

Michigan Journal of Race and Law

Volume 3

1998

Striking the Rock: Confronting Gender Equality in South Africa

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Recommended Citation

Penelope E. Andrews, *Striking the Rock: Confronting Gender Equality in South Africa*, 3 MICH. J. RACE & L. 307 (1998).

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STRIKING THE ROCK: CONFRONTING GENDER EQUALITY IN SOUTH AFRICA[†]

Penelope E. Andrews*

This Article analyzes the status of women's rights in the newly democratic South Africa. It examines rights guaranteed in the Constitution and conflicts between the principle of gender equality and the recognition of indigenous law and institutions. The Article focuses on the South African transition to democracy and the influence that feminist agitation at the international level has had on South African women's attempts at political organization. After dissecting the historical position of customary law in South Africa and questioning its place in the new democratic regime. The author argues that, although South African women have benefited from the global feminist endeavor, they have adopted the shape and substance of women's rights to accommodate conditions peculiar to South Africa. The Article concludes that this balancing of respect for indigenous culture and the ultimate goal of eradication of all forms of sexism provides the best means for women in South Africa to make progress in their quest for equal status in that society.

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† The phrase "striking the rock" first made its way into South African political parlance in the 1950s, when a large number of women marched on Pretoria to protest the application of "pass laws" to African women. "Pass laws" required all Africans to carry passes (identity documents) which described both their status and the geographical areas in which they were permitted. The central piece of legislation was the Black (Urban Areas) Consolidation Act of 1945 and its subsidiary regulations. Section 10 of the Act contained the key provisions and, with certain exceptions, stated that it was illegal for a Black person to remain in a prescribed (White) area for longer than seventy-two hours. Penny Andrews, *The Legal Underpinnings of Gender Oppression in Apartheid South Africa*, 3 AUSTL. J.L. & SOC'Y 92, 97 (1986). Until that period the pass laws had not applied to women, and the official shift in policy pushed women to protest. The women said to the Prime Minister: "'Wathint' abafazi, wathint' imbokodo, uzokufa'—'now you have touched the women you have struck a rock, you have dislodged a boulder, you will be crushed.'" HILDA BERNSTEIN, FOR THEIR TRIUMPHS & FOR THEIR TEARS 90 (1985).

* Associate Professor of Law, City University of New York School of Law. I would like to thank the members of the *Michigan Journal of Race & Law* for organizing the symposium, "Constitution-Making in South Africa" (Mar. 21-22, 1997), on which this Article is based. I would also like to thank the participants in the Symposium, particularly those who were members of my panel.

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INTRODUCTION

Women, through creative advocacy, enlarged the concept of the new South African democracy early in the long and difficult process of constitutional negotiation, when they insisted that their concerns be included.¹ Before women forced their concerns to the fore, only the urgent task of abolishing apartheid and designing the new non-racial order occupied the attention of the architects of the new South African democracy.² The leading parties to the negotiations, namely the African National Congress and the Nationalist Party, had political and legal differences about the shape and substance of the post-apartheid order.³ There was, however, a general consensus that racism, in all its manifestations, needed to be eradicated.⁴

1. Catherine Albertyn, *Women and the Transition to Democracy in South Africa*, in GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER 39, 60-61 (Christina Murray ed., 1994). In this piece, Albertyn assesses "the extent to which [the architects of the new order] took account of the experiences, interests and demands of women in South Africa," and concludes that women "succeeded in obtaining an equal commitment to race and gender equality in the preamble and the constitutional principles." *Id.* (footnotes omitted). Albertyn points out that there were limits to what women could achieve:

[T]he form which [equality rights] took and the status of the equality guarantee in the Bill of Rights were issues which had to be negotiated, defended and fought for by women and other groups. Here the energy and resources of women were consumed by the battle over customary law and the equality clause. As a result there was less or no intervention by women's organizations on such important issues as the wording of the equality clause, the status of affirmative action, the horizontal application of the Bill of Rights, and the inclusion of a clause which would ensure that equality trumped other rights and effective enforcement mechanisms.

Id. at 61 (footnotes omitted).

2. See generally ALBIE SACHS, *ADVANCING HUMAN RIGHTS IN SOUTH AFRICA* (1992) (discussing the negotiation process that led to the formulation of the South African Constitution).

3. Reference to the negotiations in this Article refers to CODESA I (the first multi-party Convention for a Democratic South Africa), which commenced in December 1991; the second session, CODESA II, which commenced in May 1992; and the third session, normally referred to as the Multi-Party Negotiating Forum or the World Trade Center Talks, which commenced in April 1993, after a

Eradicating sexism was not on the agenda, but even at the margins of discussions negotiators had to deal with this vexing issue. The entrance into the process of an organized women's lobby confronted the delegates with a largely ignored reality: the legal and economic edifice of apartheid had, both in the public and private realms, generated and reinforced the dispossession, discrimination, and subjugation of women.⁵ Although oppression of women had been obscured by the larger issue of racial oppression, anti-apartheid political rhetoric occasionally referred to the plight of women.⁶ The possibility of imminent democratic transformation, however, required more than political rhetoric. Women sought to ensure that this transformation included a commitment to changing many aspects of their lives. A vocal and determined women's lobby demanded that the largely male delegation pay attention to women's concerns.⁷

This Article analyzes the interaction of indigenous law and women's equality in the newly democratic South Africa by examining rights guaranteed in the Constitution and possible conflicts between the principle of gender equality and the recognition of traditional law and institutions. It focuses on the historic moment of the South African transition to democracy and the influence that feminist agitation at the international level bore on women's organizational attempts within South Africa. It also investigates the historic place of customary law within the South African legal and political framework and whether it can be accommodated institutionally in the new democratic dispensation. The Article suggests that, although South African women have benefited from the global feminist endeavor, they have adopted the shape and substance of women's rights to accommodate conditions peculiar to South Africa.

lengthy breakdown over violence and key constitutional issues. For an insightful account of the negotiations, refer to ALLISTER SPARKS, *TOMORROW IS ANOTHER COUNTRY* (1995). See also *THE SMALL MIRACLE: SOUTH AFRICA'S NEGOTIATED SETTLEMENT* (S. Friedman & D. Atkinson eds., 1994) (analyzing race relations, the ANC, and politics and government generally in the period from 1989 to 1994, and making predictions for the years after 1994).

4. *Id.*

5. See Andrews, *supra* note *, at 102; see also FATIMA MEER, *WOMEN IN THE APARTHEID SOCIETY* (1985).

6. Anti-apartheid rhetoric displayed a paradox: on the one hand, it linked women's subordination to the laws and policies of apartheid; on the other hand, the rhetoric often reflected patriarchal protective attitudes. For example, Judge Albie Sachs, a member of the Constitutional Court, has described patriarchy as "one of the few profoundly non-racial institutions in South Africa." Albie Sachs, *Judges and Gender: The Constitutional Rights of Women in a Post-Apartheid South Africa*, 7 *AGENDA* 1, 1 (1990).

7. See generally Albertyn, *supra* note 1.

Women have attempted to strike a balance between respect for indigenous culture and the eradication of all forms of sexism.

I. FEMINIST CONCERNS AND STRATEGIES FOR CHANGE: THE GLOBAL CHALLENGE

The political events in South Africa in the early 1990s occurred on the heels of a well orchestrated campaign by feminists across the globe that had brought women's issues from the margins of political and legal discourse to a place where women's concerns and priorities were accorded some formal recognition.⁸ Evidence of these developments is found in the United Nations Decade for Women,⁹ the 1993 Vienna Conference,¹⁰ the 1994 Cairo Conference,¹¹ and the Fourth World Conference in Beijing.¹²

8. See generally Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, in HUMAN RIGHTS OF WOMEN 3 (Rebecca J. Cook ed., 1994) (examining a consultation of lawyers who sought to develop legal strategies to promote and protect women's international human rights).

9. The United Nations Decade for Women represented an intensification of efforts to achieve objectives of equality, development, peace, employment, health, and education. *Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace*, U.N. Doc. A/CONF.94/35 (1980); *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, U.N. Doc. A/CONF.116/28/Rev.1 (1985); see also Andrea E. Stumpf, *Re-examining the UN Convention on the Elimination of All Forms of Discrimination Against Women: The UN Decade for Women Conference in Nairobi*, 10 YALE J. INT'L L. 384 (1985) (discussing the Convention and briefly chronicling its origin and operation).

10. At this conference, feminists lobbied extensively in favor of recognizing that violence against women is a violation of human rights. The conference culminated in the *Declaration on the Elimination of Violence Against Women*, G.A. Res. 104, U.N. GAOR, 48th Sess., Agenda Item 111, U.N. Doc. A/RES/48/104 (1993). See Donna J. Sullivan, Note, *Women's Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT'L L. 152, 152 (1994) ("[T]he conference crystallized a political consensus that various forms of violence against women should be examined within the context of human rights standards and in conjunction with gender discrimination.").

11. The 1994 International Conference on Population and Development in Cairo addressed, among other topics, women's reproductive health issues. Feminists lobbied extensively to ensure that the debate included women's perspectives, although individual women's perspectives differed in relation to questions of birth control and particularly abortion. The conference produced the *Programme of Action of the International Conference on Population and Development, Report of the International Conference on Population and Development*, U.N. Doc. A/CONF.171/13 (1994). See Rhonda Copelon, *Sexual and Reproductive Rights, in THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE* 190, 198-201 (Sandra Liebenberg ed., 1995).

12. The Fourth World Conference was by far the most significant United Nations conference for women during the decade. Women lobbied the governmental delegations extensively and organized a parallel non-governmental conference to coincide with the formal proceedings. The conference produced the *Beijing Declaration and*

Western feminists¹³ initiated the theoretical onslaught in the international law arena by demanding a more vigorous enforcement of international law, particularly human rights law, and also called for greater gender sensitivity in United Nations enforcement mechanisms and procedures.¹⁴

In the Western world, a groundswell of scholarship and activism flowed from significant legal and policy successes¹⁵ toward the eradication of discrimination against women.¹⁶ In the last few decades, feminist jurisprudence has made an important contribution to

Programme of Action, Report of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 (1995). The document bolsters the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 180, U.N. GAOR, 34th Sess., Agenda Item 75, U.N. Doc. A/RES/34/180 (1980) [hereinafter CEDAW], by providing a program of action for governments to address women's rights. See Margaret Plattner, *The Status of Women Under International Human Rights Law and the 1995 UN World Conference on Women, Beijing, China*, 84 KY. L.J. 1249, 1254-60, 1263-73 (1996) (discussing both CEDAW and the Beijing Conference); Elizabeth L. Larson, Comment, *United Nations Fourth Conference on Women: Action for Equality, Development, and Peace (Beijing, China: September 1995)*, 10 EMORY INT'L L. REV. 695 (1996) (same).

