A CRITICAL INVESTIGATION OF THE RELEVANCE OF THEORIES OF FEMINIST JURISPRUDENCE TO AFRICAN WOMEN IN SOUTH AFRICA

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ABSTRACT

Feminist theories emerged out of the revolutionary enthusiasm that swept the Western world during the late eighteenth and nineteenth century Europe. Based on the assumption that all persons have "inalienable or natural" rights upon which governments may not intrude, feminists in Europe and America advocated that equal rights should be extended to women who up to this point were not considered legal beings separate and deserving of these rights. Most African writers and feminists have argued that since most of the theories of feminist jurisprudence have their roots in this Euro-centric context, they cannot be applicable to African women and should therefore be discarded. The thesis acknowledges that to a certain extent their assertions are true. For years feminist jurisprudence has been restricted to an academic engagement with the law failing to take into account the practices and customs of different communities. It has largely been the realm of the middle class bourgeois white female and therefore has been inaccessible to the African woman. The thesis aims, however, to prove that these theories of feminist jurisprudence although Euro-centric have a place in the understanding and advancement of African women's rights in South Africa. In Chapter One the writer traces the history of South African women's rights and the laws that affect African women. Chapter Two presents the emergence of feminist theories and categories of feminism. The writer then seeks to identify the misunderstandings and tensions that exist between the two. The narrow conception of Euro-centric feminism has been that its sole purpose has been the eradication of gender discrimination, however, for African women in South Africa they have had to deal with a multiplicity of oppressions that include but are not restricted to gender, race, economic and social disempowerment. This is dealt with in Chapter Three. It is the opinion of the writer that despite these differences feminism does play a critical role in the advancement of women's rights in South Africa. Taking the South African governments commitment to the advancement of universal rights, the writers is of the opinion that African women can look to the example set by Western feminists, and broaden these theories to suit and be adaptable to the South African context. The answer is not to totally discard feminist theories but to extract commonalities that exist between African and European women, by so doing acknowledging that women's oppression is a global phenomenon. This is the focus of Chapter Four. To avoid making this work a mere academic endeavour, the writer in Chapter Five also aims, through interviews, to include the voices of African women and to indicate areas that still need attention from both the lawmakers and women's rights movements

(Feminists). Finally, the writer aims to present a way forward, one that is not merely formal but also substantively attainable.

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To my family – my mum, dad and brother whose pride in me keeps me going.

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DEDICATION

To God's most beautiful angel, Thembelihle 'MaNcube' Mathonsi.

"Adieu cousin! Adieu cousin!
Nous nous verrons encore!
Ces beaux jours doivent revenir
Reposons nous sur l'avenir."

"Good-bye cousin! Cousin Good-bye!
We will see each other soon!
These beautiful days must return
Let us look forward to the future"

Thomas Gounet (1801-1869)

CHAPTER ONE

1.1 INTRODUCTION: SCOPE AND OBJECTIVES

In a recent study[1] commissioned by the United Nations Research Institute of Social Development (UNRISD) in Geneva, Diane Elson[2] observes that there has been a significant improvement in the attention given to the development of gender justice in various regions in the world. Quoting from a 2001 World Bank report on gender, she notes that while gender equality in political and legal rights is highest in the OECD[3] countries, the greatest progress has been within sub-Saharan Africa. She goes further to state, however, that these improvements in legal rights have not been extended to women within their social contexts.[4] This trend has been observed within the South African context, especially with the advent of the new Constitution. While the legal rights extended to women have improved noticeably, this improvement has not been experienced in their social contexts.

In South Africa, Van Zyl,[5] in her attempt to address the question, "What do women want from the law?" comments as follows:

"Throughout history, the law has reflected society's views of consigning women to a subordinate status, usually based on her supposed biological inferiority and frailty. Attitudes of passivity and subservience were inculcated and were characteristic of the female half of the world's population for many millennia. However, more than half a century ago it occurred to women in the Western world that when laws were made they were not consulted, nor were they counted among the legislators having been for the most part illiterate and fully occupied with more mundane occupations."[6]

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[1] This important work entitled *Gender Justice, Development and Rights*, 2002 covers women's issues on a global scale. It invites researchers worldwide to comment on gender justice in specific countries. M. Molyneux and S. Razavi, 2002, edit this work.

[2] D. Elson "Gender Justice, Human Rights and Neo-Liberal Economic Policies" in Molyneux and Razavi (eds) *Gender Justice, Development and Rights*, 2002:90-91.

[3] The OECD is an organisation consisting of 30 members whose primary aim is the commitment to democratic government and market economy. Among them are countries such as Australia, the Netherlands, United Kingdom and United Nations (most so-called first world countries).

[4] Here she quotes the World Bank report as stating that there have been no improvements in gender equality in social and economic rights within sub-Saharan Africa between 1985-1990.

[5] L. Van Zyl 1992: 509.

[6] *ibid.*

While what Van Zyl expresses is true as far as women in the Western world are concerned, the same knowledge and realisation has taken longer in the case of African[7] women. This is not to suggest that the latter has been accepting of this unfavourable situation. On the contrary, there has been vigorous opposition to this *status quo*. However, African women more so South African women, unlike Western women, have dealt with and operated from a different social and political framework. The colonial gender politics in South Africa illustrates the dichotomy that existed between the rights of black women and their white counterparts. While, for example, suffrage was extended to the privileged on the basis of race and sex, black women were the very last to be extended this honour. Simons[8] accurately summarises this as follows:

"Africans have carried the main burden of South Africa's rapid industrialisation. Their own social order splintered in the process, and ceased long ago to operate as a complete, distinct entity. Its elements - the subsistence economy, joint families, an elaborate network of kinship ties, devotion to ancestors, hereditary chieftainship - withered away or blended with elements of the alien culture. The discrepancy between the old rules and new facts is greatest where women are concerned, and is most harmful to their interests. They are worse off, in terms of customary law, than they were before industrialisation set in. This is so partly because the courts have interpreted the law to the disadvantage of their sex. But the main reason for the unfavourable trend is that women have outgrown the status assigned to them in the traditional society."

The aim of this research project is to analyse the legal position of South African women in light of the new constitutional commitment.[9] The new dispensation has ushered in a glimmer of hope for a society that has risen from the vestiges of a shameful past to embrace democratic values. While the Constitution asserts equality between men and women as clearly expressed in section 9,[10] it also seeks to accept the practice of what has been a "long established, parallel system of customary law, a body of traditional practices

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[7] For the purposes of this thesis, African women denote black women. This is not to suggest that white, Indian or coloured women are not African. It is merely for the purposes of this work and the context and questions it seeks to address that "African women" denote black women.

[8] H. J. Simons 1968: 9.

[9] As expressed in the fundamental rights enshrined in chapter two of the Constitution the Republic of South Africa Act 108 of 1996. From hereon referred to simply as the Constitution.

[10] Section 9 (1) establishes that "everyone is equal before the law and has the right to equal protection and benefit of the law."
Section 9 (4) notes "No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3) i.e. race, **gender**, sex, pregnancy, marital status, ethnic or social

distinctly African in origin, and largely dependent on the principle of patriarchy."[11]

The thesis will investigate whether theories of feminist jurisprudence, most of which are arguably rooted in European scholarship, can be applied to South African women in their context. Much of feminist writings has been branded as "bourgeois Western phenomenon" and has been dismissed as irrelevant and inapplicable to the African context.[12] The research seeks to explore the accuracy of this assertion. As indicated above the issue of gender equality and more specifically women and the law is not, by any means, a novel one; it is one that has been widely researched by many a respectable scholar.[13] However, the position that South African women find themselves in is unique in that, while seeking to gain independence from the shackles of apartheid, the issue of gender equality took an inferior position. As a result, African women's rights have therefore operated within a different framework from the mainstream scholarship that has shaped feminist jurisprudence. Therefore, it is necessary to question whether previous models that shape gender research can provide sustainable solutions where South African women are concerned. In an environment pervaded by poverty, exploitation and underdevelopment, there may exist a need to deconstruct mainstream theories of gender. According to Meena[14] researchers on gender/women issues in Southern Africa have had to grapple with various conceptual and theoretical issues in this region:

"There is confusion with regard to definitions of various concepts such as gender, women, men, sex, sexuality, feminism, gender studies, women studies, feminist studies, and so on. There is confusion on whether or not traditional methodologies and research instruments are still valid in analysing and collecting data on gender/women issues. Scholars are also questioning the relevance of those concepts in the African context."[15]

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origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." (**my emphasis**).

[11] A. Van Blerk 1997:608. See also section 211 read with section 39(3) of the Constitution. This dichotomy

[12] F. Kaganas & C. Murray 1991:118.

[13] See in this regard a series of contributions included in Molyneux and Razavi *op cit* noted in footnote 1 above.

[14] R. Meena "Introduction" in Meena (ed) *Gender in Southern Africa: Conceptions and Theoretical Issues*, 1992: (ix).

[15] *ibid.*

The proposition made above does not seek in any way to minimise the similarities that may exist issues between Western and African women. It is prudent to note that, in varying degrees, both are affected by the structures of patriarchy and the history of male supremacy. As Sachs[16] comments, "It is a sad fact that one of the few profoundly non-racial institutions (in South Africa) is patriarchy." Although this research has drawn heavily on the academic writings of leading feminists and lawyers such as Catherine Mackinnon (1983) and Carol Gilligan (1981), the wide range of scholarly research on feminist jurisprudence will not be neglected or undermined.

The writer will go further and will investigate the South African governments's commitment to the advancement of universal women's rights. It is the writer's opinion that African women can look to the Western feminists and seek commonalities that will serve the African woman in her own context. This will also serve to show that the struggle for gender equality is and will remain a global struggle. Finally, the writer will include, through empirical research, the voices of African women and will suggest a way forward for the struggle for gender equality.

The writer is aware and seeks to remain wary throughout to ensure that the research remains a legal exertion despite the various overtones of politics and sociology. It is, however, imperative to acknowledge that the law is a living instrument used, abused and interpreted by society. It cannot be considered in a vacuum and must be placed in a social context. This is more so where customary law is concerned, where most of the principles that underlie it are unwritten, uncodified and largely subject to societal interpretations. In considering the legal rights of women, the writer takes cognisance of the distinction between "living law" and the "official customary law"[17] and recognises that despite several legislative developments, customary practices are still embedded in the moral code of African society.[18]

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[16] See Sachs as quoted with approval by S. Bazilli "Introduction" in Bazilli (ed) *Putting Women on the Agenda*, 1991:9.

[17] This distinction has been encapsulated in the leading case of *Mabena v Letsoalo* 1998 (2) SA 1068 (T) 1074 H-I where Du Plessis J states that customary law exists not only in the "official version" as documented by writers but also in "living law" denoting "law actually observed by African communities."

[18] R.B. Mqeke quotes Fallers 1969:2 who describes the relationship between law and society as follows:

1.2 DEFINITIONS OF MAJOR TERMS

This section defines major concepts that will be used often in this chapter and throughout the thesis generally. As the thesis deals with theories of feminism and the development of laws concerning women, it is essential that one examine terms often used when referring to women. Such terms may not be within the sphere of the legal world and may therefore be unfamiliar to the legal person. However, all the terms will be familiar to the disciplines that study society; disciplines such as politics, sociology and anthropology. As the law cannot be studied in a vacuum but is a reflection of societies' mores, these terms ought to be defined for the purpose of this thesis.

1.2.1 GENDER

In her introduction to the 1991 edition of *Putting Women on the Agenda*, Susan Bazilli[19] writes that men and women are "gendered beings". What she describes is that outside of our biological attributes as "man" and "woman", persons are socialised to act or react to certain situations in particular ways:

"The ways in which men and women operate in society is not natural and given, but is historically and culturally constructed and socially located."

According to Stoller,[20] gender has psychological and cultural connotations. In his view gender is more than just a mere synonym for woman, or a substitute for sex, which is a biological characterisation of "man" and "woman". Other writers such as Schoemaker[21] regard gender as a social, cultural and political construct that unlike sex changes as the norms of society change. Socialisation, be it within the family or within the society in general, creates and sustains gender differences. The socio-anthropological approach to

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"Whatever else the law is about, it concerns the major institutionalised values of societies, the values to which people are sufficiently committed to be willing to impose them upon themselves in an authoritative manner. Such values are "cultural" in the sense that they form elements in the interrelated system of ideas shared by a people; and they are "social" in the sense that commitment underlies the mutuality of expectations upon which ordered social life rests. An interest in legal institutions leads quite naturally into a concern with the social system out of which ... they arise."

[19] Bazilli *op cit* at 8.

[20] M. Haralambos *et al* 2000:126.

the definition of gender places emphasis on their social role and status, thus their social existence. In turn, the social status of women and the relationship between them and men cannot be thought of outside the power that determines social dynamics.[22] The result is a development of what feminists describe as a "gendered personality", which is internalised within the male or female. In a patriarchal society this allows for the acceptance of practices that are oppressive to women. In fact, ironically because women in such a society will have been socialised from an early age to believe that a man has superior authority over them, they too begin to accept the *status quo* without questioning it.[23] The writer agrees that while sex differentiates between male and female, society defines and shapes gender. Gender is therefore a product of society, and consequently gender inequality a result of social structures.

1.2.2 PATRIARCHY

The term patriarchy as used in this study refers to the "hierarchy of authority that is controlled and dominated by males in which women are subordinated to the role of minors."[24] By patriarchy, feminists refer to the arrangement of society under which standards, be they political, economic, social or legal are set by and fixed in the interest of men.[25] In the African context patriarchy originates within the family structure and the social system where male power over females is seen as acceptable. The result of such a system is the progressive disempowerment of women. Because this system is so pervasive, it is "upheld by means of a web of laws."[26] As seen below,[27] the law becomes a vehicle of oppression and upholds these patriarchal structures reflecting the male experiences and perspectives that are the reference point in relation to which the law is fixed. While the structures of patriarchy in pre-colonial times were sustained by the social

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[21] R. Schoemaker 1998:1.
[22] P.B. Logo and E.L. Bikkie "Women and Land in Cameroon: Questioning Women's Land Status and Claims for Change" in L. Muthoni-Wanyeki (ed) *Women and Land in Africa: Culture, Religion and Realising Women's Rights*, 2003:32.
[23] See also the survey done by writer in Grahamstown discussed in Chapter Five.
[24] P. Knauss 1987:xii.
[25] J.G. Riddall 1999:273.
[26] Bazilli *op cit* at 10.
[27] See pages 7-9 below.

structures, in post-colonial times it was due to the need by traditional leaders to assert their power at a time when it seemed they were slowly losing it. In order to construct laws that will effectively benefit women, Bazilli[28] suggests that there is a need to understand how patriarchal structures work and how they influence the law.

1.2.3 FEMINIST JURISPRUDENCE

The idea behind feminist jurisprudence lies in the assumption that because women have historically been placed in positions of subservience, the laws that govern women have reflected these indiscrepencies. As a result, in the same manner that society has oppressed women, the laws, which are "**man-made**", will tend naturally to favour the male over the female. This has been termed aptly as "legally-sanctioned" discrimination or the "masculinism"[29] of the law. McGlynn writes that:

"The language, logic, and structure of the law are male created and reinforce male values. By presenting male's characteristics as a 'norm' and females characteristics as deviation from the 'norm' the prevailing conceptions of law reinforce and perpetuate patriarchal power."[30]

Feminist jurisprudence was fully developed within "second wave" feminist movement, notably among them writers such as Catherine Mackinnon[31] and Carol Gilligan.[32]

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[28] *ibid.*

[29] R. West "Jurisprudence and Gender" in Bridgeman and Millins (eds) *Feminist Perspectives on Law: Law's engagement with the Female Body*, 1998: 66. West writes that "masculinism" of law is the view that women's lives are not reflected at any level in the legal doctrine. The law has historically been individualistic and this alienates women from participation as women's values are traditionally collective and intimate as opposed to individualistic. This is more so where African women are concerned. She writes: "Jurisprudence is masculine because jurisprudence is about the relationship between human beings and laws we actually have, and the laws we actually have are 'masculine' both in terms of their intended beneficiary and in authorship." One important aim of feminist jurisprudence is the "unmasking and critiquing of the principle of patriarchy" with the aim of exposing that jurisprudence and the legal doctrine protects and defines men not women.

[30] C. McGlynn 1998: 21. For the African woman, as mentioned, the situation is exaggerated by the fact that they also had to contend with racially discriminatory laws.

[31] R. Tong "Feminist Thought: A Comprehensive Introduction" in Bridgeman and Millins (eds) *Feminist Perspectives on Law: Law's engagement with the Female Body*, 1998: 69. Catherine Mackinnon argues that laws are in themselves gendered and although presented as neutral and impartial, the reality lies in that they are fashioned to advantage the power holders in society, who traditionally have been men. She considers that the State, and therefore lawmakers through its laws, maintains the power of men over women and thus ensures the subordination of women to men.

[32] Gilligan argues that males and females have differing perceptions of the law. The former focus on justice, rights and autonomy while the latter focus more on responsibility and community. She refers to

Feminism, therefore, builds on the themes that propose that discrimination is a social construct that is, in turn, "reproduced and legitimised"[33] to perpetuate inequalities within the law. One of the many criticisms of feminist jurisprudence is the assertion that it is not in fact "jurisprudence". Riddall[34] comments that feminism may not have a part in the law and should be considered as a part of sociology, history or politics but not jurisprudence. Because different voices form part of the feminist movement, it has been criticised for not being consistent and objective in its approach. The present writer is in disagreement with this view and contends that what feminism advocates for is women's rights and as rights are matters that form a part of the law and justice, it is therefore not a misnomer to term this study of women's issues "feminist jurisprudence". By locating discrimination within the broader social and cultural context, feminists argue that only then can effective changes be made to the laws. Feminist legal theory raises questions about the compatibility of the legal order with women's experiences and calls for a re-evaluation of the role of law in promoting social change. For the African woman, the law must go far beyond recognition of gender and should simultaneously confront issues of race, class and culture, which adversely affect how women view and participate in society.

Feminist jurisprudence thus means two main things, firstly the process of "unmasking and critiquing"[35] patriarchy, which involves lawmakers acknowledging that laws are in fact biased against women and can therefore not be beneficial to them. This process is deconstructive in nature. It involves the break down of those structures that perpetuate gender discrimination and shield men. Robin West and Mackinnon state that in order to achieve an "ungendered' jurisprudence, it is important to ensure the total abolition of patriarchy. It is only with this abolition that there can be a non-masculine feminist jurisprudence.[36] The second theme involves the "reconstruction" of laws, to

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these differing perceptions as an "ethic of justice" and an "ethic of care" She argues that as a result males and females view the law and apply it in different ways. Because the power holders are male, it therefore naturally results in the law taking a more "masculine" stance.

[33] West *op cit* at 66.

[34] Riddall *op cit* at 289.

[35] West *op cit* at 67-68.

[36] C. Smart "The Women of Legal Discourse" in Naffine (ed) *Gender and Justice*, 2002:30.

accommodate women and to ensure that laws that were previously discriminatory or oppressive to women are corrected.[37]

Naffine[38] identifies three phases of feminist jurisprudence: the first presents the law as sexist, the second sees the law as male whilst the third sees it as gendered. He argues that if these three perceptions of the law are properly understood, then the impact of feminism on the law will be better appreciated.

1.2.4 FIRST STAGE - THE LAW AS SEXIST

The argument that the law is sexist is based on the fact that the law treats men and women differently, thereby actively disadvantaging women. This it does by denying women the power to control resources and by denying women equal opportunities. For example, the fact that women cannot own land in their name makes them economically dependent and seeks to advantage men over women. The attribution of the law as sexist is based on the fact that it is biased in its allocation of rights or in whom it gives rights. What this also means is that if the law ensures "equality" and "equal opportunity" then the result will be a correction of this bias. Much like the arguments by liberal feminists, what this does is assumes that once the imbalance is corrected, the result will be a society based on non-discrimination. Like the liberal feminist theory, this theory fails to acknowledge the social structures that cause this discrimination. Instead of recognising the differences between men and women, it creates an androgynous society, which is, in reality, not possible.[39]

1.2.5 SECOND STAGE - THE LAW AS MALE

This works on the hypothesis that the lawmakers are male and therefore influence the tone that the law takes. Although the laws are presented as impartial and objective, in reality they favour the male. The law is "judged by the values of masculinity."[40] Gilligan

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[37] *ibid.*
[38] *ibid.*
[39] Smart *op cit* at 85.
[40] Smart *op cit* at 33.

writes that men see the law as rights while women see the law as responsibility. Simone De Beauvoir correctly summarises this as follows:

"Humanity is male and man defines woman not in herself but as relative to him, she is regarded not as an autonomous being ... she is incidental, the inessential as opposed to the essential."[41]

De Beauvoir suggests that within the operation of the law, the male perspective is taken into account to the detriment of the female. This view differs from the "law is sexist" only but slightly. The hypothesis suggests that it is not that the law fails to be objective in itself but that it does apply the objective criteria, the criteria themselves being male. The irony lies in the fact that in its objectivity it relies on masculine values. According to feminists such as Mackinnon,[42] it is an objective standard of application that argues, for example, for equality in the workplace. However, where this male objectivity becomes oppressive is when it fails to take into account the fact that a woman unlike a man can become pregnant and therefore needs to be treated differently from a man and be accommodated as such. The male norm in this case is what is used as a standard for behaviour, and though it may itself be objective, it "subordinates the different norms of women."[43] A feminist critique of the law is an analysis of how some or all women are disqualified from the design of the legal system or the application of law.

1.2.6 THIRD STAGE - LAW AS GENDERED

In terms of this phase women are seen as being socially constructed to cope and react to the world in a certain manner, often times the result being that they are unable to use and define the law. The law is seen as "**man-made**" and thus reflects and advantages the male gender. Women do not possess the practical skills to deal with this "male-order". So, for example, it is for this reason, that women would find the notion of marital rape alien and are more willing to accept violence against them. It is a societal structuring that will not allow a woman despite the formal laws protecting her to report a case of rape or marital

[41] D. Johnson *et al,* 2001:221.
[42] Mackinnon 1991:1281.
[43] Johnson *op cit* at 224.

violence. The law in itself also works to perpetuate gender divisions. Naffine[44] describes this as "law as gendering".[45]

While relying on Finley, Albertyn[46] expresses the view that in order to fully understand the inequality of women "we must grapple with the nature of the law itself, the extent to which it is male-defined and the extent to which its language and process of reasoning are built on the male conception ...."

The history of black South African women makes the above feminist theories applicable and relevant to South Africa. One cannot help but see the similarities in the struggle for equality between South African women and their Euro-American counterparts. Both seek to fight the structures of patriarchy that are still a part of their day-to-day lives.[47] It is the opinion of the writer that the foundation set by the Euro-American feminists need not be totally ignored but instead be applied within the context of South Africa.

1.3 THE LEGAL POSITION OF WOMEN UNDER CUSTOMARY LAW: AN HISTORICAL OVERVIEW

1.3.1 THE PRE-COLONIAL POSITION OF AFRICAN WOMEN

Before embarking on the laws that affect women, it is important to provide an overview of the position of African women during pre-colonial times. The recordings and writings of the colonists present a dismal picture of the position of women in pre-colonial times. These sources seem to suggest that women in African societies were treated "no better than slaves."[48] It was only with the writings and research of men like Soga,[49] Whitfield[50]

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[44] Smart *op cit* at 33.
[45] Smart *op cit* at 34.
[46] C. Albertyn " The discriminatory and gendered nature of the law and institutions of Criminal Justice" in Jagwanth, Schwikkard and Grant (eds) *Women and the Law*, 1994: 19.
[47] As noted below, there is a distinction between formal and substantive law. Despite the constitutional commitment to equality, changes need to seen at the grassroots levels. See also Chapter Five on research done on women in Grahamstown for the effect the laws have on women on their day-to-day lives.
[48] G.M.B. Whitfield 1948:222.
[49] J.H. Soga 1931.
[50] *op cit.*

and Simons[51] that some accurate insight was given to the rights of African women in the pre-colonial communities.

Simons[52] argues that the advent of industrialisation and colonialism resulted in the erosion of many of the African customs that protected women. He goes further to say that the special courts that were established to deal with issues pertaining to Africans, interpreted customs and traditions in a manner that disadvantaged women. The African society is largely communal and within that system it was not unusual to have practices such as patriarchal rule, primogeniture, arranged marriages and polygamy. Each of these received disdain from colonialists and was held unacceptable under what was known as the "Repugnancy Clause".[53] Yet it is the opinion of many writers notably among them, Soga, that the view of such practices as being oppressive to women, is a misconception. He remarks that such customs in many instances were present to provide "protection and to secure the rights of women."[54] He argues that *lobolo*[55] for example, was created to secure the status of married women and to protect them from physical abuse. By paying *lobolo* the husband would be obliged to protect his wife and ensure her welfare. African women did not see this practice as a sale[56] but rather as protection in the case of neglect or gross ill treatment.[57] Soga[58] writes that:

"Bantu women had their protection entirely in their own hands, with the full and immediate support of custom, without the necessity of appealing to a court of law."

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[51] H.J. Simons 1968.
[52] Simons *op cit* at 9.
[53] Simons *op cit* at 60. The acceptance of African customs was subject to the repugnancy clause, which stated that any custom that was "opposed to the principles of public policy and natural justice" would be held inapplicable.
[54] Soga *op cit* at 263.
[55] A practice common in most African cultures. It is generally the payment of dowry, which is a result of a contract that arises from a proposed marriage by which the future husband delivers or promises to deliver to the father of the future wife, stock or property. It had received criticism from feminists, who are of the opinion that this practice amounts to the selling of a bride and is therefore degrading to women. Whitfield *op cit* 235 writes that payment of dowry is seen among the Africans as the creation of a bond between families from which flow certain rights, duties and obligations.
[56] Soga op cit at 269 writes that there is no parallel/comparison between a purchase and *lobolo;* it is a friendly contract with no recognised time limit and no fixed value in numbers.
[57] Should ill treatment arise, the woman has a claim for the protection of her father, who could opt to return the *lobolo* received and dissolve the marriage.
[58] Soga *op cit* at 269.

The writer also goes further to write:

"If the Bantu woman were "bought", "purchased" or "owned" as some assert, her subservience would be complete, her spirit would be broken. But the spirit of the Bantu woman is not broken, far from that, she is proud, has a high sense of her independence and makes her influence felt in the home and in the tribe."

While the African system of succession and inheritance is patrilineal and primogeniture is a governing principle, it was well understood and "not unsuitable to the conditions of all involved."[59] Whitfield[60] writes that among the people of Pedi, despite the opinion of colonists to the contrary, there is evidence that it was not unusual for women upon the death of their husbands to take charge of the affairs of the family. Females were often given priority over males in their own homes and they could succeed in preference to males. Although this was rare, it was not impossible. The writer goes further to say that the principle underlying succession although patrilineal in nature was not cast in stone. It was based on the need to protect and promote the communal nature of the African family where reciprocal responsibility was expected of the males who inherited. Widows often inherited domestic property, which included in most cases the house, gardens and utensils:

"The property is regarded ... as belonging essentially to females and as passing to female heirs, whether or not through a female line of succession .... Houses are built, and gardens are acquired, by a family for the occupation and use of the women belonging or accruing to it, and the woman in occupation of the house and/or in possession of a garden, has absolute right over them, such right devolving on her death to the female members of her own family ...."[61]

Bekker[62] argues that in many ways the African culture protected and empowered women. Where a male inherited, he takes up the duties to maintain suitably the widow and minor children of the house. He is also obliged to consult the widow in dealing with the property of the house and she has the right to restrain him from dissipating its assets or impoverishing it.

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[59] Whitfield *op cit* at 262.
[60] *ibid.*
[61] Whitfield *op cit* at 50.

