actors to renegotiate their own narratives of identity and difference through multicultural encounters in a democratic civil society.").

7. *See* Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1450 (2003) (discussing the organization Women Living Under Muslim Laws and its practice of encouraging women to question and re-interpret the traditional teachings of the Qur'an).

8. *See id.* at 1451 (discussing activities that require women to organize or lead groups to pursue a common goal as a way to redefine cultural norms).

9. LESOTHO CONST. s. 18(4)(b) (1993).

countries.[10] Because those issues that most commonly affect women are external to the constitution, women lack a crucial vehicle through which to negotiate the meaning of cultural norms in light of equality guarantees.

The discussion of constitutionalism in Commonwealth Africa is fraught with the complex interplay of nationalism, preservation of custom, and contemporary conceptions of equality.[11] The history of colonialism in the region has created a plural legal system in which multiple systems of law—statutory, customary, and religious—operate simultaneously.[12] Although the colonial authorities created the system in an effort to preserve indigenous custom and appease traditional leaders, it has left women subject to varying, and often insufficient, equality rights.[13]

The drafters of the early post-colonial constitutions struggled with the balance between protecting communal or minority group rights and individual rights. Many of the post-colonial constitutions contained non-discrimination provisions that specifically excluded personal law, including most family law issues, from constitutional protection.[14] Although many of the independence constitutions in Commonwealth Africa articulated a commitment to gender equality, the exclusion of personal and customary law from constitutional protection has severely undermined that commitment.[15]

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10. *See* David M. Bigge & Amelie von Briesen, *Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in* Magaya v. Magaya, 3 HARV. HUM. RTS. J. 289, 294 (2000) (discussing the Supreme Court of Zimbabwe's decision in *Magaya v. Magaya*, SC No. 210-98 (Zimbabwe, Feb. 16, 1999), which demonstrated that women are still denied the full benefit of domestic inheritance laws).

11. *See* Beverley Baines & Ruth Rubio-Marin, *Introduction: Toward a Feminist Constitutional Agenda, in* THE GENDER OF CONSTITUTIONAL JURISPRUDENCE, *supra* note 5, at 1, 12 (noting that feminists in South Africa, among other countries, "have not hesitated to identify some disadvantages women experience under these religious and customary jurisdictions, and to argue for the necessity of greater harmonization with women's constitutional rights.").

12. *See* Johanna Bond, *Chapter Introduction: Women's Rights within the Family, in* VOICES OF AFRICAN WOMEN: WOMEN'S RIGHTS IN GHANA, UGANDA, AND TANZANIA 181, 182 (Johanna Bond ed., 2005).

13. *See id.* (noting, for example, "[t]he rights that a woman may legally enjoy during her marriage and at its dissolution depend upon the type of marriage into which she has entered.").

14. *See, e.g.*, LESOTHO CONST. s. 18(4) (1993).

15. *See* Kivutha Kibwana, *Women, Politics and Gender Politiking: Questions from Kenya, in* CONSTITUTIONALISM IN AFRICA: CREATING OPPORTUNITIES, FACING CHALLENGES 194,

Many Commonwealth African countries have amended their constitutions significantly in the approximately forty years since independence.[16] Some countries have eliminated the exclusionary provisions that place personal and customary law outside the purview of constitutional protection; others have not.[17] Since 1990, the continent has ushered in a number of new or reformed constitutions,[18] all of which grapple with the desire to preserve custom and cultural identity at the same time that they recognize women's equality rights.[19]

Almost without exception, the new or reformed constitutions among Commonwealth countries in Sub-Saharan Africa include protection against gender discrimination.[20] They vary with respect to how vigorously and completely they protect women against discrimination.[21] In most cases, however, the new constitutions represent a significant advance for women's rights on the continent.

Despite the marked trend toward increased constitutional protection for women's rights, a number of countries in the re-

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205 (J. Oloka-Onyango ed., 2001) (suggesting that these kinds of exclusionary clauses amount to constitutional contradictions).

16. Some amendments have concerned individual rights, but many have involved political representation and the prevention of authoritarian rule in response to military coups and other unauthorized assertions of power throughout the region during the post-colonial period. *See* Peter Slinn, *A Fresh Start for Africa? New African Constitutional Perspectives for the 1990s,* 35 J. AFRICAN L. 1, 1 (1991). "[I]n almost all the independent countries of sub-Saharan Africa free political competition was eliminated either by the establishment of the one-party state or the complete replacement of civilian politicians by military rulers." *Id.* Barry Munslow offered the following explanation as to why Africa has experienced so many authoritative rulers in the post-colonial period: "The problem was not so much a failure by Africans to learn the lesson of parliamentary government: rather, the lesson of authoritarian colonial rule was taught and learnt too well." *Id.* at 6 (quoting Barry Munslow, *Why Has the Westminster Model Failed in Africa?*, 36 PARLIAMENTARY AFFAIRS 218 (1983)).

17. *See infra* note 88 and accompanying text (listing African countries that have exclusionary provisions and quoting the relevant article of several constitutions).

18. For example, the Electoral Institute of Southern Africa lists the constitutions for sixteen countries in Africa, ten of which were adopted in 1990 or later. *See* Electoral Institute of Southern Africa, ESA Comparative Data: Constitution, http://www.eisa.org.za/WEP/comconstitution.htm (last visited Oct. 21, 2007). The Constitutions for every one of these sixteen countries has been amended since 1990. *See id.*

19. Although it is misrepresentative to construe culture and equality as inherently conflicting, judges must, at times, confront conflicts between these rights in constitutional interpretation.

20. *See* CTR. FOR REPRODUCTIVE LAW & POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES: ANGLOPHONE AFRICA 153 (2001).

21. *See infra* notes 88-99 and accompanying text.

gion have retained clauses that exclude personal and customary law—and, by extension, women—from constitutional non-discrimination protection.[22] This is not a constitutional anomaly found in a lone post-colonial constitution, but rather a pattern that is repeated throughout a number of Commonwealth African constitutions. This Article examines this pattern of constitutional exclusion, explores the theoretical rationale for its existence, and argues that constitutional reform is necessary to provide women with a voice in redefining personal and customary law in a way that is consistent with equality principles. Because women are excluded from litigating issues that most directly affect their lives, exclusionary clauses deny women's constitutional agency.[23] Constitutional reform that opens the door for women to litigate claims that are central to their lives marks the beginning, not the end, of the struggle for women's equality. Without public education and advocacy by the activist community, equality laws mean very little.[24] Law reform that recognizes women's constitutional agency, however, should be seen as a necessary first step.

Part I of this Article briefly describes customary law and explores the effect of colonialism on legal pluralism and the region's early post-colonial constitutions. Part II describes the structure and content of constitutional clauses that exclude personal law and customary law from constitutional non-discrimination protection. Part III briefly examines international and regional human rights law and offers a pragmatic conclusion that countries must eliminate exclusionary clauses in order to conform to human rights commitments. Part IV provides a theoretical justification for eliminating exclusionary clauses from these constitutions. This section builds upon feminist theory and dia-

22. The following eight countries have retained exclusionary provisions: Botswana, Gambia, Kenya, Lesotho, Mauritius, Sierra Leone, Zambia, and Zimbabwe. *See* infra note 88 and accompanying text.

23. Beverley Baines and Ruth Rubio-Marin aptly use the term "constitutional agency" to describe the ways in which women use the constitution to bring about improvements in women's legal status. Baines & Rubio-Marin, *supra* note 11, at 7-8. They conclude, "women who are active in feminist movements have begun to identify constitutions and constitutional change as relevant to our lives." *Id.* at 7.

24. *See* J. Oloka-Onyango, *Constitutionalism in Africa: Yesterday, Today and Tomorrow, in* CONSTITUTIONALISM IN AFRICA: CREATING OPPORTUNITIES, FACING CHALLENGES, *supra* note 15, at 10 (noting "constitutional reform *per se* is clearly insufficient and must be accompanied by consciousness raising and the transformation of culture.").

logic constitutionalism to argue that countries should eliminate constitutional exclusionary clauses in order to dismantle the faulty public/private dichotomy and provide a voice for women in constitutional debates over the normative content of customary law.

Finally, Part V assesses alternatives for judicial intervention once the exclusionary clauses have been eliminated through constitutional amendment. This part explores a number of strategies courts might employ in interpreting personal and customary law in light of constitutional equality guarantees, ranging from less interventionist to more interventionist. These intervention strategies include limited intervention, in which customary law is largely left to evolve on its own; formalist intervention, in which gender equality rights clearly trump rights to custom or vice versa; and activist intervention, in which courts must balance gender equality rights with rights to custom. This Article proposes a rights-balancing approach that values both culture and equality rights. Recent jurisprudence in South Africa illustrates the promise of a type of rights balancing that I call "weighted balancing." Eliminating exclusionary clauses and encouraging courts to balance relevant rights is the only way to facilitate a constitutional dialogue that will ultimately determine the normative content of constitutional equality guarantees as applied to personal and customary law.

Two cautionary notes are appropriate here. The first involves comparative analysis across the borders of very different countries. Too often, African states are lumped together and collectively addressed as "the continent," despite vast differences in historical, social, cultural and legal backgrounds.[25] This Article attempts to overcome this analytical difficulty by providing some context within which to locate and ground the discussion. In a work of this length, however, it is impossible to provide enough context to offer a complete picture of the countries discussed. Despite these shortcomings, there is considerable value in comparative analysis, and this Article offers some cautious

25. *See* JOHN HATCHARD, MUNA NDULO & PETER SLINN, COMPARATIVE CONSTITUTIONALISM AND GOOD GOVERNANCE IN THE COMMONWEALTH: AN EASTERN AND SOUTHERN AFRICAN PERSPECTIVE 8 (2004) (suggesting that there is a risk of "over-generalising the problems and the solutions applicable to individual countries.").

generalizations in an effort to diagnose and explore regional trends.

The second cautionary note involves the Article's treatment of custom and customary law. Academics in the United States have traditionally discussed custom primarily with reference to foreign legal systems, leading to an understanding of custom as it relates to other legal systems but not our own. Recent, compelling scholarship has exposed the inherent bias in approaching custom this way. Leti Volpp, for example, has demonstrated that ignoring how custom operates in our own legal system leads to a narrow, racist understanding of custom as inferior and "other."[26] This Article ventures warily into a discussion of African custom and customary law with an awareness of the hegemonic pitfalls of such a discussion.[27] Comparative analysis of women's rights within the U.S. legal culture, however, is simply outside the scope of this Article.[28]

It is worth noting that much of the literature on African custom treats customary law as uniformly regressive.[29] Such a view leads to a reductive image of African women defined solely as victims of their culture.[30] As a corollary, it neglects African women's agency as participants in, and in some cases, resisters of their culture. According to this limited understanding, women have nothing to gain through active engagement with custom and tradition. In fact, custom is viewed as a harmful anachronism, whereas statutory law is seen as progress, the hope of the future.[31] Although this Article ultimately recommends a statutory remedy, it does so with the understanding that there is value

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26. *See* Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1193-94 (2001).

27. *See, e.g., id.* at 1184 (noting that the point is "not that we ought to eliminate or dismiss feminist values, but to suggest they will broaden and shift when we examine immigrant women and Third World women in a more accurate light.").

28. For a comparative discussion of U.S. laws and pluralistic legal systems, *see generally* Brenda Oppermann, *The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States*, 17 HASTINGS WOMEN'S L.J. 65 (2006).

29. *See, e.g.*, Okin, *supra* note 2, at 13.

30. See Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 2 (2002) (describing how the emphasis on the Third World victim subject amounts to gender and cultural essentialism).

31. *See* Sunder, *supra* note 7, at 1414 (describing a historicist view in which religious law constitutes "law's past").

in the preservation of custom and culture. It is only when custom, as articulated by cultural elites, is permitted to harm vulnerable group members, such as women, that it must be altered to bring it into conformity with constitutional equality guarantees.[32]

I. *BACKGROUND*

A. *African Customary Law*

African customary law primarily regulates personal, familial issues, or relationships between private persons.[33] It consists of largely unwritten rules or laws that may be applied informally by traditional leaders or, in some cases, by the courts.[34] Official customary law, the law reflected in judicial precedents and academic texts, is often quite different from the more dynamic "living" customary law that reflects the actual day-to-day practices of communities.[35] Customary law also varies between ethnic groups and, at times, even between villages.[36] Because it can be difficult to ascertain what the law is, judges who are tasked with interpreting customary law often turn to prior judicial articulations of customary law or descriptions of the law in academic texts.[37] This leads to a misunderstanding of customary law as ossified or fixed in time rather than as a flexible, evolving system of law.[38]

The difficulty in interpreting customary law is compounded by the region's colonial past. During the colonial period, colonial administrators brought customary law into the colonial court system, filtering the law through the lens of British under-

32. *See infra* notes 229-35 and accompanying text.

33. *See* Wieland Lehnert, *The Role of the Courts in the Conflict Between African Customary Law and Human Rights*, 21 S. AFR. J. HUM. RTS. 241, 247 (2005).

34. *See* Adrien Katherine Wing & Tyler Murray Smith, *The New African Union and Women's Rights*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 33, 38-39 (2003).

35. *See* Lehnert, *supra* note 33, at 246.

36. *See* Akua Kuenyehia, *Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa*, 40 U.C. DAVIS L. REV. 385, 388 (2006).

37. For a useful typology of customary law, see Alice Armstrong et al., *Uncovering Reality: Excavating Women's Rights in African Family Law*, 7 INT'L J.L. & FAM. 314, 324-25 (1993).