13. By "Western feminists," I refer to women in North America, Western Europe, and Australia. These countries generally share a dominant European culture, democratic or social-democratic political systems, free-market economies, and similar levels of economic development. For a detailed discussion on the feminist movement in Europe and the United States, refer to *THE WOMEN'S MOVEMENTS OF THE UNITED STATES AND WESTERN EUROPE* (Mary Fainsod Katzenstein & Carol McClurg Mueller eds., 1987). See also Susan Ryan, *Australia's Sex Discrimination and Affirmative Action Legislation*, 8 J. IRISH SOC'Y FOR LAB. L. 10 (1989) (discussing the passage of the Sex Discrimination and Affirmative Action statutes in Australia during the author's tenure as Minister on the Status of Women and the statute's projected impact on the economic empowerment of women).

14. For a feminist critique of the mechanisms and procedures of the United Nations, see Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991). See generally Cook, *supra* note 8 (discussing the effect of the women's movement on international human rights).

15. Note that "successes" refer to incremental attitudinal changes as well as positive legislative and judicial steps. The list is extensive, but a few examples are worth noting here. In Australia, the legislature passed the Sex Discrimination Act, 1984, No. 4 (Austl.), and the Affirmative Action (Equal Employment Opportunity For Women) Act, 1986, No. 91 (Austl.). See CHRIS RONALDS, *AFFIRMATIVE ACTION AND SEX DISCRIMINATION* (1987). In the United States, women scored major victories in the courts. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (affirming the right to have an abortion); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (upholding an affirmative action plan using gender as a factor in promotion and hiring).

16. Obviously the legislative inroads into sexism were not monolithic in the West, and huge differences between, and even within, countries existed. It is fair to argue, however, that within these societies there was a consensus about the need to work toward the goal of gender equality. This was certainly true at the formal legal level. See, e.g., Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, in *FEMINIST LEGAL THEORY* 15 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (examining the role of the courts with respect to gender equality).

the field of legal theory. It has succeeded in transforming many areas of domestic law, forcing accommodation of women's experiences.¹⁷ A cursory glance at the areas of criminal law (particularly rape and domestic battery), family law, and anti-discrimination law, reveals the impact of feminist jurisprudence.¹⁸ Although the male bias in the law persists, the situation of certain women has improved dramatically in the past few decades, and this change is a direct result of feminist law reform efforts.¹⁹

Buoyed by their achievements in law and policy, Western feminists turned their attention to international issues. One significant reason for this shift in focus was the United Nations declaration of the Decade for Women, which provided an opportunity for feminist activists and scholars from the developed world to interact with their counterparts in the developing world.²⁰ The growing presence of women from developing countries on the international stage was another reason that Western feminists became more aware of international issues. Women from developing countries formed strategic political coalitions with Western feminists around specific issues.²¹

17. See CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); see also Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 838-43 (1990) (discussing how perspectives advanced by women have changed American law).

18. See HESTER EISENSTEIN, *INSIDE AGITATORS* 50-64 (1996) (reviewing recent feminist achievements in Australian law). Eisenstein lists strategies adopted by feminists to change the apparatus of the Australian state for the benefit of women. She analyzes the successes and limitations of these strategies in light of the dominant male political culture and changing economic climate in the mid-to-late 1980s. *Id.*; see also Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267 (1985) (focusing on the appropriate criminal justice response to battering); Robert V. Ward, *A Kinder, Gentler System: An Examination of How Crime Victims Have Benefited from the Women's Movement*, 15 NEW ENG. J. CRIM. & CIV. CONFINEMENT 171 (1989) (discussing how the issues first raised by feminists made a crime victims' movement possible). For a personal narrative regarding involvement in women's struggles and various strategies adopted to improve the situation of women, see PATRICIA IRELAND, *WHAT WOMEN WANT* (1996).

19. See Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 323 (1995). In this article the author provides a detailed account of women in the legal profession and of strides made by certain women in this largely male-dominated profession. *Id.*; See also MARGARET THORNTON, *DISSONANCE AND DISTRUST: WOMEN IN THE LEGAL PROFESSION* (1996) (providing a sober reflection on the impediments women face in the legal profession in Australia).

20. See Stumpf, *supra* note 9 (looking briefly at the United Nations Decade for Women and presenting the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) for reexamination).

21. For a thoughtful discussion that illustrates this point, see Julie Mertus & Pamela Goldberg, *A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct*, 26 N.Y.U. J. INT'L L. & POL. 201 (1994).

This period of change coincided with widespread political upheaval in some Third World countries, where popular movements were attempting to unseat non-democratic minority governments.²²

In recent years feminist scholars have called for an expanded definition and operation of international law, one that recognizes the "fundamentally skewed nature of international law" that privileges men and ignores the interests of women.²³ While recognizing vast economic, geographical, cultural, and social differences between women in the developed world and their counterparts in the developing world, feminist scholars nevertheless have suggested a collective mobilization of women against male domination. A leading Western feminist has argued that

[i]ssues raised by Third World feminists . . . require a reorientation of feminism to deal with the problem of the most oppressed women, rather than those of the most privileged. Nevertheless, the constant theme in both Western and Third World feminism is the challenge to structures that permit male domination, although the form of the challenge and the male structure may differ from society to society. An international feminist perspective on international law will have as its goal the rethinking and revision of those structures and principles which exclude women's voices.²⁴

Therefore, a feminist perspective on international law challenges the "masculine world of international law"²⁵ in its content, organizational structure, procedure, and enforcement mechanisms.²⁶

22. The political situation in many countries during this period supports this point. In South Africa, for example, women involved in the national liberation struggle aligned themselves with international solidarity endeavors. Women in Nicaragua followed the same pattern. See Barbara J. Seitz, *From Home to Street: Women and Revolution in Nicaragua*, in *WOMEN TRANSFORMING POLITICS* 162 (Jill M. Bystydzienski ed., 1992); see also bell hooks, *Sisterhood: Political Solidarity Between Women*, 23 *FEMINIST REV.* 125 (1986) (arguing that women must live and work in solidarity in order to build a sustained feminist movement).

23. Charlesworth et al., *supra* note 14, at 615. The Charlesworth article is regarded as the pioneering article in this area of analysis. The authors "argue that both the structures of international lawmaking and the content of the rules of international law privilege men; if women's interests are acknowledged at all, they are marginalized. International law is a thoroughly gendered system." *Id.* at 614-15.

24. *Id.* at 621.

25. *Id.*

26. See Andrew Byrnes, *Toward More Effective Enforcement of Women's Human Rights Through the Use of International Human Rights Law and Procedures*, in *HUMAN RIGHTS OF WOMEN*, *supra* note 8, at 189; see also Geraldine A. del Prado, *The United Nations and the Promotion and Protection of the Rights of Women: How Well Has the Organization Fulfilled Its Responsibility?*, 2 *WM. & MARY J. WOMEN & L.* 51 (1995)

Feminist activists, particularly those from the developing countries involved in the decolonization process, have engaged in sophisticated and partially successful lobbying of the United Nations to ensure that the organization more vigorously pursues women's rights.²⁷ The adoption by the United Nations of the CEDAW²⁸ was a political milestone for women activists. CEDAW provides a comprehensive legal framework designed to ensure equality for women.²⁹ It outlines the major legal and social structures that impede women's rights and opportunities, and it specifies measures that state parties who ratify CEDAW must take to eliminate such discriminatory structures.³⁰ In relation to cultural matters, CEDAW describes how state parties must modify the conduct of their citizens in order to eliminate all practices which incorporate the idea of the inferiority of either of the sexes or set up stereotyped roles for men and women.³¹

Since the adoption of CEDAW, pressure by female lobbyists has ensured that women's issues remain on the global agenda. The political momentum made the adoption of the Vienna Declaration on Violence Against Women³² possible and it renewed dedication to the principles and aims of CEDAW in the Beijing Platform for Action.³³

Despite formidable obstacles to women's equality in a vast array of economic, social, and political areas, there now exists a highly

(discussing the extent of the United Nations' success in achieving gender equality via policy pronouncements and treaties).

27. See Mertus & Goldberg, *supra* note 21, at 207-16. The authors describe the vigorous lobbying efforts of various feminist groups, the resultant conflicts, and the difficult process of achieving compromise as feminists from the "North" and the "South" lobbied to incorporate their agendas into the final conference report. *Id.*

28. CEDAW, *supra* note 12.

29. *Id.* at 1. "[D]iscrimination against women is incompatible with human dignity and the welfare of society and constitutes an obstacle to the full realization of the potentialities of women." *Id.* For a detailed tabulation of global developments with respect to women's human rights, see UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, THE UNITED NATIONS AND THE ADVANCEMENT OF WOMEN 1945-1996 (1996). For a comprehensive list of international documents that incorporate women's rights, refer to WINSTON E. LANGLEY, WOMEN'S RIGHTS IN INTERNATIONAL DOCUMENTS (1991). See also A THEMATIC GUIDE TO DOCUMENTS ON THE HUMAN RIGHTS OF WOMEN (Gudmundur Alfredsson & Katarina Tomasevski eds., 1995) (providing relevant international standards grouped by subject matter).

30. CEDAW, *supra* note 12, at 2-10; see also Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643 (1990) (arguing that CEDAW obligates state parties to provide the means to move progressively toward elimination of discrimination against women).