It is difficult to get a firm grasp on women's rights before colonisation. As painted above, although most of the literature recognises that women were subjected to patriarchal control, there is also evidence that points to the fact that women did have rights. There is no denying, as will be seen in the subsection below, that one of the results of colonial legislature was to impose perpetual tutelage.[63] This is not to argue that women were empowered prior to colonial use and abuse of customary law. Instead this section seeks to demonstrate that the security which women had enjoyed under traditional customary law, was eroded by the colonial legislature.

1.3.2 AFRICAN WOMEN UNDER COLONIAL LEGISLATION

In his first speech to Parliament in May 1994 former President Nelson Mandela stated:

"Freedom cannot be achieved unless the woman has been emancipated from all forms of oppression ... unless we see in visible practical terms that the conditions of women in our country has radically changed for the better, and that they have been empowered to intervene in all aspects of life as equals with any other member of society."[64]

His speech marked a defining point in what was to become a new course for African women. Such rhetoric was not characteristic of the pre-1994[65] South Africa, where various Acts (notably the Black Administration Act 38 of 1927, the Kwa-Zulu Act on the Code of Zulu Law, Act 16 of 1985 and Natal Code of Zulu Law Proclamation R151 of 1987) and other customary law[66] traditions had succeeded in consigning women to the position of mere minority. In tracing the historical background, the writer is not by any means stating that the transformation is as yet complete. Such a notion would be gravely naive and flawed. Nonetheless, as noted by Samantha Willan[67] in her thesis, the year

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[62] J.C. Bekker 1989:298.

[63] S. Willan 1998:53 writes "The codes treatment of the situation was a serious abrogation of rights that women had traditionally enjoyed."

[64] M.Myakayaka-Manzini "Women empowered: Women in Parliament in South Africa" at http://www.idea.int/women/parl/studies5a.html accessed on 3 November 2003.

[65] The first significant statement issued regarding the emancipation of women came in 1990. The ANC's National Executive Committee issued a statement, which enshrined the rights of women as a fundamental policy. This was the first comprehensive statement on women's emancipation released by a political party in South Africa.

[66] There have been changes in the nomenclature used to describe customary law. It is important to state from the onset that customary law and indigenous law will be used interchangeably.

[67] Willan *op cit* at 57.

1994 presents an important benchmark as the beginning of a new era based on non-discrimination. In South Africa, as elsewhere, women are not a homogenous entity. There are black rural women, black urban women, white women, Indian women and coloured women. Although all categories have, for the most part, occupied subservient positions, it is the rural black women who as a result of the abuse of traditional customary principles have suffered the most. It is in light of this that customary law has been perceived as inimical to women's rights. Thandabantu Nhlapo[68] explains the position thus:

"It is everything that emanates from an attitude to women in marriage and in the family, which sees them solely as adjuncts to the group, means to the anachronistic end of clan survival, rather than as valuable in themselves and deserving of recognition for their human worth on the same terms as men."

In order to properly analyse the legal rights of South African women, it is important to provide a historical overview of the laws that governed their lives pre-1994. Simons[69] notes that while white South Africans of the last century resented the African person's way of life, seeing it as "backward and immoral, yet the governments recognised the risk of making a frontal assault on the institutions and beliefs of a people who had only just been conquered and held an aversion to alien rule." The only solution left to them was to sanction customary principles and to subscribe to a dual of system of law, which began first in Natal and later spread to the rest of the territories.

In tracing the history and application of customary law, it is apt to draw a distinction between the "official" and "non-official" customary law. The "official" customary law, which is embodied in legislation and court decisions, appears to be the result of a process of change, which involved an alliance between the colonial administration and African male elders. Traditionally male elders who were in control of strategic resources attempted to gain power by manipulating customary law. In 1842, after five years of armed struggle for supremacy between the British and the Boers, the Volksraad finally capitulated to the British authority. By May the following year, Natal became a British colony under Advocate Henry Cloete. Months later Natal was successfully annexed to the

[68] Nhlapo is quoted with approval in Van Zyl *op cit* at 263.

Cape. In adherence to Ordinance 50 of 1828, the British guaranteed equal treatment of all persons within the colony.[70]

By 1845 Roman-Dutch law became the legal system for the entire population of the colony. Although this may have seemed at the time a remarkable enactment aimed at securing that all persons in the colony were treated equally, such a decree failed to acknowledge the customs and traditions of the people settled in these regions. Non-recognition led to tension between the two races and persisted in a long and acrimonious debate about the future of tribalism and the status of customary principles.[71]

In 1846 Theophilus Shepstone became diplomatic agent to the tribes. His duties included being paramount chief and he assumed this role in his dealings with the Natal tribes. According to Simons[72] and Guy,[73] Shepstone was one of the few colonialists who had a thorough knowledge of the Zulu language and customs. He was opposed to the codification of customary law. He was, nevertheless, even more opposed to customs and tribal laws that were incompatible with the principles of European law. It was imperative to raise the status of women. Sitting on the Locations Commission of 1846, he maintained that tribal marriages and divorces should be remodelled so as to give them a much greater significance than under traditional law.[74] Such an endeavour would have cost more than the Natal treasury or the British government was willing to cough up. The seemingly insoluble problem was resolved by a scheme approved by George Grey who was secretary of State at the time. Shepstone decided to use the tribal leaders to govern. Such an endeavour would achieve the necessary control over a large restive African population.[75] This was not a popular move for Shepstone and he received much opposition from men such as Henry Cloete. Policy according to those who opposed Shepstone ought to be aimed at the "amalgamation of the different races" and the merger

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[69] Simons *op cit* at 15.
[70] For the full account of the historical discourse see Chapter Three of T.W. Bennett 1985: 40-48.
[71] Simons *op cit* at 15.
[72] Simons *op cit* at 18.
[73] Willans *op cit* at 31.
[74] Simons *op cit* at 19.
[75] Bennett *op cit* at 43.

of the different systems of law into one and the same authority.[76] It was through a chance move by Shepstone that traditional leadership and custom was recognised. With the enactment of Ordinance 3 of 1949 customary law was reinstated in its entirety except so far as it was "repugnant to the general principles of humanity observed throughout the civilised world."[77] In defence of the official position taken, Shepstone insisted that such a move would be to the benefit of the colony allowing for greater control of the natives. In giving evidence before the 1883 Commission, he explained it as such "customary law must be recognised to ensure control of the natives. You cannot control savages by civilised law."[78] The codification of customary law, however, became inevitable despite Shepstone's efforts to the contrary. The earliest sources of knowledge of Native law are the reports of Commissions appointed to inquire into particular problems.

Between 1852 and 1891, these Commissions dealt mainly with administrative problems arising from the conflict of European or "colonial law" and what became known as native law.[79] Hence, with time, the situation with regards to the extent of recognition of African customary law differed in various provinces. To remedy this and to bring a degree of uniformity, the Black Administration Act 38 of 1927 was promulgated. Preceded by the Natal Code, the Transkein Proclamation 142 of 1910 and 145 of 1923, the Native Administration Act came into being in 1927 as a means to provide a uniform approach to the application of customary law in South Africa. The Governor-General was made the Supreme chief of all Africans and as Simons[80] notes, was conferred all the rights and powers over all Africans. For African women this period saw some change their legal status of African women. This is not to say that change was positive. Although the Governor-General was given powers and rights to appoint and depose chiefs and headmen, which in theory ought to have included women, in practice such changes were more often than not never reflected. Section 29 of the Native Administration Act which

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[76] *ibid.*
[77] *ibid.*
[78] *ibid.*
[79] J. Lewin 1947:1 Native law was terminology used before the Union of South Africa. The main source of native law is found in the writings of those who record their own knowledge of it based on direct contact or observation. Another early source is the reports of commissions appointed to enquire into particular problems.
[80] Simons *op cit* at 19.

was enthusiastically termed the "incitement clause", sought to limit "feelings of hostility between natives and Europeans", saw to it that the focus remained that of "maintenance and accommodation of the gendered society" of Africans which was based largely on patriarchy. On the one hand, was a desire by Europeans and missionaries to implement Christian rites and prevent what they termed "barbaric practises" and, on the other, was the need to ensure that no feelings of hostility existed among the natives that would result in any militancy that would unsettle European power. The overriding results were decisions made that would not "rock the boat" where customary law was concerned.

The distinctive Cape and Natal approaches to the application of customary law were retained many years after the Act was passed.[81] The Act[82] also sought to create a separate court system, made up of Chiefs Courts, Native Commissioners' Courts, Native Appeal and Native Divorce Courts.[83] With respect to section 11(3)(b), the Act had very unfavourable legal, social and economic consequence for African women in customary unions. Despite the fact that social changes dictated that strictures of a traditional African society be abandoned, many African women were burdened with the oppressive policies, which were applied to them under customary law. In the case of *Yako v Beyi*[84] an African woman sued for seduction. McLoughlin P concluded "native women had no right of action to sue for seduction in their own right, since this right rested with their guardians." Relying on the case of *Matsheng v Dhlamini*[85] he remarked that it was the wish of Africans that the courts in their decisions retain native laws and customs. It was only in 1943 that the Parliament sought to remedy the situation, by providing that the contractual capacity and *locus standi* of African women was generally determined as if she were

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[81] Bennett *op cit* at 43 writes that in the Natal and Transvaal Divisions customary law was primarily applied, and it was only in exceptional cases that common law could be applied. Customary law therefore was to be generally applied in cases involving Africans as it was considered "the system familiar to them and unquestionably the only system they contemplate and follow in their daily dealings ...."

[82] The Native Administration Act 38 of 1927.

[83] Simons *op cit* at 53.

[84] 1944 NAC (C and O) 72.

[85] 1937 NAC (N and T) 89. In this case McLoughlin P was firmly opposed to the emancipation of African women and favoured the concept of perpetual tutelage. In his view allowing any emancipation of women would be encouraging Africans to break away from the "restraint of Native law with the complete subversion of Native life and institutions." To do this would be to "promote social dislocation."

European.[86] By 1969, most of the customary law relating to marriage and divorce and thus directly affecting women had been affected by legislation.[87] A limitation was put on the amount of bride wealth that could be stipulated for marriage; consent was made essential for a valid union and all marriages had to be registered.[88]

Willan[89] notes that one of the results of codification of customary law was the manipulation of customary law. Quoting from writers like Guy and Ranger, she gives evidence that points to the assertion that many of the chiefs and traditional leaders who felt they were losing their power, saw an opportunity to increase it by actively participating in the process of manipulating traditional customary principles. Chanock[90] states that the manipulation of customary law was an attempt by traditional leaders "to cope with social dislocation" caused by colonialism. He writes:

"The law was the cutting edge of colonialism, an instrument of power of an alien state and part of the process of coercion. And it also came to be a new way of conceptualising relationships and powers and was used as a weapon within the African society."

The African community was undergoing economic changes, and many traditional leaders interpreted customs as a means of survival in this new social and economic climate, often to the detriment of women. While authentic traditional customs had provided protection against abuse to women, colonial laws developed customary law in a manner that that changed its content and form.[91] In a society that was patriarchal, women were not accommodated for in the new dispensation.

In Natal and Zululand the manipulation of customary law was summarised by Ranger[92] as follows:

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[86] Bennett *op cit* at 67.
[87] Most had been reduced to written code.
[88] Bennett *op cit* at 44.
[89] Willlan *op cit* at 36.
[90] M. Chanock 1985:4.
[91] Chanock *ibid* writes that customary law during this period was neither "customary nor law".
[92] T. Ranger "Untitled Contribution" in Hobsbawn and Ranger (eds) *The Invention of Tradition*, 1992:254.

"Elders tended to appeal to 'tradition' in order to defend their dominance of the rural means of production against challenge by the young. Men tended to appeal to "tradition" in order to ensure that the increasing role, which women played in production in the rural areas, did not result in any diminution of male control over women as economic assets. Paramount chiefs and ruling aristocracies in politics, which included numbers of ethnic and social groupings, appealed to 'tradition' in order to maintain and extend their control over their subjects. Indigenous populations appealed to 'tradition' in order to ensure that migrants who settled among them did not achieve political and economic rights."

Power once more was vested in the senior men of the ruling class, lineages and joint household. The men in the society were entitled to exercise control over their wives and daughters. Willan,[93] quoting from Kaganas and Murray, captures concisely the position of African women throughout the last one and half centuries, in the following terms:

"Under customary law, women are always subjected to the authority of a patriarch, moving from the control of their guardians to that of their husbands (perpetual minority status). The male head of the household represents the family and a woman cannot generally contract or litigate without assistance. Husbands control virtually all the family's property while wives rights are confined to things such as items of personal nature. Women cannot initiate the divorce process but must enlist the help of the bridewealth holder, who may have a vested interest in the continued existence of the marriage. Husbands, on the other hand, may simply unilaterally repudiate their wives or, if they wish to retain the bridewealth can rely on specified grounds. Finally, on divorce, the children "belong" to the husband's family."

The system of patriarchy was not restricted only to those practising customary principles. Women married in accordance with civil or Christian rites were subject to the same patriarchal tradition. However, the latter's legal disability was removed by the enactment of legislation in the form of the Matrimonial Property Act 88 of 1984. The change only affected non-African women and was not extended to customary marriages as well as civil marriages of blacks in terms of Section 22 (b) of the Black Administration Act 38 of 1927.[94] As a result the legal status of most white women was advanced, while that of

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[93] Willan *op cit* at 48.

[94] J. Sinclair 1996:126-127 writes the Matrimonial Property Act 88 of 1984 abolished marital power, but even though calls were made for the reform to affect African women, section 11 of the Act expressly excluded those marriages governed by the Black Administration Act 38 of 1927. This was only amended by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, which equalised the consequences of marriages of persons of different races. However section 22(6) reared its ugly head even within this amended Act. The consequence was that unless an ante nuptial contract was entered, marital

African women remained stagnant. African women took up their positions merely as child bearers, house manager and food producers and remained "obedient, submissive and humble."[95] It was commonly accepted that African women lacked legal capacity and were considered perpetual minors who could not own property in their own rights, inherit or act as guardians to their children.[96] With few exceptions women of any age or marital condition were considered minors, had no *locus standi* and could not conclude contracts without male guardian's consent. As stated in Zwane v Dhlamini:

"A woman cannot enter a valid for the loan of livestock without the consent of the head of her household."[97]

The institution of marriage cannot be separated from issues of African women's rights. Much as feminists would like to see a broader definition of family, the legal position of women is defined in the relationship that arises from marriage. The present writer is in agreement with Thandabantu Nhlapo who writes that African women were not seen as separate entities, but as an "adjunct to the family."[98] One of Friedrich Engel's important contributions to Marxist feminism relates to the interpretation of the status of women in different societies. According to the author the general subordination of women is rooted in the patriarchal form of the family.[99] As sanctioned by section 11(3) (b) of the Black Administration Act 38 of 1927, a black woman in a customary union was deemed a minor and her husband was deemed to be her guardian.[100] As a result marital power has

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power continued to apply regardless of the matrimonial property system. Few black women had ante nuptial agreements, and most became subject to marital power.

[95] Nhlapo *op cit* at 99.

[96] See also Sijila v Masumba 1940 NAC (C & O) 44 where McLoughlin, P writes "Among the tribes, women have far less share and say in the administration of the estate, being themselves regarded as assets and 'inherited' by the heir or some other favoured male relative of the deceased, who thereafter has the duty of supporting the women."

[97] 1938 NAC (N&T) 278.

[98] Nhlapo 1991:135.

[99] F. Engels 1985: 88.

[100] See also sections 27(3) of the Kwa-Zulu Act on the Code of Zulu Law and section 37 of the Transkei Marriage Act 21 of 1978 had the similar legal effect on the status of wives in customary unions. Section 37 of the Transkei Marriage Act provided: "Notwithstanding anything contained in any law, a woman married in terms of the provisions of this Act shall ... be under the guardianship of her husband for the duration of her marriage." See also Prior v Battle 1998 (8) BCLR 1013 [Tk] where the applicant attacked the institution of marital power, which had existed by virtue of the Transkei Marriage Act. Miller J in this case declined to extend the order to abolish marital power where customary unions were concerned. This is yet another example of the reluctance by judges to reform customary law. The result is that most African women are placed at a disadvantage in comparison to their white counterparts.

been aptly described as "the most glaring inequality in our law."[101] In litigation a woman could not appear without the assistance of her husband or her guardian. The legal disability of African women was exacerbated by the practice of polygamy, which made it made it possible for African men to marry two different women under different legal systems.[102] African women therefore found themselves parties to unions that were governed by dual systems of marriage law. The civil marriage had the effect of nullifying the customary union. This meant that most rural African women were left in the dark about the subsequent marriage, and in the majority of cases only discovered about the second marriage upon the death of the husband. Such women were left with no bargaining power and often empty-handed upon the death of their husbands.[103]

Because the African property system is communal in nature, women were unable to hold property in their own name.[104] In 1998 the South African Law Commission Report on Customary Marriages acknowledged the disadvantages women face in that although they play a vital role in food production, they are often denied control over property in the form of land or otherwise. The decisions of the Native Appeal Court had the effect of entrenching the subordination of women. The case of *Ndlovu v Ndlovu*[105] for example, asserted the rule that women had no capacity "to hold or deal with property." On the other hand, some writers, notably among them Dlamini,[106] are of the view that the institution of customary marriages is not the cause of such inequities. Dlamini argues that:

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[101] M.L.Sultan "Equality and Gender in African Customary Law in South Africa" at www.uct.ac.za/depts/rgru/equapaps/golcul.pdf accessed on 24 August 2003.

[102] Section 3(1) of the Transkei Marriage Act 21 f 1978 notes that a male person exercising his statutory rights to enter into a second marriage while his first one subsists is not required to get his first wife's consent. See also *Makholiso and Others v Makholiso and Others* 1997 (4) SA 509 (Tk).

[103] Willan *op cit* at 49.

[104] As seen in *Sijila v Masumba supra* the Native Appeal Court described property possession in the African society as follows: "It is a joint communal possession .... Hence though the kraal head is legal owner of the estate, his ownership is burdened with what we might call personal rights of various types of which maintenance and habitation are two of the chief, subject to mutual corresponding duties on the part of the beneficiaries." See also *Qolo v Ntshini* 1950 NAC (S) 234 at 235 where the court declared "As a rule the heir in whom the ownership of the estate property vests, will provide the support and the widow has no right to dispose of any assets without his consent."

[105] 1954 NAC 59.

[106] C.R.M. Dlamini 1991:71.

"The subordinate position of women in the traditional black society is not a product of a customary marriage. It is attributed to the simple technology and subsistence economy that gave the family head control of property. By virtue of this, he would conclude contracts with outsiders, represent all inmates in his family home in litigation and assume liability for their delicts. There would have been little sense in granting these various capacities to women if they didn't have any control over property."

According to Martin Chanock,[107] customary law was constructed and informed by the political structure of the times. Martin Chanock's phrase that "customary law was neither customary or law"[108] invokes the question of whether traditional customs and practices existed to perpetuate male dominance. In his account he draws attention to the shift from custom to customary law, which took place prominently in the sphere of the family and was a consequence of the alliance between colonial administration and African male elders. Traditional holders of power over strategic resources saw this power dwindling and "sought to regain it by manipulating customary institutions..."[109] Sachs[110] states that colonialism and apartheid managed to diminish those aspects of traditional African society that were democratic and emphasised vertical power and patriarchy. African women neither had the protection they possessed under custom nor were they conferred any individual rights by the state. While in many ways this may be true, it is also important to acknowledge that the role of women in the African family operated in denying women equal rights to their male counterparts, this even before the advent of colonialism.

Central also to the argument that customary marriages resulted in the unequal treatment of women, is the assertion that polygyny, the customary practice that allowed men to marry many wives, was degrading to women and created a number of social inequities. Unlike civil marriages, customary unions were seen as inferior in nature. According to Simons the colonialists saw polygyny as a "licensed system of unbridled lust."[111] Kaganas and Murray[112] contend that in the earliest reported cases or decisions in South

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[107] Chanock *op cit* at 4.
[108] Nhlapo *op cit* at 136.
[109] *ibid.*
[110] A. Sachs 199:2.
[111] Simons *op cit* at 15.
[112] Kaganas and Murray *op cit* at 119.

Africa, it was taken as self-evident that the Christian forms of marriage were the only ones to be recognised by the law. The reality, however, was that whether married under customary law or civil law African women continued to bear the brunt of the patriarchal structure of the time. Dlamini [113] is of the view that "the idea that polygyny was a blatant degradation of or discrimination against women is a misconception". In his own words polygyny is calculated to protect women who cannot find a single man to marry and is prepared to settle for a married man:

"It provides her a stable relationship and companionship. The first married woman although she may be aggrieved is also protected in that she still remains a wife and may be given the status of great wife ...."

The writer is by no means denying that the views of white colonisers were often ethnocentric and intolerant. It would, however, be parochial if one fails to recognise the view that polygyny is a practice that often contributes to the inequities experienced by African women, especially in their familial contexts. Kaganas and Murray[114] correctly observe that "cultural relativism does not absolve us from the responsibility to respond to oppression and suffering in different cultures." While there is no concrete evidence to support the assertion that polygyny entails the oppression of women, it cannot be denied that it is "inextricably linked to social practices that are oppressive to women."[115]

1.4 ACCESS TO LAND FOR WOMEN

In light of the African National Congress's recent commitments to include women in their Land redistribution policy, a historical trace of the denial of women to the right to

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[113] Dlamini *op cit* at 77.

[114] Kaganas and Murray *op cit* at 113.

[115] *ibid.* The writer is aware that such remarks are generalisations, which could have the effect of implying that the all African traditions are oppressive to women. This is not her intention. As Aili Mari Tripp "The Politics of Women's Rights and Cultural Diversity in Uganda" in Molyneus and Razavi (eds) *Gender Justice, Development and Rights*, 2002:415-416 writes, such statements tend to lack sociological insight and could be held as highly offensive. The writer feels, however, that it is legitimate to state that many forms of oppression faced by African women have their origins in culture. This is not a situation particular to African women. Cultural rationales are used throughout the world to protect the *status quo* when it comes to advancing women's rights.

land is wanting. Gregory Alexander[116] has observed that land law has not been conventionally considered from the perspective of gender. Yet, as land is considered paramount to survival in an agro based economy such as South Africa, it is important to address the injustice that resulted from the colonialists' dispossessing Africans of their land. Such measures were primarily based on race; they had an impact on the right to ownership by women. Women are generally disadvantaged, compared with men of the same race and class in access to land. The result is that in general women often find themselves insecure in their rights of access to land. Access often largely depends on their link to a man and married women are placed in even a greater dilemma as they are often forced to remain in unfavourable marriages to secure the income and resources that come with land control and ownership.

According to Small and Kompe[117] in addition to the failure to access these resources, women are also disadvantaged in the control they are able to exercise over them. It is generally accepted that Bantu-speaking tribes of Southern Africa did not practise a system of individual land tenure.[118] The traditional system of land holding is often described as communal.[119] Some writers[120] argue that the conception of land being held communally is misleading.[121] Apparently there is no tribal law stating that women cannot have access to land in their own right. The issue of women owning land depends to a great degree on the extent to which women can persuade the tribal authorities to grant them land rights. Women are, in practice, often disadvantaged by social assumptions and informal land practices rather than by law. As Murphy states a woman gaining land in her own right appears in many traditional African societies as an exception rather than the rule. Whatever the opinions of different scholars, land ownership was characterised by the dominant role of the Chief/Headman, who in turn allotted stands to individuals for

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[116] G. Alexander "Critical Land Law" in Bright and Dewar (eds) *Land Law: Themes and Perspectives*, 1998:1.
[117] J. Small and L. Kompe 1991: 1.
[118] N.J.J. Olivier "Indigenous Land Law in South Africa" in Sanders (ed) *Southern Africa in need of Law Reform: Proceedings of the Southern African Law Reform Conference*,1980: 70.
[119] Mqeke quoting from McLoughlin *op cit* at 132 who expresses the view "that the principle underlying all land-tenure among the native tribes is that land belongs to the tribes ...."
[120] Simons *op cit* at 261.
[121] All writers do not share this opinion, notably Mqeke *op cit* at 130 ff who quotes many writers as noting that land was communally owned.

cultivation and residence. Older African tenure systems generally viewed land more as a social and political issue rather than one of production and reproduction. Under European rule, extensive changes were made to the *status quo* of the time. The Natal Native Trust Act of 1864 saw to it that tribal areas were registered in the name of the Natal Locations Commission who in turn would administer the areas on behalf of the Africans. The Cape Commission on Native Law and Customs 1883 saw to the gradual replacement of communal tenure with a system of individual freehold.[122] With the exclusion of Africans from access to land, it is true to note that land became a scarce commodity; its social and political value became a vehicle for the maintenance of power. Coupled by the power conferred on chiefs, such conditions established an even more secure stronghold of the system of patriarchy. While the traditional customary position allowed that a wife, divorcee, widow or woman could own land in her own right and assert her claim against male counterparts,[123] the Native Land Act 27 of 1913 and the policy on "one man one lot" resulted in scarcity of land and the rights of women taking a subsidiary position. Under indigenous law, widows could legitimately reside at the kraal of her deceased husband until her death or remarriage. Such a situation was akin to an "unregistered personal servitude." Proclamation 16 of 1905 and Proclamation R188 of 1969 ensured that the law protected a widow's servitude. However, as a result of the radical change in the traditional system of land holding, few women could own land in their own right. Married women were relegated to positions of minors, and could not dispose of their property without their husbands' consent. Women could not inherit as inheritance devolved on the male heirs according to the rules of primogeniture.[124] Women were rarely owners of land, and since they lacked proprietary rights, widows who remarried forfeited their rights to land, and unmarried women could not or had little prospect of

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[122] Olivier *op cit* at 71.

[123] Simons *loc cit* states that although often unjust in their allocations of rights and resources, older patriarchal land systems had the value of guaranteeing women support through husbands. See also section 9(1) of Proclamation 142 of 1910 still applicable in the Transkean territories, which gave a widows the right to legal possession and use of land in the same capacity as her late husband was entitled. See also the case of Dyasi v Dyasi 1935 NAC (C&O) 1. In this case a widow's claim to eject a defendant heir was disputed. In the appeal, the court stressed the need to take customary law rules into account when seeking the intention of the legislature. The purpose of Proclamation 142 of 1910 according to the court was to ensure that widows were safeguarded against exploitation from the family of the deceased and to ensure that she could claim for support for herself and her children.

[124] *ibid.*

obtaining allotments.[125] The result of this unsatisfactory situation was that widows were forced by circumstances into entering *ukungena* relationships or what was irregular cohabitation that allowed them to obtain rights to land. With the new migration policies, the system of social production changed from home production to reliance on wages. Men took over the burden of supporting the household. The change from older values has seen many men withdrawing from the commitment of maintaining the household. Without access to land, authority and other resources, women are still faced with the difficulty of supporting their families.

Feminist scholars contend that both historically and currently land law has treated men and women differently in ways that have nearly always disadvantaged women. Both women and men's claims to resources, power and authority are fashioned principally through intersections between race, class and gender. These interconnections are located and deployed within specific cultural and historical contexts. Depending on the varying personalities of the various chiefs and his headmen, it appears that customary tenure and the circumstance of women's rights are often ambiguous and non-existent. As with the struggle to obtain any of the other Constitutional rights, rural black women find themselves consigned to inferior positions, while men hold the exclusive power to "use and control the profits on all land."[126] It is women who are often in the first line of attack when housing, land and basic needs are threatened, and in these instances women mobilise themselves across the community, yet as Small and Kempe[127] have observed, it is the very same community political structures that prevent active involvement by women in decision making. The existence of married women's right to land depended on consent to such an arrangement, or on the "altruistic" nature of the male heir to the land. Either way, the woman was dependent on someone else.

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[125] Simons *op cit* at 263.
[126] Alexander op *cit* at 61.
[127] Referred to with approval by S. Meer "Introduction" in Meer (ed) *Women, Land and Authority: Perspectives from South Africa*, 1997:4.