38. *See id.* at 327; Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 HUM. RTS. Q. 838, 841 (observing "[r]eferences to 'traditional African culture' or a 'traditional Asian culture' often convey the idea of a monolithic and unchanging pre-modern state of affairs to be contrasted with modern Western traditions.").

standing.[39] Sweeping economic changes and corresponding changes in labor migration during the colonial period disrupted African customs, establishing a new version of customary law "which suited the white administrators and African male elders who ruled colonial society."[40] Colonial authorities, for example, helped to establish a system of law that recognized only African males as title-holders to land in part because that form of patriarchal hierarchy resonated with British conceptions of the family.[41] Although some have characterized the influence of colonial authorities on the interpretation of customary law as a "corruption"[42] of true, pure customary law, this understanding suggests that law may exist in an objective, unadulterated state. I do not mean to suggest that here. The interaction between colonial authorities and indigenous leaders, however, transformed

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39. As Alice Armstrong and her colleagues suggest:

> The very process of "feeding" customary law into the colonial court system led to a construction of a customary law that often sharply contrasted with African systems of justice which focus more on the processes of achieving peaceful resolutions of disputes rather than on adherence to rules as the basis of determining disputes . . . the preoccupation by western courts with ascertaining rules of substantive law where, in fact, none existed resulted in the construction of rules which were often neither customary nor equitable to women.

Armstrong et al., *supra* note 37, at 325.

40. Martin Chanock, *Neither Customary Nor Legal: African Customary Law in an Era of Family Law Reform*, 3 INT'L J.L. & FAM. 72, 72 (1989). Chanock explains:

> [Male elders'] assertion of control over women, and over family property, was supported by colonial administrations as it accorded with the administrators' own prescriptions for African societies. As one traces the story of these developments it becomes plain that customary law is to be treated as a matter of politics and not of culture. If, then, one were to resist its continuing operation in the post-colonial state one could do so on the basis of resistance to the political premises and demands, and not on the basis of the denial of viability or dignity to an indigenous culture.

Id. at 76.

41. "[T]he British introduced formal land registration in the names of individual, not lineage, title-holders and, because of their own cultural biases, registered land only in men's names." RHODA E. HOWARD, HUMAN RIGHTS IN COMMONWEALTH AFRICA 190 (1986); *see also id.* at 10 (noting that during the colonial period "traditional relations between the sexes were distorted by the imposition of Western patriarchal ideals."); Chanock, *supra* note 40, at 77 ("The family law of England during the colonial period was not devoted to equality between men and women . . . . The early impetus to reform African marriage laws in the name of female emancipation was replaced by support from the colonial state for the preservation, and in some cases the extension, of male power.").

42. I borrow Alice Armstrong and her colleagues' characterization of customary law as a "corrupted version" of traditional ways. *See* Armstrong et al., *supra* note 37, at 325.

custom and customary law by interpreting it through a colonial lens.

In addition to the external influence of colonial authorities, some permutations in customary law grew out of an internal mischaracterization of custom in the form of court testimony offered by the indigenous African population. For example, when judges attempted to apply customary law in a particular case, witnesses often testified as to the substantive content and requirements of customary law in a certain community.[43] When these witnesses, who were usually male elders, testified about a particular custom in question, they often offered an interpretation of the custom that was favorable to their position.[44] As Fareda Banda observes, "[f]or the indigenous men involved in this process of interpretation of the customary law, it was a question of an oppressed group using their limited leverage to gain for themselves more rights and privileges."[45]

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43. *See id.* ("[W]hat the elders and other witnesses gave as evidence of customary law was a distorted and rigid version of customary law designed to express their idea of what the law should be and not what it really was . . . their versions were greatly influenced by the elders' anger and frustration at their loss of political power and challenges they were facing at the time from women and young men.").

44. *See* Fareda Banda, *Global Standards: Local Values*, 17 INT'L J.L. POL'Y & FAM. 1, 7-8 (2003). Banda notes:

> Discussing South Africa Walker has noted that both the indigenous men and the colonizers were committed to tradition and traditional leadership so that "successive white governments worked to refashion pre-colonial society in the interests not only of a white but also of a patriarchal supremacy." This mutation of local claims into legal rules took place, as Chanock notes . . . "through a process not only of selective understanding by colonial officials but also of selective presentation of claims."

Id. at 7-8.

45. *Id.* at 8. Similarly, Welshman Ncube asserts:

> [M]ost of what is today held out as "our" customary law is a "construction" of the colonial judiciary in complicity with some elders of the African society, who redesigned most of what is today presented as customary law so as to increase male authority and control over women and children, to compensate for the loss of their political and social power to the colonial state.

Uche U. Ewelukwa, *Post-Colonialism, Gender, Customary Injustice: Widows in African Societies*, 24 HUM. RTS. Q. 424, 432 (2002) (citing Welshman Ncube, *The White Paper on Marriage and Inheritance in Zimbabwe: An Exercise in Superfluity and Mischief*, 5 LEGAL F. 10, 12 (1993)). Martin Chanock notes:

> We are able to trace in the colonial period how, for example, male elders were able to press for and establish as customary law a form of marriage which was clearly not that practiced by most people in pre-colonial or early colonial times and which was, indeed, resisted by many.

Chanock, *supra* note 40, at 76.

Indigenous male leaders thus had an interest in establishing a source of authority, particularly in light of colonial oppression. The colonizers, in turn, had an interest in pleasing indigenous male leaders whose labor and cooperation was needed for effective colonial administration and economic development.[46] In part to appease indigenous leaders, the colonial authorities allocated control over personal law to indigenous communities. Personal law, however, was never truly free of British influence.[47] It was this interaction between traditional elites and colonial authorities that led to the distortion of custom and customary law during the colonial period.

B. *The Colonial Era & the Creation of Legal Pluralism*

The history of constitutionalism in Africa begins with the colonial period. At the Berlin Conference of 1884, the colonial powers partitioned the continent into territorial units.[48] These arbitrary divisions have led at least one commentator to conclude that the continent will not stabilize politically until there is a radical geographic reorganization of the borders on the continent.[49] Although such reorganization is not realistic, it is crucial to understand the effect of the early colonial history on the contemporary African state. The arbitrary divisions imposed by the

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46. *See* Banda, *supra* note 44, at 8 (noting that colonial authorities attempted to keep the indigenous male population "reasonably happy for their co-operation was needed in the form of labour to develop the country, and thus their assistance was sought in developing the personal law to apply to the governed peoples.").

47. British colonial authorities, in fact, considered themselves missionaries of women's emancipation. Despite severe inequalities between women and men in British society at the time, the colonial authorities attempted to eliminate some customary practices that they considered "repugnant" to notions of morality and justice. *See id.*

48. *See* HATCHARD ET AL., *supra* note 25, at 13. John Hatchard, Muna Ndulo, and Peter Slinn provide a fascinating historical example:

> [I]n 1890, Lord Salisbury, the British Prime Minister remarked at a dinner that followed the conclusion of the Anglo-French Convention which established spheres of influence in West Africa: "We have been engaged in drawing lines upon maps where no white man's foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never really knew exactly where the mountains and rivers and lakes were."

Id. at 13 n.3 (quoting M. Makuwaw Wa Mukua, *Why Redraw the Map of Africa? A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1135 (1995)).

49. *See* M. Makuwaw Wa Mukua, *Why Redraw the Map of Africa? A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1118 (1995) (noting political difficulties created by arbitrarily drawn national borders).

colonialists and the changing economic environment disrupted life and forced a departure from subsistence farming among African communities.[50] Colonial policies and practices resulted in a great economic divide between urban and rural areas, a divide that continues to this day.[51]

The period of colonial rule was characterized by elitism and authoritarian governance.[52] "As colonial rulers sought expedient collaborators, they distorted or destroyed pre-colonial governance systems by creating or encouraging arrangements such as indirect rule, which made local chiefs more despotic and created new ones (warrant chiefs) where none had previously existed."[53] The British policy of indirect rule in Commonwealth African colonies provided the indigenous population with some measure of control over the private sphere, particularly with respect to family or personal laws.[54]

Colonialism created a plural legal system, in which statutory, customary and religious law operated simultaneously.[55] In some substantive areas, colonial authorities imported British law to govern all people in the colonies. In other areas, such as family law, colonial authorities recognized multiple sources of law. Multiple systems of family or personal law still operate in many Commonwealth African countries. In Ghana, for example, a couple may choose to marry according to statutory law pursuant to the Marriage Ordinance, according to customary law, or according to Islamic law pursuant to the Marriage of Mohammedans Ordinance.[56] An African could opt out of customary marriage law by, for example, contracting a civil law marriage under statutory law. In this case, statutory law rather than customary law would govern the rights and duties of marriage. To

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50. *See* HATCHARD ET AL., *supra* note 25, at 13 ("Dislocation of African peoples from their lands and communities continued throughout the colonial period as the needs of the colonial economy expanded, further undermining any tribal economy or social organization that were left in place after the initial establishment of colonial rule.").

51. *See id.* at 14 ("The result was a colonial state characterized by a huge gap in the standard and quality of life between the rural and urban areas.").

52. *See id.* ("Colonial rule was philosophically and organisationally elitist, centralist and absolute and left no room for either constitutions or representative institutions.").

53. *Id.*

54. *See* Armstrong et al., *supra* note 37, at 324 ("[C]ustom and tradition became a means by which the local rulers and family heads bargained with the colonial state for retaining a part of their political power in their communities . . . .").

55. *See* Kuenyehia, *supra* note 36, at 387-88 (describing legal pluralism).

56. Bond, *supra* note 12, at 182.

this day, however, the majority of indigenous Africans contract marriages according to customary law, particularly in rural areas.[57]

The plural legal system established under colonial rule created difficult choice of law questions. In cases involving two Africans of different ethnic groups, the courts sometimes had to resolve conflicts between customary laws.[58] In addition, under this system, if a white person appealed to the court for resolution of a family law matter, the court would apply the relevant "received" or British law.[59] If an African appealed to the court for the same relief, the courts would apply the relevant customary law or religious law.[60] The colonial powers thus created a plural system of law in which the determining factor as to the relevant law was a person's race.[61] Rights and duties vary significantly among the different systems of law, and courts must often decide which law is applicable. Although not confined to any particular part of the world, legal pluralism continues to be a defining characteristic of much of the African Commonwealth today.[62]

In cases involving the indigenous population, the courts applied customary law unless it was "repugnant to natural justice, equity and good conscience."[63] As such, the British colonial powers became the arbiters of what was just and moral within

57. *See, e.g.*, CTR. FOR REPRODUCTIVE LAW & POLICY, *supra* note 20, at 167 ("Customary marriages are still pervasive in Anglophone Africa. In Zimbabwe, for example, they accounted for 82% of marriages. Polygamous marriages occur in each of the countries, with 36% of women in Nigeria, 29% in Tanzania, and 23% in Ghana being part of such unions.").

58. *See, e.g.*, KWAME OPOKU, THE LAW OF MARRIAGE IN GHANA: A STUDY IN LEGAL PLURALISM 5 (1976).

59. *See* Anne Hellum, *Human Rights and Gender Relations in Postcolonial Africa: Options and Limits for the Subjects of Legal Pluralism*, 25 LAW & SOC. INQUIRY 635, 636 (2000) (discussing the dual legal systems of former European colonies in Africa, which apply different laws to different races).

60. *See id.*

61. *See* Armstrong et al., *supra* note 37, at 322 (noting that "customary law applied to Africans while the received law applied to non-Africans."). As Bart Rwezaura points out, people in legal disputes tend to invoke whichever system of law is most advantageous in any given situation. *See* Bart Rwezaura, *Tanzania: Building a New Family Law Out of a Plural Legal System*, U. LOUISVILLE J. FAM. L. 523, 524-25 (1995). In other words, a man married according to statutory law may nevertheless claim that customary law controls in a divorce dispute.

62. *See* Catharine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects, and "Personal Laws,"* 4 INT'L J. CONST. L. 181, 181 (2006).

63. Ewelukwa, *supra* note 45, at 449-50.

African society,[64] creating considerable resentment among the indigenous African population.[65] Despite marked inequalities between women and men in British colonial society, the colonial authorities most often invoked the repugnancy clause in an effort to free African women from what colonialists considered to be oppressive traditional practices.[66] This history has contributed to African skepticism toward the efforts of international human rights activists to promote women's equality.[67]

During colonial times, "[t]he development of the customary law was a vital part of African political assertion under colonialism."[68] Because many equated allegiance to custom with politi-

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64. At least one commentator has argued that the repugnancy clause was used primarily to challenge traditional practices related to women and girls, such as early marriage. *See* Fareda Banda, *Women, Law and Human Rights in Southern Africa*, 32 J. S. AFR. STUD. 13, 14 (2006) (citing CLAIRE PALLEY, THE CONSTITUTIONAL HISTORY AND LAW OF SOUTHERN RHODESIA 1888-1965, at 511 (1966)).

65. *See* Banda, *supra* note 44, at 7 (noting that Africans continue to have a resistance to human rights causes as they equate them with the imposition of Western values).

66. *See* Chanock, *supra* note 40, at 77 ("It is also important to avoid any identification of a model of a modern, egalitarian, non-sexist and individualistic family and family law with the law of Europe and Britain, and its opposite with Africa."). Chanock further observes:

> The early impetus to reform African marriage laws in the name of female emancipation was replaced by support from the colonial state for the preservation, and in some cases the extension, of male power. It is important that we understand the input of the colonial courts and administrators and missionaries into the fashioning of the customary law of marriage, and that we avoid treating the development of African family law as if it was isolated from the dominant 'white' system. Once we understand the modern customary law as the product of this interaction during the colonial period, it again becomes harder to invoke custom in opposition to reform.