31. CEDAW, *supra* note 12, at 4.

32. See Mertus & Goldberg, *supra* note 21.

33. Valerie A. Dormady, Note, *Women's Rights in International Law: A Prediction Concerning the Legal Impact of the United Nations' Fourth World Conference on Women*, 30 VAND. J. TRANSNAT'L L. 97 (1997).

organized, politically astute, articulate, and vocal cadre of feminists³⁴ who have committed themselves to eradicating the vestiges of patriarchy, not only within their borders, but on a global scale.³⁵ However, their activities have raised a few concerns, not because of disagreement with the ultimate goal of women's equality, but because of reservations concerning tactics. These concerns arise from campaigns tinged by a certain evangelism that accompanies much of the writing and the resultant activism.³⁶ This evangelism surfaces in discussions about traditional or religious law, and it becomes particularly animated with regard to certain traditional practices, such as polygamy and female genital surgeries.³⁷ For the impartial

34. The large volume of literature focusing on the rights of women makes this point. See, e.g., Cook, *supra* note 8 (discussing the effect of the women's movement on international human rights); Karen Busby, *The Maleness of Legal Language*, 18 MANITOBA L.J. 191 (1989) (arguing that sexist language must be eliminated in order to eliminate sexism); Diane Crothers, *Owning the Power of the Law*, 20 HUM. RTS. 12 (1993) (arguing that women must exercise their rights to participate at all levels of the legal system in order to effect change); Lisa R. Pruitt, *A Survey of Feminist Jurisprudence*, 16 U. ARK. LITTLE ROCK L.J. 183 (1994) (examining various approaches to feminist jurisprudence); Denise G. Reaume, *What's Distinctive About Feminist Analysis of Law*, 2 LEGAL THEORY 265 (1996) (discussing a new approach to feminist legal analysis). Women's studies courses have proliferated in most disciplines in universities across the United States and across the globe. Cf. A FEMINIST PERSPECTIVE IN THE ACADEMY: THE DIFFERENCE IT MAKES (Elizabeth Langland & Walter Gove eds., 1981) (discussing whether women's studies, which have brought a feminist perspective to the academy, actually have made any difference); BELL HOOKS, TEACHING TO TRANSGRESS (1994) (considering how teachers may use education as a tool for liberation). For a stinging critique of women's studies programs, see CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM: HOW WOMEN HAVE BETRAYED WOMEN (1994). Women are lobbying in huge numbers to have female politicians elected to political office. WOMEN TRANSFORMING POLITICS 203, 204 (Jill M. Bystydzienski ed., 1992); see also Susan J. Carroll, *The Politics of Difference: Women Public Officials as Agents of Change*, 5 STAN. L. & POL'Y REV. 11 (1994) (discussing the role of women both as voters and as public officials).

35. See, e.g., Annie Bunting, *Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies*, 20 J. L. & SOC'Y 6 (1993) (exploring how international human rights strategies can be more responsive to the needs of women in diverse cultural settings); see also Cook, *supra* note 8, at 228 (arguing that states must eliminate human rights violations against women).

36. Consider, for example, the campaign against female genital mutilation in which Alice Walker, author of such popular works as *The Color Purple* and *In Search of Our Mother's Gardens*, played a prominent role. For an extensive discussion of this campaign and associated issues, see Isabelle Gunning, *Female Genital Surgeries and Multicultural Feminism: The Ties That Bind; the Differences That Distance*, in THIRD WORLD LEGAL STUDIES: WOMEN'S RIGHTS AND TRADITIONAL LAW: A CONFLICT? 17 (Penelope E. Andrews ed., 1994-95). Gunning accuses certain Western feminists of not being sensitive to the perspectives of women of "other" cultures. *Id.* at 19-29; see also Maivan Clech Lam, *Feeling Foreign in Feminism*, 19 SIGNS 865 (1994) (criticizing the dominant form of feminism with respect to its treatment of non-White cultures).

37. Gunning, *supra* note 36, at 19-29; see also Thandabantu Nhlapo, *Women's Rights and the Family in Traditional and Customary Law*, in PUTTING WOMEN ON THE

observer, these practices represent the body of laws, practices, and procedures that have maintained the culture of entire communities for centuries.³⁸ In short, the focus on discarding these practices means losing the totality of what constitutes a particular community's traditions and laws, ignoring the complexities of their interaction with the community and the nuances of an individual's engagement with these practices.³⁹

In 1990, when delegates to South Africa's constitutional negotiations fought over details of the rights to be included in the new Constitution, women activists within South Africa had already managed to organize and successfully influence the process. They armed themselves with evidence of the importance of formalizing protection for women. They were also sensitive to the complex arguments over human rights and moral relativism that ensue when an attempt is made to incorporate gender equality into a system of constitutional law that retains respect for traditional law.

AGENDA 111 (Susan Bazilli ed., 1991) (considering the conflicts between traditional South African family norms and women's equality).

38. I intend to defend neither polygamy nor the practice of female genital surgery. With respect to polygamy, it has been ascertained that hostility to the practice is widespread in South Africa. See Beauty Mkhize, *Rural Women's Movement—the Position of Rural Women*, in CUSTOM AND RELIGION IN A NON-RACIAL NON-SEXIST SOUTH AFRICA 10 (Community Law Centre, University of the Western Cape ed., 1993). Substantial evidence suggests that female genital surgery causes severe physical and psychological harm to young girls. See Robyn Cerny Smith, *Female Circumcision: Bringing Women's Perspectives into the International Debate*, 65 S. CAL. L. REV. 2449 (1992); see also DPI-Release, *Subcommission on Prevention of Discrimination and Protection of Minorities Addresses Harmful Traditional Practices Affecting Health of Women and Girls*, The Human Rights Information Network, HR/SC/97/14.

39. For example, this point is made forcefully with respect to *sati* (bride burning):

A woman burns to death in a village in the state of Rajasthan in India. The news makes it to the front page of the *New York Times*—as had some years earlier the news that a woman had been stoned to death for adultery in a Middle East country. The “monolithic ‘Third World Woman’ ” as subject instantaneously becomes an overdetermined symbol, victim not only of universal patriarchy but also of specific third world religious fundamentalism.

The stereotypical and merely sensational aspects of these ‘events,’ isolated from their context, have tended to overwhelm not only the much greater complexity of the issues actually involved, but the equally significant protest mounted by local women's groups and other sections of the population . . .

RAJESWARI SUNDER RAJAN, *REAL AND IMAGINED WOMEN* 15 (1993) (footnotes omitted); see also L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics, and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997) (arguing that imperatives of culture must be taken seriously when evaluating practices such as female circumcision).

II. THE POST-COLONIAL CONUNDRUM: CUSTOMARY LAW AND DEMOCRACY

The cultures and traditions of non-Western peoples have always invited scrutiny. This proved true for non-Western peoples under colonial rule and equally true when they were the beneficiaries of developmental assistance.⁴⁰ During the colonial period, the pejorative notion of the "other" justified the various values and practices of colonialism.⁴¹ Modern day developmental assistance is often predicated on whether recipient countries meet "acceptable" norms.⁴²

The period of decolonization was accompanied by a rush of Western lawyers and legal scholars who supported the goals of liberation, and who were inspired by a desire to assist lawmakers and lawyers in these newly independent states in the implementation of modern laws consistent with democracy.⁴³ These Western lawyers displayed an unquestioning support of, and remarkable enthusiasm for, the legal, political, and social transformations upon which those societies were embarking.

One particularly significant group consisted of what became known as law and development scholars.⁴⁴ In an article alluding to

40. See generally ROBERT B. SEIDMAN, *THE STATE, LAW AND DEVELOPMENT* 108-17 (1978) (examining how the law functions in Third World countries).

41. See, e.g., HENRY REYNOLDS, *THE LAW OF THE LAND* (1996) (discussing the legal and political arguments used to justify the European settlement of Australia).

42. David Weisbrot, *Restricting Foreign Aid on Human Rights Grounds*, in *INTERNATIONALIZING HUMAN RIGHTS AND HUMANIZING INTERNATIONAL LAW: DOMESTIC ISSUES AND GLOBAL PERSPECTIVES* 30, 31 (David A. Johnson ed., 1981) (analyzing restrictions on trade and aid based on violations of human rights by recipient nations).

43. For an interesting discussion on law and lawmaking in newly independent states, see Jean G. Zorn, *Lawyers, Anthropologists, and the Study of Law: Encounters in the New Guinea Highlands*, 15 *L. & SOC. INQUIRY* 271 (1990) (reviewing ROBERT J. GORDON & MERVYN J. MEGGIT, *LAW AND ORDER IN THE NEW GUINEA HIGHLANDS: ENCOUNTERS WITH ENGA* (1985)). Of course, Western lawyers were not the only culprits. The Cold War ensured that Marxist lawyers from their respective societies also attempted to place an imprimatur on laws in countries that were clearly committed to socialism. See Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding, & Serving Palm Wine*, *CASE W. RES. J. INT'L L.* 167, 189 (1997).

44. See, e.g., Robert B. Seidman, *Law and Development: A General Model*, 6 *L. & SOC'Y REV.* 311 (1972) (arguing for a general model relating law and social change). For a critique of the law and development movement, refer to David Trubek & Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis of Law and Development Studies in the United States*, 1974 *WIS. L. REV.* 1062. See also John Henry Merryman, *Comparative Law and Social Changes: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 *AM. J. COMP. L.* 457 (1977) (arguing that "comparative law and social change" serves a better purpose than the law and development movement).

the role of the law and development scholars in the developing world, Jean Zorn comments that

they viewed the introduction of Western law into the Third World as a *modernizing and beneficent act*. To these American lawyers, impelled by a terrible innocence not only of the Third World, but of their own society as well, . . . Western law . . . would promote individual freedom, expand citizens' participation in government and in the shaping of their own lives, and enhance social equality.⁴⁵

This attitude coincided with what became a pattern in the postcolonial state, namely, that traditional law was fated to succumb to either modernization and incorporation into the national legal framework or to relegation to second-rate status in a dual legal framework.⁴⁶ For newly independent governments, the cultural traditions of local communities, whether codified or not, often proved too sensitive to deal with consistently.⁴⁷ Commissions of inquiry were appointed to investigate particular institutions or practices of traditional law and to make recommendations to the legislature.⁴⁸ The presence of traditional law is not any easier for governments to handle today. Certain cultural traditions remain highly contested

45. Zorn, *supra* note 43, at 285–86 (emphasis added) (footnote omitted).

46. See generally MARTIN CHANOCK, *LAW, CUSTOM AND SOCIAL ORDER* (1985) (examining the historical formation of African customary law).