The history of such disadvantage is not unique to South Africa. Aili Mari Tripp[128] gives an account of the position in Uganda where since 1996 the debate over the amendment of an Act that prevented women from owning land,[129] illustrated not only how political and social structures contribute to the oppression of women, but also the impact of feminists in changing that *status quo*. The President of the country, Museveni, argued against the Act on the grounds that it would be in conflict with "tradition" and "custom", while traditional leaders feared loss of land to another clan should a woman be married outside the clan.[130] According to Tripp[131] in Uganda, as elsewhere in the world, women provide 70-80 per cent of all agricultural labour and 90 per cent of all labour involving food production:

"Yet they own 7 per cent of the land. They are generally responsible for providing for the household therefore their access to land is critical. Yet women are dependent on men to access that land ...."

Until July 1998 women in Uganda could jointly acquire land with their husbands but could not claim ownership in their own name. As a result they were placed at the mercy of men where land ownership was concerned. Most were left with no form of subsistence upon the death of their husbands and although heirs had to provide for women, in most cases they did not. Another result of the lack of capacity to hold land was that often men would sell off land without consulting wives and women lacked the power to contest this. In response to this, feminists in Uganda mobilised and demanded that legislation be amended to allow ownership. The result was the Land Act of 1998 which provided among other things, that "decisions regarding land held under customary law either individually or communally shall be taken in accordance with the custom, traditions and communities concerned unless they deny women ownership, occupation or use of land."[132]

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[128] Tripp *op cit* at 420.
[129] In pre-1998 Uganda a woman could jointly acquire land with her husband but could not claim ownership of the property her own name.
[130] Uganda is a patrilineal society, where fathers often do not bequeath land to their daughters for fear that should the daughter marry outside the clan, land will transfer to another clan. To ensure that land remains in the clan, female ownership is discouraged.
[131] Tripp *op cit* at 421.
[132] Section 28 of the Land Act of 1998 taken from Tripp *op cit* at 423.

What needs to be acknowledged and has been argued by many feminist scholars is that gendered power relations resulted in women's subordination. Despite popular misconceptions, it was not simply race, class and the impacts of colonialism and apartheid policy that led to the present South African situation of access to and control over resources. These processes operated within a gender framework and interacted with existing gender relations to bring about the present circumstances of race, class and gender inequities.[133] Moreover, the roots of gender inequalities lay not only within the domain of state and economic policies but were largely a result of inequalities that exist in household and community structures. Dependence on men and lack of community support inhibited women from acting contrary to men's expectations. Even though measures were taken to improve women's status as property owners, equality and independence remained and still remain elusive goals for many women.

An awareness of the difficulties women experience in relation to land has led to implementation of policy decisions implemented first within the ANC framework and in government.[134] Shamim Meer[135] lists them as follows:

i) that women must participate in decision-making structures from local to national level;

ii) that women's demands must be taken up so that their priorities get addressed in community and national decision making forums; and

iii) that women must be organised and empowered at community level.

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[133] Meer *op cit* at 6.

[134] This same commitment to an equitable land policy is reflected in both the Green Paper on South African Land Policy, 1996 and the White Paper on South African Land Policy, April 1997. In this the vision of the Department of Land Affairs includes among others the acknowledgement that traditional communal land tenure systems are discriminatory to women and the need to break down these systems. It includes as one of its four basic objectives the need to "ensure that all reforms reflect the values of basic human rights and equality as required by the Constitution." D.L Carey Miller, 2000:459. M. Robertson "Land and Post-Apartheid Reconstruction in South Africa"in Bright and Dewar (eds) *Land Law: Themes and Perspectives*, 1998 quotes from the preamble to the R.D.P which among its many objectives was the need to encourage "the profound transformation of all levels of government and society", by giving equal opportunity to women in land access. The R.D.P was replaced by the Growth, Employment and Redistribution policy, better known as GEAR. See below for a discussion of how GEAR has affected African women.

[135] Meer *op cit* at 1.

Meer contends that though the revision of policy by government to allow for greater emphasis on women and equal opportunity is a welcome step for women, it is fraught with negatives. Academics and activists in their approach tend to shroud women's experiences by presenting policy measures in a gender-neutral or gender-blind manner. The result of this is that government implement and pursues policy that is oversimplified and ignores or underestimates the complexities that exist in communities. By camouflaging the difference in gender, policy guidelines emerge with men's experiences serving as reflections for the entire community. Like a vicious cycle benefits of policy leave out the women and the poor who ironically are the very targets for the policies. It has been observed that for most rural women access to land is synonymous with and is viewed in conjunction with access to other resources and that without income, access to land is worthless for many women.[136] Using Zimbabwe's case study as an example of the problems that result from approaching land issues in a gender neutral manner, Jacobs[137] argues that gender-neutral policies have the impact of entrenching gender inequalities even if more often than not it hardly ever is the intention of policy-makers. According to the author, in Zimbabwe such an approach has led to and continue to see women as dependants of men. He reasons that policy that ignores differences and different needs often ends up as being gender-biased in favour of men. Women then become excluded and neglected in state policy and though formal law demands equality, substantively these policies hardly do benefit women. Norms and values that frame gender roles and behaviour and are ingrained in custom and tradition ought to be addressed by policy makers. Agarwal[138] gives the example of India where changes in the law allowed women to inherit land but custom remained unchanged and demanded that a good woman was one who would give land to a male counterpart such as a brother or a father. Changes in the law unaccompanied by changes in attitude and custom will not allow women to claim rights. According to Walker,[139] within the South African context it is important to acknowledge the role that tradition plays yet "if democratisation of society is the goal, then what is preserved in the name of tradition has to be subjected to a very serious

[136] Meer *op cit* at 4.
[137] *ibid.*
[138] Referred to by Meer, 1997 *op cit* at 12.
[139] *ibid.*

review." Any gains that are made by the Constitution are likely to be lost if traditionalists are acceded to. Tradition is "the product of contestation, co-option, reconstruction and invention. Having been refashioned in the past it can be shaped to fit the goals of a non-sexist and non-racist society."[140]

1.5 INHERITANCE LAWS – SUCCESSION

The Native system of succession and inheritance is invariably patrilineal. Primogeniture is the governing principle and the universal practice of polygamy is fundamental. Central to the principle of primogeniture is the postulation that only males can inherit. Widows are therefore denied benefiting from their deceased husbands' estates.[141]In traditional African society, a widow had to look to the male heir for support and for payment of debts that may arise from the estate. The Native Appeal decision of *Madolo v Nomawu*[142] clearly outlines that women cannot inherit, but rather remain under the heir's guardianship who, in turn, is obliged to provide support. African estates devolve on a son, brother or nephew of the deceased, but never on his widow or daughter.[143] The rule of primogeniture is consistent with the structure and functions of the joint family. The general heir, who succeeds to an office as well as to an estate, must be a male, as only a male can take the position as head of a household in the traditional society. In a household each wife creates a separate establishment, and the moveable property of the husband accrues under custom or is allotted by him to his different establishments or houses. The eldest son of each wife or house, upon the father's decease, succeeds to the property appertaining to that house and thereupon becomes charged with the legal obligation of providing for the widow and dependants of that household.[144] In the same manner land, whether occupied under the system of communal or individual tenure, is apportioned among his different houses, and the respective divisions of land become substantially subject to the same laws of succession and inheritance.

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[140] *ibid.*
[141] Kaganas and Murray *op cit* at 123.
[142] 1 NAC 12 (1896).
[143] Simons *op cit* at 239.

The advantages of the system lie in that the subdivision of land and property are provided against, and thereupon there is no interruption of the uses to which his property was devoted during his lifetime, and due provision is continued for the maintenance of his dependants.[145] In the Sotho culture it is possible for a woman to be heir in the absence of a male heir; however she is still bound by the principle of patriarchy that dictates that she administer her estate with her guardian's (who is male) approval.[146] In terms of the state of customary family law, Bennett[147] comments as follows: "By mid-twentieth century, it was obvious that legal reforms were urgently needed to ameliorate the position of women and children." Yet the courts and at least until 1985, the legislature clung to their policy of non-intervention. The 1943 amendment of the notorious section 11(3)(b) was one of the few amendments made applicable to women married in African customary law. In his contribution to the South African Journal on Human Rights, Likhapha Mbatha[148] asserts the need for South Africa to reform the customary law of succession. He writes that the codified customary law of succession in South Africa no longer serves the original purpose underlying this system:

"In particular, the rule that control of family property should be entrusted to a male heir with a corresponding obligation to care for the deceased dependants has been distorted by changing socio-economic conditions. The living customary law has already began to change in order to allocate family property after the death of their husbands."

The recent case of *Bhe v The Magistrate, Khayelitsha*[149] has seen a complete overall of the customary law principle of primogeniture, with the Cape High Court declaring it to be unconstitutional. The case was brought by the Women's Legal Centre on behalf of two illegitimate girls, aged two and nine. The girl's father, Maboyisi Mgolombane, died intestate and their mother, Nontupheko Bhe, was never married to him although they lived in monogamous partnership for 12 years until his death. Their grandfather, who in terms of African custom would have inherited the estate, had indicated that he intended to

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[144] See also *Dyasi v Dyasi* 1935 NAC (C&O) 1 as discussed above.
[145] Whitfield *op cit* 314.
[146] *Myazi v Nofenti* 1 NAC 74 (1904) "... the respondent shall have the use of the property, but ownership in it shall not vest in her, but that for the purposes of administration of this stock, she shall be considered to the ward ...."
[147] Bennett 1985:32.
[148] Mbatha 2002:259.

sell the girls' home.[150] He argued that the Black Administration Act prevented black women from inheriting from their parents if they died intestate. The court decided that the Black Administration Act discriminated on grounds of race and gender and was "offensive to their right to equality" and therefore unconstitutional.[151]

The principle of primogeniture does not extend only where property is concerned but also spreads its influence in the sphere of succession to status as in the office traditional leadership.[152] Traditionally women cannot hold positions as traditional leaders or as *amakhosi.* Only first-born males of particular houses could be heirs. However, they can hold the position of *amabamba,* where they act on their children's behalf where conflict has arisen because those acting in the interim, while a son is coming of age, refuse to leave their position.[153] Many of those who are in support of the preservation of this unequal state argue that custom does not discriminate female children but also against all other male children. The submissions note:

"It is not any and every male who can become the heir. It is a particular male born of a particular wife ...."[154]

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[149] *Bhe and Others v The Magistrate, Khayelitsha and Others* 2004 (1) BCLR 27 (C) .

[150] As discussed above, the African rules of succession are based on a traditional ideal that the family unit is preserved through the family head. When the head of the family dies, his heir takes his position as head of the family and becomes holder of the property. Although the family head holds the property, it is owned for the collective benefit of family members.

[151] In the Cape Argus Newspaper, 7 October 2003, the Traditional Leaders' of South Africa President Pathekile Holomisa comments: "It is unjust for those girls not to inherit their father's property. If the grandfather wanted to secure the property for the benefit of the children, then fine, but he is not entitled to it for his own interests. Women are proving to be capable of looking after their families' interests. If someone feels she can look after the property then they can have it." However, he warns that the grandfather's behaviour must not be a reflection of African customary law in general.

[152] K.B Motshabi and S.G Volks 1993:111.

[153] Submissions on the Draft White Paper on Traditional Leaders and Governance Vol 2 (2003).

[154] Submissions on the Draft White Paper on Traditional Leadership and Governance Vol 2 (2003). A summary of the responses to the Draft White Paper on Traditional Leadership and Governance shows that the majority of Traditional Leaders are opposed to women succession to traditional leadership positions. In Kwa-Zulu Natal they argue that since *ubukhosi* runs along bloodline, installing female *amakhosi* has the potential of contaminating the bloodline, which normally results in conflict and war. In the Limpopo Province the traditional leaders acknowledged that women in the past (citing an example of Mkabayi ka Jama) did hold position of power but did not get married, so did not contaminate the bloodline. Yet they go further to argue that because women have monthly periods, they cannot stand in front of men, as this would affect them. In the North-West Province, the leaders were of the opinion that representation by women in positions of leadership was acceptable, yet appointment of *amakhosi* was unlikely to work. The

This view is justified by adding that *ubukhosi* runs along bloodline and women holding such a position could lead to potential for the contamination of this bloodline. The Traditional Leadership and Governance Framework Act,[155] which stresses in its preamble that the institution of traditional leadership must "promote freedom, human dignity and achievement of equality and non-sexism". It requires that at least one-third of the members of the traditional council must be women. This Act is an indication of the government's commitment to gender equality. It remains to be seen whether such changes will be acceptable to the people at large.[156]

1.6 CONCLUSION

It is important to acknowledge that the perception that customary law was oppressive to women is not always accurate. As Willan[157] notes there are many areas in which women were protected by customary practices. She quotes Burman as follows:

"Some man is always responsible for providing for a woman and her children, and while the head of the family may control the product of 'his' woman's labour, he does not own it absolutely. He is more in the position of the manager of a joint estate. He has obligations to protect the interest of each house formed by a wife and her offspring ... and even to consult the 'house' and his heirs inherit his obligations to provide for widows remaining under the heirs' control."[158]

However, what is not arguable is that African women are often assigned positions of subservience, and remain unempowered and oppressed. The codification of custom and

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submissions by IDASA and COSATU were that gender equity was to be exercised but warned against deviating from traditional rules of succession.

[155] Act 41 of 2003.

[156] The case of *Mkhatshwa v Mkhatshwa and Another* 2002 (3) SA 441 is an indication that some changes are already evidenced at the grass root levels. In a dispute over the lawful successor to the chieftainship of the Mawewe tribe, Moseneke J upheld the appointment by the Premier of Mpumalanga of one Miriam Mkhathswa as chief of the Mawewe tribe.

[157] Willan *op cit* at 52.

[158] see also as discussed above the case of *Sijila v Masumba* 1940 NAC (C & O) 42 and *Mpungose v Mpungose* 1946 NAC (T & N) 37 where McLoughlin P declares that " the native social system regards the family as a whole and **all members** of the family participate in its possession". **(my emphasis)**

traditions led to inconsistency with what was authentic traditional customs. Gordon[159] captures it as follows:

"It is now generally accepted at least by revisionists that "customary law" as it emerged in the colonial era was not the product of some authentic communal tradition, but was rather a tool developed by local indigenous elites and colonisers to control resources ...."

The protection that women could claim under customary law was eroded by the codification of customs.[160] As discussed above, institutionalising the power of chiefs and headman had a similar effect on customary law. Traditional leaders in many instances manipulated tradition in order to establish their power.[161] Although the practice of patriarchy had existed way before colonial times, increasing the powers of the chiefs, led to an institutionalisation of this principle. Where before, women had enjoyed protection in culture, the changes led to 'legislated gender inequities'. What a remains true however is that women were unempowered and in most instances subjugated. Their position has been captured in the following terms:

"The ethnocentrism of the white coloniser in their approach to African family law is now easily recognised and we should be alert to the dangers of generalising from culturally specific notions ... But this insight need not inevitably lead to an ethical quicksand of cultural relativism and does not absolve us from a responsibility to respond to oppression and suffering in different cultures ...."[162]

Much as we ought to acknowledge the part played by colonialism in diluting "authentic customs and traditions" and in "perpetuating patriarchy" we must also be wary of the

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[159] R.J. Gordon 1991:93.

[160] Willan *op cit* at 54.

[161] Mbatha *op cit* at 263 writes that the codification of customary law led in many ways to the distortion of various customary values and purposes. He gives the example of land ownership where he notes that changes in colonial land policies and laws increased the pressure on black occupied land and meant that there was a struggle for land ownership. To curb this, many of the traditional leaders and males in the African society used customs as a means to prevent women from owning land. The manipulation of culture was in many ways also caused by poverty, migracy and high unemployment. It was essentially a matter of "survival of the fittest", where leaders and males in society used their positions as a means to survive in the new social order.

[162] Kaganas and Murray *op cit* at 125. Tripp *op cit* at 415 criticises Western theorist who tend to make sweeping generalisations about the position of women in Africa. She instead argues that feminists must acknowledge that patriarchy is not a system that is unique to Africa, but is and has been a part of the World's tradition and cultures in Africa, the Middle East, Latin America and Asia. See the discussions by the present writer on human rights versus cultural relativity in Chapter four of this work.

danger of "the trap of parochialism and romanticisation of the past ... which could so easily become an excuse for not facing up to the challenges posed by African patriarchy in its present context."[163]

The struggle to empower women took an inferior role throughout the apartheid era. Although within the African National Congress women were deeply involved in all the Congress campaigns, almost exclusively men dominated the leadership of the Congress organisations.[164]And although in the 1950's, the A.N.C's National Executive Committee acknowledged the importance of women to the struggle and the significance of addressing issues affecting women, the hardships faced by women more especially African women remained throughout the resistance era. As Elizabeth Schmidt observes, African women played a leading role in the resistance movement and more especially, were pass legislation was concerned:

"It was through the pass laws that the influx control system was enforced, and it was this system that turned their husbands into migrant workers and made them into widows in the reserves. Passes deprived them of the basic right to live with their husbands and to raise their children in a stable family unit. On the basis of race, African women suffered the same disabilities as African men. Because of their sex, they carried a double burden."

Even in the 1990's, gender took a peripheral role.[165] The 1990 draft Constitution of the African National Congress Women's League is an illustration of this point. The first of its aims and objectives was to "mobilise and organise South African women into participation in the struggle for liberation of all oppressed groups." The oppressive condition of African women though mentioned did not constitute a central aim. In her introductory topic Susan Bazilli[166] observes that while gender equality was of concern to the African National Congress' aims and objectives, slogans such as "a woman's place in

[163] P. Mc Fadden 1992: 162.
[164] E. Schimdt "Now you have touched the woman" at www.anc.org.za accessed on 10 August 2003. It was only in 1956 that a woman was elected to the National Executive Committee of the African National Congress, despite women being actively involved since inception in 1912.
[165] In spite of gender being subsidiary to the discussions on race post 1990, several conferences and meetings were held that ensured that women's issues were put "on the agenda". Primary among them was South African Council of Churches *Women and Constitution* held in October 1990 in Durban, the ANC's conference on gender held in November 1990 and the Lawyers for Human Rights Conference *Putting women on the Agenda* held Johannesburg.
[166] Bazilli *op cit* at 11.

the struggle" and "mothers of the nation", are an indication that women's issues were held not as separate and distinct issues for discussion, but in connection with and contextualised within the political struggle for racial equality.

CHAPTER TWO

2.1 INTRODUCTION - FEMINISM AS A GLOBAL PHENOMENON

This chapter intends to examine the history of feminism and to present it as a global phenomenon. By tracing the history and origin of feminism within the Euro-American context, the writer aims to attend to the question of whether feminist theories that have their foundations in the Western world can be used or applied to the African context and more particularly the South African context. While a great number of African feminists have established their mark in the struggle for equality between men and women, it is not a slight to state that the realm of feminist work has from the nineteenth century been Euro-American.[1] The study of feminism and the theories that surround it are both mystifying and incomprehensible to say the least. They are often times so largely categorised and divided that it is difficult to define the terms and conditions that govern them.

Although quite a great deal of literature has been devoted to the subject of "gender and justice", for several reasons it has concentrated on the situation of women. Feminists have observed that gender is a much greater concern for women than it is for men and therefore argue that the leading justice theories both tend to assume "men as their subjects and fail to recognise gender-specificity of much of their scholarship."[2] The result in contrast is that men are more likely to experience their gender as a social, political or legal advantage than women. The women's right activities from the 1840's to the 1920's was known as "first wave" feminism,[3] in the 1960's, 1970's and the early 1980's there was a move towards what was popularly known as "second wave" feminism. The "third wave" feminism has its roots in the 1990's onwards. There is also a further classification into Contractarian, Liberal (bourgeois), Marxist and Radical feminism. With the rise of

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[1] The author J. Donovan 2001 traces the earliest work of feminists to the period between 1405-1726. In her book entitled *Women and the Rise of the Novel, 1405-1726* she documents the beginning of the movement as going as far back as the 15th century. She writes that even then women were aware of the inequalities that existed and voiced concern about their position as the disadvantaged sex.

[2] N. Naffine "Introduction" in Naffine (ed) *Gender and Justice*, 2002:xi.

[3] J. Donavan 2001:11-12 notes that the idea that "first wave" feminism was a product of this period is a fallacy. According to the author feminism began much earlier in the 15th, 16th and 17th Centuries in Western

"third wave" feminism comes yet another division in an already heterogeneous theory, that of African (Nationalist), Islamic and Western feminism. It is within this realm that this chapter focuses. A further classification exists in the modernist and post-modernist version of feminism. Despite the great strides made in recent history, African women face the mammoth challenge of advocating for women's rights. This they must do in the face of challenges of race, religion, culture and poverty. Any feminist work that focuses on African women naturally ought to recognize and deal with the multiple oppressions underpinning their existence. Their positions not only deal with current and present issues of economics and politics that face their contemporary communities, but as Mikell[4] has observed, African women have to go further and grapple with and affirm "their own identities" in the midst of and within the agenda of the "societal notions of gender and familial roles."[5] Arndt[6] comments thus:

"There is hardly a debate that is more controversial than the African discourse on feminism. Anti-feminist positions are widespread in Africa. On the one hand, there are those who reject feminist ideas fundamentally. Most of their arguments do injustice to the heterogeneity of feminism and do not really threaten the existence of feminism in Africa. On the other hand, there are the critical positions of those who sympathize with feminist ideas, but do not feel at home with Western feminism. Their central reproach is that feminism does not see beyond Western societies, and hence ignores or marginalizes the specific problems of African women."

According to Amina Mama,[7] a well-known African feminist, African women are quite often reluctant to be associated with feminism. Such an attitude is manifested by expressions such as "I am not a feminist but I do believe in women's rights." The very definition of feminism in light of the great many sub-divisions discussed above is not well known and is therefore beyond the understanding of many. Because most African scholars consider feminism as a foreign and bourgeois importation, which has no

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Europe. Even then many of the issues that later feminists were concerned about (rape and violence against women) had already been the subjects of much debate.

[4] G. Mikell "Introduction" in Mikell (ed) *African Feminism: The Politics of Survival in Sub-Saharan Africa*, 1997:1.

[5] *ibid.* The argument used by African writers in their rejection of feminism is based largely on the premises that Western feminists base their theories around the nuclear family whereas the African family is characterised by the extended family with a communitarian tradition.

[6] S. Arndt "The dynamics of African Feminism: Defining and classifying African Feminist Literature" at http://shop.store.yahoo.com/africanworld/0865438986.html accessed on 19 October 2003.

relevance to the African situation, it remains in most writings an elusive and invisible concept.[8] Mama feels that instead of rejecting wholly the concept of "feminism" African women ought to give the notion meaning that is appropriate to the African context.[9] Although sometimes the term has been associated with anti-democratic interests it occupies a presence in the African society.[10] The reality of feminism is that it deals with the problems facing women, be they economic or otherwise. While it might be implied that everyone is included, given the history of the movement, the definition needs to do more than name the enemies of women as patriarchy and cultural practices. Msimang[11] makes the following observations:

"Given the limitations of western, liberal conceptions of democracy we want to conceptualise what might be called 'feminist democracy' in relation to the project of decolonisation - in other words to think through an anticolonialist, anticapitalist vision of feminist practice .... Such a vision necessarily involves acknowledging the objectifying, dehumanising effects of colonisation (eg imitation of the coloniser, horizontal violence, self-depreciation due to internalised oppression, self-destruct, psychic and material dependency, desire to assimilate) - and build actively anticolonialist relationships and cultures as a crucial part of the project of feminist democracy."

There is consensus among many African feminists that Western feminist theory does not always cater for all women. This has led to the emergence of anti-essentialists who postulate that instead of merely questioning the difference between men and women, feminists ought to question the differences that exists between women themselves. By recognising that those differences in race, religion, ethnicity and socio-economic

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[7] A. Mama referred to with approval by S. Essof 2001: 125.

[8] R. Meena "Gender Research/ Studies in Southern Africa: An Overview" in Meena (ed) *Gender in Southern Africa: Conceptions and Theoretical* Issues, 1992: 4.

[9] See also R. Meena *ibid* who by quoting Tsikata defines feminism as "the recognition of the systematic discrimination against women on the grounds of gender and the commitment to work towards change." She goes so far as to claim that anyone who advocates for equality and equal opportunity between men and women, is a feminist. The fact that African male scholars have used culture as merely an excuse to conceal the existing oppressive gender relations and to legitimise the perpetuation of these oppressive relations. Msimang (see below) argues that in light of the critiques of feminism that have emerged from third world feminists, and African feminists in particular, this definition is inadequate. To simply state that feminism and feminist movements merely address women's subordination, is to ignore what happens to women who happen to be black, poor, immigrants, lesbian, or otherwise at the periphery of the category "woman", that is to ignore what in the past has been known as the "other".

[10] See in this regard E. Salo at http://www.agenda.org.za/focus.html accessed on 23 October 2003.

[11] S. Msimang 2002:11.

positions exist; feminists acknowledge that there is no universal experience.[12] Catherine Mackinnon[13] is of the view that anti-essentialists have no place in the feminist movement. She writes that "all men have their feet on women's necks, regardless of race or class" and that "all (women) are measured by a male standard." It is the present writer's view that although commonalities can be drawn from all women; it is essential that feminists acknowledge that differences do exist between different women in different contexts.[14] Eryn Scott encapsulates this view in the following comment:

"Global feminism is far beyond our grasp for many reasons: the inequities of the international division of labour; the hierarchical stratifications among women socially, economically, and racially; and the unacknowledged prejudices and privileges between women of the North and South. While feminists of all circumstances work against all forms of male domination and oppression, the socio-political reality of the capitalist structure inhibits universal sisterhood."[15]

Such a notion gave rise to what became known as "critical" or "third wave" feminism, which incorporates Marxist, nationalist and post-structural (post modern) feminism. This focuses on the social relations that exist between gender, class and race. Most African feminists are incorporated into this approach. It tends to be multi-disciplinary and multi-dimensional taking into account the economic, political, cultural and psychological issues that face and are part of the history of many African women. One of the many theories that underlie this ideology is the concept of "women-in-development", which as Mbilinyi[16] notes, has its roots in Western feminism but is more context-sensitive and moves away from the academic to focus more on being practice-oriented. This school of thought arises from the need as Mama[17] comments, "to retain the concept of feminism and make it our own (**that is applicable to the African woman**)[18] by filling the name

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[12] A.E. Van Blerk 1996:184.
[13] C. Mackinnon 1987:324.
[14] Harris referred to with approval by Van Blerk *op cit* at 280 writes that "the consequence of gender essentialism is not only that some voices are silenced in order to privilege others but that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice".
[15] E. Scott " Differences and Intersections between Feminism in Africa and Feminism in the United States" at http://www.columbia.edu/cu/sister/Differences.html accessed on 20 October 2003.
[16] M. Mbilinyi "Research Methodologies in Gender Issues" in Meena (ed) *Gender in Southern Africa: Conceptions and Theoretical Issues*, 1992:46.
[17] Mama referred to by Essof *op cit* at 125.
[18] My emphasis.

with meaning." Feminists such as Abrahams[19] acknowledge the need and rights of white women but stress the necessity to aim for a "single gendered, single-racial space for solidarity and struggle among black women."

Another criticism against feminism is based on the fact that what the global community knows about African women is largely as a result of the writings of white female scholars.[20] The valuable contribution of these writers cannot be denied. However, the debate is that many of them, although well meaning, often fail to understand the African woman and the context in which she operates. Claire Robertson[21] states that even with the best data collection most white feminists fail to contend with the relationships that exist within indigenous communities. Even where one is aware of the need for subjectivity it is a sad fact that lifestyles that are alien to one's own are often considered and identified as "the other". She remarks that "culturally specific knowledge is essential" and that "subjective consciousness is very difficult for outsiders (no matter how well intentioned) to explore effectively."[22] Because of this, some writers have advocated that the struggle within the African context be separated from the feminist perspectives of the West. This school of thought acknowledges the importance of feminism but feels the need for it to be named differently. Advocates for this include women such as Alice Walker[23] and Chikwenye Ogunyemi who are of the opinion that the movement be known instead as "womanism". Ogunyemi[24] argues that the term "womanism" be used as alternative to "feminism" and states that African men and women are united in a common struggle against colonialism and can, therefore, not be identified with Western philosophies.