Id.

67. *See* Banda, *supra* note 44, at 7. Fareda Banda writes:

> It is here worth noting that, to this day, Africans equate human rights and the need to change customs with that repugnance clause. Indeed part of the struggle for independence was so that Africans could reclaim their much derided culture, thus the resistance to the perceived re-imposition of European values in the guise of human rights norms.

Id.

68. Chanock, *supra* note 40, at 75-76.

> Which patterns of behaviour were accepted as legitimate customary law is a part of the political history of the colonial period and which patterns of behaviour are now put forward as representative of custom is likewise a matter of current politics . . . . There is a need in modern Africa to recognize and to respond to the variety of customary traditions regarding family, rather than simply to continue to cling to, as fully representative of the past, the version which was able to gain ascendancy during the colonial period.

cal resistance to British rule, colonialism imbued customary law with an even greater sense of Africa-ness. In contrast to foreign occupation, African custom and customary law became an even greater source of pride and unity. This renewed cultural pride found pointed expression during the independence period, resulting in an enthusiastic embrace of a new national identity and corresponding traditional customs immediately following the colonial period.[69] As Chanock observed almost two decades ago, "[t]he relatively recent overthrow of the colonial states has made it an important part of the symbolical politics of modern Africa to reassert African values and institutions."[70] This allegiance to custom, as an expression of national identity, continues today and sometimes takes the form of fundamentalism or radical nationalism.[71]

The end of colonialism brought greater allegiance to customary law as it was seen as the legitimate expression of the people rather than the law of the state.[72] Newly independent African states thus embraced customary law with renewed vigor when colonialism ended, and custom and tradition became even more important symbols of independence and national identity. It is against this backdrop that the early post-colonial constitutions began to emerge.

Id. at 86.

69. *See* Banda, *supra* note 44, at 7 ("[P]art of the struggle for independence was so that Africans could reclaim their much derided culture . . . ."). Of customary law, Chanock observes:

> This misunderstanding has resulted in a notion of customary law which embodies a confusion about both its parts . . . . If we choose a form of definition which asserts the essential similarity in form of the law of pre-colonial Africa, and the customary law of the colonial period, and the imported law of the colonizers, we make it easier to assert the authenticity of the claims of African law in the post-colonial period, as these become a matter of revival and extension. But there is a price to be paid for this, which is that this makes it very difficult to understand the far-reaching changes which African modes of social ordering underwent in the twentieth century as a result of being subordinated to foreign law, and the need to respond to a transformed set of social relationships.

Chanock, *supra* note 40, at 75.

70. *Id.* at 72.

71. *See* Lehnert, *supra* note 33, at 242.

72. *See* Chanock, *supra* note 40, at 72 ("The relatively recent overthrow of the colonial states has made it an important part of the symbolical politics of modern Africa to reassert African values and institutions.").

C. *Modern Constitutionalism: The Post-Colonial Constitution And The Reform Era Of The 1990s*

British colonial rule largely came to an end in the late 1960s, in a flurry of constitution-making.[73] The colonial authorities consulted nationalist leaders during the process, and the independence constitutions were largely a product of this collaboration.[74] Because many of these countries gained independence in rapid succession, the Colonial Office engaged in rigorous drafting and logged innumerable hours in the process of making constitutions.[75] The language of the independence constitutions contains many similarities, suggesting that the lawyers involved did not "reinvent the wheel" with each new constitution.[76] "In many African states, initial constitutional provisions were drawn overwhelmingly from patterns familiar to the departing colonial power, hence reflecting assumptions far more common in the metropole than in particular African societies."[77]

Many of those drafting similarities appeared in the Bill of Rights provisions of the independence constitutions.[78] This, to some extent, explains the recurrent formulation that is the subject of this Article. Many of the independence constitutions contained some protection of fundamental rights, such as non-discrimination, but specifically excluded personal law from the purview of the constitution.[79]

In the period following independence, constitutionalism simply failed in a number of African states.[80] Some commenta-

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73. *See* HATCHARD ET AL., *supra* note 25, at 15.

74. *See id.* at 18 ("The picture that emerges from the British Government records is a corrective to the traditional view, reflected in the secondary literature, that Whitehall imposed the independence constitutions with little or no regard for local conditions . . . .").

75. *See id.* at 15 ("At the apogee of the process, the pace of constitutional change was rapid with independence coming in quick succession to Tanganyika (1961), Uganda (1962), Kenya (1963), Zanzibar (1963), Northern Rhodesia (1964) and Malawi (1964) . . . followed by Botswana (1966), Lesotho (1966), and Swaziland (1968).").

76. *Id.* at 16.

77. Ibhawoh, *supra* note 38, at 845-46.

78. *See* HATCHARD ET AL., *supra* note 25, at 16; *see also* Ibhawoh, *supra* note 38, at 845 ("Legal recognition and protection of rights in the colonial states of Africa was belated and inadequate, with constitutions hastily created at independence being in many cases the first significant expression of them.").

79. *See infra* notes 88, 93, 94 and accompanying text (discussing the exclusion of personal law from constitutions).

80. *See* H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa,* 80 TUL. L. REV. 1239, 1244 (2006).

tors have suggested that the independence constitutions failed "not so much [because of] a failure by Africans to learn the lesson of parliamentary government: rather the lesson of authoritarian colonial rule was taught and learnt too well."[81] Some of these nations experienced long periods of military rule and corresponding constitutional suspension.[82] In others, the focus on economic development eclipsed any emergent rights discourse.[83] During this time, authoritarian rule characterized many of these young states.[84]

The 1990s, however, ushered in a new wave of constitutionalism on the continent.[85] "Postcolonial Africa's first ever prodemocracy constitutional moment had finally arrived, and the 1990s would be characterized by vigorous constitution-making . . . ."[86] Several events served as a catalyst for this "constitutional moment," including "the ending of the Cold War, the Harare Commonwealth Declaration's influence and pressure from international donors through the linking of economic aid with good governance . . . ."[87] As part of the "new constitutionalism" in Africa, many states amended their constitutions and eliminated exclusionary clauses in an effort to more fully protect fundamental human rights.

II. *THE CONTOURS OF THE EXCLUSIONARY CLAUSES*

Despite the wave of constitutional reform in the 1990s, eight countries in Commonwealth Africa have retained exclusionary clauses in their constitutions. The constitutions of Botswana, Gambia, Kenya, Lesotho, Mauritius, Sierra Leone, Zambia, and Zimbabwe contain exclusionary provisions.[88] Although slight

81. Slinn, *supra* note 16, at 6.

82. *See* Prempeh, *supra* note 80, at 1243-44 ("In countries such as Nigeria and Ghana, where the national experience since the 1960s has been one of an alternating cycle of (long) military and (short) democratic rule, the current constitutions represent their fourth or fifth attempt at constitutionalism . . . .").

83. *See id.* at 1267.

84. *See id.* at 1265.

85. *See* Oloka-Onyango, *supra* note 24, at 1 (referring to "[n]ew winds" of constitutionalism on the continent).

86. Prempeh, *supra* note 80, at 1275.

87. HATCHARD ET AL., *supra* note 25, at 22.

88. Botswana, which gained independence from the British in 1966, still retains an exclusionary clause in its constitution. *See* BOTS. CONST. s. 15(4)(c) (amended 1997); HATCHARD ET AL., *supra* note 25. Despite amendments to the constitution in 1969, 1987, 1996, and 1997, section 15 of the constitution continues to specifically exclude

variations exist, each country's exclusionary clause is similar in both form and content. The clause begins with a commitment to non-discrimination based on articulated grounds.[89] Some of the constitutions in question specifically list sex or gender as a

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issues related to "adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law" from the protection of the non-discrimination clause. BOTS. CONST. s. 15(4)(c) (amended 1997).

The first Gambian Constitution was promulgated in 1970 and contained an exclusionary clause. The second and most recent promulgation of the Constitution was in 1996 and incorporated the same exclusionary language in section 33, which states that the non-discrimination provision shall not apply to "adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law." GAMBIA CONST. s. 33 (1997). Ironically, at the same time that the Constitution retained its exclusionary clause, the 1996 amendments also added broader constitutional protection for women pursuant to section 28. GAMBIA CONST. s. 28 (1997). This section, entitled "Rights of Women," states that "[w]omen shall be accorded full and equal dignity of the person with men" and "[w]omen shall have the right to equal treatment with men, including equal opportunities in political, economic and social activities." *Id.* It is unclear how the Gambian courts will resolve the apparent conflict between sections 28 and 33.

Kenya is currently in a period of constitutional transition. Although Kenya's current 1999 Constitution retains exclusionary language similar to the Constitutions of Botswana and Gambia, the new draft Constitution has eliminated the exclusionary clause. Kenyan voters, however, rejected the draft Constitution in a 2005 referendum. *See Kenyans Reject New Constitution*, BBC NEWS, Nov. 22, 2005, http://news.bbc.co.uk/1/hi/world/africa/4455538.stm. "In 1997, section 82 of the constitution was changed to outlaw sex discrimination." Kibwana, *supra* note 15, at 204. As with other exclusionary clauses, however, Article 82 of the Constitution makes the non-discrimination provision inapplicable to "adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law." CONSTITUTION, Art. 82 (1992) (Kenya). By contrast, the new draft Constitution eliminates Article 82 and includes additional protection for women in terms of non-discrimination, enumerated protections for women, and property rights of spouses. The Proposed New Constitution of Kenya, KENYA GAZETTE SUPP., Aug. 22, 2005, art. 38. Until the new Constitution is adopted, however, the exclusionary provision of the current Constitution continues to permit discrimination in family or personal law areas. Significant opposition remains, however, including from inside the government. "For example, a minister in the Office of the President Julius L. Sunkuli has clearly stated that women's civil society groups should not be part of the constitution making process." Kibwana, *supra* note 15, at 205.

Similarly, Mauritius amended its Constitution in 1995 with the goal of prohibiting discrimination based on sex. *See* U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Mauritius*, ¶ 6, U.N. Doc. CCPR/C/79/Add.60 (1996). Despite adding "sex" to the list of prohibited grounds for discrimination in 1995, the Constitution retains its exclusionary clause to date. MAURITIUS CONST. s. 16(3), 16(4)(c) (amended 2001). Sierra Leone, Zambia, and Zimbabwe also retain similar exclusionary provisions in their constitutions. SIERRA LEONE CONST. s. 27(4)(d) (amended 2000); ZAMBIA CONST. (Constitution Act 1991) s. 23(4); ZIMB. CONST. s. 23(3) (amended 2005).

89. *See supra* note 88 and accompanying text (quoting nearly identical language from the constitutions of Botswana, Gambia, and Kenya).

prohibited ground for discrimination.[90] Others do not.[91] In those countries that do not explicitly list sex or gender, however, women's rights activists have successfully challenged those provisions as implicitly incorporating gender.[92]

In each of the constitutions with exclusionary clauses, two different types of exclusionary clauses follow the general non-discrimination clause. The first clause excludes personal or family law, and the second excludes customary law. Although there is considerable overlap between personal law and customary law, the exclusionary clauses address them separately.[93]

Lesotho provides an example.[94] Section 18(1) of Lesotho's Constitution states, "[s]ubject to the provisions of subsections 4 and 5 no law shall make any provision that is discriminatory ei-

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90. *See, e.g.*, LESOTHO CONST. s. 18(3) (1993).

91. Interestingly, the non-discrimination provision of the Constitution of Botswana does not explicitly include gender. It prohibits discrimination on the basis of "race, tribe, place of origin, political opinions, colour or creed . . . ." BOTS. CONST. s. 15(3) (amended 1997).

92. In the now famous case of *Attorney General v. Dow,* for example, the Botswana Court of Appeal held that gender was included in this list of prohibited grounds, albeit implicitly. *See* Unity Dow v. Att'y Gen., *reprinted in* 15 HUM. RTS. Q. 614 (Bots. High Ct. 1991); Lisa Stratton, *The Right to Have Rights: Gender Discrimination in Nationality Laws,* 77 MINN. L. REV. 195, 231 (1992) (noting the court's observation in *Attorney General v. Dow* that "[a] ruling excluding gender from the equal protection provision of the Constitution would not be consistent . . . ."); Vicki Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality,* 37 LOY. L.A. L. REV. 271, 296-97 (2003) (stating that the holding in *Attorney General v. Dow* rejected "a reading of the Botswana Constitution as excluding protection from gender discrimination."). Although the *Dow* case and the concomitant recognition of gender as a prohibited ground for discrimination was a significant victory for women's rights, the retention of the exclusionary clause in the Constitution represents a critical obstacle in achieving equal rights for women in the country.

93. In some countries, for example, a couple may choose to marry according to statutory, customary, or religious law. *See, e.g.*, Bond, *supra* note 12, at 182. If a woman married under the statutory law, a hypothetical discrimination claim related to her divorce would be banned from constitutional consideration by the exclusion of personal law from the constitution. If a woman, who was married according to customary law, asserted the same claim, her claim would be excluded under both the exclusionary clause for personal law and the exclusionary clause for customary law.