47. This point has been made in relation to indigenous property rights in Namibia. See Sidney L. Haring, *The Constitution of Namibia and the 'Rights and Freedoms' Guaranteed Communal Land Holders: Resolving the Inconsistency Between Article 16, Article 100, and Schedule 5*, 12 S. AFR. J. HUM. RTS. 467 (1996).

48. For example, after independence in Kenya, the government confronted the issue of polygamy by setting up a commission of inquiry to make recommendations. Even after deliberations, the Commission recommended that outlawing polygamy would not prove beneficial but that changes in lifestyles, particularly for women, would ensure that the practice ended. See J.B. Ojwang, *Polygamy as a Legal and Social Institution in Kenya*, 10 E. AFR. L.J. 63, 74. After independence, the government of Ghana "attempt[ed] a reform of the customary marriage system. The [then-ruling] Convention People's Party programme of 1962 affirm[ed] adherence to the principle of complete sex equality and declare[d] that social changes ha[d] made polygamy inappropriate." H.J. SIMONS, *AFRICAN WOMEN* 85 (1968). In Zimbabwe, the government promulgated the Legal Age of Majority Act, Act No. 15 of 1982, after independence. The Act enabled a woman over the age of 18 to contract a marriage without her (former) guardian's consent and without a *lobolo* agreement. *Lobolo* describes a man's obligation to pay cattle, horses, hoes, money, or other property to the father of his intended bride or wife in consideration of their marriage. See T.W. BENNETT, *A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA* 195 (1991). For a discussion of these changes in Zimbabwe, see Welshman Ncube, *Released from Legal Minority: The Legal Age of Majority Act in Zimbabwe*, in *WOMEN AND LAW IN SOUTHERN AFRICA* 193 (Alice Armstrong ed., 1987).

and complex, and scrutinizing them can engender highly emotional debates.

Despite the increased urbanization of South Africa, significant proportions of the African population still have aspects of their lives governed by customary law.⁴⁹ In fact, it has been suggested that traditional authorities are, in effect, the bridge from the pre-colonialist Africanist past to contemporary South Africa.⁵⁰ The new democratic South Africa confronts the perennial challenge of all post-colonial governments incorporating the remnants of indigenous laws, institutions, and policies with the modern constitutional order. Women activists in South Africa therefore recognized that, while traditional law retained many patriarchal or sexist features, they wanted and needed to be able to discard these features without discarding all of customary law.

III. INDIGENOUS PEOPLES AND WOMEN'S RIGHTS

The entry onto the international human rights stage of women's rights activists and feminist scholars coincided with another significant inroad into human rights discourse and practice: the emergence of demands by indigenous peoples around the globe for recognition of their cultural and other derivative rights.⁵¹ In light of the historical denigration and marginalization of indigenous law and custom, the rekindling of the rights of indigenous peoples internationally resonated strongly in South Africa.⁵² A combination of the post-colonial repackaged versions of Africanism and Black Power created the possibility of the confluence of "Africanization" with the "national question."⁵³ An unintended consequence of the confluence of these developments was the emergence of a conflict between certain aspects of indigenous

49. A point worth noting is that Muslims in South Africa are also governed by a form of customary law, which shares some similarity with African customary law, particularly in relation to aspects of family law. Islamic customary law is not discussed in this Article because of significant historical and experiential differences between Muslim and African people, which are sufficiently great to require a separate analysis. For an analysis of Islamic law in South Africa, see FIROZ CACHALIA, *THE FUTURE OF MUSLIM LAW IN SOUTH AFRICA* (1991).

50. See Yvonne Mokgoro, *Traditional Authority and Democracy in the Interim South African Constitution*, 3 REV. CONST. STUD. 60 (1996).

51. Maivan Clech Lam, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, 25 CORNELL INT'L L.J. 603, 607 (1992).

52. See Christina Murray & Felicity Kaganis, *Equality and Culture in South Africa's Interim Constitution*, 5 OXFORD INT'L L. REV. 17 (1994).

53. Frances Meli, *South Africa and the Rise of African Nationalism*, in *THE NATIONAL QUESTION IN SOUTH AFRICA* 66, 67-76 (Maria Van Diepen ed., 1988).

custom and the expanded consensus (albeit a fragile one) on women's equality. This conflict created the paradigm whereby those with vested interests in maintaining a traditional legal order were pitted against feminist activists.⁵⁴ The ensuing debate between feminists and traditionalists has incorporated the hackneyed discussion of cultural relativism versus universalism⁵⁵ and the emerging post-colonial discourse that incorporates the post-modern imperative of multiple truths.⁵⁶ In short, all these theoretical traditions have influenced the tone and substance of the debates.

The issues are particularly trying in light of the post-colonial aspiration to dislodge Western political hegemony while simultaneously accommodating the new world order of human rights.⁵⁷ This struggle is mirrored in the South African context, where the issue of the role of traditional law emerges from a legacy of marginalization and denigration.⁵⁸ The colonial and apartheid legal order perpetuated an inferior role and status for traditional law within the national legal framework. Interaction and the resultant exchange of ideas and approaches between the two systems and their underlying values were almost non-existent.⁵⁹ Moreover, African laws

54. See L. Amede Obiora, *New Skin, Old Wine: (En)gaging Nationalism, Traditionalism, and Gender Relations*, 28 IND. L. REV. 575, 590-92 (1995) (discussing the conflict between traditionalist and non-traditionalist women over alimony).

55. See generally JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (1989) (discussing the necessity of approaching human rights issues without regard to conventional disciplinary boundaries); Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984) (arguing that there should be a fundamental universality of basic human rights, tempered by a recognition of the possible need for limited cultural variations); Tracy E. Higgins, *Anti-Essentialism, Relativism and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996) (exploring the culture-specific reasons for holding back the goals of feminists and the way in which feminists should respond).

56. See Mridula Udayagiri, *Challenging Modernization: Gender and Development, Postmodern Feminism and Activism*, in FEMINISM/POSTMODERNISM DEVELOPMENT 159 (Marianne H. Marchand & Jane L. Parpart eds., 1995) (critiquing the use of textual analysis as the primary theoretical strategy); see also RAJAN, *supra* note 39, at 10-13 (considering how to "unfix" subjects without embracing moral relativism).

57. See Weisbrot, *supra* note 42 (analyzing the tying of aid to an acceptable human rights record).

58. See Martin Chanock, *The South African Native Administration Act of 1927: Reflections on a Pathological Case of Legal Pluralism*, in THE RIGHTS OF SUBORDINATED PEOPLES 295 (Oliver Mendelsohn & Upendra Baxi eds., 1994).

59. Ismail Mahomed, *The Future of Roman-Dutch Law in Southern Africa, Particularly in Lesotho*, 1 LESOTHO L.J. 357, 361 (1985).

Roman-Dutch law and customary law evolved virtually as parallel systems.... The Roman-Dutch system interacted and cross-pollinated with English law to create in effect a new system of South African common law. But in Lesotho and certain other parts of

and customs, when accorded authority through the Bantustan structure and the system of chiefs, actually served a useful purpose in administering apartheid. Traditional chiefs were frequently the apartheid government's surrogate administrators in the so-called homelands.⁶⁰ In the urbanized context of the liberation struggle in South Africa, certain traditional institutions became synonymous with apartheid rule in the Bantustans.⁶¹ In the mind of the urban elites of the liberation movement, the crisis of legitimacy for the apartheid legal configuration affected its Bantustan apparatus of chiefs.⁶² Consequently,

Southern Africa, the Roman-Dutch law remained substantially immune from the influence of African customary law.

Id.

60. The legal instrument that solidified this control was the Black Administration Act No. 38 of 1927 (also known as the Native Administration Act). Through the passage of this Act, the South African government imposed upon the African population a national system of "recognition" of African law. Under this system, "[t]he governor-general [of the Union of South Africa] was made the supreme chief of all Africans, and [was empowered to] appoint and depose chiefs, divide or amalgamate tribes, deport and banish tribal groups or individuals, and legislate by decree for the scheduled native areas." SIMONS, *supra* note 48, at 53. A separate system of courts uniformly recognized and administered tribal law. These courts were comprised of "chiefs', native commissioners', native appeal[,] and native divorce courts." *Id.* They had discretion to apply tribal law in actions between Africans arising out of "African custom," unless the custom was repugnant to natural justice or public policy, or conflicted with any statutory provision. *See id.* at 53-55.

61. *See generally* SIMONS, *supra* note 48, at 42-43 (discussing strategic South African governmental acceptance of African customs that benefited rule by Whites). The Bantustans, or "homelands," were part of the grand scheme of apartheid; it was to be the place where ostensibly African people would exercise political rights (thereby denying such rights in South Africa). It was an integral part of the migrant labor system; the Bantustans in effect served the purpose of housing South Africa's "surplus population" (women, children, and unemployed men). BARBARA ROGERS, *DIVIDE AND RULE* (1976); *see also* HUMAN RIGHTS IN THE HOMELANDS: SOUTH AFRICA'S DELEGATION OF REPRESSION (Fund for Free Expression ed., 1984). *See generally* INTERNATIONAL DEFENSE & AID FUND FOR SOUTHERN AFRICA, *APARTHEID: THE FACTS* (1983) (discussing the use of Bantustans to segregate persons on account of race).

62. It is significant that, at the local level, the chiefs are a form of local government, dispensing certain goods and services. *See* Mokgoro, *supra* note 50, at 66. Their functions include:

- The allocation of land held in trust for small-scale farming, grazing and residential purposes (not for commercialism);
- The preservation of law and order, including adjudication over minor disputes of a civil nature;
- The provision and administration of services at a local government level;
- Social welfare administration within their communities, including the processing of applications for social security benefits and business premises; and

the association of certain indigenous structures with the administration of South Africa limited their broader appeal within the country. The link between traditional African leadership and apartheid did not prevent the role of the traditional leadership from receiving weighty consideration in the deliberations preceding the constitutional negotiations.⁶³ A leading ANC lawyer, and now constitutional court judge, made the point clearly:

Traditional leaders [in a new South Africa] are entitled to a dignified and respected role which enables them to take their place in and make their contribution towards building a new [society]. Their position in the new constitutional order should be such as to permit them to recapture the prestige which was undermined by colonialism, segregation and apartheid.⁶⁴

At the constitutional negotiations, traditional leaders lobbied extensively to place customary law outside the purview of the Constitution or legislative enactments that mandate equality.⁶⁵ First, they viewed traditional law as deserving a new parallel status with the national legal system.⁶⁶ Second, they maintained that traditional laws and institutions were sufficiently democratic so as not to require change by the new Constitution.⁶⁷ Third, they wanted to ensure

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- Promotion of education, including the erection and maintenance of schools and the administration of access to education, finance, for example, scholarship and study loans to scholars and students.