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[19] Abrahams referred to by Essof *op cit* at 126.

[20] At the First International Conference on Women in Africa and the African Diaspora held in Nigeria, one of the main issues on the agenda was the role that white/European women had on the growth of feminism in Africa. It was argued by many African feminists that white women could not present papers about the experiences of black women, as they would be unable to fully capture these experiences. Volume One was a combination of papers presented by women and compiled to make up what was known as "Sisterhood: Feminism and Power." In this volume it was contended that there was a need to present feminism as a transformative process aimed at acknowledging the life experiences, concerns, and values of women from differing backgrounds and recognising feminism as a global issue.

[21] C. Robertson referred to by P.E. Okeke 1996:225.

[22] *ibid.*

[23] Essof *op cit* at 126.

According to Abrahams[25] the term "womanism" can be applied within the South African context and is more applicable to the African woman. However, Mama[26] argues that a change of names is merely a matter of semantics. She suggests that having agreed that different women are oppressed differently, and having acknowledged the importance of class and race and culture in configuring gender relations, all that needs to be done instead is to define the struggle towards equality in African terms. It is conceded that the same arguments against Western feminists could be applied with equal force to African feminists themselves. Many African feminists are from East Africa and have very little perception of the indigenous communities in Southern Africa. While most of these writers aim to be emancipatory, often times, their work ends up being alienating. If their works are to be discarded on the basis that they are written outside the context of Southern Africa then what will result is abandonment of the struggle against inequality where surrender is unnecessary. It is the opinion of the present writer that it is more beneficial to view feminism as a global phenomenon where different theories can be adapted to suit diverse situations.

South African feminists emerged within a context that differed both from the Euro-American as well as from the other African feminists. As Penny Andrews[27] observes, before South African 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. Further, many of the traditional leaders demanded during the negotiation stages that Constitutional lawmakers recognise traditional laws and institutions. As a result, although South African women benefited from the global feminist endeavour, they have had to adopt the shape and substance of women's rights to accommodate conditions peculiar to South Africa. This issue is not unusual to the South African context alone; the recent trend among feminists has been to adopt a stance that is more in tune with the concerns of the "international community" and not just the European or American perspective. In this regard Andrews states:

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[24] D. Lewis at http://www.codesria.org/Links/conferences/gender/LEWIS.pdf accessed on 21 October 2003.
[25] See page 40 above.
[26] See page 40 above.

"Issues raised by third world feminists ... require reorientation of feminism to deal with the problem of the most oppressed women, rather than those of the most privileged."[28]

Another difficulty that arises when assessing whether Western feminist perspectives are applicable to African women is the fact that, as many African writers have pointed out, personal and subjective material is often used and justified as being academic fact. These "facts" are often constructed and legitimated by the minority group that is the white middle class. As Evans[29] writes:

"So powerful was the hold of this section (**on feminist theories/perspectives)** that different views and experiences particularly and crucially views and experiences from outside that group, were seldom, if ever, given space or credence ...."[30]

It is Evans' view, that although writings by feminists from the West are often presented as exclusive and narrow, they ought not to be wholly discarded. Instead there is a need to develop new ways of debating and viewing the central issues in accordance with present situations. The boundaries of these theories are not firm and fixed but can be re-read and reinterpreted in light of different social and cultural worlds. The author observes that:

"... gendered assumptions are interwoven into the fabric of our culture. Unpicking the strands of gendered bias is thus a crucial task for feminists: what follows hopefully is a **guide** to the ways in which the manifest inadequacies of what has so far passed as universal knowledge might be rejected in favour of more truly representative accounts of the world."[31]

Whatever the main focus of concern may be and whatever the differences that may exist between Western feminists and Third World feminism, a constant theme in both is the invariable challenge to the construction of both societies that are built on patriarchy and male domination. The rise of the international feminist perspective has the goal of "rethinking and revising" these social structures and of bringing women's issues to the fore. So despite working in different contexts, the focus among feminists has been to ensure the establishment of legal structures that promote women's rights. In South Africa

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[27] P. Andrews 1999:125.
[28] *ibid.*
[29] M. Evans 1997:2-3.
[30] My emphasis.

it was paramount that women strike a balance between respect for indigenous culture and the eradication of all forms of sexism.

2.2 THE EMERGENCE OF FEMINIST THOUGHT

As already alluded to in the beginning of this chapter, feminism literature emerged in Europe, Great Britain, and the United States between 1792 and 1869, with the publication of writers such as Mary Wollstonecraft's *Vindication of the Rights of Women* (1792) and John Stuart Mill's *The Subjection of Women* (1869). Wollstonecraft insisted that women were born equal to men and that their inequality was a social construction. In this era, the terms women's rights and women's emancipation were used interchangeably to refer to what we today would call "feminism." These early feminists included both women and men who advocated greater equality for women in public institutions, such as the church and government, and in the family and household, and the equality of the sexes in general. These "first wave" feminists as they are popularly referred to, were also known as liberal feminist. Some of the more radical feminists also insisted on a woman's right to exercise control over her body, including the right to remain single, to develop sexual relations and to bear children outside of marriage. Almost all feminists in this period viewed a woman's right to higher education as one of their most important demands. With the advent of the Enlightenment period, feminist writers and philosophers such as Condorcet[32] published works on the rights of women. The claim of most of these philosophers was that women had the same natural rights as men. In 1791, Olympe de Gouges published a Declaration of the Rights of Woman.[33] These 18th Century feminists were responding to the tide of revolutionary enthusiasm that was sweeping the Western world. This period became known as the Enlightenment Period or the Age of Reason. The Enlightenment period was a period where philosophers and writers challenged the *status quo* of the times, be it the power of the church or that of the state. Based on the idea that people have certain "inalienable or natural" rights upon which governments may not intrude, these theories were firmly based both in the American Declaration of

[31] *ibid.* My emphasis.
[32] Donavan *op cit* at 18.

Independence (1776) and the French Declaration of the Rights of Man (1789). Revolutionary movements in the United States (1770's) and France (1790's), dominated by middle-class (or bourgeois) groups, overthrew monarchical orders that claimed to rule by divine right. Feminists used this period to emphasis women's basic humanity and equality with men. However, despite the theories on women's rights as were postulated by the various feminists, they focused mainly on middle class women and had little or no reference to the poor or working class woman.[34] Opposition to this early women's liberation movement was found, surprisingly, among the male theorists who themselves were in support of the natural rights doctrine. It was argued that while the belief that man possessed natural rights such rights were not to be extended to women. Women belonged to emotional and non-rational world and were not to be included in the scheme of things. It was presumed therefore that all "that did not operate according to reason, was the "other", that is secondary, not significant."[35] It was in this class that women were to be placed. Male liberal thinkers viewed the rational world as superior and that "order ought to be imposed on the marginal other."[36] Women belonged not in the rational world but in the home taking up positions as mothers and wives, isolated and kept in the domestic sphere.[37]

"Every male is assumed to be sufficiently rationale, or "naturally" to have the capacity, to govern a family ....In Locke's theory it is women who are seen as "naturally" lacking in rationality and as "naturally" excluded from the status of "free and equal individual" and so unfit to participate in public life."[38]

Such rationalism led to the divide between the public sphere, which identified with the rational, and the private, which identified with women and the non-rational world.[39] Much as with the issues that plague African feminists, the divide between the "private" and the "public" sphere meant that women's issues were often hidden and that traditional

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[33] *ibid.*
[34] M. Wollstonecraft 1759–1797: Chapter X111 It was her contention that the "rights which women in common with men ought to contend for ... are a natural consequence of their education and station in society."
[35] *ibid.*
[36] *ibid.*
[37] See the note above on the view by traditional leaders of women in African societies.
[38] Evans *op cit* at 24.

patriarchal expectations of women were established as "truths." What this meant was that the laws, which are a construction of the "public" world, were organised around male experiences. Women were therefore excluded from the law, the church and politics, which are the strongest pillars of the public world. This disempowerment meant that society was gender stratified.[40] As a result, women had no property right, no right to inheritance, no custodial rights and no rights to litigate. As with the critical issues facing most African women, marital power was firmly placed in the hands of the men. Donavan[41] writes that marriage resulted in the law interpreting husbands and wives as one entity. The very being and existence of women was suspended during marriage and women became not legal beings with separate rights but were consolidated under the power and control of their husbands. So despite the rhetoric of "natural rights" as being unequivocally applicable to "all mankind", such rights did not extend to women who were not considered legal beings separate and deserving of these rights. As Wollstonecraft wrote:

"Females, in fact, denied all political privileges, and not allowed, as married women, excepting in criminal cases, a civil existence, have their attention naturally drawn from the interest of the whole community to that of the minute parts, though the private duty of any member of society must be very imperfectly performed when not connected with the general good. The mighty business of female life is to please, and restrained into entering into more important concerns by political and civil oppression ...."[42]

Some of the more prominent feminists to emerge from these times were Sarah Grimke[43] and Francis Wright[44] who like their predecessor Wollstonecraft, asserted that women and men ought to be viewed as intellectual equals. However, unlike her they presented a more

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[39] *ibid.*
[40] *ibid.*
[41] Donavan *op cit at* 19.
[42] Wollstonecraft *op cit* at Chapter X111.
[43] Sarah Grimke was the first woman in the United States of America to publicly denounce slavery. She argues that women could contribute to the politics of the time, and challenged the conventional beliefs of a woman's place. What makes Grimke interesting and applicable in the South African context is that she advocates simultaneously for both gender and racial equality despite opposition by many abolitionists who believed racial equality was more important than gender equality. In her book *Letters on the Equality of the Sexes* (1838) Grimke linked the rights of slaves to the rights of women. See S. Grimke "Letters of Equality of the Sexes" at http://www.pinn.net/~sunshine/book-sum/grimke3.html accessed on 2 October 2003.

radical view of feminism claiming that men as a class kept women as a class in subordinate positions. By denying women their rights, women are kept in positions much like slaves. Grimke[45] postulates that women by denying their roles in the domestic sphere, it was only then that they achieved equality with men. Following closely were feminists such as Elizabeth Cady Stanton[46] and Susan B Anthony[47] who became the cornerstone of liberal feminism and what was "first wave" feminism. Working within the American context they advocated for women possessing rights as "citizens" in a country, more particularly the right to the elective franchise. This view of women as citizens was in direct conflict with the idea that a woman's place was in the home. One of the main weaknesses of liberal feminists lies in that even though they advocated for rights and opportunities for women, they fail to question the structural inequities that prevail in the society. According to Mackinnon[48] the failure to acknowledge structural inequities has the impact of masking hierarchy and the reality of male dominance.

Although this women's rights movement had its origins in the anti-slavery movement and although black feminists such as Sojourner Truth[49] did advocate for the improvement of black women's rights, the women's movement of the nineteenth century has been criticised for the fact that it failed to concern itself with issues other than those of the

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[44] In her writing, Francis Wright campaigned for social reform including the abolishment of slavery and the development of feminist issues. However, she is best known for her work in advocating for the need for equality in education between men and women.

[45] See footnote 42 above.

[46] Elizabeth Cady Stanton was one of the foremost early American feminists; Stanton was influential in the Women's Right movement of the 1800's. She was also the driving force of the 1848 Convention, the first Women's Rights Convention where she argued that women had a natural right to equality in all spheres. She also in her lifetime focused increasingly on social reforms related to women's concerns and the issue of woman's suffrage. See "Elizabeth Cady Stanton" at http://www.nps.gov/wori/ecs.htm accessed on 2 October 2003.

[47] Was behind the extension of civil and political rights to women. She and other early feminists believed that the power of the vote was the key to fulfilling all other goals. See also F. Matthews-Green "Susan.B.Anthony: A Pro-Life Feminist" at http://www.family.org/fofmag/sl/a0024084.cfm accessed on 2 October 2003.

[48] C.A. Mackinnon 1989:116-7.

[49] "First wave" feminism was largely defined and led by the educated middle-class white women who built the movement primarily around their own concerns. This created an ambivalent, if not contentious, relationship with women of other classes and races. By highlighting the different treatment of white and black women, Truth drew attention to the limitations of the bourgeois women's feminist movement. While white, rich women were talking about struggling for the vote, black women were still struggling against slavery, and most poor women lacked even basic economic independence. She passionately believed that these diverse movements needed to work together and support each other's aims.

middle-class, white woman. Like African feminists, black feminists in America were not concerned much with the public sphere issues such as the vote but had to deal with issues concerning race. So while much was achieved by the "first wave" feminists importantly, the right to vote, protective legislature for married women and the right to education, such privileges were more the realm and success of the few middle class bourgeois class. Little was done for the black women or for the working class population. However, these early feminists, and important liberal theorist set the foundation for later feminists and remain significant in later writings. In the late 1880's as a reaction against the mainstream feminist theories of the day Marxist feminism was established. Marxist feminism was founded on the ideology of class-consciousness. Based on the idea that the minority ruling class who controlled the means of production rules the proletariat, Karl Marx[50] went further, stating that within the family context the husband rules the wife. The family or the marital institution was in itself oppressive and created unequal distribution. He goes so far as to say it creates "slaves" of women. The fact that in the "modern family the husband is obliged to earn a living and support his family ... gives him a position of supremacy." The author further states that it is only when these social structures are abolished that equality can exist between men and women.

"Second wave" feminism saw the growth and redefinition of radical feminism, social feminist and cultural feminists. This era developed in the late 1960's and 1970's largely in America. Many of these theories were as a result of and a reaction against the political activities of civil rights and anti-war campaigns of the 1960's. By this time many of the important works by modern feminists such as Simone de Beavouir's *The Second Sex* (1949)[51] and Mary Daly's *Beyond God the Father* (1973) had been written. The basis of these writing was the belief that in a patriarchal society, women are socialised to believe the male or masculine is the "positive or the norm" while the female or feminine is negative and abnormal and therefore set as the "Other."[52] It was within this era that black

[50] K. Marx 1938 in a publication edited by F.Engels, 1975:89.
[51] J.G. Riddall 1999:274 commenting on this work writes that theme of the book was that " man defines woman not in herself but relative to him, she is not regarded as an autonomous being thus she is differentiated with reference to a man and not with reference to herself, she is incidental ...." The tone of this passage is similar to Nhlapo's who postulates that women are "adjuncts to the family."
[52] Donavan *op cit* at 136.

feminist found a voice. Yet even within this solidarity, many black feminists emphasised that the experiences between white and black women were varied and therefore many of the theories that applied to the white voices could not be applied to the black woman. Writing in 1964, Pauli Murray aptly described it as follows:

"The black woman ... bears more children ... has less education, earns less, is widowed earlier and carries a heavier economic burden as a family head than a white sister."[53]

Many of the "second wave" feminists insisted that feminism ought to go further than merely granting rights but must also ensure that it contributes towards social reform. The cultural feminists propose that women experience the world in a different way to men. This is as a result not only of the fact that they have in the past had no political power and have therefore been excluded from the public sphere but also because they experience the society differently from men. "Second wave" feminists are of the opinion that the dichotomy between private/public is reflected within the law. Women are seen primarily within the context of the home. And because the ideology of privacy and non-intervention are so interwoven, the law does not involve itself with the matters arising within the private sphere. This situation conceals women's oppression and precludes it from public scrutiny. Men, on the other hand, receive the full protection of the law and can pass freely between the private and the public sphere.[54] It was also during this era that feminism established itself as an academic discipline. "Second wave" feminism presented the more obvious ways in which women are affected by the law (e.g. sexual discrimination) arguing that the concerns of women must be recognised by the legislature and the courts. Feminism was expanded to include not only issues of discrimination but also of violence, childcare, women's involvement in the labour market and abortion. The 80's saw writers like Carol Gilligan and Catharine Mackinnon[55] refining contemporary feminist jurisprudence and questioning the laws applicability to women's lives. Mackinnon argues that the law is biased in that it presumes that neutrality and impartiality assure fairness. The disadvantage of this assumption lies in the fact that it ignores the reality of women's lives. The underlying debate is whether women ought to

[53] Donavan *op cit* at 170.
[54] R. Graycar and J. Morgan 1990:32-33.

be identified as a special group that needs special legal treatment or whether equal treatment ought to be applied to all persons. This debate became popularly known as the "equality versus difference" debate. Mackinnon argued that treatment of women as equal to men, only led to the assessment of women's issues in male terms. On the other hand, other feminists advocated for it on the basis that "institutionalising" differences would only lead to the "intensification of the differences."[56]

"Third wave" feminists, inspired by larger theoretical discussions about race and sexuality, have started to place a greater emphasis on establishing multiracial alliances among women.[57] The movement seeks to broaden the parameters of feminism to include certain groups of women who have previously been excluded as a result of race, class, and sexual orientation prejudice. It is within this realm that African women and their rights are discussed more fully. This period from the early 1980's to the mid-1990's is consequently an important shaping moment for African feminist scholarship and women's studies. Interventions by scholars like Chikwenye Ogunyemi[58] (1984) and Molara Ogundipe-Leslie[59] (1985) challenged Euro-centric traditions to define distinct forms and goals for feminism in Africa. From the late eighties, an emerging emphasis among Africanists was the preoccupation with literary and cultural studies whose main aim was critiquing western feminisms. This gave way in subsequent years to more goal-oriented work addressing the numerous challenges posed by gender oppression in different African contexts. Careful analysis of particular processes also shaped a growing emphasis on gendered social processes. While much earlier scholarship registers an interest in

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[55] Mackinnon and Gilligan are discussed by Evans. See below.

[56] M. Evans *op cit* at 118.

[57] See in this regard page 40 above.

[58] In her writings Ogunyemi is strongly opposed to the theories of western feminism. She argues that they ignore the peculiarities and differences that exist between the Western woman and the African woman and either ignore African women's problems completely or speak in the name of all women without really being sufficiently informed about the situations. She goes further to say that even Blacks outside Africa cannot fully grasp and understand the situation of the African woman. African women have to deal with extreme poverty, polygamy, religion and culture, all of which are experienced and understood only by the African woman.

[59] M. Gyimah 2003:3 writes that Ogundipe-Leslie coined the popular words "stiwanism" or Social Transformation including Women in Africa and "motherism". Ogundipe-Leslie believed that by replacing feminism with Stiwanism, those who advocate for women's rights in Africa can avoid the debate by anti-feminists that feminism has no part in Africa. She also advocates that feminism must not be viewed as

celebrating women's activism, more recent scholarship intricately theorises women's agency to develop multi-disciplinary explorations of the ways in which gender affects all social relationships both personal and collective.[60] "Third wave" feminism takes into account the differing cultural and societal influences, and broadens the feminist theory from being largely applicable to middle class white women to include the black and poor female population. "Third wave" feminism does not totally discard the lessons learnt from "second wave" feminism but seeks instead to incorporate the lessons from the women's movement of the 1960's and 1970's (second wave feminism) into their own unique, lived experiences. "Third wave" feminism seeks to reconstruct and redefine the parameters of mainstream feminism. Ironically the greatest criticism that faces third wave feminists is that they embrace their contradictions and so-called pluralities to such an extent that they compromise many important core feminist principles created by our feminist foremothers, that is, the original bourgeois feminists.[61]

Although all feminist share the same goal, that is to ensure equality between men and women, the main schools of feminist jurisprudence are categorised not in terms of the decade in which they were most popular but in terms of theories they advocated for. They are summarised as liberal, cultural, radical and post-modern feminists. The liberal feminists are the believers that both men and women possess rights and must, therefore, have equal opportunity and equal rights. The belief is that the law must formally articulate these rights and once this is done, equality is achieved. Radical feminists, on the other hand, believe that the law reflects society's male dominated norms. They advocate that merely changing the laws will not do enough to ensure equality but that there ought to be a thorough breakdown of the structures that perpetuate the oppression of women. Women need to be totally stripped of their "socialised" being if they are to be placed at par with men. Cultural feminist believe much like radical feminists that the laws are biased and favourable to men; however, they differ in that they do not deny the socialisation of women. They believe that it is not necessary to create an androgynous

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being in opposition to men. Secondly, that the struggle for women's rights in Africa ought to be viewed within the context of African culture and traditions.

[60] Accessed at http://www.gwsafrica.org/knowledge/africa.html on 20 October 2003.

[61] K. Jacobs 200:1-2.

society in order to achieve equality and that "feminist jurisprudence must reflect the reality of women's lives ...."[62]

Perhaps the most difficult to understand is the post-modernist feminism. Post-modernist feminism begins from the premise that where there is society, there are divisions according to gender. It aims to expose the gendered realities of social relations, particularly the influence of patriarchy on women's lives. By revealing these so called realities and deconstructing them, the claim by post-modernist feminists is that new realities are created which will guarantee equal access to power and recognise the diversity of women. Post-modernists acknowledge differences and recognise that cultural and social environments shape persons' identities. They reject any assumptions of universality. Laws that claim to be universal and applicable to all women would not have a place in this theory. Narnia Bohler-Muller[63] argues that post-modern feminist theory plays an integral role in post-Constitutional South Africa. She writes that because the theory acknowledges the differences in cultural background of many South African women, it overcomes the weaknesses of the other theories that have the effect of sidelining African women and constructing these women as "the other." She contends that the "post modern feminist legal theory has assisted in the development of the capacity to accommodate particularity in a caring and compassionate manner and consequently to avoid exclusions."[64]

Ironically some African writers and feminists have criticised this theory, stating that it is too academic and totally ignores the need for "democratic thinking" that may have been

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[62] Johnson *op cit* at 22. Cultural feminism is similar in its approach to what Parvin Paider "Encounters between Feminism: Democracy and Reformism in Contemporary Iran" in Molyneux and Razavi (eds) *Gender Justice, Development and Rights*, 2002: 270 coins the term "pragmatic feminism." This has its roots in the Islamic context and advocates a pragmatic approach to the issue of difference and multi-culturism. Instead of presenting a war of cultures e.g. West versus "The Other", Paider argues that feminism should not call for women to totally discard their culture or religion rather to use it as a determinant to the overall success of feminism. Using contemporary Iran as an example, he writes that "pragmatic feminism" advocates the collaboration across feminists irrespective of their perceived limitations on gender issues, a kind of alliance building that is based on the recognition of difference, not for the purpose of setting limits and drawing lines but in order to build across them. He recognises that to do this, however, Western feminists should be acknowledged but the goal of feminism ought to be more accommodating of differences that exist between women globally.

[63] N. Bohler-Muller 2002:629.

developed in other parts of the world.[65] If the post-modernist perspective were to be applied in South Africa, it would deny women the basic ideals of democracy that are documented in conventions such as CEDAW and the Universal Declaration of Human Rights:

"The post-modernist critique ... could demoralise the emerging feminist movement in Africa and weaken the struggle which has been ongoing-the struggle for equality ...."[66]

So even though it may seem an advantage that difference and diversity be recognised, the disadvantage is that African women do not exist in a vacuum and there is a need to look to the international world for some guidance to women's movement.

2.3 FEMINIST THEORIES AND GENDER IN AFRICA[67]

In her contribution to the Southern Africa Political Economy Series, Changu Mannathoko[68] of the University of Botswana presents a thought-provoking debate in which she argues that feminism is in fact located within the pre-colonial patriarchal society in Africa. She rejects the argument that feminism is alien to the African context. The very fact that feminist theories are so diverse is credited to the diverse ways in which women from differing backgrounds view the origins of women's oppression. She presents an interesting viewpoint on feminist perspectives in Africa:

"... Feminism has its roots in the African condition. This is because women in the continent have always been aware of the prevailing oppressive gender relations and have throughout history challenged these conditions in a variety of ways. It is a misconception to view feminism as a Western ideology which reflects Western culture simply because feminist theories, just like other theories, have been influenced by external pressures resulting from colonialism and imperialism."[69]

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[64] *ibid.*
[65] M. Nzomo 1995:132.
[66] *ibid.*
[67] C. Mannathoko "Feminist Theories and the Study of Gender Issues in Southern Africa" in Meena (ed) *Gender in Southern Africa: Conceptual and Theoretical Issues*, 1992: 69.
[68] Mannathoko *op cit* at 69.
[69] *ibid.*

Amina Mama supports this view, adding that historically it is a misconception that feminism was strictly the realm of the white, middle class bourgeois. She argues that white women have always looked to Africa for alternatives to their own subordination since the days of the early anthropologists. She quotes anthropologists like Sylvia Leith Ross and Judith Van Allen who have seen Africa as the source of feminist writings. Africa has therefore "always been part of the early conceptualisations of so-called "Western feminism", even if not properly acknowledged as such."[70] She goes further to say that African women have always defined and carried out their own struggles. "African feminism dates far back in our collective past - although much of the story has yet to be researched and told."[71] Despite the argument that gender was a Western conception, anthropologists such as Sylvia Leith Ross write that as early as 1920 there is documented proof that many of the African women had become aware of the disparities in rights between men and women and had begun even then to advocate for equality between men and women. Shattering the pre-conceived view that women had no place in the public realm, many of the women in the liberation struggle in South Africa, for example, organised themselves and fought against racial discrimination. An amazing anthropological study is also presented by Leith-Ross. She writes that in the early 1930's, there is another historic example of women's successful attempts to protest. In this case, women were again very influential in changing the laws of the time which they believed were detrimental to their reproductive rights.

In the 1920's Ghana experienced the increase in rate of venereal disease across the region. As a means to curb this, the Asante chiefs decided that all girls over the age of 15 were to be married. This they believed would curb the spread of the disease. A jail sentence was given to all girls over 15 who were not married. The Chiefs argued that they were trying to put a stop to prostitution and the spread of the disease. The Asante chiefs believed that within the sanctity of marriage, the husband had exclusive sexual rights over his wife, without the reciprocal duty of support by the husband. History has it that as a reaction to these laws women stopped marrying. Because the women stopped marrying,

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[70] Salo *op cit* at 1.
[71] *ibid.*

the colonial chiefs responded the way they did, arresting the women. However, often times the women thought ahead and evaded such arrests by making arrangements to get around the government's plans. When women were arrested, they were all taken to jail, where they had to wait for a man to come to get them. The women had to mention the name of a man that they intended to marry and have him come and pay a fee in order to be released. Most women had arranged to have male relatives or friends to come and profess their plans to marry her. After the fee was paid, the girl was free to go. Women were so disgusted by the fact that men were no longer fulfilling their basic marital duty providing the bare necessities for their wives. As a result women began "assert(ing) a great deal of autonomy and independence, much of it linked to the establishment of cocoa farms or to engagement in foodstuffs trade." During this period women were tremendously victorious at avoiding marriage. They manoeuvred the system and ensured that they were kept out of jail. They even went further by divorcing their husbands and claiming "matrilineal inheritance." This reaction to the laws they felt were oppressive, led to even more positive results. It is documented that during this period women moved in dramatic numbers into trading, especially in previously male-dominated commodities. Leith- Ross writes that although it is not definite, it is suggested that these women better survived the severe economic decline of the 1930's than many of their male peers. In this respect it is easy to see the difference in what men and women wanted. Men wanted total control of the women. The colonial chiefs felt that they were losing authority over the women, so they wanted to tighten their reigns. Women's uncontrollability had grown too large for the men not to act. The chiefs felt as if the respect from women and the Colonial government would diminish if they could not control their own women. The Asante women fought back because they wanted exclusive authority of their productive and reproductive rights. Also, when slavery was abolished, men began pawning their wives and exploiting them for use on their cocoa farms. The women became so enraged at their subjugation by men that they reacted successfully. Leigh-Ross quotes Allman as affirming that these women were successful when she says that "this particular form of coercion was unsuccessful in even minimally facilitating the exploitation of women's unpaid labour and one important reason for its failure was that the capture of unmarried women did not get the backing of the colonial government." In this particular instance,

women were able to "shape actively the emerging colonial world." The only thing that the chiefs succeeded in doing was making the arrest of women a profit-making venture; because every time a woman was released from jail, she or the man had to pay the fine. Unfortunately, this was not their goal, so they were ultimately unsuccessful. Women's productive and reproductive rights remained under their control.[72]

However, despite proof from various anthropologists who argue that feminism indeed had its origins in the African context, there still remain a great number of writers who disagree. Eryn Scott[73] in her article, *Differences in Intersections between Feminism in Africa and Feminism in the United States*, argues that "black women in Africa have not yet fully engaged themselves in an organized feminist movement." Feminism is still deemed an imported concept detached from tradition and disruptive to African women despite the fact that African women have engaged in acts of resistance since pre-colonial days. While many of the women in Africa have been involved in the nationalist movements in their countries, they still remain the most unempowered, lacking any access or control over resources. Most Western women already possess these rights and as a result deal with and have to comprehend with differing social problems. While white women in Africa can identify themselves with the Western feminist perspectives, the same cannot be said of Black women who have to contend with not only race issues but also economic (dis)empowerment. Scott[74] writes that "the patriarchal economic structure, which privileges white over non-white" leads to differing perspectives on gender and rights in Africa. Whatever the sentiments of the different writers, what cannot be denied are the realities within the African context. Commenting within the Ugandan context, Msimang[75] writes:

"The anti-western sentiment that colours the criticism of feminism in Africa remains a significant threat to women's efforts to end gender oppression. As Richard Ssewakiryanga points out in his article, many of the discussions about gender in Uganda, invoke 'that Beijing thing'. For the Ugandan public, gender is inextricably linked to a

[72] This account of the Asante women is taken in its entirety at http://www.ez-essays.com/free/2782.html accessed on 20 October 2003.
[73] Scott *op cit* at 5.
[74] *Ibid.*
[75] S. Msimang 2002:4.

conference that took place far away in China. Ssewakiryanga suggests that to many Ugandans, the idea that feminism is a home-grown, indigenous movement, similar to the movements of independence that swept Africa in the '60s, seems far-fetched."