94. Lesotho retains an exclusionary clause despite the fact that the country adopted a new Constitution in 1993, after twenty-three years of operating under a suspended independence constitution. *See* LESOTHO CONST. s. 18(4) (1993). Even though the early 1990s brought a wave of equality-based constitutional reform in the Commonwealth, Lesotho opted to retain its exclusionary clause. As a result, section 18(4)(b) contains the same language described above, excluding personal law from the protection of the non-discrimination provision of the Constitution. *See id.*

ther of itself or in its effect."[95] Subsection 3 then defines "discriminatory" to mean "different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion . . . ."[96] Subsection 4, which qualifies the non-discrimination provision, then states:

> Subsection (1) shall not apply to any law to the extent that that law makes provision . . . with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons . . . ; or (c) for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law.[97]

Other countries in the African Commonwealth have eliminated or simply not included exclusionary clauses in their more recent constitutions.[98] Cameroon, Ghana, Malawi, Mozambique, Namibia, Nigeria, Seychelles, South Africa, Swaziland, Tanzania, and Uganda are examples of African Commonwealth countries that do not have exclusionary clauses in their constitutions.[99] Many of these constitutions are a product of the wave of constitutional reform that passed through the continent in the 1990s.[100]

III. *THE HUMAN RIGHTS MANDATE: PRAGMATIC REASONS FOR ELIMINATING EXCLUSIONARY CLAUSES*

A. *The Convention On The Elimination Of Discrimination Against Women*

International human rights law requires states to eliminate constitutional exclusionary clauses. Of the eight Commonwealth African countries that have retained exclusionary clauses, all have ratified the Convention on the Elimination of All Forms

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95. *Id.* s. 18(1).

96. *Id.* s. 18(3).

97. *Id.* s. 18(1).

98. Saras Jagwanth & Christina Murray, *"No Nation Can Be Free When One Half of It is Enslaved": Constitutional Equality for Women in South Africa, in* THE GENDER OF CONSTITUTIONAL JURISPRUDENCE, *supra* note 5, at 230, 231 (noting that although traditional leaders in South Africa asserted that "gender equality could not extend to traditional systems," advocates for gender equality prevailed and defeated this attempt to add an exclusionary clause to the new South African Constitution).

99. *See,* e.g., UGANDA CONST. art. 21(3) (1995). Uganda's non-discrimination provision contains no exclusionary clause. *See id.*

100. *See* CTR. FOR REPRODUCTIVE LAW & POLICY, *supra* note 20, at 10.

of Discrimination Against Women ("CEDAW").[101] Article 2(f) of CEDAW obligates States Parties "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."[102] Article 5 requires States Parties to "modify the social and cultural patterns of the conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes."[103] Article 16 of CEDAW requires that States Parties eliminate discrimination against women in "all matters relating to marriage and family relations."[104] The Convention requires application of constitutional equality guarantees to family or personal law.[105]

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101. *See* Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, art. 5, 1249 U.N.T.S. 13 [hereinafter CEDAW]. Lesotho ratified CEDAW with a reservation to Article 2 "to the extent that it conflicts with Lesotho's constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and the law relating to succession to chieftainship." *Id.*

102. *Id.* art. 2(f).

103. *Id.* art. 5.

104. *Id.* art. 16.

105. *See* Donna Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795, 799-800 (1992). Although not binding on many of the states that have retained exclusionary clauses, the Protocol to the African Charter on the Rights of Women also requires elimination of the clauses. *See* 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 the Protocol]. Articles 6 and 7 of the Protocol, which address rights within marriage and divorce, respectively, provide additional support for the elimination of exclusionary clauses. *See id.* arts. 6-7. With respect to marriage, Article 6 obligates States Parties to enact national legislation that requires the "free and full consent of both parties," establishes eighteen as the minimum age for marriage for women, guarantees women nationality rights, establishes marital property rights for women, and safeguards a number of other rights within marriage. *Id.* art. 6. Although the content of these rights is important, the fact that the Protocol imposes an obligation on states to ensure these rights for all women, *regardless of the type of marriage*, is perhaps even more significant. *See id.* This willingness to apply human rights norms without deference to culture in the marriage context lends further support to the elimination of constitutional exclusionary clauses.

In many countries, marriage remains subject to a plurality of laws, meaning that a woman's rights within marriage may vary significantly depending on the type of marriage into which she has entered. The Protocol supports the enactment of a constitutional non-discrimination standard applicable to marriage and other aspects of personal law. Article 7, which deals with divorce, also provides minimum standards with which a State Party must comply and makes no allowances for customary or religious marriages. *See id.* art. 7.

B. *Regional Human Rights Law*

In addition to CEDAW, regional human rights law supports this type of constitutional reform.[106] African regional human rights law is instructive for several reasons. First, the continent is largely viewed as a subject of, rather than a source of, human rights law.[107] The region has been plagued by some of the most intractable human rights problems, and early institutions such as the Organization of African Unity proved to be ineffective.[108] Nevertheless, African scholars and activists have made enormous contributions fighting massive human rights violations.[109] The African Union holds greater promise than its predecessor, and African scholars and activists have begun to generate a body of law that responds effectively to these challenges.[110] This perception of the region as the "recipient" of human rights law is reminiscent of the "received" law during colonialism and masks the important ways that African human rights activists are contributing to norm development and internalization in the region.[111]

Second, partly because of the region's colonial past, some on the continent view international human rights norms as a product of a western, hegemonic project.[112] This is, in my view, an inaccurate perception of the contributions and potential of international human rights law. Nevertheless, regional human rights mechanisms offer another source of human rights law that may be viewed with less skepticism than international sources of law.[113]

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106. *See infra* notes 114-35 and accompanying text (discussing regional efforts to eliminate discrimination against women).

107. *See* Jeremy I. Levitt, *Africa: Mapping New Boundaries in International Law*, 98 AM. SOC'Y INT'L L. PROC. 231, 231 (2004) ("African states, intergovernmental organizations, and civil society institutions have contributed to the evolution of the corpus of international law by confirming the existence of norms through formal and informal law-making processes and have been fashioning new regimes through state practice and treaty making.").

108. *See* Wing & Smith, *supra* note 34, at 54-56.

109. *See* Bond, *supra* note 12, at 3-11.

110. *See* Wing & Smith, *supra* note 34, at 66-79.

111. *See* Adrien Wing, Jeremy Levitt, & Craig Jackson, *The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift?*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 1, 1 (2003) ("In the Western hemisphere, Africa is frequently viewed as a basket case and 'welfare continent' rather than a market place and exporter of values and norms.").

112. *See* Banda, *supra* note 44, at 3 (discussing Shiuji's thoughts on the human rights agenda).

113. *See id.* at 5, 6, 13; Sebastian Maguire, *The Human Rights of Sexual Minorities in*

Third, African women rights activists, like their colleagues around the world, have grappled with the question of how best to protect women's rights while simultaneously protecting rights to culture and religion. In November 2005, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (the "Protocol"), a progressive document that articulates a wide range of women's human rights, came into force.[114] The document, which African women's rights organizations played a significant role in drafting, represents a balance between the preservation of custom and the embrace of gender equality. Despite an articulated commitment to preserving the positive aspects of culture, the Protocol explicitly subjects marriage and family law to equality standards and preserves a voice for women in the establishment and interpretation of cultural policies.

The African Charter on Human and Peoples' Rights (the "Charter") offers protection for women's rights within countries that have ratified the Charter.[115] Article 18 of the Charter calls on States Parties to ensure the "elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."[116] The Protocol on the Rights of Women was designed to supplement the women's rights provisions of the Charter and to enhance the protection offered by the Charter.[117]

Because most of the countries that have retained an exclusionary provision in their constitutions have not ratified the Pro-

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Africa, 35 CAL. W. INT'L L.J. 1, 40 (2004) (suggesting that "[d]evelopments at the regional level are . . . less likely to encounter resistance based on cultural relativist arguments . . . [when] the debate between universality and cultural relativism is . . . carried out in regional human rights systems that have a more nuanced understanding of and sensitivity to the concerns of constituent states.").

114. As of January 2006, the following countries had ratified the Protocol: Benin, Cape Verde, The Comoros, Djibouti, Gambia, Lesotho, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, South Africa and Togo. *See* Equality Now, Protocol on the Rights of Women in Africa, http://www.equalitynow.org/english/campaigns/african-protocol/african-protocol_en.html (last visited Oct. 21, 2007).

115. African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5 (entered into force Oct. 21, 1986).

116. *Id.* art. 18.

117. *See supra* note 105 and accompanying text (pointing out various ways that the Protocol advances the rights of women).

tocol, it is not legally binding on those countries.[118] The Protocol, nevertheless, represents a critical articulation of African women's human rights.[119] Because African women played a significant role in the drafting of the Protocol, it is less susceptible to the criticisms often leveled at human rights advocates, namely that they seek to impose a Western view of rights upon the African continent.[120]

The Protocol represents a far-reaching statement of women's rights on the continent.[121] Article 2 of the Protocol unambiguously obligates States that have ratified the Protocol to "combat all forms of discrimination against women through appropriate legislative, institutional and other measures."[122] The provision specifies that States Parties shall: "include in their national constitutions and other legislative instruments . . . the principle of equality between women and men and ensure its effective application."[123] This obligation to promote equality through the national constitution suggests that eliminating the exclusionary provisions would further the objectives of the Protocol.

A number of other provisions refer, either explicitly or implicitly, to the obligation of a State Party to protect against discrimination even if the non-discrimination right encroaches on other rights such as cultural rights.[124] Specifically, Article 2 refers to the obligation to enact legislation "curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women."[125] Article 5 of the Protocol also obligates States Parties to eliminate harmful

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118. *See supra* note 114 (listing the countries that have ratified the Protocol). *See generally* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

119. *See* Wing & Smith, *supra* note 34, at 78 (calling the Protocol "the most promising vehicle at the AU's disposal for promoting and protecting African women's rights.").

120. A determined cultural relativist might still claim that those African women were influenced by a western notion of rights, undermining their credibility as activists and agents of change.

121. *See* Wing & Smith, *supra* note 34, at 79.

122. Protocol, *supra* note 105, art. 2.

123. *Id.*

124. *See, e.g., id.* art. 5 (discussing the elimination of harmful practices against women in both private and public spheres).

125. *Id.*

practices.[126] The reference to "harmful practices" suggests that there is a subset of cultural or traditional practices that are harmful to women.[127] Because harmful practices sometimes thrive in the personal and customary arena,[128] exempting such practices from constitutional scrutiny hurts women and violates the spirit of both Articles 2 and 5.[129] Under the language of the Protocol, a non-discrimination provision that excludes personal and customary law would not be acceptable.[130] This subset of harmful cultural practices should, at a minimum, be subject to equality guarantees—whether they are international, regional, or domestic.

Articles 6 and 7 of the Protocol, which address rights within marriage and divorce, respectively, provide additional support for the elimination of exclusionary clauses.[131] In many countries, including those that have retained exclusionary clauses in their constitutions, marriage remains subject to a plurality of laws, meaning that a woman's rights within marriage may vary significantly depending on the type of marriage into which she has entered.[132] With respect to marriage, Article 6 obligates States Parties to enact national legislation that requires the "free and full consent of both parties," establishes eighteen years as

126. *Id.*

127. Harmful practices should not be equated with cultural practices. *See* Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483, 493–94 (2002) (distinguishing cultural practices that cause pain and suffering). Doing so creates the misimpression that all cultural practices are harmful to women, thereby perpetuating the stereotype that women from the global south are purely victims of culture. *See id.* at 513. This elides the fact that women in the global north are also victims of culture and ignores the agency the women in the global south exert to define positive culture and resist negative forms of culture. *See id.* ("The legacy of a colonial paternalism that posits the third world female as victim still triggers a great deal of resentment even among those who are generally favorable to women's rights.").

128. *See, e.g.*, Wing & Smith, *supra* note 34, at 39 (discussing, inter alia, child marriage, sororate marriage, and bride price).

129. *See, e.g.*, Martin Semalulu Nsibirwa, *A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women*, 1 AFR. HUM. RTS. L.J. 40, 43-45 (2001) (analyzing the scope of the articles of the Protocol that address the elimination of discrimination and harmful practices against women).

130. *See id.* at 49 (stating that the Protocol emphasizes the role of women by eradicating "negative cultural practices" and by "promoting positive ones . . . especially in very traditional societies . . . [where] women have played a role in the continuation of negative practices that affect them.").

131. *See* Protocol, *supra* note 105, arts. 6-7.

132. *See* Bond, *supra* note 12, at 182.

the minimum age for marriage for women, guarantees women nationality rights, establishes marital property rights for women, and safeguards a number of other rights within marriage.[133] Although the content of these rights is important, the fact that the Protocol imposes an obligation on States to ensure these rights for all women, *regardless of whether they have married according to statutory, customary, or religious law,* is perhaps even more significant.[134] Similarly, Article 7, which deals with divorce, also provides minimum standards with which a state party must comply and makes no allowances for customary or religious marriages. This willingness to apply human rights norms without deference to culture in the marriage context further supports the elimination of constitutional exclusionary clauses.[135]

IV. *THEORETICAL JUSTIFICATIONS FOR ELIMINATING EXCLUSIONARY CLAUSES: RECONCILING CUSTOMARY LAW AND CONSTITUTIONAL LAW*

A. *Accommodating Multiculturalism And Gender*

Human rights activists have embraced the concept of universalism in an effort to ensure that all people enjoy fundamental human rights regardless of their national, ethnic, cultural, or other affiliation.[136] Relativists, by contrast, have argued that it may be necessary to deviate from basic human rights standards depending on the cultural context.[137] The debate has been highly polarized and largely unproductive. Nowhere is this more pronounced than in the debate over women's human rights.[138]

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133. Protocol, *supra* note 105, art. 6.

134. The potential benefit and harm of a uniform marriage law in any of the countries discussed is outside the scope of this Article. Articles 6 and 7, however, demonstrate a commitment to applying human rights norms without deference to cultural law or practice.