Id. Customary law largely provided the framework for personal laws, particularly family law, in the Bantustans. T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW 66 (1995).

63. See, e.g., African National Congress, *Constitutional Guidelines for a Democratic South Africa*, 5 S. AFR. J. HUM. RTS. 129, 130 (1989) ("The institution of hereditary rulers and chiefs shall be transformed to serve the interests of the people as a whole in conformity with the democratic principles embodied in the constitution.").

64. SACHS, *supra* note 2, at 77.

65. See Mokgoro, *supra* note 50, at 70.

66. Iain Currie, *The Future of Customary Law: Lessons from the Lobolo Debate*, in GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER, *supra* note 1, at 146, 149 ("The essence of their proposal . . . was that customary law and general South African law should be parallel legal systems, neither empowered to interfere with the other.").

67. Their argument was based not so much on democracy but on a sense of the community's loyalty to things traditional. See Mokgoro, *supra* note 50, at 68.

The [traditional] system itself, despite its flaws and the controversy around it, is firmly in place and is cherished by rural communities. They identify with it and see it as their own. Whether it is appreciated or not, [traditional authorities] do exercise substantial power and authority, including that of a political nature, over their rural communities.

Id.

a level of autonomy for traditional institutions in order to maintain the status quo, in which power was vested in the chiefs, who were all older males.⁶⁸

For two discrete and important constituencies in South Africa, women and African traditionalists, the new constitutional order provided the opportunity for past legal exclusions to be corrected. Women lobbied extensively for a constitutional commitment to gender equality. African traditionalists lobbied for the constitutional protection of indigenous customs and laws.⁶⁹ Both groups secured certain constitutional guarantees, as outlined in the following section.⁷⁰

IV. THE SOUTH AFRICAN CONTEXT

Once women's issues were incorporated into the post-apartheid political and legal agenda, women could utilize their political skills developed in the decades of struggle against apartheid to place their mark on the new constitutional arrangement.⁷¹ In the decades preceding the seismic changes that reshaped the nation, South African women had been involved in major debates about the shape and content of constitutional protections of women's rights in various international forums. Women's organizations, academics, female members of the major political parties,

68. Their rationale appears to be replete with contradictions. Although persuasive arguments can be raised about parallel systems and autonomy, the exclusion of women and younger men from positions of leadership in traditional communities raises questions about the inherent democracy of these institutions. See Khanya B. Motshabi & Shereen G. Volks, *Towards Democratic Chieftaincy: Principles and Procedures*, 1991 ACTA JURIDICA 104 (examining the institution of chieftancy and suggesting ways in which it may be made more democratic). Referring to the Bill of Rights during the constitutional negotiations, an irate Chief Nonkonyana, in a highly publicized newspaper interview stated, "[m]y son can be successfully challenged for my throne by my daughter, because the Bill says that all forms of discrimination—and it is emphatic on gender—should not be permitted." BENNETT, *supra* note 62, at 21.

69. As Martin Chanock has pointed out, "debates about the customary law tend to begin with cultural celebration of its special characteristics and develop into skepticism about its equity." Martin Chanock, *Law, State and Culture: Thinking About 'Customary Law' After Apartheid*, 1991 ACTA JURIDICA 52, 63.

70. Similar questions are related to the laws and customs of other communities, such as Islamic and Jewish ones. Mavivi Manzini, a female South African parliamentarian, has challenged the "special status" of African communities with respect to these issues, concluding that all religious and ethnic minority traditions were marginalized by the system of Roman-Dutch law that dominated in South Africa. See Mavivi Manzini, Remarks at the *Michigan Journal of Race & Law Symposium, "Constitution-Making in South Africa"* 366 (Mar. 22, 1997) (transcript on file with the *Michigan Journal of Race & Law*).

71. See Albertyn, *supra* note 1, at 51–54.

and women's trade union groups lobbied hard for the incorporation of gender equality into the transitional Constitution.⁷² Both the transitional Constitution and the final version are evidence of the successes of these lobbying efforts.⁷³

Women presented their demands in a charter of women's rights, which embodied the priorities of women throughout the country.⁷⁴ These demands included contractual, property, and inheritance rights that had been denied to women under both the South African legal system and African customary law.⁷⁵ The women identified the right to participate in traditional and community courts as essential⁷⁶ and they called for active participation in all traditional institutions.⁷⁷ Women demanded the discontinuation of laws that failed to recognize the legality of customary marriages, calling for recognition equal to that given to other legal forms of marriage.⁷⁸ Although the Charter articulates the freedom of women to "practice their own religion, culture or beliefs without fear,"⁷⁹ it states unequivocally that "custom, culture and religion shall be subject to the equality clause of the Bill of Rights."⁸⁰

72. Murray & Kaganis, *supra* note 52.

73. The principle of gender equality is enshrined in both the transitional and final Constitution in the Bill of Rights. S. AFR. CONST. §§ 7-39; S. AFR. CONST. §§ 7-35 (1993).

74. WOMEN'S CHARTER FOR EFFECTIVE EQUALITY (1994) [hereinafter CHARTER]. The preamble to the Charter states that "[w]e set out here a programme for equality in all spheres of our lives, including the law, the economy, education, development and infrastructure, political and civic life, family life and partnerships, custom, culture and religion, health and the media." *Id.* at 1.

75. Article 2 of the Charter states that "[w]omen shall have equal legal status and capacity in civil law, including amongst others, full contractual rights, the right to acquire and hold rights in property, the right to equal inheritance and the right to secure credit." *Id.* at 2. Article 5 of the Charter provides that "[w]omen must have equal access to land and security of tenure, including women living under customary law." *Id.* at 6. Article 8 of the Charter provides that "[w]omen married under customary law shall have the right to inherit from their husbands." *Id.* at 7.

76. Article 2 of the Charter provides that "[w]omen shall have equal representation on, and participation in, all traditional courts, alternative dispute resolution mechanisms and local community courts." *Id.* at 3. Similarly, Article 7 states that "[r]ural women have the right to be part of decision-making structures in traditional communities." *Id.* at 7.

77. Article 7 of the Charter provides that "[t]raditional institutions shall be restructured in accordance with the principles of equality and democracy." *Id.* at 7.

78. CHARTER, *supra* note 74, Art. 8. In South Africa only civil marriages are recognized by law; customary marriages do not have legal status because they are seen as potentially polygamous. A customary marriage can be converted into a civil marriage, however. See MURIEL HORREL, THE RIGHTS OF AFRICAN WOMEN 7-9 (1968). Legal recognition is denied to Muslim marriages as well. See *Kader v. Kader*, 1972 (3) SA 203 (A).

79. CHARTER, *supra* note 74, Art. 9 at 8.

80. *Id.*

Moreover, Article 9 of the Charter, entitled "Custom, Culture and Religion," is introduced in rather strong terms: "Customary, cultural and religious practice frequently subordinate women. Roles that are defined for women are both stereotypical and restrictive. Women are often excluded from full participation, leadership and decision-making in religious and cultural practice."⁸¹

The formal commitment to the democratic ideals of non-racialism and gender equality as embodied in the Constitution raises questions about customary law and certain customary institutions that discriminate against women.⁸² Criticism has been

81. *Id.* The foregoing comments have mainly focused on those sections of the Charter dealing with traditional law, policy and practice. The Charter, however, comprehensively deals with the overall spectrum of women's lives. *Id.* The significance of the Charter and the political lobbying preceding it, was the comprehensiveness of the document and its representation of solid grass-roots organizing and political coalitions among women from different constituencies. These developments indicate that a South African "feminism" may emerge that not only recognizes the intersection of race, class, and geographic location, but that may avoid the elitism of Western feminism. See Jacklyn Cock, *Putting Women on the Agenda*, in *PUTTING WOMEN ON THE AGENDA*, *supra* note 37, at 27 (exploring the problems involved with working to get women's concerns heard); see also Jo Beall et al., 'A Bit on the Side?': *Gender Struggles in the Politics of Transformation in South Africa*, 33 *FEMINIST REV.* 30, 32 (1989) (critiquing the "women question position," a position "broadly based on the classical socialist position on women's oppression, namely that women's oppression will be eliminated in the course of transition to socialism," and offering "as an alternative, a socialist-feminist position which sees women's struggles as a legitimate and integral part of a broader struggle, which transform not only the form and content of those struggles, but also the type of development policy which flows from them").

82. In the area of family law, Thandabantu Nhlapo has identified as clearly discriminatory institutions such as *lobolo*, polygamy, child betrothal (whereby young girls are promised as brides, often to older men), the levirate (when a man dies, and his male relative fathers children on his behalf with the decedent's wife), and the sororate (when a younger sister must replace a wife who is unable to produce children). See T.R. Nhlapo, *The African Family and Women's Rights: Friends or Foes*, 1991 *ACTA JURIDICA* 135. But Nhlapo has also warned against simplistic tabulation of these institutions and practices. Instead, he has suggested a comprehensive analysis that places them within the socioeconomic, political, and cultural context of community and family relations. One must deconstruct their significance within those parameters. For example, with respect to marriage in traditional African society, Nhlapo highlights that the group as a whole, and not only the husband and wife, has a stake. Thandabantu Nhlapo, *African Customary Law in the Interim Constitution*, in *THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE*, *supra* note 11, at 157. He argues further that

there is another aspect to this favouring of group interests over those of the individuals involved: in patriarchal societies group interests are framed in favour of men.