The trends and perspectives of gender in Southern Africa have, however, been undeniably influenced by the Anglo-American models of feminism. It is no great surprise therefore that the very values and concepts that were used by the liberal bourgeois in Britain are in fact applicable and can be adopted in the Southern African context. Liberal feminism has had a great impact on the development strategies and approaches to women in Southern Africa. Rudo Gaidzanwa[76] argues that liberal feminists fail to question the structural inequities in society, merely contending that equal opportunity would lead to equality within the society. The same is applicable in the Southern African context, where the same mindset was popular among the nationalist governments established within the post-colonial era. Although they encouraged the creation of women's wings within their party, the African National Congress in South Africa and ZANU in Zimbabwe, failed to question the reasons behind the oppression of women. As noted below, many of the nationalist parties encouraged the formation of women's wings as a means to solicit the female masses support rather than to ensure the participation in the agenda of these parties. What resulted was merely "token participation." In South Africa, for example, women were given seats in Parliament yet the structures of decision-making remain male-dominated. The 1919 Constitution of the A.N.C granted full membership to women but failed to give them full voting rights. So although there has been some semblance of formal equality, both politics and economy are controlled and dominated by males and the position of women remains unchanged.

Much like the criticism that faced liberal feminist jurisprudence, South African women have realised that the oppression of women is deeply embedded in the structures and institutions that are found in society. They advocate that the law be taken to another level and must include not only the formal laws, such as the mere naming of the rights acquired by the female, but must go further to include the breaking down of structures that create

[76] R. Gaidzanwa "Bourgeois Theories of Gender and Feminism and their Shortcomings with reference to Southern African Countries" in Meena (ed) *Gender in Southern Africa: Conceptual and Theoretical Issues*, 1992:94-97.

these inequities in society. Structures such as traditional institutions that bar female participation must come within the scrutiny of the law. Although much of what "second wave" feminists have advocated for may seem at first glance too radical for the African society, their theories which state that laws are favourable to men, are as will be noted below, valid. They contend that gender identity is socially constructed. With reference to the interviews done in Grahamstown, it can be seen that even within the South African context it has become acceptable that women play traditionally feminine roles and that the values ascribed are those of a patriarchal society. Because of this, women are often times left powerless and unable to break away from the circle of abuse that pervades their lives. "Third wave" feminism manages to effectively capture the African context. It takes into consideration the differing cultural context in which women live in. It allows for the dichotomy that exists in the South African Constitution where women have rights to equality but are still able to participate within their cultural contexts.

2.4 CONCLUSION

It is not an underestimation to claim that the South African feminist movement is one that is still in its embryonic stage. With a society that has such an unfortunate past, it is no surprise that there is an absence of any significant South African feminist movement. Many of the women, particularly black women, remain concealed in the history, sociology and politics of the apartheid years, so that individual rights and freedoms took only but a minority role. This chapter has not aimed to conceal the fact that substantial feminist theories have their roots in the European context and more specifically in the bourgeois context and therefore often lack any awareness of the major social concerns that plague African women.[77] This dichotomy that exists between what Johnson-Odim terms Third World and Euro-American First World feminist movements,[78] is one that the writer fully acknowledges. African feminism only took shape in the decade of the 1970's when many of the African countries were just emerging from colonialism, yet for many of the First World nations this era was already a part of what was known as "second wave" feminism. Although at this time many of the African nations were advocating for

[77] Bozzoli *op cit* at 1.
[78] Johnson-Odim *op cit* at 314.

equality and equal opportunity, their immediate aim was to deal with issues of race and economic development and so "neither the advent of independence in the former colonies nor legislation passed ... was to prove immediately victorious in improving the quality of life for the overwhelming majority of ... women."[79] And so it was with the thrusting and revolutionary insights of feminists from the West that feminism and feminist thought was introduced to many of the African nations. It is the opinion of many writers that the basis of these "prior insights" that Western feminists deepened the understanding of women's rights in the African context.[80] The question of whether Western feminist theories can be applied in the African context is not one that can be answered with a simple affirmative or negative. As mentioned several times before, the perception of feminism is that it has emerged from white, middle-class Western women and therefore has no place in the African context. Euro-American feminist theory is constructed around gender and class while that of African women is linked more with race relations and imperialism. These tensions that exist between the two are tension between what is popularly known as "mainstream feminism" and "the other." The formers chief goal is sexual egalitarianism while for the latter gender discrimination "is neither the sole nor perhaps the primary locus of the oppression of women." Priority items that are essential for African women will therefore differ largely from the Euro-American woman.[81] For example, while Western women would view the payment of *lobolo* as perpetuation of a patriarchal system, research has shown that for African women this practice "is directly tied to the indigenous cultural context"[82] and is therefore not viewed as discriminatory or oppressive. Although the early 1960's saw a movement by radical feminists that did take into account the impact that race had on African American women, by and by the trend is that feminism is connected with popular liberal feminist perspectives which do not "sufficiently define racism and imperialism as major feminist issues."[83] However, as Johnson-Odim suggests, the answer is not in totalling discarding the writings and theories from the West but in viewing them and adapting them to the context of the African woman. This she suggests is achieved by acknowledging that unlike Western women, the

[79] *ibid.*
[80] *ibid.*
[81] Johnson-Odim *op cit* at 321.
[82] Johnson-Odim *op cit* at 322.

rights of African women are closely associated with the need for racial equality and economic development. So she writes:

"In "underdeveloped societies" it is not just a question of internal redistribution of resources, but of their generation and control, not just equal opportunity between men and women, but also the creation of opportunity itself ....Thus third world women cannot afford to embrace the notion that feminism seeks only to achieve equal treatment of men and women ... rather it must address issues of race, class, and imperialism ...."[84]

African women need to become a part of serious discussions surrounding feminist theory and feminist theories ought to accommodate and acknowledge the struggle and complexity that surround African women. The writer agrees that the definition of the term feminism should be redeveloped so as to ensure the participation and inclusion of African women in their various social and cultural contexts. The theories ought not to be discarded wholesome but instead ought to acknowledge the fair amount of universality in women's oppression.[85] Johnson-Idim writes:

"For although the oppression of women is universal in nature ... it is time to move beyond simple truisms about the situation of women to a more profound analysis of the mechanisms perpetuating the subordination of women in society ... in the third world, women's demands have been explicitly political, with work, education and health as major issues *per se* and not so linked to their specific impact on women. In addition, women of the third World perceive imperialism as the main enemy of their continents and especially of women ...."[86]

By allowing the participation of African women in redefining feminism, the result will not be a complete overhaul of existing feminist theories but more an adaptation that seeks to include the once "excluded" group that is the poor, African woman. The solution as Johnson puts forward is not a blanket criticism and rejection of "mainstream feminism" but a reconstruction taking into account the needs of Third world women. A broader definition would be along these lines:

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[83] *ibid.*
[84] *ibid.*
[85] *ibid.*
[86] *ibid.*

"Feminism ... constitutes the political expression of the concerns and interests of women from different regions, classes, nationalities and ethnic backgrounds. There is and must be a diversity of feminisms, responsive to the different needs and concerns of different women, and defined by them for themselves. This diversity builds on the **common opposition to gender oppression** and hierarchy ...."[87]

[87] Johnson-Odim quoting Catagay, Grown and Santiago *op cit* at 325. My emphasis.

CHAPTER THREE

3.1 INTRODUCTION - AFRICAN WOMEN'S RIGHTS IN THE CURRENT DISPENSATION

This chapter will focus on post-apartheid legislation that affects African women's rights. Both the interim and final Constitution envisage a new democracy that ensures that there exists in the new South Africa not only racial equality, but also gender equality. The task of the government is to redress the imbalances of the past and to guarantee that non-sexism becomes endemic in our society. This inevitably requires the amendment of old laws that discriminate against women and introduce new laws that will facilitate gender equality. The new state in South Africa is compelled by the history of the country to become what some political scientists call a "development state."[1] As a result of the determined anti-apartheid movement overseas and the extensive censure of apartheid, important international expertise was made available to lawyers engaged in the South African constitutional process. The availability of international "experts" also bolstered the then burgeoning feminist movement in South Africa. For example, women's campaigns conducted at the grassroots level in South Africa were often supported by women's organizations and development agencies in Europe, North America, and Australia. In addition, feminist scholars in South Africa were being exposed to the body of feminist literature elsewhere. Moreover, South African women activists were increasingly engaging with activists from other communities who were embarking on similar agendas in their own societies.[2] For African women this called for the establishment of mechanisms aimed at transforming "the institutions that resulted in placing black women in positions as minorities."[3] Some would go so far as to say that patriarchy and sexism are older and even more insidious than apartheid, and that a failure

[1] S.B.O. Gutto 2001:8. This serves to indicate the legislation boom that characterised (and still characterizes) the first decade since the democratic dispensation in 1994.
[2] P. Andrews 2000:2.
[3] *ibid.*

to construct a constitutional order expressly dedicated towards abolition is not a reflection of a true transition for South Africa.[4] Catheryn Albertyn summarizes it as follows:

"The emancipation of women and the attainment of equality in the political, economic, social and cultural spheres of life is, we know, a long term process of social transformation that fundamentally challenges the way in which society is organized."[5]

As noted earlier in the thesis, for Africans the 1996 Constitution and the right to equality present a dilemma, which requires on one hand that:

i) "Every person shall have the right to equality and equal protection of the law.

ii) .....

iii) No person shall be unfairly discriminated against, directly or indirectly on one or more of the following ground in particular race, **gender, sex,** pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[6]

and, on the other, the right to " ...participate in the cultural life of their choice ...."[7] under which the concept of gender equality is unfamiliar and the principle of patriarchy is central. According to Andrews,[8] the feminist project in South Africa had to confront contextuality and difference at the same time that it lobbied for women's rights in the new Constitution. Similarly, the strategy to ensure recognition of women's rights in South Africa also needs to incorporate the particularities of class, race, sexuality and culture. Women activists in South Africa recognised that, while the traditional law retained many patriarchal or sexist features, their aim was to discard these features without abandoning the whole of customary law. This chapter will deal with how the legislature and the courts have dealt with this predicament. As many authors have noted, unlike common law, customary law is a fairly underdeveloped legal discipline, due mostly to a lack of understanding and in the limited recognition of customary rules and

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[4] A. Sachs 1996: 6.
[5] C. Albertyn 1995:9.
[6] Sections 9(1) and 9(3) of Act 108 of 1996. My emphasis.
[7] Section 30 of the Constitution.
[8] Andrews *op cit* at 1.

principles.[9] Although the 1993 Constitution does not explicitly assure the continued application of indigenous law, in chapter 11 read together with section 229 and Constitutional Principle X111, it is correct to assume that it was the aim of drafters of the Constitution to apply and give explicit recognition to customary law. Many have suggested that the problems that exist because of the dichotomy between customary law and common law as concerns women, would be dealt with effectively if the legislature synthesized the two systems of law. The end result would be a harmonisation of the two systems of law. As Joan Church[10] comments, such moves have been made in Tanzania with some success, although it was argued that in the end the law reflected Western influence rather than traditional values. It is the opinion of the writer that whatever decisions are taken by the courts and the legislature, such decision ought to take into consideration that indigenous law should not remain rigid and inadaptable but must take into account the changes in the social status of African women and should reflect such change. Church writes that:

"Logic, and history, and custom, and utility and the accepted standards of right conduct are the forces, which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will thereby be promoted or impaired."[11]

Finally, the chapter seeks to acknowledge the difference between formal and substantive equality. There is a relationship that exists between women and society that perpetuates discriminatory practices. As the A.N.C. national executive statement on the emancipation of women states: "to achieve genuine equality, our policies must be based on a real understanding of gender oppression and the way in which it manifests itself in our society."[12] Feminist theorists have argued that the concept of equality is fallacious as it ignores the social constructions upon which the discrimination of women is built. By presenting an abstract concept of equality, the Constitution fails to recognize the actual

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[9] M. Pieterse 2000: 35. It is also the view of Thandabantu Nhlapo that one of the reasons there was a lack of understanding of customary law, was that in many cases it did not truthfully present the traditional African principles. Quoting Chanock 1985:4 he concedes that colonialism led to a watered down and in most cases, misleading account of customary law. This is encapsulated in the popular phrase "Customary law was neither customary nor law" See also Chapter One above.

[10] J. Church 1995:299-300.

[11] *ibid.*

experiences that women go through in reality. The very purpose of equal treatment should be the breaking down of complex systems such as patriarchy that perpetuate the inequality and subordination of women. Critical feminist scholars argue that it is only by recognizing the contextual realities of African women that substantive equality can be achieved. Freedman writes that:

"The question of equality (to be captured in constitutional rights) is the meaning of equal moral worth given the reality that in almost every conceivable concrete way we are not equal, but vastly different, vastly unequal in our needs and abilities. The object is not to make these differences disappear when we talk about equal rights, but to ask how we can structure relations of equality among people with many different concrete inequalities."[13]

3.2 AFRICAN WOMEN AND THE EQUALITY CLAUSE IN THE CONSTITUTION

An understanding of South Africa's Constitution requires a thorough understanding of the dire record of human rights under apartheid. It is accurate to suggest that when discussing racial equality, very little explanation is required to substantiate the choice of subject. South African society is distinguishable from its long history of racial discrimination and we as a society are deeply aware of the consequences of the system of apartheid in our day-to-day living. Christina Murray[14] points out, that while the focus on racial inequalities of the past is crucial in the re-modelling of the new South African community, it tends to obscure the complexities of oppression that many South Africans suffered. According to the author, more often than not black women are too easily forgotten when issues of race and the new Constitution are discussed. For African women, inequality is situated not only in sex and gender, but also inevitably in race, family status or responsibility and in marital status. So, while the most dominant clause as pertains women's rights lies in section 9 of the Constitution, it is essential to recognize that women face multiple oppressions based not merely on gender and sex.[15] The final

[12] F. Ginwala 1991:62.
[13] W. Freedman, 2000:315.
[14] C. Murray 1994:19.
[15] H. Combrinck 2001:223.

Constitution[16] provides guarantees for women that go far beyond the right to equality, but affect women's lives nonetheless. Entrenched are the rights to human dignity, the right to security of person,[17] which are important considering the violence that women face both outside and within their public lives, the right to employment[18] and the right health care[19] which in the past meant that women were unable to access the correct reproductive health services.

In the first Constitutional Court case to deal with equality after the interim Constitution, *Brink v Kitshoff*, O'Reagan J points out that:

"Although our history is one which the most visible pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed on our social fabric. In drafting s 8, the drafters recognized that systematic patterns of discrimination on grounds other than race have caused, and many continue to cause, considerable harm. For this reason, s (8) 2 lists a wide and not exhaustive, list of prohibited grounds of discrimination."[20]

December 1991 was a monumental time in South Africa in that it marked the start of multi-party negotiations, Convention for a Democratic South Africa (CODESA) at the World Trade Centre in Kempton Park outside Johannesburg. President FW de Klerk led the apartheid government. Dawie de Villiers led the National Party (NP). Opposition parties included the African National Congress (ANC) led by Nelson Mandela, the

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[16] Act 108 of 1996.

[17] Sec 12(1) Everyone has the right to freedom and security of the person which includes the right –
(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c) to be free from all forms of violence from either public or private (my emphasis)
(d) not to be tortured in anyway; and
(e) not to be treated or punished in a cruel, inhuman or degrading way-

Sec 12 (2) Everyone 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 (my emphasis)**
(c) not to be subjected to medical or scientific experiments without their informed consent.

[18] Section 23 (1) Everyone has the right to fair labour practices - which includes the right not to be unfairly discriminated on the bases of gender, sex or pregnancy (Employment Equity Act).

[19] Section 27(1)(a) Everyone has the right to have access to -
(a) health care services, including **reproductive health care (my emphasis).**

Inkatha Freedom Party (IFP) by Chief Mangosuthu Buthelezi, and the Democratic Party (DP) by Zac de Beer. The black traditional leaders represented the traditional Board sector. The main purpose of these different groups was to provide a basis for discussion for the Interim Constitution of South Africa that would provide a break from the apartheid system of the past and ensure a new democratic South Africa. Prior to these negotiations women had attended interminable meetings and conferences where they bemoaned the government which responded to their demands with merely incremental changes in legislation.[21] Angered by the passivity of the government, they[22] protested outside the World Trade Centre for representation in the negotiations. Commenting on the protests the African National Congress Women's League secretary general, Baleka Kgositsile noted that while the negotiations were primarily focused on race, it was important to acknowledge the part played by women in the struggle and to concede that African women were especially affected by the struggle:

"That apartheid is still alive, well and particularly violent to women is illustrated by an article in the February 23(1991) Sowetan. The township paper reported that a gang of white youths stoned a black woman and her 11-month-old child; the little girl suffered brain damage and was in a coma fighting for her life. Although an "attempted murder docket" was opened against the youths, who were known to the police, a police spokesperson said that the assailants could not be arrested because "they are sitting for their exams. There is no use rushing the case ...." This is a fairly typical response to attacks on black women. Of course domestic violence and abuse of women by men are not limited to the black community. In fact, white women don't often realize that they suffer many of same problems as black women Women's issues must not wait for the new government to be in place for them to be addressed. This is why we are insisting that CODESA [Convention for a Democratic South Africa, the multiparty negotiations forum], must have a way of ensuring that these issues are taken on board."[23]

Andrews[24] writes that despite the formidable obstacles to women's equality, by the early 1990's South African women had mobilized themselves creating a "highly organized, politically astute, articulate and vocal cadre of feminists." So that by 1990 when the

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[20] 1996 (4) SA 217 (CC) at 41D.

[21] These included among others the General Law Fourth Amendment Act 132 of 1993, Prevention of Family Violence Act 133 of 1993.

[22] This included groups varying from the ANC Women's League, the Woman's Legal Status Committee (WLSA), Women for Peace, Kontak, the National Council of Women (NCW), Union of Jewish Women (UJW), the SA Association of University Women and several others.

[23] At www.greenleft.org.au accessed on 5 September 2003.

[24] Andrews *op cit* at 2.

"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."[25]

In 1992, the South African South African National Women's Coalition was formed with the aim of ensuring that the interests of women were not ignored in the negotiation process. This was a preliminary to the creation of the Woman Charter for effective equality formed to ensure a "programme for equality in all sphere of [women's] lives." The Charter contained demands by women of issues that were a priority to them. The women identified the need to be included and to participate in the traditional institutions that were in the past largely the realm of males. Women also demanded the discontinuation of laws that failed to recognize the legality of customary marriages, calling for the recognition equal to that given to the other forms of marriage. Although the Charter expresses the freedom of women to "practise their own religion, culture or beliefs without fear", it also states unambiguously "custom, culture and religion shall be subject to the Equality clause of the Bill of Rights." The Charter acknowledges the necessity of allowing women "full participation, leadership and decision-making in religious and cultural practice."

The culminating point of all these negotiations was the drafting of the Interim Constitution, which expressed the commitment to:

"Create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between **men and women** and people of all races so that all citizens shall enjoy and exercise their fundamental freedoms."

Despite the acknowledgement given to women in the Interim Constitution, the lack of attention given to customary law is conspicuous. As Bennett[26] points out, for African women section 229 which stated that all laws in force in the Bantustans remained in force unless repealed or amended, meant the continued existence of the Black Administration Act of 1927 and the Code of Zulu Law and Kwa-Zulu Act which had placed black

[25] *ibid.*
[26] T.W. Bennett 1994:122.

women in customary unions in positions as minorities.[27] Further, the recognition of traditional authorities is an unqualified statement made by the drafters of the Constitution that the system of primogeniture of males was to be maintained. Hence, it would seem that the Interim Constitution contained clauses that conflicted, on one hand it guaranteed equality to all regardless of gender[28], and on the other, the right by traditional leaders to be recognized and protected by the Constitution. Albertyn[29] contends that one of the reasons for the establishment of the Commission for Gender Equality in the Interim Constitution was to bring about a compromise between on the one hand the traditional leaders who wanted customary law to be excluded from the operation of the Constitution, and on the other to pacify the women's groups that were lobbying for its inclusion. The Gender Commission was established "to promote gender equality ... and to advise and to make recommendations to parliament or any other legislature with regard to any laws or proposed legislation which affect gender equality and the status of women."[30] The need to pacify the two opposing groups resulted in an Interim Constitution that contains language favourable to both traditionalists[31] and feminists alike. Supporters of a structure that was separate from the Human Rights Commission were of the opinion that such a body would be able to deal comprehensively with women's issues without the fear of "marginalizing and trivialising" women's issues.[32] The fact that the drafters had to accommodate both parties creates certain difficulties in interpretation. The Interim

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[27] The Interim Constitution did acknowledge in section 31 that "every person will have the right to use the language and to participate in the cultural life of his or her choice" and in section 11 establishes that " the institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution" and s 33(2) which stated that no "rule of ...customary law...shall limit any right entrenched in this chapter."

[28] Chapter 3, section 8

(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly on one or more of the following grounds in particular: race, **gender, sex**, ethinic or social origin...(**my emphasis**).

[29] C. Albertyn, 1995:64.

[30] Section 119(3).

[31] T. Nhlapo, 1995:159 notes that amendments made that resulted in section 126(1) and Constitutional Principle XXXIV were aimed solely at persuading the Inkatha Freedom Party to participate in the 1994 elections.

[32] According to Andrews *op cit* at 4 the same had been done during the negotiation stages were women's concerns had been incorporated under the general rubric of human rights, which led to racial issues taking priority over women's issues. Opponents of such a separation however were of the view that having two

Constitution fails to provide any guidelines for the resolution of the conflict that arises between customary law and women's rights.[33] Thandabantu Nhlapo describes the document aptly as more "... akin to a peace treaty than a fundamental law ...."[34] In drafting the final Constitution, debates raged between the two opposing groups. Traditional leaders attempted to get customary law exempted from any gender equality clause. This bid failed as a result of strong petitioning by many women's groups. Instead the technical committee proposed a compromise in consultation with the Ad Hoc Committee on which the traditional leaders were represented.[35] There was an effort to get customary law entrenched as a fundamental right. This was also unsuccessful, leaving customary law subject to the equality clause. Many asserted at the time that one of the main weaknesses of the Interim Constitution was the fact that it recognized customary law, but as Nhlapo[36] argues its exclusion would have resulted in much opposition from various traditional leaders and chiefs. Strong constitutional recognition was inevitable in a country in which three-quarters of the population was black. Willan[37] quoting with approval from Walker states:

"In the final analysis a handful of women were pitted against an unyielding block of traditional leaders ... one suspects that political considerations (the chiefs wield considerable influence in the rural areas) may have outweighed a commitment to basic human rights principles."

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separate structures ignored the fact that "women's rights" were indeed "human rights" despite the rally against such a distinction by several feminists.

[33] In the First Certification cited as *Ex Parte Chairperson of the Constitutional Assembly: in Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) one of the issues brought before the court which was raised by the Congress of Traditional Leaders was the effect of the horizontal application of the Bill of Rights on customary law. The argument was that patriarchal principles would be outlawed by the Bill of Rights on customary law. As R.B. Mqeke 1997:8 notes "although the court felt that the objection fell outside its competence, it nevertheless expressed the view that the feared destructive confrontation between the Bill of Rights and the legislation on one hand and indigenous law on the other need not take place because the phrase in the New Text 8(2) had qualified the application of the Bill of Rights "if, and to the extent, it is applicable taking into account the nature of the right and the duty imposed by the Right."

[34] Nhlapo *op cit* at 159.

[35] L.M. du Plessis "A background to drafting the Chapter on Fundamental Rights" in DeVilliers (ed) *Birth of the Constitution*, 1994:98.

[36] *ibid.*

[37] S. Willan 1998:59.

The Constitution of South Africa was finalized in February 1997, entrenching in it a number of rights that are significant for women.[38] South African analysts have stressed that the role of women's movement was pivotal in driving a feminist agenda. By demanding that women have a place in the transitional negotiations, women forged for a more permanent place for feminism. Goetz and Hassim write:

"In South Africa, the negotiated transition, involving consensus among the major political parties and liberation movements, produced a rights based discourse that opened a space for women activists to extend feminist conceptions of democracy."[39]

It was now the duty of the legislature to ensure that the promises entrenched in the Constitution would become a reality to the majority of African women, most whom were uneducated and unempowered. Changes for women were to take place not only in the public sphere but more so in the private were the greater inconsistencies with the Constitution would be felt. Since the *Ndlovu v Ndlovu*[40] case, it can be said that under colonial administration women had been viewed as "rightless entities under the authority of men." In the private sphere, the family became the institution from which women's lives and consequently women's rights were constructed. The role of women was therefore measured and understood in terms of the needs of the group. Most African women's lives, more particularly in terms of personal independence and quality of decision making, was subjected to the needs of the group. What this meant as Nhlapo[41] comments, was that ties to the group served to subordinate the interests of the woman as persons to the interest of the wider group. The final Constitution and the duty of subsequent legislation was to ensure not only that women's right to equality was maintained, but also that substantively the problems facing African women, most of which stem from their being "perceived not as separate entities but always as adjuncts to the family",[42] were dealt with. This included their rights to acquire land, unequal treatment by chiefs courts and administrative justice in general, problems arising from

[38] Section 9, 12, 15, 16, 25, 26, 27, 29, 30, 31, 34 of Act 108 of 1996.
[39] A.M. Goetz and S. Hassim "In and Against the party: Women's Representation and Constituency-building in Uganda and South Africa" in Molyneux and Razavi (eds) *Gender Justice, Development and Rights*, 2002:312.
[40] 1954 NAC 59.
[41] Nhlapo 1991:135.

divorce, *lobolo*, polygamy, legal capacity, personal status, child maintenance, custody and guardianship.[43] To do this greater participation was to be made by women in decision making and in the enactment of just, fair and equitable laws that not only existed on paper, but also impacted the black uneducated woman in their day-to-day lives.