135. *See* ANNE-MARIE MOONEY COTTER, GENDER INJUSTICE: AN INTERNATIONAL COMPARATIVE ANALYSIS OF EQUALITY IN EMPLOYMENT 122 (2004) ("On the issue of marriage, Article 7 guarantees that State Parties shall ensure that man and women enjoy equal rights and are regarded as equal partners in marriage . . . [and States Parties] shall enact appropriate national legislative measures to ensure that during her marriage, the women shall have the right to acquire her own property . . . .").

136. *See* Higgins, *supra* note 1, at 92 (stating that the Universal Declaration of Human Rights "embraced the assumption of the universality of human rights.").

137. *See id.* at 95 ("Opposing the various theories offered as justifications for the existence of universal human rights, cultural relativism reflects skepticism about the availability of universal norms.").

138. *See* Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic*

In response to the perceived conflict between women's equality rights and the preservation of culture, Susan Moller Okin, in 1999, posed the question *Is Multiculturalism Bad for Women?*[139] Okin's question provoked considerable response from feminists both sympathetic to and antagonistic of the efforts of multiculturalists.[140] Professor Leti Volpp cogently argues that it is misrepresentative to characterize the relationship between gender equality and culture as oppositional.[141]

The binary construction of multiculturalism versus equality is objectionable on several grounds. First, it leads to the view that women are either victims of an oppressive culture (as in the global south) or beneficiaries of relative equality (as in the global north).[142] It elides the many ways that women in the global south resist oppression on a daily basis and the ways that women in the global north succumb to it. Second, the binarism encourages women to align themselves on one side of the purported divide. Women must, in other words, identify as either gendered beings or cultured beings—but not both.[143] This approach ignores the reality that the vast majority of the world's women enjoy membership in ethnic, religious, and cultural communities. As such, feminists and multiculturalists must employ a more complex analysis that values and accommodates both multiculturalism and gender equality.[144]

In the context of the constitutional exclusionary provisions

Exploration of Women's International Human Rights Violations, 52 EMORY L.J. 71, 71-76 (2003).

139. *See* Okin, *supra* note 2.

140. *See* BENHABIB, *supra* note 3, at 86.

141. "To posit feminism and multiculturalism as oppositional is to assume that minority women are victims of their cultures." Volpp, *supra* note 26, at 1181; *see also*, Higgins, *supra* note 1, at 103-04.

142. *See* Volpp, *supra* note 26, at 1185 ("This is due to the assumption that non-Western women are situated within cultural contexts that require their subordination, achieved by a discursive strategy that constructs gender subordination as integral to their culture.").

143. *See id.* at 1199 ("[T]he assumption in the discourse of feminism versus multiculturalism is that women can live their lives only as women, rather than as parts of other communities, so that their subjectivity is constructed only by gender."); *see also* Bond, *supra* note 138.

144. As Madhavi Sunder observes with respect to women's equality and religious freedom, "[r]ather than accepting the binary framework of religion (on traditional leaders' terms) or rights (without normative community), activists are developing strategies and new human rights theory that enable women to claim freedom and equality within the context of normative community." Sunder, *supra* note 7, at 1406.

described above, the colonial powers determined that it was in their interest to preserve multiculturalism at the expense of gender equality.[145] Akua Kuenyehia observes, "[c]olonial administrators put up with customary law so long as natives used it to regulate matters among themselves and their actions did not threaten colonial rule."[146] In an effort to facilitate colonial administration, the colonial authorities ceded power over the "private" realm of family law and allowed local, indigenous authorities to resolve disputes involving family or customary law.

B. *Public/Private Dichotomy*

States and liberal theorists often maintain a distinction between the public realm, in which legal regulation is deemed natural and appropriate, and the private realm, in which such regulation is deemed offensive to individualist notions of privacy.[147] The "public" or "private" designation is politically meaningful.[148] Depending on which side of the dichotomy a particular activity falls, it will either be imbued with a sense of public importance and corresponding state regulation or triviality and corresponding deference to privacy and particularity.[149] Liberal theory has primarily concerned itself with abuses of state power rather than abuses of private power.[150] The realm of the public thus becomes the primary subject of public discourse and scrutiny; the realm of the private remains sheltered from public debate.[151]

For two decades, feminist scholars have been working to dis-

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145. *See* Kuenyehia, *supra* note 36, at 389.

146. *Id.*

147. *See* Martha Albertson Fineman, *Feminist Legal Theory*, 13 AM. U. J. GENDER SOC. POL'Y & L. 13, 20 (2005).

148. *See id.*

149. *See* BENHABIB, *supra* note 3, at 85.

150. *See* James Boyle, *Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORNELL L. REV. 371, 394 (1993) ("Many flavors of liberal state theory take as definitionally true that abuses of public power are more to be feared than abuses of private power . . . that autonomy is more legitimately the concern of the state than equality"). The private sphere, inhabited by women and families, has historically been accorded less value than the masculine public sphere of the "work place, the law, economics, politics and intellectual and cultural life." Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 626 (1991).

151. *See* Martha Albertson Fineman, *Gender and Law: Feminist Legal Theory's Role in New Legal Realism*, 2005 WIS. L. REV. 405, 414 (2005).

mantle the public/private dichotomy.[152] Feminists have argued that shielding the private sphere from public scrutiny serves to perpetuate male domination in the family.[153] In the United States, feminists have demonstrated how domestic violence and sexual violence in the home harm women and require state intervention.[154]

In the international context, feminists have successfully challenged the traditional focus of the international human rights movement on public or state action.[155] Historically, the human rights community challenged actions by the state that intruded on individual (male) rights against arbitrary state intervention.[156] Civil and political rights were constructed as public rights and enjoyed a privileged status within the hierarchy of human rights.[157]

By the 1990s, international feminists had transformed human rights law in a profound way. The traditional focus on states that violated human rights through state-sponsored "public" acts gave way to an expanded notion of state accountability for human rights.[158] The expanded doctrine of state responsibility holds states accountable for systemically failing to act with due diligence to prevent, investigate, or punish the acts of private actors.[159] As such, the human rights community began to offer hope to victims of violence within the private sphere as well

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152. *See, e.g.*, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

153. Tracey E. Higgins, *Why Feminists Can't (Or Shouldn't) Be Liberals*, 72 FORDHAM L. REV. 1629, 1629 (2004).

154. *See, e.g.*, ELIZABETH SCHNIEDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000).

155. *See* Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, *in* WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 14 (Julie Peters & Andrea Wolper eds., 1995) ("The distinction between private and public is a dichotomy largely used to justify female subordination and to exclude human rights abuses in the home from public scrutiny.").

156. *See* Bond, *supra* note 138, at 88-89.

157. *See* Dorothy Thomas, *In Defense of the Civil and Political Rights of Women*, *in* FROM BASIC NEEDS TO BASIC RIGHTS 42 (Margaret Schuler ed., 1995) ("The critique of this public/private distinction and thus of the gendered character of traditional concepts of civil and political rights, challenges the historical primacy of these rights as well.").

158. *See* Bond, *supra* note 138, at 88-90.

159. *See, e.g.*, Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (Dec. 20, 1993).

as victims of state violence in the public sphere.[160] Within international human rights discourse, this dismantling of the public and private spheres indicated an international consensus that the private realm should enjoy the same level of scrutiny as the public realm.

The dismantling of the public/private dichotomy, however, is incomplete both in theory and practice. Although the family is viewed as private, states around the world continue to vigorously regulate it.[161] In many parts of the world, for example, the state regulates family form.[162] State regulation determines who qualifies as a family and, as a corollary, who benefits from that status.[163] In much of Commonwealth Africa, the state is actively involved in choice of law questions concerning the family.[164] In other words, even a family dispute that is controlled by customary law rather than statutory law may require a judicial determination to that effect.[165]

In addition to resolving choice of law questions concerning family law, the state actively constructs and reconstructs the public/private divide through legislation.[166] In countries that have retained constitutional exclusionary clauses, for example, the state has carved out areas of law that are considered "personal" or "private" and are not subject to constitutional scrutiny. This distinction between public and private was enshrined in the independence constitutions when the non-discrimination provisions were drafted to specifically exclude personal or family law from protection.[167]

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160. *See* U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work for the Commission*, ¶1, U.N. Doc. E/CN.4/1996/53/Add.2 (February 2, 2006) (*prepared by* Radhika Coomaraswamy).

161. *See generally* Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307 (2004).

162. *Id.*

163. *Id.*

164. *See supra* notes 55-62 and accompanying text (describing plural legal systems).

165. *See generally* John W. van Doren, *Death African Style: The Case of S. M. Otieno*, 36 AM. J. COMP. L. 329 (1998).

166. Remarking on the state's role in maintaining the public/private distinction, Martha Fineman observes, "[b]y scooping out what is public, [the state] also defines what remains public." Fineman, *supra* note 151, at 412.

167. Indeed, as Madhavi Sunder observes concerning religious law, "[t]he revolutionary concept of enlightenment was acceptable precisely because it did not reject, but rather cabined, religion, attempting to control religious passions by carefully tucking them away in the private sphere." Sunder, *supra* note 7, at 1418.

During the colonial and independence periods, however, this critique of the public/private split had yet to take hold. While the colonial authorities expressed no hesitation regarding legislating in the public sphere, they readily carved out the realm of family and personal law as an area that was simply less important and one into which they would not intrude.[168] Feminist scholars have demonstrated, however, that the law actively constructs the private sphere even while professing non-interference.[169] Sunder observes, "[i]n ceding complete authority to religion without subjecting it to tests of rationality and legitimacy, law plays a far more active role in defending a particular conception of religion and, ultimately, in obstructing change."[170] Although Sunder refers to religion here, in the context of Commonwealth Africa, the law plays an equally active role in constructing culture and customary law as patriarchal systems by refusing to subject these areas to constitutional non-discrimination law.

For many years, feminist scholars and activists have exposed as faulty the construction of distinct spheres of public and private. Feminists have also long criticized the prioritization of the public sphere over the private sphere, collapsing the categories and emphasizing their interrelatedness.[171] In the case of constitutional exclusionary clauses, the state is, therefore, actively maintaining a dichotomy that has been discredited by feminists for decades.

Feminists have also demonstrated the gendered nature of law.[172] Feminists around the world have demonstrated how facially neutral laws can have a disproportionate effect on women, making them discriminatory in application or effect.[173] The exclusionary clauses are facially neutral.[174] They exclude matters related to: "adoption, marriage, divorce, burial, devolu-

168. *See* Charlesworth et al., *supra* note 150, at 627 ("[T]he law has always operated primarily within the public domain; it is considered appropriate to regulate the work place, the economy and the distribution of political power, while direct state intervention in the family and the home has long been regarded as inappropriate.").

169. *See id.*

170. Sunder, *supra* note 7, at 1420-21.

171. *See generally* Charlesworth et. al., *supra* note 150.

172. *See id.*

173. *See id.*

174. *See id.*

tion of property, or other matters of personal law."[175] In each of these constitutions, there is another exclusion for customary law.[176] Both exclusionary clauses have a disproportionately negative effect on women. The areas of the law carved out in the exclusionary provisions are those areas that most commonly affect women in their relationships with children, spouses, and parents. In addition, customary law continues to govern the legal disputes of the vast majority of women in these countries, applying almost uniformly in rural areas. Familial rights for these women are thus doubly excluded from constitutional protection. As Catharine MacKinnon has observed with respect to personal laws in India, "[o]nce it is recognized that the family is a terrain of sex inequality, calling the law of that arena personal is revealed as little more than a way of precluding women's assertion of equality there."[177] Rather than impose a non-discrimination standard in the private sphere, the exclusionary clauses impose the public/private divide onto definitions of equality and non-discrimination.[178]

The feminist critique alone does not adequately explain the exclusion of personal and customary law from the post-colonial constitutional domain. Racism and Eurocentrism also played an important role in rendering African personal law external to the constitution. As Achille Mbembe observes in describing the status of the colonized or the "native," "[c]onsigned unilaterally to a sort of minority without foreseeable end, he/she cannot be a subject of politics, a citizen."[179] The colonial powers perceived the colonial subject as unworthy of law. The African woman is thus located at the intersection of mutually reinforcing colonial biases: the belief that the African colonized subject is unworthy of the public sphere of law; and the belief that women must occupy the private sphere free from state intervention.

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175. *See, e.g.*, LESOTHO CONST., s. 18(4) (1993).

176. *See supra* note 93 and accompanying text.

177. MacKinnon, *supra* note 62, at 197.

178. Tracey Higgins makes this point in a slightly different context. Discussing the limitations of Rawlsian liberalism, Higgins observes: "The response, too often, is not to extend the principle of equality fully into the private realm, but to extend the public/private boundary into the definition of equality." Higgins, *supra* note 153, at 1640-41.

179. ACHILLE MBEMBE, ON THE POSTCOLONY 35 (2001).

C. *Dialogic Constitutionalism and Women's Agency*

Some feminists would undoubtedly advocate eliminating customary law in its entirety.[180] Although appealing in its simplicity, such an approach would generate little positive change for women and would create a harmful backlash against efforts to ensure women's equality.[181] In addition, it would harm women who enjoy the positive aspects of membership in their cultural communities and who embrace the non-discriminatory aspects of customary law.[182]

Instead, women who live in those countries that have retained exclusionary provisions must have a voice in defining the content of customary and personal law. One of the best ways to ensure that women have a voice in the development of customary and personal law is to subject such laws to constitutional scrutiny. In this way, women who challenge customary or personal law are participants in and initiators of a dialogue that will shape the contours of customary law and gender equality law. Women will have a role in the preservation of custom, but one that also allows them to redefine customary and personal law consistent with constitutional equality norms.