Here is the first indication of why inequality is such an enduring part of African customary systems. The field of family relations is one in which Africans construct the foundations of their social lives. If that system masks inequality under the guise of group

directed at the constitutional protections of traditional authorities in light of their apparent contradiction of the democratic ideals underpinning the new legal order. The contradictions surface in relation to three characteristics of customary institutions: the first two intrinsic to these institutions, the last is an extraneous factor. The first is the hierarchical and patriarchal nature of the traditional institutions.⁸³ According to African law, succession to the office of chief is hereditary.⁸⁴ This is linked to the second characteristic, that hereditary rules mandate that only male heirs can become chiefs.⁸⁵ Both of these limitations clearly vitiate accepted notions of democracy. Hereditary succession with respect to community leadership contradicts the principle of elected government. In addition, excluding women from holding office clearly violates the constitutional mandate of gender equality.⁸⁶ The third characteristic of African customary law in which these contradictions surface is the manipulation of its institutions by successive colonial and apartheid governments.⁸⁷ The manipulation and distortion of customary law and its institutions, as opposed to its marginalization or destruction, faces less of a challenge. The political process of Africanization in South Africa, which is an imperative of the new order, will entail both a modification and reinvigoration of traditional law.⁸⁸

Although this debate is conducted in the cultural arena, its concerns are fundamentally economic. In other words, the struggle

interests, women and children, lacking a say in the articulation of those interests, are certain to be disadvantaged.

Id. at 160.

83. Motshabi & Volks, *supra* note 68, at 111 (discussing the patriarchal basis of traditional chieftaincy).

84. BENNETT, *supra* note 48.

85. J.C. BEKKER, *SEYMOUR'S CUSTOMARY LAW IN SOUTHERN AFRICA* 273 (1989). Motshabi and Volks have pointed out that, except for one community in the Northern Transvaal, women are precluded from becoming chiefs. Motshabi & Volks, *supra* note 68, at 104–05.

86. See S. AFR. CONST. §§ 7–30.

87. See *supra* notes 58–61 and accompanying text.

88. See Mokgoro, *supra* note 50, at 67. Mokgoro points out that

[t]he call for enhanced and maximized power for traditional leadership, despite the system's notorious history, seemed to form part of the justification in the arguments that colonialism, apartheid and racism in South Africa had made Africanism an integral part of the history of the national liberation struggle. Achieving national liberation should therefore include the restoration and revival of institutions symbolic of African pride, dignity and other forms of assertion.

Id.

is not only over cultural rights, but also over the economic rights that traditional laws may thwart. To state the obvious: an economic loss occurs when African women are denied the right to own property, inherit, or be recognized as heads of households.⁸⁹ Therefore traditional laws that disadvantage women contribute to the cycle of poverty and despair that plague a large proportion of Black women in South Africa.⁹⁰ In addition, the patriarchal basis of traditional authorities excludes women from becoming engaged in activities at the local government level and making decisions that will have a profound effect, not only on their own lives, but on their communities as a whole.⁹¹

V. THE SOUTH AFRICAN CONSTITUTION

A. *The Constitution and Gender Equality*

References to the ideals of non-sexism are scattered throughout the South African Constitution. In the Founding Provisions,⁹² the values that underpin the democratic state, including non-racialism

89. I refer here to traditional laws that deny women these rights. See Chanock, *supra* note 58. Referring to *lobolo*, Chanock elaborates: "The entrenchment of bride-wealth payments as a fundamental legal necessity for marriage, and as a major transfer of . . . resources, has been arguably the most crucial feature of African private law in South Africa. It is the lynchpin of the legal subordination of African women in private law." *Id.* at 317-18. Similarly, the KwaZulu Code in Natal provided that women could not become heads of households and accordingly could not own or control property. *KwaZulu Government Notice 47* (1982); *KwaZulu Act on the Code of Zulu Law* (1981), cited in Penelope Andrews, *Spectators at the Revolution? Gender Equality and Customary Law in a Post-Apartheid South Africa*, in 7 *LAW & ANTHROPOLOGY: INTERNATIONAL YEARBOOK FOR LEGAL ANTHROPOLOGY* (René Kuppe & Richard Potz eds., 1994).

90. However, one commentator has argued that certain traditional practices provide a social welfare net for women. See C.R.M. Dlamini, *The Role of Customary Law in Meeting Social Needs*, in 1991 *ACTA JURIDICA* 71. Referring specifically to polygamy (the practice whereby a man could marry as many wives as he could afford), Dlamini argues that "[i]n traditional society, where there were few job opportunities for women, polygamy enabled women to marry and to have children; marriage provided security." *Id.* at 77.

91. Yvonne Mokgoro makes the point persuasively:

[T]he undemocratic aspects of traditional authority serving as local structures cannot be ignored. They have outlived their acceptability and are offensive to the principles of participatory development and government accountability. Because of this weakness, many rural communities have become the pariah of South African society. Meaningful development in rural areas is therefore imperative.

Mokgoro, *supra* note 50, at 68.

92. *Id.* §§ 1-6.

and non-sexism, are listed.⁹³ The most significant provisions relating to gender equality are found in the Bill of Rights, particularly the section on equality.⁹⁴ This section contains a general commitment to equality before the law and equal protection of the law,⁹⁵ and states that “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”⁹⁶ Not all of these rights, however, are non-derogable.⁹⁷ Derogation from the constitutional protection of equality is not allowed with respect to “unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion, or language.”⁹⁸

The prohibition on direct and indirect discrimination implicitly acknowledges the invidiousness and tenacity of institutionalized discrimination.⁹⁹ This acknowledgment reflects the dominant jurisprudential trends in liberal democracies where the principle of equality has been trumpeted in constitutional and legislative packages.¹⁰⁰ The inclusion of both sex and gender as grounds for proscribing discrimination protects women from invidious discrimination based on both biological and physical attributes, as well as social and cultural stereotypes about the perceived role and status of women.¹⁰¹

93. *Id.* § 1(b).

94. *Id.* § 9.

95. *Id.* § 9(1).

96. *Id.* § 9(3).

97. *Id.* § 37(5).

98. *Id.* The exclusion of sex, and not gender, as a non-derogable category reflects a certain reticence on the part of the constitutional drafters to upset prevailing stereotypes about the role and status of women. However, the South African drafters were bolder than the American courts that subject sexual discrimination to intermediate scrutiny and racial discrimination to strict scrutiny.

99. See generally MARGARET THORNTON, *THE LIBERAL PROMISE* (1990) (discussing anti-discrimination legislation in Australia).

100. See Diana Majury, *Strategizing in Equality*, 3 WIS. WOMEN'S L.J. 169 (1987). “Equality is, at present, too much a part of the dominant legal discourse in Canada to be ignored.” *Id.* at 174. Majury believes that the focus should be on inequality, rather than equality. *Id.* at 172. She proposes an “inequality-based strategy.” *Id.* Of course, the principle of equality is a contested one. Feminists have advocated for an interpretation of equality theory that recognizes the real experiences of women; they do not want one that is abstract and formal and that does not address structural inequality. *Id.* at 180 (“As abstract constructs, [existing equality] models do not and cannot address the realities of women’s lives.”); see also Kathleen A. Lahey, *Feminist Theories of (In)Equality*, 3 WIS. WOMEN'S L.J. 5 (1987) (considering the definitions of equality under the laws of Canada, the United States, and Wisconsin).

101. Majury, *supra* note 101 at 173–76. Majury stresses, however, that in the ensuing debate over the meaning of equality, women must be vocal and active. She

The inclusion of protective measures or affirmative action is of potentially great value to women. The relevant constitutional provision reads: "To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."¹⁰² It has become clear that a constitutional mandate for affirmative action is an important weapon for tackling structural discrimination in a comprehensive manner, as well as shielding affirmative action programs from constitutional challenge.¹⁰³ The policy of affirmative action has been enshrined in international human rights instruments, most notably in CEDAW, which provides that "[a]doption by State Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discriminatory These measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."¹⁰⁴

The goals of non-sexism are promoted in other sections in the Bill of Rights. Section 12 provides that "[e]veryone has the right to bodily and psychological integrity, which includes the right (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent."¹⁰⁵ All of these provisions have the enormous potential of protecting women with regard to personal choices about birth control and reproduction. In a clause that has potentially profound consequence for victims of domestic and other forms of violence, the Bill of Rights provides that all people have the right to freedom and security of their person, which includes the right to be free from all forms of violence *from either public or private sources*.¹⁰⁶ The Constitution also protects freedom of expression only insofar as it does not involve "advocacy of hatred that is based on race, ethnicity, *gender* or religion, and that constitutes incitement to cause harm."¹⁰⁷

believes that women must "operationalize equality" instead of simply "defining it through legal analysis and theory making." *Id.* at 187.

102. S. AFR. CONST. § 9(2).

103. Penelope E. Andrews, *Affirmative Action in South Africa: Some Theoretical and Practical Issues*, in *THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE*, *supra* note 11, at 49, 55. In this article I focused on affirmative action as one way of overcoming the historical impediments facing the majority of women. *Id.* at 49.

104. CEDAW, *supra* note 12, at 3.

105. S. AFR. CONST. § 12(1)(c).

106. *Id.* § 16(1).

107. *Id.* § 16(2)(c). The Constitution also does not extend the right to the freedom of expression to "propaganda for war [or] incitement of imminent violence." *Id.* § 16(2)(b)-(c).

An innovative provision in the Constitution is the establishment of a Commission for Gender Equality empowered to promote, educate, monitor, and lobby for gender equality.¹⁰⁸ The Constitution also provides for a Human Rights Commission to promote and protect human rights.¹⁰⁹ The constitutional provision of these two commissions has engendered some passionate debate in South Africa. Supporters of a separate structure, such as the Commission for Gender Equality, opine that only such a body can deal comprehensively with women's issues and develop the capacity to build and enhance a solid culture committed to eradicating sexism.¹¹⁰ They fear that the incorporation of women's concerns under the general rubric of human rights will marginalize and trivialize women's issues, and that, consequently, the eradication of racism will take priority.¹¹¹ Opponents of a separate body to administer only women's issues argue that such a structure will inevitably serve to ghettoize women's issues and that, in any event, for most Black women, subordination stems from an interplay of racial, gender, and economic questions.¹¹² Opponents also argue that it is important for a body like the Human Rights Commission to develop the means to

108. Section 187 provides for the following functions of the Commission for Gender Equality:

(1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.

(2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

Id. § 187(1)–(2).

109. *Id.* § 184.

110. Catherine Albertyn, *National Machinery for Ensuring Gender Equality*, in *THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE*, *supra* note 11, at 17 ("These councils can enhance the role of the executive structure in developing an overall policy vision on gender and developing specific policies in accordance with this vision Implementation and enforcement of rights and policy is as important as formulation and planning."). *Id.* at 16–17.