3.3 FORMAL VERSUS SUBSTANTIVE EQUALITY[44]

When discussing section 9 of the Constitution, the right to equal protection before the law, there is the need to distinguish between formal and substantive equality. Formal equality is a principle of equal treatment: individuals who are alike should be treated alike, according to their actual characteristics rather than stereotypical assumptions made about them. It is a principle that can be applied either to a single individual whose right to be treated on his or her own merits can be viewed as a right of individual autonomy, or to a group, whose members seek the same treatment as members of other similarly situated groups. So in relation to gender, what this means is that women and men have identical rights and status. It means that they are treated equally under the law and in society. This formulation is based on the fundamental Aristotelian maxim that likes should be treated alike. This formulation assumes a gender-neutral test stating that when men and women are similarly situated they ought to be treated similarly. By so doing it takes an essentially comparative approach and assumes it as the norm.[45] By comparing man and woman it fails to take into account that the norm is male. This equality principle ignores that even where similarly situated there exist subtle differences that may not be visible, which

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[42] *ibid.*

[43] Nhlapo *op cit* at 153. Also see the sections in the Final Constitution that deal with these problems.

[44] See also Chapter Five for the study done on some African women in Grahamstown.

[45] As seen in Chapter Two above liberal feminists initially insisted that men and women were equal in all respects. However, subsequent feminists argued that by so doing women were assimilated into the male norms and values and so advocated instead for seeing difference. S. Fredman, 1999:197 writes that it is myopic to look at the equality principle as a dichotomy. She writes, "not only does this obscure the richness of human experience and qualities, but it also continues to use the male norm as a yardstick, even in respect of difference. The focus on this dichotomy thus prevents us from tackling the real disadvantage of women in society."

disadvantage women. By their very social upbringing, women invariably are fundamentally different to men.[46]

Gender equality although closely related to gender equity, differs from the latter. Certain social and economic structures and conditions disqualify women from getting the same treatment, advantages or privileges as men even though they have equal rights to them; these are issues of equity. In international human rights law, for example, in interpreting CEDAW,[47] this distinction is seen as the difference between "formal equality" and "substantive equality". Although formal equality has led to important gains for women, more so African women, limiting women's rights to mere "formal" equality without substantial progress can indeed be counterproductive. Formal equality assumes that by removing gendered legal boundaries men and women of similar talent and motivation will enjoy the same opportunities and achieve the same successes. Formal equality treats discrimination as an aberration, which can be eliminated by extending the same rights and entitlements to all. However, formal equality is blind to entrenched structural inequalities and ignores actual social and economic disparities between groups and individuals. "Substantive equality" demands an examination of the actual conditions experienced by groups and individuals and requires the elimination of discriminatory structural barriers. This may mean taking affirmative action, which is not to be interpreted as discrimination. CEDAW's General Recommendation No. 5 recommends countries "make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and enjoyment."[48]

Traditional liberal legalism would postulate that all persons are created equal and that in order to reverse the unequal status of women there is need to change the legislation that prevents women having equal opportunity. It looks at the complete system and believes that if we remove laws, women will become equal with men. Its main thrust is that

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[46] S. Fredman "Less Equal than Others - Equality and Women's Rights" in Gearty and Tomkins (eds) *Understanding Human Rights*, 1999:197.

[47] Convention On the Elimination of All Forms of Discrimination against Women. To be discussed in Chapter Four below.

female subordination is rooted in a set of customary and legal constraints that blocks women's entrance and/or success in the so-called "public world". Because society has the false belief that women are by nature less capable than men, it excludes women from the public sphere and relegates them to the private. As a result of this policy of exclusion, the true potential of many women goes unfulfilled.[49] Liberal political and legal theory stresses the primacy of the individual and so by securing the equal protection of the law for all, it postulates that discrimination is eliminated.[50] Such a notion has been criticized on the basis that it fails to acknowledge social patterns of discrimination and disadvantage based upon race, sex, religion and such. For African women, formal gender equality in the law is meaningless in a society where agents such as the family structures enforce that inequality. African women's rights are in practice bound up with the interests of the family and children and never as independent entities. Critical feminist theory will advocate for substantive equality and challenges the law to expose gender bias. Equality and equal treatment must take into account legal, social and cultural disadvantages of the past as a means to achieve equality.[51] For the African woman the Constitution requires not only a promise for "equal protection before the law"[52], but goes further to give content to the right when it notes that "equality includes the full and equal enjoyment of all rights and freedoms."[53] Albertyn *et al*[54] are of the opinion that this sentence supports the Constitution's commitment to substantive equality, which concedes that there is a need for policy that takes account of cultural and social constructions. In order to achieve equality, societies have to reject behavioural patterns that were previously male oriented. This is not achieved merely by enacting laws that claim equality of persons but by shifting mental constructions that claim that men are superior to women and more especially in the African tradition that they are the sole decision-makers and breadwinners. In *Moseneke*,[55] Sachs J adds that discrimination is rooted in attitudes and

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[48] At www.unifempacific.com accessed on 6 of September 2003.
[49] Bartnett 1998,96.
[50] W. Freedman *op cit* at 314.
[51] C. Albertyn and B. Goldblatt 1998:252-253.
[52] Section 9(1) of Act 108 of 1996.
[53] Section 9(2) of Act 108 of 1996.
[54] Albertyn *op cit* at 265.
[55] *Moseneke and others v The Master and Another* 2001 (2) SA 21 (CC).

practices of the past, which need to change; yet "change cannot be achieved with a simple stroke of a pen." Van Blerk also makes this point in the following manner:

"The equal state promised by the ... Constitution should not, however, lull women into a false sense of security. Liberation requires more than paper statements; it requires that those statements be put into action. It is only when legal rights are translated into reality that they will transform society and women's lives for the better."[56]

The notion of substantive equality presents a challenge to the judges who apply equality legislation. As will be seen in subsequent subsections in this chapter at times judges have failed to take cognisance of this. In the words of the Honourable Justice L'Heureux-Dube,[57] real substantive equality cannot be achieved through the actions of judges and lawyers alone as sources of inequality lie in the realities of, for example, the labour market, the divisions of familial responsibilities and prejudicial attitudes held by members of society. Yet at the same time the promotion of equality is at the heart of the jurist's mandate. Speaking on behalf of the legal profession, judges in particular, the following of Mr Justice L'Heureax-Dube should be heeded, especially in South Africa:

"The evaluation of social and historical context and the recognition of differing perspectives, hallmarks of a jurisprudence infused with the values of substantive equality, require of our profession a new sensitivity and openness to ideas and information about people and experiences perhaps previously unknown to us."[58]

The struggle for non-sexism is not as easy as it may appear at first sight. Although recognising the significance of these rights is of paramount importance, it will be the process leading up to the adoption and implementation that will present the greater challenge. Gender equality is in itself a multifaceted, complex and indefinable phenomenon. Mere guarantees in a document that promises to uphold the rights of women will unlikely be sufficient. It is important to note that it is the males that will both make the laws and apply and interpret them. Judges and parliamentarians are largely male and form a greater majority of the powerhouses that affect change. As Sachs[59] indicates,

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[56] A.E. van Blerk 1998:190.
[57] C. L'Hereux-Dube 1997:335.
[58] *ibid.*
[59] Sachs *op cit* at 9.

there are several voices in the women's movement, which argue that the Constitution's emphasis on equality could prove to be detrimental to women. It is argued that by stressing equality, one obscures ways in which the legislature should intervene to correct the injustices to which women are subjected on a day-to-day basis. The Bill of Rights must not merely make provisions dealing with women's rights, because subjugation of women is multifaceted, the problems that women face should permeate every section of the Constitution and not only in special provisions. So the argument is that from the rights to citizenship, to the rights of choice and workers' right, the Constitution should be as non-gender as they are non-racial. It is my opinion that such an argument presents a gender-neutral manner of looking at the Constitution, which in the end could be more detrimental than beneficial. To ignore that there are differences that exist between men and women is to perpetuate male dominance. Although it is acceptable that all facets of life must acknowledge gender, it is paramount that the social and cultural differences imposed on women be conceded. An attempt to ignore differences that exist between men and women creates fallacious views on masculinity and femininity. It is more beneficial in my opinion to acknowledge the differences and to seek the breaking down of those man made or man imposed notions of women and their position in society.

3.4 LEGISLATION THAT AFFECTS WOMEN'S LIVES – LAWS PASSED SINCE THE INTERIM CONSTITUTION

This section will deal with and comment on the laws that affect women's lives directly and indirectly. It will also deal with the way the courts have interpreted the changes made in the Constitution as pertains women's rights in general and African women's rights more particularly. One cannot argue that one of the most destructive pieces of legislation (at least as far as women's rights are concerned) was the Black Administration Act 38 of 1927. As noted before in the thesis, traditionally women have been identified primarily in terms of their roles within the private realm and more particularly within the family nucleus. It is no surprise that the greatest changes made in legislation are those in the realm of marriage. Because anti-discriminatory legislation is often based on the Aristotelian concept of equality, which requires that like should be treated, as like, it is

often difficult for black women to prove that they are unfavourably treated. Most African women were because of past legislation placed in subordinate positions and as a result it is often difficult for women to meet this Aristotelian concept of equality. As Catherine MacKinnon states:

"The more unequal a society gets, the fewer such women are permitted to exist. Therefore, the more unequal society gets, the less likely the difference doctrine (for example anti-discrimination legislation) is to be able to do anything about it ...."[60]

Feminists have also criticized anti-discriminatory laws on the basis that they are too individualistic in focus. The present writer agrees with the comments by O'Reagan[61] that this manifests itself first in cases brought before the courts and secondly in the tendency of legislation to treat women as individuals and not as members of a particular sex or gender. What this does is that it ignores the entrenched patterns of social disadvantages that exist in community. While I agree that such an individualistic approach can have its advantages, legislation must not fail to acknowledge that gender is a social depiction and laws ought to be promulgated to affect the group as well as the individual. It is a dilemma that requires the lawmakers to create a balance, which will allow for a positive change in women's fight for equality.

3.4.1 VIOLENCE AGAINST WOMEN

The South African government has time and again expressed at the highest policy making levels the commitment to address all forms of violence against women. The Reconstruction and Development Programme[62] committed itself to the reconstruction of

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[60] C. Mackinnon 1987:37-38.
[61] C. O'Reagan 1994: 72.
[62] The R.D.P. was drawn up by the A.N.C led alliance in consultation with other key mass organisations to create a policy framework to assist in the transformation period post 1994 in South Africa: The Reconstruction and Development Programme 1994:1. This was replaced by the Growth Employment and Redistribution Plan (GEAR) in June 1996. One of the many criticisms of GEAR lies in that although on paper it commits itself to gender equality, many of these commitments are vague and lacking. In an article titled "Why we say Asifune Gear" at http://flag.blackened.net/revolt/africa/wsfws/98/gear.html accessed on 17 September 2003, critics write that GEAR will benefit the rich male, putting the African woman, who lacks economic power at a disadvantage. See below on the relationship between economic empowerment and violence against women.

family and community life, and set to recognize the needs of women who have been victims of domestic and other forms of violence. South Africa carries a legacy of violence that underpinned the apartheid state and has led to all forms of violence throughout South Africa-both within and outside of the home. For African women, this legacy has impacted on them in the worst possible way. Violence ranged from their interaction with the police (especially during the apartheid years) and judicial officers and extending to the home where the "traditional"[63] values prevailing in all sections of South African society reinforce the attitude that "wife-beating"is not only acceptable but is a private affair.[64] The fact that violence is considered in many cases a private affair, has meant that it is hidden from the public view and therefore obscured from any scrutiny. Recognition of violence against women as a denial of fundamental rights means that the South African government has made itself accountable for the "acts of private individuals within the home and the community through the maintenance of a legal and social system in which violence against women is endemic and where such actions are trivialised or discounted."[65]

Gender violence is commonly defined as "violent acts (real or threatened) perpetrated on females because they are female. Whether gender violence operates as direct physical violence, threat or intimidation, the intent is to perpetuate and promote hierarchical gender relations."[66] Although the new Constitution contains a commitment to the elimination of discrimination on the basis of sex and gender, it is important to note that concern about the inequities in a family and focus on violence within the family has only until recently been concealed from public scrutiny. It is only towards the end of the

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[63] I use the word "traditional" very cautiously, nowhere in my research have I found that traditional African societies in any way condone violence against women. However, with the manipulation of African customs, which created a peculiar hybrid system of law certain rigid rules of customary law led to rapid changes in African society. Research done in Cape Town by the Human Rights Watch/Africa between 1990-1991 reflects that most of the violence experienced by African women is experienced within the home. The position of African women as minorities tends to lead to African women internalising societal views to the extent that they see themselves as children. One woman who spoke at a focus group held by the Woman's National Coalition in 1994 was quoted as saying "a man should beat you up if you deserve it": Human Rights Watch/Africa 1995:47.

[64] *ibid.*

[65] C.M. Chinkin "Women's Rights as Human Rights under International Law" in Gearty and Tomkins (eds) *Understanding Human Rights*, 1999:563.

[66] W.R .Bohmke quoting D. Green 1999:1-2.

1970's that the South African women's movements have drawn attention to the problems of domestic violence and rape. This transition was greatly influenced by the work of feminists, mostly American, who criticized the government's response to violence. Thus feminists such as Gelles, Steinmetz, Straus described the need to transform the mindset that domestic violence was a private affair to be dealt with in the private sphere. Kaganas and Murray[67] show that the 1980's saw an increasing number of academic work and research dealing with violence against women. In 1985, the South African Law Commission set to re-evaluate the treatment of domestic violence victims in the criminal justice system. Commenting on this project, the above writers note that although it was the single major intervention relating to violence against women during this period, its report failed to acknowledge the actual social and cultural (male supremacist ethos) that perpetuated violence against women.[68] Many African women feel the impact of violence more severely than white women. During the height of apartheid when political violence became a significant phenomenon in many black communities, it was the black women that were left to bear the brunt. Although the larger participants in political violence were men, it was the women and children who suffered indiscriminate killings. When conflict arose, it was women and children who formed the majority of the displaced and had to pick up the pieces and attempt to salvage homes that had been destroyed during the conflict. In rural areas of South Africa, violence against women also includes the phenomenon of witchcraft killings, most of which were directed against women. Outside of the home during the emergency of the 1980's, it was that majority of the black women that were detained without trial for political activities and it was them that were beaten and often raped by police either during custody or as a means to force them to reveal the location of their husbands who were involved in the struggle.[69] The recognition that violence actually exists is an important development in the black community. In the past it was felt that domestic violence and rape were issues for white women to deal with. It was felt that black women had other important political and anti-apartheid issues to focus on.[70] Within the home more black women find themselves in abusive relationships than

[67] C. Murray and F. Kaganas 1994:21.
[68] *ibid.*
[69] Human Rights Watch Women's Rights Project *op cit* at 13-25.
[70] *ibid.*

white women and more so find it harder to leave such relationships.[71] The reasons for this are unclear, but some possible explanations include the following:

(1) African women have fewer options due to the inequalities that exist in marital partnerships. Being based on patriarchal society that considers women as "mere minorities" perpetuates the view of women as "property". Feminists argue that the payment of *lobolo* as is the tradition in African societies could encourage such notions. Women are therefore as a result of payment of *lobolo* considered property to be done with as the male feels:

"Violence is best understood by the way our society constructs the social roles of men and women and by an analysis of the gendered imbalance of power in society. It is behaviour based on the assumption that the man owns his female partner, has a right to dominate and control, and that violence is used as means of exercising that domination and control."[72]

(2) African women on average are at a lower income level than that of most white women. There is no denying the fact that South Africa is one of the most unequal of societies. These inequities stem not only from race but pervade gender as well. The effects of apartheid are often reflected by the disparities that exist between rich and poor, with the poverty concentrated amongst the African population. A Report released by the Ministry of Finance early in 2002 states that 22 million South Africans live below the United Nations' poverty datum line; of these the greatest poverty is concentrated amongst the African population.[73]African women have no access to land[74] and resources. Unemployment rates range between 30-40 percent according to a report by Nicole Itano in the New York Times,[75] of which not more than 30 percent of women make up the total workforce, even fewer are black. These disadvantages that black women face mean that

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[71] See the study done in Grahamstown as found Chapter Five.
[72] Murray and Kaganas *op cit* at 28.
[73] At www.woza.co.za feb02/budget19.htm accessed on 11 September 2003.
[74] As seen in the first chapter their access to land under communal tribal land tenure systems is through their male counterparts be it husbands or male relatives. Further allocation of land by chiefs is almost always exclusive to men.
[75] N. Itano at http://www.nytimes.com accessed on 9 September 2003.

in most cases they are unable to get out of marriages that are violent or potentially violent.

(3) African women are often reluctant to report any violence to the police. This is more so were domestic violence is concerned. Social stigma and fear of reprisal often deters women affected by violence from reporting it.[76] According to Ngaire Naffine[77] "the silence that has surrounded domestic violence has, in fact, condoned it and has contributed to the reluctance of victims to seek legal and social remedies to protect themselves from their violent spouses." Indifference and hostility on the part of police and judicial officers have also further contributed to this reluctance by women to report violence against them. For black women this is intensified by the legacy of suspicion towards the police that was adopted from the apartheid era. In the courts the use (in the past) of such legal techniques as the cautionary rule, which requires that the court exercise additional care when assessing the credibility of the rape survivor, have also emphasised this reluctance. The notion of marital rape is also alien to the African woman. It is the duty of the wife to consent to all sexual advances by the male. The above mentioned author further states[78] that the fact that marital violence in general has been entrenched as behaviour that is normal, leads to not only silencing of women, but also to continuation of these violent practices. Ironically, taking what was a 17th European held century notion of marriage most African men feel that marital rape is alien to black people's traditions. It is the view of most that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife has given herself in kind to the husband which she cannot retract." In 1795 Blackstone wrote "a husband must give his wife moderate correction. For as he is to answer for her misbehaviours, the law thought it reasonable to entrust him with the power of restraining her by domestic chastisement."[79] When reporting cases to the police, violence within the home is often considered a domestic affair that ought to be dealt with

[76] A recent case on Morning Live (30 September 2003) reported an incidence where a woman was brutally assaulted by her husband (Sam Maluleka) in the presence of police officers who were unwilling to intervene justifying that this was a domestic issue.
[77] N. Naffine 2002: 86.
[78] Naffine *op cit* at 88. See also the views of women in Grahamstown as presented by research done by the writer in this peri-urban area.

within the private realm. The Human Rights Watch Project quotes a November 1994 case, where a 30-year-old man was acquitted in the regional court for raping his wife. According to the statement given by the wife, the husband had come home inebriated, had threatened her and forced her to have sex. Because the case was not corroborated, the magistrate in this court stated that it should be viewed with caution. It was his opinion that the woman should have fought off her husband and her failure to do so was tantamount to consent.[80]

Feminists argue that the patriarchal system of gender inequalities that is characteristic of African families seeks and succeeds in empowering men while oppressing women. It is for this reason, in their opinion, that violence becomes prevalent in such communities. According to Ward[81] it is this "stratification and social control" that becomes fundamental causes for domination of women and leads subsequently to violence. The major arguments from the many varying feminist perspectives revolve around power inequality between the genders as well as mentioned above, the institutionalized system of patriarchy. Desiree Hansson[82] refers to the preamble of the African National Congress's constitutional guidelines which state:

"[w]e also have to acknowledge that the oppression of women in South Africa is not only a consequence of conquest and white domination, and make commitment to abolish all vestiges of patriarchy in our institutions and practices, not just those that followed conquest."

The assumption is that patriarchy exists in the structure of society and the impact and influence of Western feminist studies is pertinent in African structures[83]. When discussing the "traditional" African family, there is no denying that the family is fundamental. It is within this realm that the power differences that exist between men and women are most visible. As Nhlapo[84] writes, the values underlying the African marriage are such that men ultimately gain power over women resulting in the transformation of

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[79] Blackstone referred to with approval by Naffine *ibid.*
[80] Human Rights Watch/Africa *op cit* at 107.
[81] C.A. Ward 1995:4.
[82] D. Hansson "Working Against Violence Against Women: Recommendations from Rape Crisis (Cape Town) in Bazilli (ed) *Putting Women on the Agenda,* 1991:180.
[83] Bohmke *op cit* at 3. He also adds that women are taught to be helpless, dependant, submissive, passive, cooperative and obedient to society. Cultural values and beliefs are transmitted through the socialisation process and it is surrounding these values that women perceive violence.

women into commodities and property which in turn tends to depersonalize them and has implications towards male attitude in respect of issues concerning violence. Practices such as *lobolo* and the Xhosa custom of *ukuthwala* have come under strong criticism by feminists who believe that they succeed in perpetuating the view of women as property, which leads to power inequalities between gender and ultimately violence against women. *Ukuthwala*'[85] is seen as the "ritualized" abduction of a bride by a prospective bridegroom, and in which a certain amount of physical resistance from the bride is expected.[86] It is Bohmke's opinion that practices such as these have important implications for the way in which resistance to male overtures are viewed by the Xhosa society. So that even where the female might be set against the prospective union, her resistance is not acknowledged. Such gender relations could have an influence on the way males in the society view resistance by a woman and could perpetuate acceptance of gender violence.[87]

Domestic violence is endemic in most societies across the world but remains unrecognized from national and international agendas. The most detailed document detailing rights to which women are entitled is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). However, it is the Vienna Declaration that clearly outlines the issue of violence against women as a human right. In 1993, the United Nations as its World Conference on Human Rights in Vienna recognized the specificity of women's rights as part of the International Human Rights agenda. The Vienna Declaration identifies and condemns "gender-based violence and all forms of sexual harassment and exploitation" and calls upon the General Assembly to "adopt a draft declaration on violence against women." That South Africa is the first African country to express a commitment at policy levels to eradicate gender-violence is a positive testament to the government's commitments to upholding women's rights.

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[84] Nhlapo *op cit* at 113.
[85] This practice still common in the Eastern Cape.
[86] Bohmke *op cit* at 11.
[87] Bohmke also discusses the perception that African women seem more accepting of violence committed against them. Quoting Braine, Bless and Fox (1995) he writes that a study done at the University of Natal and University of Transkei found that African women were less sensitised to and more tolerant of gender violence. He attributes this to the customs and practices that are common among Africans that perpetuate gender violence.

3.4.2 THE PREVENTION OF FAMILY VIOLENCE ACT 133 OF 1993

It is the view of many that this Act was promulgated as a means to clinch the female vote in the April 1994 election. Its enactment was not accompanied by government funding for support structures or by programs to address gender bias in the police and court system. It provides for an "improved" and "expedited" procedure through which a woman can seek an interdict against an abusive partner. An abused woman can file for an interdict at the nearest magistrates' court. If the magistrate believes that the woman is in danger of abuse, he or she may grant an interdict, accompanied by a suspended warrant of arrest in order to prevent the abuser from further assaulting or threatening the woman. Once the abuser is served notice by the sheriff's office, a governmental agency separate from the Department of Justice and the Police Services the interdict comes into effect.[88] One of the most important sections in this Act states that a husband may be convicted of the rape of his wife. The commencement date for this Act was 1 December 1993 and the Domestic Violence Act 116 of 1998 later amended this Act. The summary of this Act is found in the title, which provides the objectives of the Act in the following terms:

"To provide for the granting of interdicts with regard to family violence; for an obligation to report cases of suspected ill-treatment of children; that a husband can be convicted of the rape of his wife; and for matters connected therewith."

For African women, this Act seemed like the dawn of a new era, albeit being fraught with many difficulties. As noted above the fact that African women are often economically dependant on their male counterparts meant that once the violence was reported they found themselves in the streets with nothing to sustain them. Again the fact that the Act was restricted to married persons (both those married in terms of civil and customary law) ironically was not enough for many African women. Due to migrant policies many women in urban areas found themselves living with men outside the realm of any formal legal relationship. It was not unusual for an African man to maintain two relationships, a wife by customary law in the rural areas and a partner in the urban areas where he worked.[89] The Act did not protect women in these cases. It can also be gleaned from the

[88] Human Rights Watch *op cit* at 67-68.
[89] *ibid.*

Act that the fact that the Act was meant to protect individuals in marital relationships, could be problematic for African women in that, for years they had been placed in positions as mere minorities. The principle of patriarchy is such that they were not only considered the property of their husbands but of all male relations in the family. So they were under the tutelage of fathers, uncles and brothers and often experienced abuse at the hands of all. Women were, therefore, often abused by a male relation and still would not be protected by the Act. They instead had to resort to applying for interdicts in the High Court, a procedure which was complicated and which would cost money they did not have. The 1995 Human Rights Report on Domestic Violence notes that the most important shortcoming of the Act lies in the fact it was unavailable to former homelands (i.e. former TBVC states that had legislative competence and did not have to apply the Act within their boundaries). Although the Act made provision that if a woman were unable to pay the fee for the interdict, it would be carried by the state, many African women often could not afford this fee and had to endure long delays within the sheriff's office. It is obvious that such delays led to unfavourable consequences. Because of these various limitations, the South African Law Commission launched a project to investigate domestic violence. A team of experts, chosen from the non-governmental sector, the magistracy, private law firms and academia was put together to devise a new Act that would remedy the shortcomings of the Prevention of Family Violence Act.[90] Tackling these problems, the team produced draft legislation based on a better understanding that domestic violence was linked to financial, psychological and other social issues.[91] For African women this legislation was an acknowledgement by the legislature of the predicament they often find themselves in.

3.4.3 THE DOMESTIC VIOLENCE ACT 116 OF 1998

The Act, which became operational in December 1999, was promulgated to give the victims of domestic violence protection from domestic abuse. The objective of the measure is to initiate methods, which seek to guarantee that the relevant organs of state give full significance to the provisions of the Act. It would seem from the wording of the

[90] Act 133 of 1993.
[91] P. Parenzee *et al* 2001:3.

Act that the lawmakers took into consideration the fact that domestic violence is a serious social evil and that there is a high occurrence of domestic violence within South African society, which leaves that victims of domestic violence among the most vulnerable members of society.[92] Therefore, this Act is a reflection of the South African Government's commitment to the eradication of domestic violence, which was mostly directed to women. The Act is founded on a broader and enhanced understanding of what domestic violence means to women and what relationships are considered to be "domestic" in nature. It includes in its ambit a wider selection of what constitutes abuse[93] and it also extends the definition of a domestic relationship to include not only those married to each other, but those in a dating or customary relationship and those who share the same residence. For black women this means that uncles, brothers and fathers who may abuse are not exempt from the ambit of this Act. In passing this legislation, the South African government has to an extent fulfilled the commitments and obligations made under CEDAW. This Act allows South African women a quick, affordable legal remedy to combat abuses in the domestic sphere.[94] Unfortunately, a report in 2000-2001, which was conducted to monitor the implementation of the Act, has yielded some disappointing results. Parenzee[95] *et al* states:

"Despite the South African government's ratification of various international agreements that condemn violence against women, as well as national legislation, there seems to be no significant changes to women's lives. Women continue to be primarily the victims of violence and to be subjected to secondary victimisation when they seek assistance from policing and criminal justice sectors. Part of this secondary victimisation flows from the impoverished knowledge, sensitivity and resources of the very personnel assigned to implement protective legislation."

For the greater number of black women in the rural areas, who are uneducated, this Act brings little relief. The process of obtaining a protection order is not only a daunting one, it requires that the woman think and react outside her paradigm. For so long she has been identified and defined according to her family, to her this means a shift from the view

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[92] Act 116 of 1998

[93] *ibid.* The exhaustive list of abuses in the Act includes: physical, sexual, emotional, verbal, psychological and economic abuse and any behaviour, which may cause imminent harm to the safety, health and well being of the complainant.

[94] *ibid.*

that she is a wife and a mother, to her seeing herself as a victim of violence. Often she has to think about her economic circumstances and weigh the advantages of taking this route. It is reported that 9 out of 10 times complainants withdraw their complaints.[96] For the Act to be effectively implemented it is suggested that the factors that cause domestic violence must be investigated. These include gender equality, financial oppression, power dynamics and patriarchal attitudes. These changes should affect not only men in the domestic situations, but also the police whose attitudes towards black women are often nonchalant and intolerant.