Theories of dialogic constitutionalism offer support for ensuring that women have a voice in the development of constitutional equality norms. Although most theorists have focused on the constitutional dialogue that occurs (or should occur) between courts and the legislative branch, some have expanded the scope of the dialogic inquiry to include other constitutional actors.[183] Construed broadly, the category of constitutional ac-

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180. Celestine Nyamu refers to this approach as the abolitionist approach. She observes, "[s]ome critics have pointed out that these abolitionist responses create the impression that women's rights do not exist in custom or local practice . . . ." Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L.J. 381, 393 (2000).

181. *See id.* at 393-94.

182. *See id.*

183. *See* Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1109 (2006). In describing theories of constitutional dialogue, Bateup states, "when exercising the power of judicial review, judges engage in an interactive, interconnected and dialectical conversation about constitutional meaning. In short, constitutional judgments are, or ideally should be, produced through a process of shared elaboration between the judiciary and other constitutional actors." *Id.*

tors includes women seeking to challenge and redefine discriminatory personal and customary laws.

For over a century, scholars in the United States have been concerned that judicial review is anti-democratic and leads to the "countermajoritarian difficulty."[184] Dialogue theories have gained currency in recent years as a response to concerns about democratic legitimacy.[185] Dialogue theorists recognize that judges are not the exclusive arbiters of constitutional meaning.[186] They suggest that it is the dialogue between judges, legislatures, and citizens that determines constitutional meaning.[187] Although much dialogue theory has focused on the U.S. Constitution and the Canadian Charter of Rights and Freedoms, many of its insights apply in other regions of the world.[188]

Barry Friedman, among others, has recognized that popular opinion informs constitutional dialogue.[189] This version of dialogue theory values both the judicial resolution of constitutional questions and the resulting public dialogue that engages the people in resolving contested questions of constitutional meaning.[190] Christine Bateup also supports a more expansive, positive account of dialogue theory, one which promotes and values the society-wide dialogue that informs and is informed by constitutional interpretation.[191]

Christine Bateup observes, "[t]he best way to . . . foster the legitimacy of constitutional commitments to rights as important expressions of a nation's self-understanding may well be adapting or designing systems of constitutional dialogue in a way that

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184. *Id.* at 1113.

185. *See id.* at 1118.

186. *See id.*

187. *See id.* at 1122.

188. *See id.* at 1109-11.

189. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 645 (1993).

190. Christine Bateup, *Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective*, 21 TEMP. INT'L & COMP. L.J. 1, 20 (2007). Bateup remarks: "On this understanding, judicial decisions are important not only because of what judges say about the resolution of constitutional issues, but also because when judges decide cases they spark (or continue) a broader societal discussion about constitutional meaning." *Id.*

191. Bateup observes, "[t]he ultimate effect is to preserve popular input into constitutional debate, thereby ensuring that the Constitution is owned by the people, and that society as a whole plays a role in working out its fundamental commitments." *Id.* at 22.

recognizes the central place of the people in ongoing discussion about fundamental values."[192] The first step in any such dialogue regarding women's rights under personal or family law is a constitutional amendment that brings these laws within the purview of the constitution. Only then can a meaningful dialogue about the normative values of equality and culture take hold. Constitutional scrutiny is a *catalyst* for constitutional dialogue.

The process of constitutional amendment itself can initiate society-wide dialogue.[193] When the National Resistance Movement Government assumed power in Uganda in 1986, for example, it engaged in a nationwide inquiry to both assess the people's views concerning a new constitution and to raise public awareness of constitutionalism.[194] The efforts of the government to seek popular consensus on the constitution and its norms led to increased legitimacy of the document. In 1993, when South Africa began drafting its post-apartheid constitution, the nature and breadth of the gender equality provisions represented a significant battleground.[195] Traditional leaders fought to include an exclusionary clause that would place personal and customary law outside the purview of non-discrimination protection.[196] Although this effort was defeated, the public controversy raised consciousness about the issue and set the stage for the Constitutional Court to later resolve conflicts between customary law and constitutional equality guarantees.[197]

Some advocates negotiating a middle path between asser-

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192. Bateup, *supra* note 183, at 1166.

193. *See generally* Reva Seigel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

194. Hatchard, Ndulo, and Slinn observe:

> In an effort to address past horrors and to establish constitutional stability, the National Resistance Government upon assuming power in 1986 gave the people of Uganda an opportunity to make their new constitution. A twenty-one member Constitutional Commission was established that toured the country obtaining the public's view through a series of seminars, workshops, debates and discussions. Efforts to sensitize the public to pertinent constitutional issues were spearheaded by a user-friendly publication entitled *Guidelines on Constitutional Issues.* As a result, the Commission received 25,542 submissions and, based on these, it proceeded to produce a draft constitution.

HATCHARD, ET AL., *supra* note 25, at 29.

195. *See* Jagwanth & Murray, *supra* note 98, at 230.

196. *See id.* at 231 ("This approach would have excluded the majority of South African women from the benefit of an equality clause in the crucial areas of family law, inheritance, and property ownership.").

197. *See infra* notes 212-25 and accompanying text.

tions of cultural rights and gender equality have argued for the necessity of internal dialogue and cross-cultural collaboration. In Abdullahi An-Na'im's formulation, internal dialogue regarding the meaning of norms creates legitimacy and local support for those norms.[198] Without this legitimacy, the standards will mean little.[199] Cross-cultural collaboration complements this internal process by providing a dialogue across national borders that will inform the normative content of rights at the international level.[200] It is, however, the internal dialogue portion of the equation with which I am concerned here. The elimination of exclusionary clauses will further the internal dialogue in two significant ways. First, the process of amending the constitution to eliminate the exclusionary clauses will spark critical local and national debate concerning women's rights within different religious and cultural communities. Second, the eventual elimination of the exclusionary clauses will allow women, as constitutional actors and litigants, to initiate society-wide dialogue concerning how best to define custom in a way that reflects constitutional equality norms.

The move toward constitutionalization is not without controversy. This increased constitutionalism, and corresponding judicial review,[201] has led some to conclude that the shift from traditional democratic, representative institutions toward judicial enforcement of constitutional rights represents a "democracy deficit."[202] Proponents of this increased focus on constitutionalism maintain that judicial review provides a critical check on majoritarian power. In contrast, critics assert that constitu-

198. Abdullahi Ahmed An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment, in* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 19-21 (An-Nai'm ed., 1992).

199. *See id.*

200. For a discussion of the willingness to apply international human rights norms within Africa, see Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT'L L. 103, 137 (2002).

201. *See* Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71, 71 (2004). Hirschl observes: "Around the globe, . . . fundamental constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries." He adds, "[t]his global trend toward the expansion of the judicial domain is arguably one of the most significant developments in late twentieth and early twenty-first century government." *Id.*

202. Bateup, *supra* note 183, at 1114.

tionalism shifts power away from institutions of representational democracy, such as the national legislature, creating instead a "juristocracy."[203] The renewed interest in constitutionalism in Commonwealth Africa in the 1990s is, however, partly a response to authoritarian leadership, and the corresponding absence of democracy, in a number of African countries in the 1970s and 1980s.[204]

It is no coincidence that the rise in constitutionalism occurred contemporaneously with the dramatic ascendancy of human rights as a foundational principle in the latter half of this century.[205] In much of post-colonial Africa, newly independent governments have enthusiastically embraced the primacy of human rights, at least on paper. The experience of oppression by the colonial authorities and, in some countries, by post-colonial authoritarian leaders has undoubtedly increased receptivity toward the constitutionalization of human rights in the region.[206] Many South Africans, for example, take great pride in their new Constitution and its rejection of oppressive policies in favor of steadfast human rights guarantees.[207]

Rather than creating a democratic deficit, the new constitutionalism affords greater, albeit different, access to public debate and norm definition. Courts with judicial review limit majoritarian policy-making and safeguard access to constitutional litigation, which "facilitate[s] the political representation of diffuse but well-organized minorities."[208] Similarly, this new emphasis on the constitutionalization of human rights creates

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203. "Juristocracy" is Ran Hirschl's term for this shift in power and increased focus on constitutionalism at the expense of democratic politics. *See id.* at 73.

204. Hatchard, Ndulo, and Slinn observe:

> Many governments that emerged after independence soon became undemocratic, over-centralised and authoritarian. Predictably, political monopolies led to corruption, nepotism and abuse of power. Presidents (or Kings) replaced the colonial governor in fact and in deeds. This often led to the emergence of repressive one-party systems of government with the constitution being amended or re-made to reflect the new reality.

HATCHARD, ET AL., *supra* note 25, at 19.

205. *See* Hirschl, *supra* note 201, at 75.

206. *See generally* HATCHARD, ET AL., *supra* note 25.

207. *See id.*

208. Hirschl, *supra* note 201, at 78. It should be noted that Hirschl does not subscribe to this view but is merely describing the position of other commentators. In describing those views, Hirschl observes, "[t]his representation creates opportunities for certain groups to participate in policy-making processes that might otherwise be closed to them in majoritarian politics." *Id.*

new opportunities for individuals to exercise agency in the pursuit and enforcement of those rights.[209] In Commonwealth Africa, the opportunity for women to exercise constitutional agency to challenge discriminatory personal or customary laws is crucial to the realization of women's rights in the region. Because it dramatically affects women's legal and economic relationships with spouses, parents, and children, personal and customary law is the lynchpin for gender equality. As such, allowing women a voice in determining its content and parameters will improve women's status in their homes and in their communities, leading to increased participation in traditional democratic forums.

Critics, alleging that the new constitutionalism creates a democracy deficit, typically assert that the legislature allows for greater participation through the legislative process.[210] In the case of African customary law, however, those assertions become less relevant. In post-colonial Commonwealth Africa, traditional male leaders still play a significant role in determining and interpreting cultural norms and customary law.[211] Unlike the system of representative government, however, these are not standard representative roles.[212] Although traditional chiefs may have the interests of individual community members in mind, the system is not set up to be a formal system of representation, which would provide a "voice" for the politically less powerful.[213] Unlike legislation, customary law is passed down through the generations and offers little to no opportunity for women to voice opposition or support for a particular interpretation of customary law. Judicial examination of customary law against constitutional standards, then, has less bearing on the democracy deficit question than does judicial review of legislation passed by parliament.

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209. *See* David Jacobson & Galya Benarieh Ruffer, *Courts Across Borders: The Implications of Judicial Agency for Human Rights and Democracy*, 25 HUM. RTS. Q. 74, 75 (2003) (noting "[t]he notion of collective 'authorship,' or deliberation, through the republican model fails to capture the force of the individual, as 'agent,' as a primary form of political engagement in current patterns of governance").

210. *See* RAN HIRSCHL, TOWARDS JURISTOCRACY 3 (2004).

211. Carolyn Dempster, *Traditional Chiefs Flex Their Muscles*, BBC NEWS, Oct. 4, 2000, http://news.bbc.co.ok/2/hi/africa/956075.stm.

212. There are a few exceptions to this. Some ethnic groups had traditional councils that functioned as a quasi-legislative body.

213. *See* Dempster, *supra* note 211.

A recent Constitutional Court case in South Africa illustrates the potential for women to initiate constitutional dialogue concerning the normative content of customary law and gender equality law. Prior to the promulgation of the new South African Constitution, South African feminists defeated an attempt by traditional leaders to insert an exclusionary clause into the Bill of Rights.[214] Because this attempt was defeated, activists were later able to use constitutional equality guarantees to bring a challenge to the discriminatory customary practice of male primogeniture.[215] The Constitutional Court's October 2004 decision in *Bhe v. Magistrate, Khayelitsha* declared section 23 of the Black Administration Act and the customary law rule of primogeniture unconstitutional.[216]

In *Bhe*, a man died intestate, leaving behind a woman with whom he had lived for twelve years and their two daughters. The indigent couple lived on a small piece of property and had saved enough money to buy building materials for a house. When the man died, the local Magistrate appointed the deceased's father as heir to the estate, pursuant to customary law. When the deceased's father announced his intentions to sell the property to cover funeral expenses, leaving Ms. Bhe and her daughters homeless, she filed an action on behalf of her two daughters.

Until the *Bhe* decision, the Black Administration Act governed the estates of black South Africans who died intestate.[217] The Intestate Succession Act governed the estates of others,[218] establishing an intestate regime that relied explicitly on race to determine the choice of law. The Constitutional Court determined that the Black Administration Act was unconstitutional as "an egregious apartheid law which anachronistically has survived

214. *See* Marilou McPhedran, *Women's Constitutional Activism in Canada and South Africa*, *in* COMPARATIVE CONSTITUTIONALISM AND RIGHTS: GLOBAL PERSPECTIVES (Penelope E. Andrews & Susan Bazilli eds., forthcoming 2007), *available at* http://www.iwrp.org/pdf/mm_wca.pdf; *see also* Jill Zimmerman, *The Reconstruction of Customary Law in South Africa: Method and Discourse*, 17 HARV. BLACKLETTER L.J. 197, 206 (2001).

215. Activists had been lobbying unsuccessfully for legislation on the issue for years. *See* SA Law Commission Issue Paper 3 Harmonisation of the Common Law and the Indigenous Law (1996).

216. *Bhe v. Magistrate, Khayelitsha*, 2004 (18) BHRC 52 (CC) (S. Afr.).

217. *Id.* ¶¶ 1-3 (S. Afr.).