111. *Id.* at 17. Some women have argued that it is important that the brief of the Human Rights Commission includes women's needs and experiences. It is for this reason that they oppose establishment of the Commission for Gender Equality, believing that it will effectively exclude women's rights from the mainstream of human rights which is the purview of the Human Rights Commission. Others argue that, because of the specific needs of women, it is not only important to have a separate Commission for Gender Equality, but that this commission should also have the power to enforce women's human rights. *See id.*

112. *Id.*; *see also* Adrien Wing, *Black South African Women: Towards Equal Rights*, 8 HARV. HUM. RTS. J. (1995) (analyzing the struggle of Black women in South Africa to overcome racism and sexism, focusing specifically on four areas: employment, education, rape and domestic violence, and health care).

cope with women's subordination so that the experiences and needs of women can be incorporated into a comprehensive and effective strategy to combat all kinds of discrimination, no matter where they originate.¹¹³

Only the passage of time will vindicate either position. At the time this Article was being written, only the Human Rights Commission had been fully established and was functioning effectively. The Gender Commissioners had been appointed, but the Commission had not yet commenced operations. Several possible explanations exist for this delay. First, the transformation of government in South Africa and the establishment of governmental structures and systems congruent with post-apartheid democratic ideals have been Herculean tasks. On the one hand, many government ministers, senior bureaucrats, and policy makers had no experience in operating within the paradigms of government. On the other hand, senior bureaucrats who maintained their apartheid-period bureaucratic positions have been hostile to the goals of transformation. Consequently, it has been impossible to set up the appropriate human rights bodies expeditiously.¹¹⁴ Second, the establishment of tribunals requires a resource commitment which the new South African government must balance against other needs. Arguably, these competing resource demands have made the establishment of the Gender Commission a lower priority.¹¹⁵ Third, the establishment of the Human Rights Commission before the Gender Commission reflects the general priority accorded racial equality issues over women's rights,¹¹⁶ as well as the continued distinction between "human rights" and "women's rights" despite several decades of feminist criticism of this distinction.¹¹⁷

113. These sentiments were raised in workshops and conversations at the Conference on Gender and Constitution, attended by the author, and held under the auspices of the University of the Western Cape in Cape Town in January 1995. The proceedings of the conference culminated in the publication of *THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE*, *supra* note 11.

114. See Albertyn, *supra* note 110, at 11.

115. *Id.*

116. In South Africa, there has been broad consensus about the need to eradicate racism in all its forms and manifestations. No such universal consensus has existed about the need to eradicate the many expressions and vagaries of sexism. See Julia Segar & Caroline White, *Constructing Gender: Discrimination and the Law in South Africa*, 4 *AGENDA* 95 (1989) (focusing on the role of law in maintaining the oppression of South African women).

117. This point has been made powerfully in relation to domestic violence. See Rhonda Copelon, *Understanding Domestic Violence as Torture*, in *HUMAN RIGHTS OF WOMEN*, *supra* note 8, at 116 (comparing domestic violence and torture, as they are defined in international law); see also Charlotte Bunche, *Women's Rights as Human Rights: Towards a Re-Vision of Human Rights*, 12 *HUM. RTS. Q.* 486 (1990) (analyzing the

It can be argued that these obstacles have been overcome, since the Gender Commissioners have been appointed. The obstacles clearly, however, contain a warning: the Commission may have to negotiate a difficult landscape in order to be effective in enforcing women's rights. Moreover, the presence of these obstacles makes it clear that in a society so resistant to removing long established patriarchal institutions and sexist practices, implementing the constitutional promises of gender equality will require tremendous vigor and vigilance by women activists.

The Bill of Rights is fairly expansive, detailing who will be entitled to legal standing and, arguably, laying the basis for class action litigation. It creates a means of enforcing some of the above mentioned rights. Relief may be sought by "(a) [a]nyone acting in [his or her] own interest; (b) anyone acting on behalf of another person who cannot act in [his or her] own name; (c) any one person acting as a member of, or in the interest of, a group or class of persons; (d) any one person acting in the public interest; and (e) an association acting in the interests of its members."¹¹⁸ The constitutional provisions promoting gender equality represent a major victory for women, but including these protections in a bill of rights is obviously only the first step in the road towards gender equality. Women activists will need to be vigilant in implementing and enforcing these protections.¹¹⁹

There is some indication that a national consensus about gender equality will grow. In *Hugo v. President of South Africa*,¹²⁰ the Constitutional Court had occasion to rule on a prison inmate's constitutional challenge to an executive order by President Mandela, made under South Africa's interim Constitution,¹²¹ which granted special remission of sentences for certain categories of prisoners.¹²² The prisoner challenged the category that applied only to "all mothers . . . with minor children."¹²³ The respondent had a twelve-year-old

reasons for and policy implications of distinct visions of women's rights and human rights).

118. S. AFR. CONST. § 38

119. The overall legal landscape for women appears positive. The government's Reconstruction and Development Program, a five year plan of governance, reflects a commitment to the principle of gender equality. See AFRICAN NATIONAL CONGRESS, RECONSTRUCTION AND DEVELOPMENT PROGRAM (1994).

120. 1996 (4) SA 1012 (CC).

121. S. AFR. CONST. (1993). This Constitution was replaced by the final Constitution which forms the basis of this Article.

122. Correctional Services Amendment Act, No. 17 of 1994 (SA), construed in *Hugo v. President of South Africa*, 1996 (4) SA 1012 (CC). The act applied to people who were under eighteen, all disabled people, and all mothers who were in prison on May 10, 1994. *Id.* at 1013.

123. *Id.*

child, and he claimed this provision violated sections 8(1) and (2) of the interim Constitution in that it unfairly discriminated against him on the basis of sex or gender.¹²⁴

The President's affidavit provided the rationale for the special remission of mothers of minor children. He stated that he

was motivated predominantly by a concern for children who had been deprived of the nurturing and care which their mothers would ordinarily have provided. . . . I am . . . aware that imprisonment inevitably has harsh consequences for the family of the prisoner Account was taken of the special role . . . that mothers play in the care and nurturing of young children¹²⁵

The Court found that even though the Act was premised on a generalization that mothers are primarily responsible for the care of small children, it did not amount to unfair discrimination. The Court distinguished between the situation where women as a group are deprived of benefits based on their child-rearing responsibilities¹²⁶ and the situation under consideration, where the presence of these responsibilities meant that women were afforded an opportunity. The Court considered the fact that men were not members of a disadvantaged group. Although the Court determined that this fact alone was insufficient to find the discrimination fair, it saw the need "to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved."¹²⁷

The Court goes beyond the notion of formal equality, to one of substantive equality.

B. The Constitution and Traditional Law

In contrast to the gender equality provisions in the Bill of Rights and elsewhere in the Constitution, the Constitution is remarkably abbreviated on the issue of traditional law. Chapter 12

124. The respondent argued that the Act, by releasing all mothers whose children were under the age of 12, discriminated against fathers of children of the same age. In fact, the discrimination was two-fold: only women who were parents (of children under 12) were released; childless women were not. Section 8 in the interim Constitution is similar to section 9 in the final Constitution.

125. *Hugo v. President of South Africa*, 1996 (4) SA 1012, 1022 (CC).

126. *Id.* at 1023.

127. *Id.*

provides for the recognition and role of traditional leaders.¹²⁸ The only provision in this chapter pertinent to the issues addressed in this Article is the stipulation that “[t]he courts must apply customary law when that law is applicable, *subject to the Constitution* and any legislation that specifically deals with customary law.”¹²⁹ This section suggests that the principle of equality will supersede any aspect of traditional law that violates that principle.¹³⁰ The supremacy of equality in the face of a “cultural conflict” is clearly enunciated in various sections of the Bill of Rights, and it appears to subvert any claims by traditional authorities to discriminate against women.

Section 30 states, “[e]veryone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”¹³¹ Similarly, section 31 provides that

[p]ersons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the 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.¹³²

These rights, however, may not be exercised in a manner inconsistent with the principle of equality.¹³³ The Bill of Rights also makes provision for legislation that recognizes “(i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.”¹³⁴ However, recognition of these systems may not conflict with the principle of equality.¹³⁵ The Constitution makes provision for a Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities¹³⁶ and exhorts that the composition of

128. S. AFR. CONST. §§ 211–12.

129. *Id.* § 211(3) (emphasis added).

130. For a comprehensive discussion on the principle of equality see Catherine Albertyn & Janet Kentridge, *Introducing the Right to Equality in the Interim Constitution*, 10 S. AFR. J. HUM. RTS. 149 (1994).

131. S. AFR. CONST. § 30.

132. *Id.* § 31(1).

133. *Id.* § 31(2).

134. *Id.* § 15(3)(a).

135. *Id.* § 15(3)(b).

136. *Id.* § 185. The Constitution also provides that

[t]he right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the

the Commission "broadly reflect the gender composition of South Africa."¹³⁷

In addition to the substance of the rights promised in the Bill of Rights, the interpretation of these rights by courts, tribunals, and forums must comport with the Constitution's underlying ideals.¹³⁸ "When interpreting any legislation, and when developing the common law or *customary law*, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."¹³⁹ Courts are also required to consider international law and may consider foreign law.¹⁴⁰ Rights or freedoms incorporated in legislation, the common law, or customary law are acknowledged, unless they contradict the values inherent in the Bill of Rights.¹⁴¹

VI. A POST-APARTHEID VISION OF CUSTOMARY LAW

The constitutional balancing of women's rights and the institutions and structures of traditional law raises perennial questions about the role of law in perpetuating cultural norms and values.¹⁴² In South Africa, there remains the distance between the lofty ideals of the Constitution and the reality of people's lives. The evolution of a new legal culture cognizant of underlying African communitarian values and judicious of women's rights will be a challenging endeavor.¹⁴³

It is undeniable that aspects of traditional law will continue to govern the lives of many South Africans, particularly residents in the rural areas. It seems apparent that despite the distortions that traditional institutions have historically suffered under colonialism and

right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

Id. § 235.

137. *Id.* § 186(2)(b).

138. *Id.* § 39(1) ("When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.").

139. *Id.* § 39(2) (emphasis added).