3.5 AFRICAN WOMEN AND MARRIAGE REGIMES

It is no exaggeration to state that nowhere in discussions concerning African women's rights is there the greatest criticism and the greatest opposing views than in the realm of marital laws. The fact that the marriage regime and the field of family law receive more attention than any other, comes as no surprise. As stated in the thesis a woman's status was largely determined by marriage and was centred within the domestic sphere. Much of women's oppression stemmed from their disadvantaged position in marriage.[97] Marital power has been described as "the most notable example of glaring inequality in our law."[98] The legal capacity of married women to perform juristic acts with regard to leasehold and ownership came about in 1985 with the amendment of the Black Administration Act 38 of 1927. In Natal and KwaZulu the Codes stipulated that wives were to fall under the "marital power" of their husbands provided that this power "in civil marriage out of community of property may be excluded by an anti-nuptial contract." It might seem at first glance that this provision was more progressive than the minority clause in the Black Administration Act, but what this meant was that the husband was allowed decision-making authority over the family, control over his wife's person and the right to administer as he wishes the matrimonial estate.[99] Bennett[100] comments that "by

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[95] Parenzee *et al* 3-7.
[96] *ibid.*
[97] With respect to the Black Administration Act section 11 (3), the Kwa-Zulu Act on the Code of Zulu Law and section 37 of the Transkei Marriage Act, African women were deemed minors with the effect that they were subjected to unbearable legal, social and economic consequences.
[98] J. Sinclair 1996:13.
[99] Bennett *op cit* at 335.

mid-twentieth century it was obvious that the African family was not what it had been at the time of colonial conquest, and that legal reforms were urgently needed to ameliorate the position of women and children." It was only the monogamous marriages[101] that were recognised as valid in South Africa. Because African unions were potentially polygamous, they were considered invalid unless solemnised by a marriage officer.[102] For the white woman some improvements had been made with the promulgation of the Matrimonial Affairs Act of 1953 and the Matrimonial Property Act of 1984[103] which stated in section 11 that:

"marital power which a husband has over the person and property of his wife ...was abolished."

But also explicitly states in section 25 that marriages governed by the Black Administration Act (which meant many African unions) were not included. In 1985 the Law Commission recommended the full recognition of customary marriages. The reason for this was that the anomalies that resulted in non-recognition had led to great injustices for the African woman.[104] It was only in 1988 with the Marriage and Matrimonial Property Law Amendment Act that the legislature accorded limited recognition to customary unions providing in essence that polygamy was recognised only were subsequent marriages were customary unions. For Africans, although there was no specific section abolishing marital power, it can be gleaned from the Act that civil marriages between two black people celebrated after December 1988 were not subject to marital power. The 1993 General Laws Fourth Amendment Act abolished marital power completely giving no preference to the dates on which the marriage was celebrated. This was not made applicable to Kwa-Zulu and the former Transkei. The KwaZulu Code of

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[100] Bennett *op cit* 146.

[101] Taking the rationale of *Hyde and Woodmanse* 1886 LRIP AD 130, which stated "that marriages as understood in Christendom may ... be defined as a voluntary union for life of one man and one woman to the exclusion of all others."

[102] A. Costa 1994:915.

[103] Amended by the General Law Amendment Act 93 of 1962, Maintenance Act 23 of 1963, Matrimonial Affairs Amendment Act of 1966, Matrimonial Affairs Amendment Act 13 of 1976, Divorce Act of 1979, Matrimonial Property Act 88 of 1984, General Law Fourth Amendment Act 132 of 1993, Guardianship Act 192 of 1993, Justice Laws Rationalisation Act 18 of 1996.

[104] For example there was a reciprocal duty of support or any claim for maintenance as a surviving spouse and the stigma attached to all children under this union being considered illegitimate.

Zulu Law Act 16 of 1985 and the Transkei Marriage Act 21 of 1978 continued to stipulate that women were to be subjected to marital power. It was only with the provision of the Interim Constitution of 1993, which created one "national territory" that the 1988 Act was extended to the former Transkei and Kwa-Zulu.[105]

The fact that customary marriages should be given full recognition has received overwhelming support. For African women, the dual system of law did nothing more than confuse them as to what legal regimes determined the spouses' rights and duties. The 1988 legislation meant that civil marriages automatically terminated customary unions. Section 15(3)(a) of the Constitution authorises Parliament to promulgate legislation recognising "marriages concluded under any tradition, or a system of personal or family law."[106] Although dealing with Muslim marriages, the case of *Ryland v Edros*[107] is an indication by the Constitutional Court of the need for tolerance and acceptance of cultural and religious diversity as per the promises made by sections 30 and 31 of the Constitution.

3.5.1 THE RECOGNISTION OF CUSTOMARY MARRIAGES ACT 120 OF 1998

Having done a report into the marriages and customary union of Africans, the Law Commission of South Africa established a project committee on the Harmonisation of Common Law and Indigenous Law and conferred on it the task of investigating the marriage regimes that existed in South Africa. The main aim of this Committee was to create a code of marriages, which would apply to an institution that was in many ways common to all the cultures in South Africa.[108] The Act is a result of an extensive consultative process. During the development of the Bill, the Law Commission published on separate occasions an Issue Paper and a Discussion Paper. These documents were disseminated and discussed at a total of twenty-three provincial and national workshops

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[105] Sinclair *op cit* at 129.
[106] South African Law Commission Report on Customary Marriages 1998:29.
[107] 1997 (1) BCLR 77 (C).
[108] South African Law Commission Report on Customary Marriages *op cit* at 8.

that involved non-government organizations, women's groups, traditional leaders, the legal profession, state departments, and the religious community. The Discussion Paper alone elicited written submissions from five national state departments, two provincial departments, three Houses of Traditional Leaders and seven women's organizations. After the passage of the Act another extensive process of consultation was followed in the drafting of the necessary regulations to facilitate implementation.[109]

The result of such an initiative was responses from different interested bodies, which contributed to the finalisation of what became the recognition of Customary Marriages Act. The main objective of the Act is to give full legal recognition to marriages entered into in accordance with customary law or traditional rites. The result is that it brings the majority of women and children in this country into the protective realm of our Constitution. In accordance with sections 9, 15, 30 and 31, Constitutional provisions had to be made that ensured that African cultural institutions and those of the Western traditions were given equal effect. By improving the position of women married into and children born of marriages conducted under traditional rites, the law-makers have introduced measures that align customary law with not only the provisions of the Constitution but also with South Africa's international obligations.[110] The promulgation of the Act was not without much criticism and objection from interested parties. There were many who felt that the "new" South Africa must not create a duality in the marriage system and believed that by recognising customary marriages, it would somehow be "divisive" and "racist" doing more evil than good. Their main argument was based on the view that a uniform marriage law would promote national unity. Many also felt that the proposals of the Discussion Paper, which formed the foundation for the Act, were too western and Euro-centric. The House of Traditional Leaders (both in the Eastern Cape and the Northern Provinces) was of the view that duality ought to be maintained but such that the law must not in any way interfere with customary marriage regimes. They felt that proposals made by the Commission on spousal and parental consent, on marital power, property and anti-nuptial contracts were concepts that were alien to African

[109] *ibid.*
[110] C. Gillwald 2000:1.

culture and laws.[111] At the end of it all, the decision that had to be made was one that would give effect and respect to the Constitution and one which gave due consideration to the Bill of Rights and to the promises made by South Africa in the International arena. There is no denying that this Act is a landmark in two respects. It brings to a welcome conclusion the "tyranny of a dictatorial recognition of civil and other Euro-centric faith based marriages at the expense of marriages concluded in accordance with customary law."[112] For the African woman, it brings to a resounding conclusion the oppressive laws that had applied to them, one being the notorious section 11(3)(b) of the Black Administration Act and the others including sections 22 and 27(3) from the Kwa-Zulu Act on the Code of Zulu Law of 1985 that entrenched the view that a man in a marriage is not only the head of the family, but is also the holder of the marital power. The Recognition of Customary Marriages Act recognises all marriages both monogamous and as per section 2(3) polygynous, which were valid at customary law and existing at the commencement of the Act as valid for all purposes. Pienaar[113] regards it as unacceptable that despite the Act, customary unions are still not recognised for the purposes of intestate succession. The new legal system endeavours to reconcile culture and tradition with the competing claims posed by the constitutional requirement to establish norms of equal treatment and non-discrimination.

Section 6 of the Act provides for the following:

"A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law."

When discussing the implementation of this Act, one of the most contentious points involved *lobolo*[114]and polygamy. From the very beginning, the Commission

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[111] South African Law Commission Report on Customary Marriages *op cit* 4.
[112] C. Gillwald *op cit* at 3.
[113] J.M. Pienaar 2003:261.
[114] Known to the different cultures in different terms. The most commonly used being *bogadi, bohali, munywalo, ikhazi. xuma, lumal* and *thaka.*

acknowledged that the giving of property by a husband to his wife's family was an important and much practised custom among the African people. As noted above, colonial administrators frowned upon the practice seeing it as the sale and trade of a woman. Feminists who feel that such a practice only serves to subjugate women have adopted the same view. They argue that such a practice only serves to perpetuate the view of women as goods rather than as persons with rights in a society. Traditionalists, on the other hand, argue that such a practice worked as a symbol to bring together the two families, to protect wives against abuse by their husbands.[115] For the traditionalist *lobolo* was a practice to which they formed deep attachments. From a survey which was done in Kwa-Zulu Natal, it was concluded that 95 per cent those questioned were in favour of retaining *lobolo*. So the recommendation was that this practice ought not to be prohibited. However this did not mean that it was an essential requirement for a marriage. Section 3 indicates the requirements to be as follows:

"For a customary marriage entered into after the commencement of this Act to be valid

(a) the prospective spouses-

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law."

One of the more surprising retentions was that of polygyny. The Act in section 4(b) recognises the practice. Writers such as Govender, Samuel and Nkosi feel that it entrenches women's oppression and as the snap survey done in Empangeni reports a

[115] It is not uncommon that husbands who mistreated their wives were often penalised when returning *lobolo* on divorce. The Report on the Act has noted in fact that some writers have gone so far as to state that *lobolo* "was the Bantu woman's Charter of liberty." Advocate J.Y. de Koker in this same document, expresses the view that although the original purpose of *lobolo* is not to humiliate, denigrate or objectify women, it serves to strengthen the authority of the male over his wife.

great percentage[116] it would seem that it served no purpose. It is the claim of many, including Professor Dlamini, that if a woman (i.e. the first wife) is happy with the husband taking on a second wife, then they should be allowed that choice.[117] The writer would, however, like to state that in reality such a choice is rarely given to the woman, or if given is most times disregarded, this leaves women in a marriage that is often dissatisfying. Often African women are placed in a difficult position and forced because of their lack of economic empowerment and access to resources to submit to the wishes of the husband. The recommendation was, however, that such a ban would be almost impossible to enforce and that because of the practice seems to be waning, such a move was unnecessary.

Section 7(6) provides that:

"A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract, which will regulate the future matrimonial property system of his marriages."

The effect of this is that it confers a wide discretion on the court with regard to the division of the assets. The court must scrutinize the proposed settlement and ensure that all vulnerable parties are protected with the emphasis being placed on equity. Further, the Act provides for a far more equitable dissolution of customary marriages. Traditionally customary law allows marriages to be dissolved (extra-judicially) by the spouses' families. This meant that women were at risk of being sidelined. Also a woman could not resort to repudiating the marriage in her own right, because she was a minor under the control of her guardian and she had to enlist the assistance of her guardian who often would be reluctant for fear of losing the *lobolo*. African women were left trapped in very unsatisfactory unions and often marriages that were abusive. On divorce she also automatically lost custody of her children as they were considered the "property" of her husband's family. The Act compels that any subsisting customary marriage may by

[116] 80 per cent of women were against polygyny and 70 per cent of men were for it.
[117] This view is shared by many traditionalists. In an article that appeared in the Daily Dispatch on 12 August 2003 titled "Polygamy debate fuelled by top soapie Isidingo" the Contralesa leader chief Mwelo Nonkonyana described polygamy as entrenched "moral value" that cannot be abandoned.

terminated by a decree of the court. Only one ground of divorce is recognised – an irretrievable breakdown of the marriage – as in civil law. Courts granting divorces are given the powers they already exercise in respect of marriages contracted under the Marriage Act of 1961. The discretion enjoyed by the courts will allow them to take into account customary principles such as maintenance already paid under customary law. The court is now able to use its discretion to make decisions that protect the best interests of the children born from a traditional marriage.

It is no exaggeration to say that the Act is monumental, however, as with the other Acts that concern the position of women in the realm of customary law, it is fraught with problems. In her article Pienaar[118] lists them and concisely describes the problems that this Act is likely to face in the future. Firstly, as with most of the newly enacted Acts that benefit women, there is a great disparity that exists between the *de jure* and *de facto* situations. African women are not only among the most illiterate in the country, but very few of them have any access to the information about the laws that affect them. The above writer quotes research done by Govender, which indicates that since the inception of the Act the women in Transkei are still of the opinion that the Transkei Marriage Act applies to them. It is also true that although formal equality may be achieved and even if the laws on paper allow for equality in the law, it is difficult to change the mentality of the persons involved in reality. In their day-to-day lives oppressive customary principles are still practised and this cannot be prohibited merely by formally declaring them invalid.[119] The community and individual mindsets ought to be changed both among men (who believe in their superiority) and women, who because for years they have been placed as minorities, are programmed to accept this *status quo*. It is for this very reason that I would disagree with Professor Dlamini's assertion that if women choose to be in relationships that can be potentially harmful (for example polygamous marriages) then they must be allowed to exercise that choice. It is the writer's opinion that such a choice

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[118] Pienaar *op cit* at 269-273.

[119] In an article "When custom leaves you out in the cold" in the Sunday Independent dated 08/12/2002 written by K. Margadie, she quotes the Deputy President of the Johannesburg Family Court as stating that African women in their bid to implement this Act were faced with so many bureaucratic hurdles. One of them involved problems faced in wanting to get their marriages registered. She describes the exclusion of

ought only to be exercised when women are fully educated about what their rights and duties are, and what the consequences of their actions are. So while the right to choice should be exercised, it ought to be an informed choice.

Secondly,[120] despite the assertion of equality for women, the Act still does not provide for women whose husbands die without leaving a will i.e. intestate. African wives in customary partnerships cannot claim, as do partners in civil unions, automatic qualification in terms of the Law of Succession Act of 1981. Their marriages were until recently governed by the law of primogeniture.[121] Although the gap between customary unions and civil unions has been reduced substantially, there still remain some disparities that impact negatively on the African woman. Section 7 sets out a detailed understanding of the proprietary consequences of a customary marriage and differentiates between marriages entered into before and after the commencement of the Act. The Act does not have a retroactive effect on existing property arrangements. What this means is that existing proprietary consequences are those of customary law and continue to place a negative burden on thousands of women married pre-the Act. Although there is provision that spouses may change the property system in their marriage under the supervision of a court of law, the practicalities remain that most of the African women find themselves without the know-how and in most African homes; such decision-making is often left to the husband.[122]

Although the Act faces many practical difficulties involving trying to balance traditional culture and modern constitutional rights, it still remains a monumental piece of legislation and is one of the most fundamental Acts post–1994 to affect African women.

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customary marriages before 2000 as "the frozen status of customary law ... blamed on pussyfooting and deference by court officials."

[120] Pienaar *op cit* at 273.

[121] This position has been changed by *Bhe v The Magistrate, Khayelitsha and Others* 2004 (1) BCLR 27 (C). In this case the Cape High Court ruled that the principle of primogeniture was unconstitutional.

[122] *ibid.*

3.6 AFRICAN WOMEN AND THE RIGHT TO INHERIT - THE POST-1994 SITUATION

In a recent decision of *Magaya v Magaya*,[123] the Supreme Court of Zimbabwe confirmed a magistrate court's decision to prevent a female child from inheriting from a deceased father's estate. In his decision Judge Muchechetere was of the opinion that while customary laws of succession do discriminate on the basis of gender, in terms of customary law the duty to support surviving family dependants is also ancillary to inheritance. Zimbabwe, like South Africa, has also obligated itself in the international arena, to upholding gender equality. However, it was the opinion of the court that:

"to allow women to inherit in a broadly patrilineal society would not only 'disrupt the African customary laws of that society' but would be tantamount to bestowing 'additional rights' upon women."

While the judgment in Zimbabwe is not binding, traditional leaders who are opposed to the system that allows women to inherit have used it to justify the principle of primogeniture. It is their opinion that allowing women to inherit would be disruptive to the customary laws that form a basis of living for most African people in this country. The case of *Mthembu v Letsela*[124] demonstrates reluctance by the judges to develop the customary rules of succession. In this case which involved succession to the whole of the estate of a deceased person who died intestate, the respondent who was the father of the deceased opposed an application by the widow, who acted on behalf of the daughter to succeed to the estate. It was the opinion of the respondent that he as the male figure ought to succeed to the estate. He based this on the fact that firstly this would be the result of the rules of primogeniture and secondly that section 30 of the Constitution protected persons and gave them the right to participate in the cultural life of their choice. The applicant, on the other hand, sought to have the provisions of section 23 (2) of the Black Administration Act 38 of 1927 nullified, claiming that they were in conflict with the right not to be discriminated on the basis of gender. In this case Le Roux J held that even

[123] 1999 ICHRL 14.
[124] 1997 (2) SA 936 (T).

though customary rules of succession appear to discriminate against women, such discrimination was not unfair and accordingly would not violate the equality clause. When referred for hearing of further oral evidence, Mynhardt J[125] took the traditionalist approach to equality. He argued that the rules of succession were merely a perceived inequity and that customary law ought to be defined as moral codes unique to a community. He held that the courts ought to "guard against applying Western norms to a rule of customary law which is still adhered to and applied by many African people...."[126] Considering that the majority of the South African population are women and that rural African women form a large portion of this population the decision in *Mthembu* is indeed surprising and for many feminists disappointing. Nkala[127] writes that the duty to interpret and develop customary law in view of the changing social climate lies within the courts. It is his opinion (and I humbly agree) that by upholding the primogeniture system of customary law, the courts seemed to have failed in their duty of developing the customary law system, which could be viewed as oppressive, and infringing upon women's dignity. The *Mthembu* case was decided before the Recognition of Customary Marriages Act but as can be seen from the above expose still forms a basis for argument by traditionalist of retaining the system of primogeniture.[128]

The rule of succession ties in closely with the capacity of women under customary law to acquire land. Previously legislation in South Africa restricted the right of women to acquire land and limited it to a privileged few. The legacy of apartheid meant that because the majority of South African were black and the majority of the black

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[125] 1998 (2) SA 675 (T)
[126] At 688 B.
[127] M. Nkala 1999:39.
[128] The recent case of *Bhe v The Magistrate, Khayelitsha and Others* 2004 (1) BCLR 27 (C) reflects courts' willingness to abolish the principle of primogeniture. The case held in the Cape High Court, sought to challenge the provisions of the Black Administration Act of 1927. This, after two Khayelitsha girls were prevented from inheriting from their father because of their gender. In the application before Judge President John Hlophe and Judge Jerome Ngwenya, the girls sought a court order that the principle of primogeniture under black law and custom be interpreted and developed in line with the Constitution, particularly the rights to dignity and equality. Alternatively, the girls asked the court to order that primogeniture (the system by which the eldest son inherits everything) was unconstitutional. The judges concluded "We should make it clear in this judgment that a situation whereby a male person will be preferred to a female person for purposes of inheritance can no longer withstand constitutional scrutiny. That constitutes discrimination before the law" They ordered that sections of the Black Administration Act

population were women, African women were the most disadvantaged. Apartheid policies pushed millions of black South Africans into overcrowded and impoverished reserves, homelands and townships. The culture of excluding females from inheriting land has its roots in the Black Administration Act. Regulations and proclamations denied women the right to acquire and hold land in their own name. Although in 1985 an amendment was made to the "perpetual minority" rule and thereafter allowed women to perform any "juristic acts" with regard to the acquisition of rights of leasehold under the Blacks (Urban Areas) Consolidation Act 25 of 1945, such concession were given on paper and hardly ever followed in practice. A further amendment in 1987[129] saw to it that black women living under customary law were conferred the capacity to own land, yet again like the earlier amendments the provisions not only never accented to the homelands but even within the Republic were hardly ever practiced. This discrepancy between the *de jure* and *de facto* abilities of women under customary law continues to exist despite the several legislative and constitutional measures taken by the South African government to ensure equality. The Black Administration Act in section 23 regulates both testate and intestate succession. While according to the Intestate Succession Act 81 of 1987 at section 1(1):

> "a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and -
>
> (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;"

Yet it goes further to note at section 1 (4) (b) that:

"intestate estate includes any part of an estate which does not devolve by virtue of a will or in respect of which section 23 of the Black Administration Act, 1927 (Act No. 38 of 1927), does not apply"

Because the customary law of succession is based on the Black Administration Act, what this means is that for African women, the laws of primogeniture applied and as a result women would be prevented from acquiring land. Although through this Act, a widow

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was unconstitutional and invalid, as well as the offending section of the Intestate Succession Act. The Constitutional Court still has to confirm the order.

was not permitted to benefit from intestacy, it was the duty of the heir to maintain the widow and to provide a residence for her.[130] One of the Reconstruction and Development Programme's[131] major aims was to establish a land reform programme that recognised the fact that women face specific disabilities in obtaining land. As a result one of its central aims was to target women and to review institutions, practices and laws that discriminate against women. Such an endeavour would recognise that the mere abolition of Land Acts was not enough to redress inequities and that support services and training were paramount to ensure the effective utilisation of the land. This would no doubt assist in bridging the gap between the formal laws and the substantive equality for women. The Equality Act aims to see to it that there is a total abolition of the principle of primogeniture (inspite of the fact that there is an argument that this Act will not pass the test in light of the rights embodied in sections 30 and 31 of the Constitution). The Amendment of Customary Law Succession Bill[132] attempted to level the playing ground by allowing widows from customary unions the same rights as their male counterparts and as the other women married under civil law.[133] While the Communal Land Rights Bill of 2003 recognises equality rights of women to benefit from land and to participate in all decision-making processes.[134]

The practice of denying women the right to land is not one that is particular to the South African community. In many African countries customary laws, cultural practices and

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[129] Constitutional Laws Amendment Act 32 of 1987.
[130] A.M. Van Rensburg 2003:286.
[131] R.D.P. *op cit* at 21.
[132] 109 of 1998.
[133] Van Rensburg *op cit* at 292.
[134] Other legislation that moves away from a male gendered approach to a more equality based approach includes the Constitution Act 108 of 1996, which requires in section 25(5) that "The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis." The White Paper on Land Reform referred to in Chapter One, illustrates the lawmakers' commitment to facilitating women in the acquisition of land. The Communal Property Association Act 28 of 1996 seeks to uphold the principles of justice and equality in the establishment of an association and recognizes that previous forms of ownership did not benefit African women. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 which in its preamble promises "to provide for the prohibition of unlawful eviction of occupiers." The last part of the preamble promises a "commitment to consider the rights of households headed by women." Further legislation affecting women are the Less Formal Township Establishment Act 113 of 1991, the Upgrading of Land Tenure Rights Act 112 of 1991, the Restitution of Land Rights Act 22 of 1994 and the Development Facilitation Act 67 of 1995.

traditional norms are used to justify the disinheritance of widows and invoked to override statutory or constitutional provisions for women that may provide them with a legal right to inherit. The International Human Rights Law group observes that in Nigeria, for example, customary law settles approximately 80 percent of land disputes at the expense of women's rights. This Human Rights group has established an international advocacy campaign that acknowledges the economic disadvantages faced by African women because of their lack of access to land and views a connection between denial of women's right to inherit with violence against women and extreme poverty. Its aims are to provide measures that allow for transformative change.[135] One of its main areas of focus is the South African situation, where African women were not only affected by apartheid but the principle of primogeniture as well.

3.7 THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 4 OF 2000[136]

As Professor Gutto[137] points out, many parliamentarians have often described the Act as the "mother of all equality legislation." It commenced on 1 September 2000 and gives expression to the constitutional equality clause. Given the history of sexism and racism that formed the foundation of South Africa, it is not surprising that many would hold this Act in such high regard. So the Act was promulgated to:

"give effect to section 9 read with item 23 (1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith."[138]

Marius Pieterse[139] contends correctly, in my opinion, that few topics have received as much legal attention as the tension that exists between customary law and the Constitution. The Equality Act, as with other legislation, again brings to the forefront the

[135] At http://www.hrlawgroup.org accessed on 22 September 2003.
[136] From hereon to be referred to simply as the Equality Act.
[137] Gutto *op cit* at 123.
[138] Equality Act 4 of 2000 long title.
[139] M. Pieterse 2000:627.

disparities that exist between the two systems of law. Although the Constitution has acknowledged the right to ones culture, it has stressed and the courts have also reiterated that certain changes must occur within the realm of customary law to allow it to reflect the views of the new democratic order. The preamble of the Equality Act highlights that:

"consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and **patriarchy**, and which brought pain and suffering to the great majority of our people; Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in **social structures, practices and attitudes,** undermining the aspirations of our constitutional democracy."[140]

For African women this is a fundamental legislation that, in the opinion of many, is not only an articulation of the principles held in the Constitution. It goes further than the other Acts in that it is not minimalist but provides a broad scope of application that gives expression to both formal and substantive equality.[141] Section 8 of the Act lists customary and social practices, which have for years formed the basis of oppression against women and it accordingly abolishes them.[142] The preamble emphasizes international treaty obligations on gender and in section 4 (2) expresses the need for elimination of gender inequality. It is the opinion of Pieterse that, far from giving effect to the right to practise one's custom, the Act as he puts it, hammers in a "final nail in the customary law

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[140] My emphasis

[141] P. Maduna quoted in Gutto *op cit* . He notes that this Act prioritises race and gender issues giving effect to both *de jure* and *de facto* equality.

[142] "... no person may unfairly discriminate against any person on the ground of gender, including -

(a) gender-based violence;

(b) female genital mutilation;

(c) the system of preventing women from inheriting family property;

(d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;

(e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources ...."

coffin"[143], and instead only succeeds in totally eliminating customary law and placing its practise as inferior. Section 8(d), which prohibits "any practice which impairs the dignity of women and undermines equality between women and men" can be seen as a sweeping clause that could be used to justify the abolition of several customary practices entrenched in African traditions. These would include the payment of *lobolo*, polygamy and primogeniture. Although the case of *Mthembu v Letsela*[144] guards against the total abolition of the system of primogeniture and reflects a tolerance for the indigenous laws of succession, the Equality Act manages to ensure the total eradication of this practice. So while the Recognition of Customary Marriages Act allows for the practice of polygamy, the Equality Act unambiguously calls for the eradication of patriarchy and orders that the judiciary follows this by holding that polygamy discriminates against women. Section 8(C) appears to deal with the *lacunae* that are left by the Recognition of Customary Marriages Act and states "no person may unfairly discriminate against any person on the ground of gender, including the system of preventing women from inheriting family property." Pieterse[145] is of the view that by banning customs that govern African succession the Act has managed to abolish practices that are inherent to customary law. He describes the systematic elimination of customary law in the Act as reeking of Euro-centrism and as placing customary law in an inferior position, a practice that in his opinion reflects what the previous political regime was trying to achieve:

"The fight for equality is not simply a process of progressive Westernization. African institutions, like their Western counterparts, can be progressively transformed in accordance with the principle of equality. The notion that people must be treated with equal concern and respect is both a precondition and a consequence of democracy. And democracy is the political form that South Africans have overwhelmingly chosen."[146]

While the writer is in total agreement that it is very unfortunate that customary law and the principles that govern traditional indigenous people seem to be slowly eroded by the Act, there is, however no denying that the customary law of succession though based on the commendable family structures that govern Africans are blatantly discriminatory

[143] Pieterse *loc cit.*
[144] 1998(2) SA 675 (T) discussed in detail below.
[145] Pieterse *op cit* at 635.
[146] *ibid.*

against women. It is also fundamental that South Africans look to the Constitution that they have pledged allegiance to. The Constitution of South Africa[147] promises a state founded on principles of "non-sexism". The Equality Act does nothing more than adhere to these founding values.