218. Section 1(4)(b) of the Intestate Succession Act provides, "'Intestate estate' includes any part of an estate . . . in respect of which section 23 of the Black Administration Act, 1927 (Act No. 38 of 1927), does not apply." *Id.* ¶ 39.

our transition to a non-racial democracy."[219]

The Court then considered whether the customary law of intestate succession violated the Constitution's equality guarantees. Under the customary law principle of male primogeniture, only a male relative of the deceased may inherit. Traditionally, the male heir inherited in a representative capacity and shouldered the burden of providing for the deceased's surviving family.[220] Today, however, the situation has changed. Justice Langa, writing for the *Bhe* majority, remarked, "[the heir] acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities."[221] This often leaves widows destitute and unable to support their children. Comparing the customary law rule of male primogeniture to the equality and dignity guarantees of the Constitution, the Court concluded that the customary law was a clear violation of the Bill of Rights.[222]

Not surprisingly, *Bhe* generated considerable controversy. The case involved a high level of engagement with national women's rights organizations.[223] In a companion case decided jointly with *Bhe,* a non-governmental organization called the Women's Legal Centre Trust and the South African Human Rights Commission brought an action in the public interest and as a class action on behalf of all similarly situated women.[224] The case, which generated a great deal of media attention, contrib-

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219. *Id.* ¶ 63 (quoting *Western Cape Provincial Gov't & Others: In re DVB Behuising (Pty) Ltd. v. North West Provincial Gov't* 2001(1) SA 500 (CC); 2000 (4) BCLR 347 (CC)).

220. "The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit." *Id.* ¶ 76.

221. *Id.* ¶ 80 (citing *Chihowa v. Mangwende* 1987 1 ZLR 228 (SC) 233-4E).

222. "It is 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 the constitutional order." *Id.* ¶ 91. Counsel for the applicants, Bhe and her two children, remarked, "[t]he Constitutional Court ruling strikes down the racist apartheid statutory scheme for deceased estates of black persons, as well as the African customary law rule of primogeniture, to the extent that it excludes or hinders women or extra marital children from inheriting property." *ConCourt Rules Customary Inheritance Laws Unconstitutional,* http://www.roylaw.co.za/index.cfm?fuseaction=home.article&pageID=8922777&ArticleID=8843366 (last visited October 1, 2006).

223. *See* CATHERINE ALBERTYN, CTR. FOR APPLIED LEGAL STUDIES, WOMEN'S RIGHTS 7 (Aug. 2004), *available at* http://www.genderstats.org.za/documents/Women'sRights.pdf.

224. *Bhe,* 18 BHRC ¶ 7.

uted to the "broader societal discussion about constitutional meaning."[225] In the case of South Africa, it is also likely that the feminist advocacy campaign to subject personal and customary law to constitutional equality provisions years earlier initiated the society-wide dialogue. The *Bhe* case represents a continuation of that dialogue.

The Constitutional Court expressed a noteworthy openness to constitutional dialogue. The Court invited a response from the Chairperson of the House of Traditional Leaders in the form of an *amicus curiae*, who chose not to respond to the Court's invitation.[226] Also, the majority opinion explicitly invited the legislature to respond with appropriate legislation.[227] Although this "conversation" is not over in South Africa, the *Bhe* case afforded women's rights groups the opportunity to actively participate in the dialogue and to influence the application of equality guarantees to the customary law. This opportunity would not have arisen had the traditional chiefs prevailed in their struggle to include exclusionary clauses in the 1994 Constitution.

As such, the case represents significant progress for the many women who are subject to customary law in South Africa. It reminds us that when women have the opportunity to promote gender equality from within their cultural communities, they will use the constitution, among other things, to do so. The constitution becomes an important, although not the only, vehicle through which to redefine and reshape cultural meaning, allowing women to challenge dominant cultural norms without abandoning culture altogether. Constitutional agency thus provides women a voice and often initiates a societal dialogue about shared norms and values. South African public institutions and women's rights groups must now engage in extensive public education campaigns to raise awareness about the decision, particularly in rural areas where judges may continue to apply the cus-

225. Bateup, *supra* note 190, at 20. *But see* Tracy E. Higgins, *Are Women Human? And Other International Dialogues by Catharine A. Mackinnon*, 18 YALE J.L. & FEMINISM 523, 535 (2006) (book review) (observing that most women in rural areas had not heard of the decision nearly a year after it was decided). It is too soon to attempt to gauge the extent to which the decision and the equality norms it reflects have been internalized.

226. *Bhe*, 18 BHRC ¶ 4.

227. "Any order by this Court should be regarded by the legislature as an interim measure. It would be undesirable if the order were to be regarded as a permanent fixture of the customary law of succession." *Id.* ¶ 116.

tomary rule of male primogeniture until the *Bhe* decision firmly takes root in the public consciousness.

V. *STRATEGIES FOR JUDICIAL INTERVENTION*

Having demonstrated that constitutional scrutiny is a precondition for dialogic constitutionalism in which women—as constitutional actors—may challenge and redefine the normative content of personal and customary law, I turn now to modes of judicial intervention. Assuming a state amends its constitution to eliminate personal and customary exclusionary clauses, how much judicial intervention is justified when evaluating personal or customary law against constitutional norms? These methods, which are discussed in turn, include limited intervention, formalist intervention, and activist intervention.[228]

A. *Limited Intervention—Evolution of Customary Law*

Customary law is not static.[229] Because it evolves over time, some would argue that limited judicial intervention is the best course of action. Indeed, attempts by colonial authorities to codify customary law have contributed to its contemporary misconception as a fixed body of law. In addition to fixing customary law in time, the colonizers' codification efforts filtered customary law through the colonial lens, leading to a corruption of meaning and perverted understanding of custom.

Many judges and scholars on the continent recognize and value the changing nature of customary law. They contrast this flexible, "living" customary law to that enshrined in statutes and academic texts. Given the evolutionary nature of customary law, some commentators have argued that it will evolve toward equality norms over time.[230] Proponents of this laissez-faire approach to customary law will undoubtedly argue for minimal constitutional oversight, preferring to allow evolution to take place at its own pace.

Legislators could elect to eliminate the exclusionary provisions and yet provide for judicial review of customary and per-

228. This typology builds upon distinctions articulated by Fareda Banda. Banda distinguishes between the following approaches to customary law: evolutionary, revolutionary, proportionate, and status quo. Banda, *supra* note 44, at 8.

229. *See* Armstrong et al., *supra* note 37, at 324-28.

230. *See* Banda, *supra* note 44, at 8.

sonal law in only limited circumstances. This low level of engagement between customary law and constitutional law, something akin to rational basis review, would neither satisfy the requirements of international human rights law nor initiate a constitutional dialogue that would allow grassroots women to help determine the normative content of the right to equality in their homes and personal lives.

B. *Formalist Intervention—Rights-Trumping*

Another response to the dilemmas posed by customary law is to establish a clear constitutional regime in which rights to custom trump equality rights or vice versa. There are several problems with this approach, however. First, a simple rights-trumping approach forces women to identify exclusively as either a woman or as a member of a cultural minority. For example, if the constitutional scheme allows cultural rights to trump gender rights, equality-seeking women may be forced to exit from their cultural communities in order to fully enjoy the right to gender equality. Conversely, if the constitutional scheme privileges gender to the exclusion of cultural rights, a woman is again forced to choose between these communities and may, in fact, forego the exercise of gender equality rights in order to maintain a connection to her familial or cultural community.

Rights-trumping encourages an all-or-nothing approach to cultural rights. Many women proudly serve as the protectors of culture and value the positive aspects of custom and tradition. These women would seek to modify or eliminate only those aspects of culture that are harmful to them.[231] A rights-trumping approach forces women to identify as either gendered *or* cultured, but not both.

The problem with this approach is, at its core, a problem of international intersectionality.[232] Intersectionality theory, which surfaced in feminist and anti-racist circles in the 1990s, describes an understanding of the self as complex, fluctuating, and subject to multiple sources of oppression and privilege. In other words,

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231. *See* Ewelukwa, *supra* note 45, at 451. In discussing discriminatory widowhood rituals, Ewelukwa observes, "[t]he rule effectively discourages potential legal challenges by women because it has the effect of pitting women against the custom and the larger society as women come to be perceived as destroyers of custom." *Id.*

232. *See generally* Bond, *supra* note 138.

feminist critiques that focus on "women" as a unified category of analysis—to the exclusion of other sites of oppression such as race, class, culture, religion, or sexual orientation—fundamentally misunderstand the human condition. Individuals do not experience "neatly compartmentalized types of discrimination based on mutually exclusive forms of, for example, racism and sexism."[233] Instead, people experience the "complex interplay of multiple systems of oppression operating simultaneously in the world."[234]

Women are often forced to choose between, for example, nationalist struggles and struggles to achieve gender equality. As Ran Hirschl and Ayelet Shachar observe in the context of Israel, "[t]he tension between manifesting loyalty to their minority group identity and struggling against their gender-based vulnerability has long silenced Arab women."[235] This construction of identity leaves no room for women to situate themselves at the crossroads of both struggles and lead to oversimplified notions of women's identity.

Within the human rights community, there has been some movement away from this binary approach to women's identity.[236] Advocates of an international intersectional approach "reject the binary approach of the Enlightenment, which forces individuals to choose between religious liberty (on leaders' terms) in the private sphere and equality (without normative community) in the public sphere."[237] Throughout much of Commonwealth Africa, women have the power to exit their cultural communities. In many countries, a woman may, for example, marry according to statutory law; she may choose to abandon other aspects of custom as well. Other women may cherish aspects of their cultural identity and community but seek equality *within* that community.[238] These women who seek change

233. Bond, *supra* note 138, at 76.

234. *Id.*

235. Hirschl & Shachar, *supra* note 5, at 225.

236. *See* Bond, *supra* note 138, at 85.

237. Sunder, *supra* note 7, at 1408 (describing her theory of "cultural dissent" as "a right to constitute individual identity within communities").

238. Sunder remarks:

> [C]ultural dissenters, or 'individuals within a community [who seek] to modernize, or broaden, the traditional terms of cultural membership,' normatively challenge traditional liberal understandings of liberty and equality as premised on a "thin" theory of the self. . . . I read in the rise of cultural dissent

without exiting their cultural communities must have the option of using the constitution to redefine personal and customary law in a way that reflects equality norms.[239]

In the case of an exclusionary clause, the drafters of the constitution have privileged women's cultural identity by taking gender equality (as expressed by women's rights within the family) out of the equation.[240] To illustrate the problem, let us examine a case in which the constitutional scheme allowed custom to trump gender equality rights. The case involves an interpretation of the exclusionary clauses in the Zimbabwean Constitution. In 1999, the Supreme Court of Zimbabwe delivered a significant blow to women's rights activists in the country in *Magaya v. Magaya*.[241] The case, which involved a woman's right to inherit from her deceased father, sparked outrage across the country and the world.[242]

Zimbabwe has, at different points in history, been both a source of optimism with respect to women's equality and a source of great consternation.[243] In 1982, Zimbabwe passed the Legal Age of Majority Act ("LAMA"), which recognized the legal capacity of both men and women upon reaching eighteen years of age.[244] The LAMA was a progressive articulation of women's equality rights.[245] Under the law, women could no longer be considered legal minors.[246] In the last decade, however, LAMA's

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that human flourishing requires not only a liberty right to normative community, but access to community free of the fear of discrimination within it.

Id. at 1409.

239. Of course, women who choose to contest discrimination within their communities often suffer some loss of community. They may be ostracized as a result of backlash from constitutional litigation.

240. With regard to multiculturalism in Israel, Hirschl and Schachar state, "women's equal citizenship status is impaired by a constitutional system that defers to the exclusive jurisdiction of religious communities in certain matters of personal status, including marriage and divorce, and in which the institutions of these communities systematically disadvantage women." Hirschl & Shachar, *supra* note 5, at 222.

241. Magaya v. Magaya, [1999] 3 L.R.C. 35 (Zimb.); Valerie Knobelsdorf, Note, *Zimbabwe's* Magaya *Decision Revisited: Women's Rights and Land Succession in the International Context*, 15 COLUM. J. GENDER & L. 749, 768 (2006).

242. *See* Knobelsdorf, *supra* note 241, at 750.

243. *See id.* at 753-56.

244. Legal Age of Majority Act [LAMA] (1982) (Zimb.).

245. *See* David M. Bigge & Amelie von Briesen, Note, *Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in* Magaya v. Magaya, 13 HARV. HUM. RTS. J. 289, 305 (2000).

246. *See id.* at 305-06.

promise of gender equality has been curtailed by the courts.

The *Magaya* case revealed the legislative limits of LAMA and delivered a major setback to women's rights activists.[247] Shonhiwa Magaya died intestate, leaving behind two wives, four children, a house in the city of Harare, and some cattle.[248] A local court appointed the deceased's eldest child from his first wife, his daughter Venia Magaya, to be the heir to the estate.[249] Although the eldest son, Venia Magaya's half-brother from her father's marriage to his second wife, declined to seek the inheritance, the second-oldest brother challenged Venia's appointment as heir.[250] The Magistrates Court upheld the brother's challenge and appointed Venia's brother, Nakayi Magaya, as the heir according to customary law.[251] Venia Magaya appealed this decision to the Supreme Court of Zimbabwe.

The Supreme Court's analysis of the case focused primarily on the Constitution and the Administration of Estates Act, which governs the application of customary law in cases involving intestate succession.[252] With respect to constitutional rights, Venia Magaya argued that non-discrimination principles enshrined in the Constitution should protect her right to inherit property from her father.[253] By excluding personal or customary law from non-discrimination protection, however, the exclusionary clause makes such a determination unlikely if not impossible.