140. *Id.* § 39(1)(b)-(c). In addition, Section 233 of the Constitution provides for the application of international law in South Africa: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." *Id.* § 233.

141. *Id.* § 39(3).

142. Chanock, *supra* note 69.

143. In *State v. Makwanye*, 1995 (3) SA 391 (CC), the Constitutional Court made substantial reference to "*ubuntu*," or traditional African values, and their significance as part of the emerging jurisprudence in South Africa.

apartheid, their legitimacy in certain rural communities remains intact.¹⁴⁴ In light of a possible conflict between the Constitution's commitment to gender equality and the persistence of perceived ancient customary practices, how might this conflict be resolved? A few likely scenarios may emerge.

First, it is possible to conceive of the democratization of traditional leadership. It has been noted that the institution of the chieftancy is conducive to democratization and that, instead of abolition, this democratization should be pursued.¹⁴⁵ It has been suggested that a thorough overhaul of the chieftancy be attempted, including changes to hereditary succession, primogeniture, the patriarchal basis, election, powers, period of office, government imprimatur, skills acquisition, governing principles, and procedures and judicial review.¹⁴⁶ These changes would be congruent with the values of the new democratic state, and they would contribute substantively and symbolically to the goals of gender equality.¹⁴⁷

The second scenario might witness the reconstruction of some practices of customary law. This has been suggested in light of the popularity and tenacity of certain customary practices. The institution of *lobolo*¹⁴⁸ is an interesting case in point. The practice remains universally popular in Southern Africa.¹⁴⁹ It has been suggested that *lobolo* be modified to accommodate modern urban conditions in South Africa, and particularly the constitutional directive of gender equality. Instead of the payment being controlled by the father (and often having the consequence of entrapping a woman in an unhappy marriage), *lobolo* could be altered so that it takes on the form of security for a woman when she is ill-treated or abandoned by her spouse.¹⁵⁰ Similar

144. Mokgoro, *supra* note 50, at 63. Mokgoro asserts that

[a]lthough the institution of traditional leadership has historically suffered political manipulation, abuse and exploitation at the hands of successive colonial governments, a significant sector of rural societies, particularly in the former homelands, still cherishes the system. Some progressive traditional leaders also still maintain the loyalty and respect of their communities.

Id.

145. See Motshabi & Volks, *supra* note 68, at 104. See generally Mokgoro, *supra* note 50 (harmonizing tradition of authority structures and gender equality).

146. Motshabi & Volks, *supra* note 68, at 109-15.

147. *Id.*

148. See BENNETT, *supra* note 48, at 195 (describing *lobolo*, or "bride wealth," as a "transfer of property, usually livestock, by the husband . . . to the wife's family as part of the process of constituting a marriage").

149. Ncube, *supra* note 48, at 202-05.

150. Cf. Sandra Burman, *Marriage Break up in South Africa: Holding Want at Bay?*, 1 INT'L J.L. & FAM. 206 (1987) (investigating the effects of discriminatory laws

approaches in relation to access to property, custody and guardianship, and other areas of personal rights may arguably pass constitutional muster in relation to women's rights.¹⁵¹

The third scenario is the gradual phasing out of certain practices. This reflects the experience of many post-colonial societies where social and economic changes render certain customary practices inappropriate or irrelevant.¹⁵² Particularly with respect to women, the increased access to education and all the prospective benefits of the new non-racial and non-sexist order might result in women having the economic status and capacity to make real choices about the laws which govern them.

The reality of customary law is manifested in everyone's daily experiences.¹⁵³ Ultimately, African communities and individuals will renegotiate traditional practices to accommodate the changing political, economic, and cultural environment. There may be room for laws and the legal process, but in order for the legal compact agreed to and enshrined in the Bill of Rights to succeed in transforming the lives of women, it must be bolstered by widespread attitudinal change.

CONCLUSION

This Article has attempted to show that the intervention of South African women at the constitutional negotiations in the early 1990s came on the heels of global campaigns by feminists to change the international human rights framework to recognize the rights of women globally. Such campaigns represented two major developments: (1) limited success of Western feminists to alter their legal and policy landscapes to accommodate the needs of women in those respective societies, and (2) democratic struggles in the developing world in which large numbers of women were involved. An interplay of these factors influenced the manner in which South African women chose to intervene to ensure that the Constitution incorporated women's rights.

governing the courts, employment, housing, welfare grants, the legal recognition of different forms of marriage, and urban rights).

151. See T.W. Bennett, *The Compatibility of African Customary Law and Human Rights*, 1991 ACTA JURIDICA 18, 26-27 (analyzing the conflict between constitutional and customary law in these areas of personal rights).

152. See Ojwang, *supra* note 48, at 88; see also Michael P. Seng, *In a Conflict Between Equal Rights for Women and Customary Law, the Botswana Court of Appeal Chooses Equality*, 24 U. TOL. L. REV. 563 (1993) (discussing the changing status of women in Botswana).

153. For a definition of customary law and a discussion of the dynamic nature of custom, see Chanock, *supra* note 69, at 54.

The impact of Anglo-American feminist jurisprudence in legal scholarship in South Africa has not been insignificant, although such impact has generally been confined to White feminist academics.¹⁵⁴ The formation of a democratic non-sexist society has taken shape in a situation deeply stratified by race and class, where the claims of White feminists might lack a certain universality.¹⁵⁵ Building on developments in the Third World, and particularly African countries, South African women chose to frame the constitutional rights to accommodate the needs and aspirations of South Africa's diverse and unequally situated women.¹⁵⁶

For reasons outlined in Part V above, the transformation of African customary law raises complicated and awkward questions. The broad coalition of women and the process leading to the Women's Charter, which incorporated the demands of women throughout South Africa, capitalized on the admirable skills that women had harnessed during the years of political struggle against apartheid.¹⁵⁷ What South African women have accomplished has been to incorporate a contextualized Western feminism into an African version of women's equality to accommodate the complexity of the transformation agenda with respect to customary law.¹⁵⁸

154. See generally Felicity Kaganis & Christina Murray, *Law and Women's Rights in South Africa: An Overview*, in GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER, *supra* note 1, at 27 (discussing current feminist legal scholarship in South Africa in the context of debates about feminist jurisprudence).

155. Dorothy Driver, *The ANC Constitutional Guidelines in Process: A Feminist Reading*, in PUTTING WOMEN ON THE AGENDA, *supra* note 37, at 82, 90–92; see also Linda Zama, *Theories of Equality: Some Thoughts for South Africa*, in PUTTING WOMEN ON THE AGENDA, *supra* note 37, at 57 (looking briefly into the nature of the struggle of women for equality and making some suggestions for the future).

156. See Brigitte Mabandla, *Promoting Gender Equality in South Africa*, in PUTTING WOMEN ON THE AGENDA, *supra* note 37, at 75, 76 (outlining how women can insure that their rights are protected and their interests promoted).

157. See *supra* note †. "Striking the rock" relates to the dramatic organizing efforts of women in the years following the anti-pass campaigns of the 1950s. The phrase is a tribute to the tenaciousness of Black women in the face of oppression, and it symbolizes the continued determination of women to confront such oppression at great personal cost. For examples of how "striking the rock" is symbolized in the accounts of Black women detailing their struggles against oppression, refer to WINNIE MANDELA, *PART OF MY SOUL* (Anne Benjamin ed., 1985) (describing her underground political work and fight against the government since the late 1950s). See also ELLEN KUZWAYO, *CALL ME WOMAN* (1985) (detailing her evolution as a politically active Black woman in South Africa). "Striking the rock" is largely documented. See, e.g., CHERRYL WALKER, *WOMEN AND RESISTANCE IN SOUTH AFRICA* (1982) (tracking the development of a woman's movement in South Africa from 1910 until the early 1960s); see also, e.g., BERNSTEIN, *supra* note † (discussing the continuing defiance of women in the face of intense repression of their voice).

158. Frene Ginwala, *Women and the Elephant: The Need to Redress Gender Oppression*, in PUTTING WOMEN ON THE AGENDA, *supra* note 37, at 62, 68.

In South Africa, it is in the law's domain that the distortion of customary law occurred. The codification of customary law inevitably fossilized age-old practices and institutions that evolved and accommodated changing times and circumstances. A whole host of factors, most markedly the process of urbanization, had major repercussions for all things customary. However, the accommodation of such factors did not suit successive colonial and apartheid governments for whom African customary law was merely an extension of the segregationist and apartheid legal apparatus.¹⁵⁹

The new constitutional order now provides the opportunity for African traditional law to reflect the aspirations of all its adherents in line with the democratic ideals espoused in the Bill of Rights. This legal moment in South African history provides the paradigm for a creative and vigorous advocacy and constitutional interpretation of gender equality. In this endeavor, non-legal methods should be utilized¹⁶⁰ so that the formal transformation mandated by the Constitution occurs alongside social, economic, and attitudinal transformation. Not only are these vital safeguards for women, but a thorough assessment of possible inconsistencies between gender equality and traditional law allows the South African legal system to revisit, and possibly improve on, a constant preoccupation of decolonized democracies.

Whatever the shape of the rights embodied in the Constitution, and however strong the promise of equality, enforcement will ultimately depend on a combination of factors: (1) the commitment of the government to the principles and rights embodied in the Constitution; (2) the interpretation of such rights and principles by sympathetic and sensitive adjudicators who will not ignore the historical legacy and the social, economic, and cultural realities of South Africa; and (3) the continued vigilance by all South Africans who yearn for a society free from oppression of and discrimination against women.

159. Martin Chanock, *Writing South African Legal History: A Prospectus*, in J. AFR. HIST. 265 (1989) (discussing the workings of the South African legal system).

160. South Africa has always had a vibrant non-governmental sector. The decades leading to the democratic elections saw innovative tactics utilized by activist organizations and trade unions engaged in a host of grassroots activities. See generally *APARTHEID IN CRISIS* (Mark A. Uhlig ed., 1986) (detailing the wide range of groups working in the anti-apartheid cause and different strategies adopted). Therefore, besides the litigation for equality that the Constitution now provides for, other non-legal methods may be appropriate as well in attaining the same goals. Such methods may include educational campaigns in the media, the dissemination of literature in the workplace, and continuing interaction with the public by governmental departments through vehicles like school programs or community workshops.