Section 11 of the Constitution provides protection for the "fundamental rights and freedoms of the individual" regardless of "race, tribe, place of origin, political opinions, colour, creed

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247. *See* Bigge & von Briesen, *supra* note 245, at 308; Knobelsdorf, *supra* note 241, at 768.

248. *Magaya*, 3 L.R.C. at 38; Bigge & von Briesen, *supra* note 245, at 292-93.

249. *Magaya*, 3 L.R.C. at 39; *see also* Knobelsdorf, *supra* note 241, at 749.

250. *Magaya*, 3 L.R.C. at 38-39; *see also* Bigge & von Briesen, *supra* note 245, at 293.

251. *Magaya*, 3 L.R.C. at 39; *see also* Bigge & von Briesen, *supra* note 245, at 293. In so doing, the Court applied the Administration of Estates Act, which states:

> [I]f any African who has contracted a marriage according to African law or custom or who, being unmarried, is the offspring of parents married according to African law or custom, dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged.

Id. The Court declined to apply the Administration of Estates Amendment Act, which includes a formula for the division of property when the deceased dies intestate, because the facts of the case occurred prior to passage of the amended act. *Magaya*, 3 L.R.C. at 39.

252. *See* Knobelsdorf, *supra* note 241, at 759.

253. Bigge & von Briesen, *supra* note 245, at 294.

or sex . . . ."[254] Section 23, however, which specifically protects against discrimination, does not include sex or gender as a protected category.[255] The Court avoided definitively deciding whether the mention of "sex" in section 11 could be imputed into section 23's protection against non-discrimination. The Court avoided the issue by concluding that *even if* one were to accept that section 23 included gender by implication, Venia Magaya would lose her case based on the exclusionary provisions in the Constitution.[256]

The Court then turned its attention to section 23(3), which states that the non-discrimination provision does not apply to "matters involving . . . devolution of property on death . . . ."[257] Furthermore, section 23(3) stipulates that the non-discrimination provision does not apply to cases of customary law involving Africans.[258] Both subsections of section 23, therefore, shielded the Magaya case from application of the non-discrimination provision. The Supreme Court concluded that customary law

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254. ZIMB. CONST. s. 11 (1996).

255. Id. s. 23. In relevant part, section 23 states:

(1) Subject to other provisions of this section—

(a) no law shall make any provision that is discriminatory either of itself or in its effect; and . . .

(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour or creed are prejudiced . . . .

(3) Nothing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of the following matters-

(a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case . . . .

ZIMB. CONST. s. 23 (1)-(3).

256. *Magaya*, 3 L.R.C. at 39. In Judge Ebrahim's words in *Magaya*:

However, even if the section was to be interpreted *as* incorporating the principle of gender equality enshrined in international human rights instruments to which Zimbabwe was a party, s. 23(3) of the Constitution expressly exempted matters involving the devolution of property on death and customary law involving Africans from the discrimination provisions.

Id.

257. ZIMB. CONST. s. 23(3).

258. *Id.*

should control and that custom in this case favored males over females as heirs.[259]

The Magaya case illustrates the difficulties women face when custom simply trumps gender equality rights. The reverse situation, in which gender equality rights simply trump cultural rights, presents a number of problems as well. In this case, a top-down, gender-trumps-culture approach may have very limited utility. It may lack legitimacy and, therefore, have minimal impact on the ground. A legal system that uniformly devalues custom and culture will force rights-seeking women to abandon their cultural values wholesale in favor of gender equality.[260] Both of these approaches amount to an either/or approach that will force women to privilege either their identity as rights-seeking women or their identity as cultured beings.[261]

C. *Activist Intervention—Rights-Balancing*

Another method of judicial intervention envisions an active role for judges in the delicate balancing of rights. As Catherine Albertyn, a noted gender equality expert in South Africa, observes with regard to the South Africa Constitution, "[a]lthough there is no clear equality trump in the Constitution, equality's place as a substantive right and a constitutional value means that it is unlikely that any cultural practice that discriminates against women will be constitutionally justified."[262] The *Bhe* case provides an example of a court balancing constitutional equality rights and rights to culture.[263] The *Bhe* Court engages in a

259. *Magaya*, 3 L.R.C at 36.

260. *See* Sunder, *supra* note 7, at 1411-12 ("[W]omen reformers in [religious and cultural] communities increasingly refuse to choose between religion [or culture] and rights and demand both").

261. As Ran Hirschl and Ayelet Shachar have observed in the context of religious laws in Israel:

> [A] major obstacle to the establishment of Isreali women's full participation as equals in all spheres of life is the (mis)perception that advancing gender equality necessarily compromises other important values of the state, such as the preservation of collective identity, national security, or religious diversity. As long as the promotion of women's rights and the promotion of other constitutive norms are seen as mutually exclusive, even the most eloquently worded rights legislation cannot guarantee women's equal treatment and human dignity.

Hirschl & Shachar, *supra* note 5, at 222.

262. ALBERTYN, *supra* note 223, at 24-25.

263. *See id.* at 26.

rights-balancing exercise, albeit one that places more weight on equality rights than rights to culture. I contend that this "weighted balancing" is an appropriate approach that recognizes and values the positive aspects of culture but ultimately subjects that culture to foundational equality norms.

The *Bhe* case is significant for two reasons. First, it illustrates the power of subjecting personal or customary law to constitutional scrutiny.[264] As Albertyn notes, the South African Constitution "makes key issues in the public domain (including culture and religion) subject to public democratic values, such as equality and freedom."[265] Because women's rights activists in South Africa successfully fought a campaign by traditional leaders to add an exclusionary provision to the new Constitution, customary law is subject to constitutional scrutiny under the Bill of Rights and its equality provisions.[266]

Second, the decision demonstrates South Africa's attempt to balance rights to culture and equality. The Constitution itself reflects a commitment to rights-balancing. Indeed, it reflects a "weighted balancing" approach that protects the right to culture but imbues the right to equality with a bit more constitutional heft. Section 30 of the Constitution, for example, protects the "right to use the language and to participate in the cultural life of their choice."[267] This right, however, is followed by the simple caveat that "no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights,"[268] including the equality provisions therein. Section 211(3) of the Constitution 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."[269] This provision reflects both a commitment to implementing customary law and to ensuring that it conforms to constitutional equality guarantees. This type of clause reappears in a number of con-

264. *See id.* at 24-27.

265. *Id.*

266. *Id.* Albertyn states, "[a]t an early stage of the constitutional negotiations, women fought to prevent traditional leaders from insulating their communities from the rights and principles of the new constitutional democracy, especially gender equality." *Id.*

267. S. AFR. CONST. s. 30 1996.

268. *Id.*

269. *Id.* s. 211(3).

stitutional provisions.[270] This formulation, consisting of a right to custom and culture followed by a clause reinforcing the primacy of the Bill of Rights, serves to ensure that courts will value cultural rights but only to the extent that they do not unfairly infringe on women's constitutional equality rights.[271]

Justice Langa, writing for the majority in *Bhe*, reaffirms the constitutional commitment to the preservation and advancement of customary law in South Africa. The opinion states, "[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."[272] The Court thus situates customary law squarely within the constitutional legal order, reinforces its societal value, and explicitly limits it by subjecting customary law to the Bill of Rights.[273]

By simultaneously valuing the positive aspects of customary law and requiring that custom conform to the Bill of Rights, the Constitution reflects a commitment to rights-balancing. Although the *Bhe* Court goes to great lengths to articulate its com-

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270. Section 31 of the Constitution states:

(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. To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Id. s. 31(1)-(2).

Similarly, section 15 provides:

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion . . . .

(2) . . . .

(3) (a) This section does not prevent legislation recognizing –

(i) Marriages concluded under any tradition, or a system of religious, personal or family law; or

(ii) Systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(iii) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Id. s. 15(1)-(3).

271. *See id.*

272. *Bhe v. Magistrate, Khayelitsha*, 2004 (18) BHRC 52 (CC) ¶ 41 (S. Afr.).

273. *Id.* ¶ 45 ("The positive aspects of customary law have long been neglected.").

mitment to custom and customary law, gender equality rights carry the day. It is worth noting here that there is a distinction between a formulaic gender-trumping approach and a rights-balancing approach in which gender equality rights prevail. By undervaluing tradition and culture, gender-trumping places women in the position of choosing between rights to gender equality and culture. Because it dismisses culture, it lacks legitimacy in the minds of the people and risks cultural backlash. A weighted-balancing approach values both cultural and equality rights but assigns slightly more weight to the gender equality side of the equation. In this way, it operates as a heightened standard, one which would require compelling justification for customary law to infringe on equality rights.

To further promote the balancing of rights, Section 36 of the South African Constitution requires that a limitation on rights must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." The Court has interpreted this general limitations clause to require a balancing exercise. The Court has stated, "[a]s a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be."[274]

In the *Bhe* decision, the Court conducts a "justification inquiry" designed to determine if the rule of male primogeniture can reasonably and justifiably operate to limit women's rights to equality and dignity. The Court first notes the centrality and importance of equality and dignity rights, remarking "[t]hey assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender."[275] Because the Court recognized that the customary rule of male primogeniture eviscerated the constitutional rights to equality and dignity, the justification for the limitation would need to be extraordinarily compelling. The Court reasoned that the customary heir's duty to support a surviving widow provided little actual protection for widows and could not "constitute justification for the serious violation of rights."[276]

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274. *Id.* ¶ 70 (quoting *S v. Manamela* (Director-General of Justice Intervening), 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at ¶ 32.)

275. *Id.* ¶ 71.

276. *Id.* ¶ 96.

The "weighted balancing" approach, as exemplified by the *Bhe* decision, holds promise for women's rights advocates. It does not reject custom and tradition as a *per se* violation of women's rights. Rather, balancing allows the positive aspects of custom to flourish, but it does not do so at the expense of women's equality rights. In addition, the rights-balancing approach allows judges to acknowledge the ways that customary law has changed over time. Judges who reject a rigid rights-trumping approach may, when appropriate, recognize the "living" customary law and the ways in which it conforms to human rights standards.

Some South African feminists have advocated an approach that rejects rights-trumping as overly simplistic.[277] These feminists favor "develop[ing] customary law norms and rules in a manner that is inclusive of women's rights."[278] In contrast with the slower, evolutionary model of limited engagement with custom, these activists seek new ways to understand and engage with cultural norms and customary law. Most importantly, they seek to give voice to the interests of women in those communities. This approach reflects an intersectional understanding of identity, one that perceives of women as potentially rights-seeking feminists and as members of cultural communities. Subjecting personal and customary law to constitutional non-discrimination scrutiny provides women with a critical vehicle through which to initiate and actively participate in a reform process that brings custom in line with the constitution. In so doing, it makes the private public.

CONCLUSION

Exclusionary clauses place family law outside of the purview of the constitution. As such, the clauses result from and perpetuate a divide between areas of law long considered public—and therefore worthy of state intervention—and those considered private and trivial. The distinction is without merit, both as a practical matter and as a theoretical inquiry. Practically speaking, states profess non-interference in the family but routinely regulate family form and benefits. At the theoretical level, feminists have demonstrated how liberalism supports the dichotomy

277. *See* ALBERTYN, *supra* note 223, at 26.
278. *Id.*

and have offered a critique that mandates state intervention in the so-called private sphere.

The exclusionary clauses represent a constitutional anachronism. Once a product of colonialism and, more specifically, the compromises struck at the hands of colonizers and traditional male elites, the exclusionary clauses have lost political currency in recent years. Indeed, women's rights activists in South Africa defeated an effort by traditional leaders to include exclusionary clauses in that country's 1994 Constitution, paving the way for the landmark *Bhe* case.[279] In addition, international and regional human rights law requires that states eliminate exclusionary clauses to conform to fundamental equality principles.

Exclusionary clauses represent a monolithic understanding of women's identity, one that requires women to surrender any aspiration of familial equality in order to enjoy membership in a cultural community. All over the world, women are exploring ways to challenge and redefine cultural and religious norms in ways that reflect a commitment to gender equality. Women must have the opportunity to exert constitutional agency and to use the constitution to initiate a societal dialogue concerning the normative content of the rights to both custom and equality. Because the exclusionary clauses preclude women's agency in this area, the countries that have retained them must now eliminate them. This is a crucial opportunity to foster meaningful societal discourse regarding women's status within their cultural communities, without forcing allegiance to gender equality at the expense of culture or vice versa.

Once these constitutions have been amended to eliminate the exclusionary clauses, judges will have a role to play in the internalization of new norms. Ideally, constitutional reform will reflect a commitment to the positive aspects of culture without pandering to custom and tradition. It will value customary law but require that customary law conform to individual rights guarantees. Constitutional reformers may adopt the structure of the South African Constitution, in which a general limitations clause requires a balancing of rights. By reflecting a commitment to both culture and equality, the Constitution increases its legitimacy among the people and stands a greater chance of in-

279. *See supra* note 263 and accompanying text.

stantiating human rights norms within the judiciary and the populace.

Although reforming constitutions to eliminate exclusionary clauses is only one step on the road to gender equality, it is a necessary one. Women must have the opportunity to invoke the constitution to contest discriminatory personal or customary law. Only by exercising their constitutional agency in this way can they begin to redefine the contours of personal and customary law in a way that is consistent with gender equality norms. As constitutional agents, women have a right to initiate a society-wide dialogue that will ultimately determine the normative content and reach of gender equality rights. Through this process of constitutional amendment, litigation, and corresponding societal dialogue, women will be a vital part of the discourse, negotiating a balance between respect for cultural communities and the demand for equality within those communities.