3.8 CONCLUSION

While the Constitution and other legislation have played an integral role in the advancement of women's rights, legislation has no effect if the issues concerning women are not dealt with at grass root level. African women need to be involved in any policy making and policy makers are obliged to seek the advice of women before enacting any legislation. Until women's voices are heard in every legal, social and political arena, the right to equality will remain elusive and unobtainable. It is a key priority of the government to include women when developing policy strategies. An example of glaring absence of women's participation is in the economic policy and African initiative of the New Partnership for African Development (NEPAD), which has its foundations in South Africa. One of the long-term objectives of NEPAD is "to promote the role of women in all activities."[148] However, analysts argue that NEPAD instead results in the marginalization of women. Sara Hlupekile Longwe[149] writes that gender goals are expressed in this policy document in a vague and lacking manner. NEPAD's main goal is to "enhance Africa's rapid integration into the world's economy." This interprets to serve the interests of market forces and does not coincide with the interests of those previously disadvantaged. The result is the social and economic exclusion of African woman and the further entrenching of patriarchal patterns in policy making.[150] It is the view of the present writer that the government needs to go beyond the mere paying of lip service

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[147] Act 108 of 1998.
[148] Paragraph 67
[149] Referred to by B. Muritala "African NGO's Battle over NEPAD as Forum Unfolds" reported on 16 October 2002 in the Daily Dispatch at http://www.globalpolicy.org/ngos/socecon/initiative/2002/1016nepad.htm accessed on 4 October 2003.
[150] "NEPAD, Gender and the Poverty Gap" at www.web.neticcart/debtsap/nepadgender.htm accessed on 4 October 2003.

when it comes to ensuring gender equity. The law and policies must be equitable and gender-sensitive and ought to ensure economic and social justice.

CHAPTER FOUR

4.1 INTRODUCTION - SOUTH AFRICA AND HUMAN RIGHTS INSTRUMENTS

Equality and non-discrimination have been the cornerstone principles of the United Nations since the inception of the Charter in 1945 and more particularly since the 1948 Universal Declaration of Human Rights. Ironically, it is in the same year that apartheid became "accepted" political ideology in South Africa and the same year that the government coined the term "separate development of races." Subsequent to this, while the rest of the world had reaffirmed "faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women",[1] South Africa had lagged behind. Prevented from any participation in international relations because of its apartheid policies, the concept of gender equality seemed an unattainable goal. From as early as 1960, the General Assembly and the Security Council of the United Nations had taken a firm resolution against the system of apartheid culminating in resolution 418 (1977) of 4 November 1977, whereby the Security Council unanimously imposed a mandatory arms embargo against South Africa under Chapter VII of the Charter.[2] It was this that marked the point where South Africa was considered an outcast among other nations.

This chapter attempts to investigate the commitments made by the new South Africa and its participation in international relations post-1994. By so doing it aims to illustrate that feminism is not Euro-centric but an international commitment to fighting discriminatory practices against women. Whereas the history of modern South Africa covering close to three and a half centuries (since 1652), has witnessed a lengthy and unmatched construction of a society based on racial discrimination and racism, the subordination, exploitation and oppression of females by males has been a feature of South Africa long before even European domination. For black women the racial colonisation of South Africa served only to deepen their subordination and oppression.[3] This has often been

[1] L. Van Zyl 1996: 257.
[2] A. Sachs 1990:39.
[3] S.B.O. Gutto 2001:152.

aptly described as a double-edged sword that managed to inflict unheralded stab wounds to the African woman. While it is conceded that the cause for women's rights is a global phenomenon and that women's experiences cut across racial groups, in South Africa the issue was compounded by statutory provisions which impacted negatively on African women in particular. Further, social and economic restrictions resulted in African women being trapped in a web of inferiority. In this chapter the writer will demonstrate that the struggle for equality is not merely a reflection of Western culture, but a global issue which transcends racial and cultural barriers. By acknowledging first that women operate in different contexts, South African feminists ought to look beyond their contexts and seek answers from the West. An essentialist's view of African culture would regard women's rights as alien yet in spite of working within differing cultural paradigms, it is the firm opinion of the writer that the oppression of women and the need for protection of women's rights is a universal struggle. The answer, writes Alice Mogwe,[4] lies in recognising that despite the differences that may exist between African and Western women, patriarchy is the common enemy for both. Mogwe writes that:

"Patriarchy, or a system of male domination is manifested in the control of women through culture, racism, class domination e.t.c. While the significance of the specific cultural context should not be overlooked, patriarchy as a concept, cannot be excluded ...."[5]

The pledge made by South Africa not only in the Constitution, but also to the international community is proof of the government's commitment to gender equity. Non-racialism and non-sexism are among the core constitutional values that run through the veins of not only the Bill of Rights but also the Constitution as a whole.[6] This same document has not only ensured equality[7] but has gone further to create bulwarks that make certain that South Africa is bound to International Conventions, which protect women. South Africa has ratified and continues to ratify many international human rights instruments that serve to guarantee equality and non-discrimination. Binding themselves

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[4] A. Mogwe "Patriarchy and the New Law: The marginalisation of Women" in Jagwanth, Schwikkard and Grant (eds) *Women under the Criminal Justice System*, 1994:4.
[5] *ibid.*
[6] Gutto *op cit* at 152.
[7] Section 9 (1).

to these treaties is a pledge by the South African government to observe and implement within their domestic policies promises made to prioritise gender equality.

4.2 CULTURAL RELATIVISM VS UNIVERSAL HUMAN RIGHTS

The concept of non-discrimination, or rather equality of treatment, occupies a prominent position in human rights discourse. It has taken centre-stage in the human rights agenda both nationally and internationally. This is an acknowledgement of the importance of this principle in human rights debate. Moreover, it is an indication that the complexity of non-discrimination and equality of treatment requires special attention. The argument remains among many anti-feminist that the concept of women's rights as human rights is one relative and only applicable to Western ideology. This is based on the premise that "values are culture-bound and that there cannot be such a thing as universal human rights."[8] Perhaps the best illustration of this clash between culture and what are considered "universal human rights" is found in the case of *Attorney General of Botswana v Unity Dow*[9] The principles decided on in this case are an illustration of how the court dealt with the issue of the overlap between universal rights and cultural traditions. This case is not only relevant to Botswana but to the region as a whole and seeks to analyse the construction of discrimination clauses found in the various Constitutions.

In this case Unity Dow sued the Attorney General of Botswana challenging the Citizenship Act of Botswana, which stated that:

"A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth – (a) his father was a citizen of Botswana or (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana."

In terms of this law, it appeared as though the youngest of her two children was not a citizen of Botswana because her father was not a citizen of Botswana. Unity Dow applied

[8] R. Gaete 1999:197.
[9] 1992 B.L.R 119.

for an order declaring that section 4 of the Citizenship Act was *ultra vires* the Constitution of Botswana since it violated her fundamental rights to pass her citizenship to her children. In particular, the said provision discriminated against her in that unlike male citizens of Botswana married to foreigners, she could not pass her citizenship to her children. The argument by the applicant was that the distinction between the sexes was in direct violation of the Constitution of Botswana, which guarantees all persons equal protection of the law. Commenting on the reaction of the public to this case, Ann-Belinda S. Preis[10] writes that government ministers "vehemently attacked the decision as an unacceptable affront to Tswana culture." The reason for this was that many of them regarded gender equality as alien to African culture. Van Blerk[11] quotes Rebecca Cook,[12] a professor at the University of Toronto and founder of the International Women's Rights Watch as saying:

"This was a significant victory because the President of the court, Judge Amissah said that custom could not be used to justify discrimination against women and domestic law could not be used to avoid a country's International human rights obligations."

4.2.1 CULTURAL RELATIVISM

Steiner *et al* writes that:

"Cultural relativism is the position that all points of view are equally valid and that all truth is relative to the individual and his or her environment. All ethical, religious, political and aesthetic beliefs are truths that are relative to the cultural identity of the individual. Relativism can include moral relativism (ethics are relative to the social construct), situational relativism (right and wrong depend on the particular situation), and cognitive relativism (truth is relative and has no objective standard)."[13]

The advocates of cultural relativism claim that rights and rules about morality are encoded in and thus depend on cultural context; hence the notions of right (and wrong) and moral rules necessarily differ throughout the world because cultures in which they

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[10] U. Dow in her contribution to *Putting Women on the Agenda* edited by S.Bazilli 1991:260.
[11] A.E. Van Blerk 1996: 190.
[12] See Rights: A Lawyers for Human Rights Publication 1993:24.
[13] H.J. Steiner and P. Alston 1996: 192.

inhere themselves differ.[14] Dlamini and Mqeke[15] argue that not all the institutions of customary law are in conflict with the current notions of human rights:

"Between the two poles of cultural and human rights there is a continuum suggesting that "a weak cultural relativism" is feasible. In other words, not all the norms currently grouped under the role of human rights are so fundamental that they must be applied to South Africa. Nor should all the norms of the current version of customary law be recognised. This would suggest that a less intransigent approach be adopted, and available techniques of the existing system be used to ameliorate the situation."[16]

So, while the human rights advocate sees such international instruments as the Universal Declaration of Human Rights as landmark, to the relativist these instruments are nothing more than a show of the "arrogance or cultural imperialism of the West."[17] Moreover, such "universalism of norms" in the opinion of many relativists serves to destroy the diversity of cultures and amounts to "homogenisation of the modern world."[18] It is no exaggeration to state that this same view has been the basis for the argument held by many anti-feminists and those who do not advocate for equality and non-discrimination. During an inquiry into initiation practices at academic institutions and a subsequent preliminary inquiry into cultural initiations, traditional leaders claimed that the Human Rights Commission did not understand their culture. This assertion was a response to discussions involving customary practices *lobolo* negotiations, the *thwala* (or abduction practices), and the customary principle of (male) primogeniture practices.[19] According to Ruth Meena,[20] culture has been used by African male scholars and particularly those who have taken a nationalistic perspective as an excuse to conceal existing gender relations

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[14] *ibid.*
[15] South African Law Commission "Final Report on Group and Human Rights" 1994:204 quoting R.B. Mqeke who argues that the customary law of delict is not incompatible with the doctrine of the Bill of Rights. C.R.M. Dlamini argues that as human beings, all people should be treated with respect and dignity, but all people are not equal.
[16] H.J. Steiner and P. Alston *op cit* at 192.
[17] *ibid.*
[18] *ibid.*
[19] L. Wessels Pretoria News 12 November 2002.
[20] R. Meena "Gender Research/ Studies in Southern Africa: An Overview" in Meena (ed) *Gender in Southern Africa: Conceptions and Theoretical Issues*, 1992: 9.

and legitimise the perpetuation of these oppressive relations. Professor Bennett[21] summarises the conflict between customary law and human rights as follows:

i) Human Rights emphasise the individual while customary law emphasises the group or community.

ii) Customary law stresses duties while human rights naturally stress rights.

iii) Customary law is imbued with the principle of patriarchy, which means that any freedoms of thought, speech, movement or association are qualified by the respect due to all senior men.

The period of decolonisation for many African nations spanned a couple of decades. Although there were some movements geared towards promoting equality for men and women, among South African women during the 80's and 90's (particularly 80's) the status of women was hardly criticised and was held as being under the jurisdiction of culture. The question of the legal disabilities of African women occupied the backseat as more attention was given to the fight against repressive racial laws:

"Debates on human rights are determined to a great extent by two contradictory paradigms; on the one hand, the Western pressure on the "third world" to adopt human rights standards as they have developed during the last three centuries in the West; and, as a response, the claim by the "third world" that the concept of human rights and of the individualism underpinning them is alien to their culture."[22]

A great criticism of human rights is that it is largely a Western creation based on the European tradition that individuals are separable from society. Because cultural practices and traditions by their very nature thrive in social settings, such a notion as presented above would arguably be in complete contradiction to those societies that are collectivist or communitarian in nature. The view held by the latter would, therefore, be that individuals are "indivisible elements of the society."[23]

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[21] T. W. Bennett 1991:18 at 23.
[22] Gaete *op cit* at 193.
[23] Heard 2001:1.

As noted above, the rhetoric of "culture" has become one that is so socially and politically accepted in most realms it has become a justification for the oppression of women and more so for African women. Culture is seen as standing in opposition to rights, hence the common reference of Rights ***versus*** Culture.[24] Phillip Iya[25] states that in South Africa culture has, in the past, been used negatively as a divisive tool. It is his view that racial segregation and fragmentation of South Africa was often justified on the basis of cultural differences:

"Racial segregation and fragmentation of South Africa into separate homelands was justified by the understanding that the population was naturally divided into different (and implicitly hostile) cultures, whose competing interests could be accommodated only by territorial and social separation."[26]

As Simons[27] has observed colonialists sought to uphold a clear divide between Europeans and Africans, modelling a separate system of law - the former became common law and the latter customary law. Thus as Griffiths notes,[28]customary law was relegated to the African "other" and a view of culture arose that separated the African from the European. The result was that conceptual oppositions arose that became frames of reference for comprehending culture and much to the detriment of women's rights – human rights became Euro-centric and the idea of women being inferior to men operated largely in the realm of "African culture." This is not to say that such inequalities in treatment were exclusively felt among black women, but needless to say such divisions were more obvious among African women. The relationship between customary law and common law established boundaries between legal and social domains and the rules associated with them. These domains, as noted by Griffiths, exist in a hierarchical relationship, so that common law took precedence over social and cultural practices. What this has led to is that persons wishing to maintain the *status quo,* that is, keeping women in positions of inferiority, have used the argument of cultural relativism as a means to motivate political opportunism. Critics of feminists frequently argue that human rights and women's rights

[24] Cowan *et al* 2001: 4.
[25] P.F. Iya 2000:228.
[26] Iya *op cit* at 235.
[27] H.J. Simons 1968:11.
[28] Cowan *op cit* at 103.

are incompatible with "traditional African values". The rejection of theories of human rights is most often a tactic used to bolster individual groups' power and to resist any international denunciations of African policy. Tripp summarizes this as follows:

"... those who defend practices that are harmful to women in the name of preserving their religious, ethnic, or other cultural identity are also often seeking to protect certain political and/or economic interests. They have a vested interest in maintaining the *status quo* and a set of power relations that are tied to certain practices. This is not to say that cultural preservation and identity concerns are not real, but rather that they are often tied to a broader political and economic context that affects their sustainability.Cultural rationales are used throughout the world to protect the *status quo* when it comes to advancing women's rights."[29]

In the submission on the draft White Paper on Traditional Leaders and Governance (2003), Provinces throughout South Africa were consulted on the issue of allowing representation and participation of women as traditional leaders, or *amakosi.* Their response was almost all unanimous, the code of conduct was such that it was accepted that *ubukhosi* was a "man thing", and that according to African culture, although it was acceptable for women to act on behalf of their children until they came of age, it would be unacceptable for women to be chiefs. The following response from Kwa-Zulu Natal Provincial Report[30] is worth noting:

"If then a woman [sic] wants to be an *amakhosi* they will have to be sterilised and not get involved (*in a relationship*) and they should not get married and must never get pregnant. There are certain times where a woman cannot be amongst men due to their menstrual cycle, and so for a woman in that condition to stand in front of the people which have men representation may be a problem as this is against Ama-Zulu culture."

Such a response is highly surprising and seems almost antiquated in the era of the 21st century, yet the submissions are unanimous in that they truly believe that the inclusion of women as part of representation in traditional governance is an importation from European way of thinking and as such alien to the African way of life. What is ironic, however, is that while all these provinces were most vocal against the intrusion of

[29] A.M. Tripp "The Politics of Women's Rights and Cultural Diversity in Uganda" in Molyneux and Razavi (eds) *Gender Justice, Development and Rights*, 2002:414.
[30] Submissions on Draft White Paper on Traditional Leadership and Governance Vol 2.

European ways of thinking, they vehemently appeal for increment in remuneration for traditional leaders (*iziduna*), something that is truly alien to the African culture. It would be true to say that traditional leaders were never in the past part of government payroll. This inconsistent attitude towards westernisation makes the rejection of women's rights discourse in the name of "African values" highly suspicious. The new South African Constitution has done little to alleviate the criticisms given by traditionalists. Based on concept of "individual liberty" this document also finds itself under intensive attack from those who feel that customary law ought to be separated from any constitutional scrutiny. In his 2002 Progress Report on customary law and the 1996 Constitution, Lyov Hassim writes:

"Constitutional supremacy has substituted for white supremacy and it is my opinion that in an ironic twist of fate, Customary Law while recognised and dignified by the Constitution retains a status no different from that which it enjoyed under apartheid but also has the added threat of the Bill of Rights which is grounded on a particular conception of individual liberty."

It is his opinion that subjecting customary law to the Constitution is merely placing it in a subordinate position and the recognition of customary law may just be the state's way of paying lip-service to the traditional authorities. He further comments that to apply customary law only where it is in tune with the principles of public policy and natural justice, is tantamount to reverting to the "repugnancy clause" of the previous apartheid era. Proponents of human rights as discussed below dispute such a view.

4.2.2 UNIVERSAL HUMAN RIGHTS

As shown above more often than not the debate on universalism and relativism is presented and debated in such a manner that one ought to embrace either one or the other, but seldom ever both. The emergence of an ever-growing body of human rights agreements has been used as justification for the high moral ground occupied by human rights. As Andrew Heard[31] observes, because of this, political activists, commentators

[31] Heard *op cit at* 1.

and many feminists are content to see this state as acceptance that internationally recognised rights are universal and inalienable. The Vienna Final Act thus declares:

"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights."[32]

It is the opinion of the writer that such a view of human rights is flawed and as will be discussed further down as simplistic. The concept of universalism has its roots in the 18th Century French Enlightenment Period. Western philosophers put forward the idea that there exists what is known as 'natural law'. This postulates that there is an absolute source of law (be it God, nature or the universe), they posit immutable and eternally valid principles that govern and guide mankind.[33]Cicero notes (as quoted by Dembour[34]):

"one eternal and unchangeable law will be valid for all nations and for all times ...."

John Locke developed this theory that there existed innate, inalienable human rights. It was reason that taught men that there were equal and that they possessed natural liberties. It was not up to man to relinquish principles of equality and liberty. Such ways of thinking were reiterated by men such as Rousseau and later Charles Louis Montesquieu.

Modern manifestations of a belief in natural law include the concept of universal human rights. The problem with such a view is that it assumes that everyone comes to the same conclusion as to what is universally accepted "principles of law". The adherents of universality claim that international human rights like equal protection or physical security or free speech are and must be the same everywhere. Dembour[35] suggests, however, that human rights do not exist outside the specific political and social history from which they have evolved, so while the 1948 United Nations Declaration of human

[32] H.J. Steiner and P. Alston *op cit* at 196.
[33] Cowan *op cit* at 57.
[34] Dembour referred to with approval by J. Khumalo 1998:16.

rights seemed to posit universally accepted concepts, especially in light World War Two, these same concepts were specific to the political and social atmosphere of the times. Cultural relativism, on the other hand, can be viewed as indifference and resistance to change, yet it would be just as equally justifiable to look upon universalism as an arrogant way of thinking. Dembour[36] describes it succinctly as "undue assumption of knowledge." The attraction of human rights is that they are often thought to exist beyond the determination of specific societies. Tripp suggests, however, that when seeking for gender equity, Western feminists do not necessarily "earn the right to speak out against injustice."[37] She suggests that feminists ought to acknowledge that patriarchy and gender inequality exists in both Western countries and African countries. The recommended way forward is to avoid dichotomising rights into cultural *versus* international but instead to seek common solutions to the dilemma of gender inequality:

"There needs to be a shift from thinking about the "liberal West versus the rest" to seeing the commonality of our problems and solutions, and our common humanity."[38]

On the one hand, South Africa finds itself striving to preserve its Constitutional commitment to respect culture and cultural practices, and on the other, acknowledging the existence and influence of foreign and international conventions that shape the international world, of which South Africa is now actively a part. It is the opinion of the writer that both can be achieved without prejudice to another. What must be remembered is that South Africa is not an island but part of an international community. By respecting the customs and traditions that are essential and positive and at the same time looking to the outside for guidance, we achieve a society that is unlikely to make the grave mistakes it made in the past.

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[35] *ibid.*
[36] *ibid.*
[37] Tripp *op cit* at 415.
[38] Tripp *op cit* at 417.

4.3 MEETING INTERNATIONAL STANDARDS

In March 1993 the Constitutional negotiations began in earnest in the form of the Multi-Party Negotiating Process. With much resistance from several traditional leadership groups, consensus was reached which allowed representation by women in the negotiation process. The result of such negotiations became part of what is known as the 1993 Interim Constitution. This new Constitution seeks *inter alia*, to promote "equal protection and benefit before the law"[39] as well as to giving due consideration to International law when interpreting the Bill of Rights.[40]

It is clear that between 1975-1985, commonly termed the United Nations "Decade for Women", the issues pertinent to women were for the first time forged into the international arena. The chant of the time was encompassed in the phrase "women's rights are human rights."[41] According to Van Zyl,[42] not only were issues of equality and non- discrimination the forte of the United Nations, but several organisations began to realise that the fight for women's rights and more particularly equality between men and women, could be included in the realm of international human rights. The issues pertaining to women could no longer be confined to the jurisdiction of nations but were extended to include international involvement. While in the process of establishing a democratic government, South Africa saw itself caught in this whirlwind of change. In 1993 the government signed four international human rights conventions and one important regional Convention relating to women. These Conventions were an indication of the commitment by the South African government to ensuring equality.

4.3.1 CONVENTION ON THE POLITICAL RIGHTS OF WOMEN

The Convention was signed by South Africa on the 29 January 1993. However, this instrument was only ratified in 1996. The Convention was created on the 31 March 1953

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[39] Section 9 (1) of Act 108 of 1996.
[40] Section 39 (1) (b).
[41] Van Zyl *op cit* at 266.
[42] *ibid.*

but only came into force in 1954. Its main aims are to implement the principle of equality of rights for men and women contained in the Charter of the United Nations. Its objectives are summed as follows:

"Recognising that everyone has the right to take part in the government of his country, directly or indirectly through freely chosen representatives, and has the right to equal access to public service in his country, and desiring to equalize the status of men and women in the enjoyment and exercise of political rights, in accordance with the provisions of the Charter of the United Nations and the Universal Declaration of Human Rights."[43]

This Convention is in line with the African National Congress' Women's League aim to mobilise and organise South African women and to encourage their participation in the public sector, taking into account their involvement in the struggle against apartheid. The Convention is of particular interest to African women, because of their often-unacknowledged involvement in the political struggles against racial inequalities.

4.3.2 CONVENTION ON CONSENT TO MARRIAGE, MINIMUM AGE FOR MARRIAGE AND REGISTRATION OF MARRIAGES

South Africa acceded to the Convention on 29 January 1993. Again this Convention has its roots in the Charter of the United Nations and it reaffirms commitment to non-discrimination on the basis of gender/sex. It states:

"Recalling that article 16 of the Universal Declaration of Human Rights states that:

(1) Men and women of full age, without any limitation due to race, nationality or religion. have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses,

Recalling further that the General Assembly of the United Nations declared, by resolution 843 (IX) of 17 December 1954, that certain customs, ancient laws and practices relating to marriage and the family were inconsistent with the principles set forth in the Charter of

[43] At http://www/.umn.edu/humanrts/instree/01ccmar.htm accessed on 16 July 2003.

the United Nations and in the Universal Declaration of Human Rights. Further that all be registered in an appropriate official register by the competent authority."[44]

There is no doubt that the language in this Convention could be in contradiction to traditional customary principles. While the South Africa government has committed itself to providing a minimum age for marriage, and to ensuring that consent be given by parties to a marriage such a provision is alien to customary law. In the August 1998 Report on the Recognition of Customary Marriages, it is recorded that in modern legal systems, the requirement for determining marriage is derived from the individual's freedom to decide when and whom to marry. This principle has its origin in the eighteenth-century Europe and was introduced in to Africa through colonialism. Under pre-colonial customary law, marriage was an agreement between kin groups rather than individuals, where consent between the spouses was not necessary. It was not uncommon for brides to be promised to a family even before their birth, and was sororal polygamy that is where a girl could take the place of an older sister where she dies. This is not to say that they were considered as forced marriages, just that marriage was not a unilateral consent of the parties involved. Simons notes that though consent was relevant, women were still expected to be obedient and to be compliant to the agreement made by the families involved.[45] Although at the recommendation of the above-mentioned report it was also suggested that customary marriages should be registered, it is not untrue to say that despite effort by traditional authorities, many such marriages exist without registration. The rule that unregistered unions would be held as void could work great hardship for the spouses and more especially for women who are more often than not the powerless and least informed victims of such unions. Similar hardships are encountered were the minimum age requirement is involved. Although the Convention does not state categorically what this age should be, it is true that in terms of traditional customs, the main purpose of marrying was to bear children and therefore in most cases the minimum requirement was that the couple be over the age of puberty. Such an approach led to and in many cases still leads to an unscrupulous guardian manipulating and taking advantage

[44] *ibid.*
[45] Simons *op cit* at 328-9.

of a child often to their detriment. Until the Recognition of Customary Marriages Act 120 of 1998, such a stance was to the disadvantage of African women, who as a result remained perpetual minors even in the marriage.

4.3.3 CONVENTION ON THE NATIONALITY OF MARRIED WOMEN

The objects of the Convention are to recognise that conflict in law and practice with reference to nationality arises as a result of provisions concerning the loss and acquisition of nationality by women as a result of marriage, of its dissolution, or of the change of nationality of the husband during marriage, and to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to sex.[46] South Africa became a signatory to the Convention on 29 January 1993. One of the purposes of the United Nations[47] is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion. Married women have not always enjoyed the same protection as to loss, and acquisition of nationality than their husbands. As there is no justification for discrimination on the basis of gender, the Convention was adopted to promote gender equality. Section 9(1) of the Constitution enshrines the equality of all persons and the right to equal protection and benefit of the law. In terms of this section no person or the state may unfairly discriminate against anyone on the grounds of, *inter alia,* gender or sex. Discrimination of women on the basis of their sex has been a reality in many spheres of society. There is a striking similarity between the provisions of the Convention and section 9 of the Constitution, in terms of which the State is prohibited from unfairly discriminating directly or indirectly against anyone, on the basis of *inter alia,* sex or gender. Women, on an equal basis with men are therefore now constitutionally protected against unfair discrimination. The Commission on gender equality as set up in Section 187(1) is an important watchdog in this regard.

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[46] At www.unesco.org/human_rights/wae.htm accessed on 16 July 2003.
[47] *ibid.*

4.3.4 SADC[48] DECLARATION ON THE PREVENTION AND ERADICATION OF VIOLENCE AGAINST WOMEN AND CHILDREN

South Africa signed the SADC Declaration on Gender and Development at a summit in Malawi on the 8th of September 1997, committing the country to take urgent measures to prevent and deal with the escalating level of violence against women and children.[49] Reaffirming the above commitment, an Addendum to the 1997 SADC Declaration on Gender and Development on the Prevention and Eradication of Violence Against Women and Children was drawn up and signed in 1998. For South Africa this was a follow up to its domestic Prevention of Family Violence Act 133 of 1993. The above declaration sought to acknowledge that violence against women is a reflection of the unequal relationship of power that exists between men and women. This same sentiment was also expressed at the Beijing Conference on Women, which reiterated the need to put women's issues in the forefront in the public realm.[50] For the first time, just as feminist jurisprudence had asked how women experienced the law, so too did the key players at this conference. Seven countries in the SADC region identified the need for the elimination of violence against women. These included Botswana, Malawi, Mauritius, Mozambique, Namibia, South Africa and Swaziland. The Convention sought to prevent "any act of gender-based violence that results in physical, sexual or psychological harm and suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty in the public or in private."[51] Strategies to prevent gender violence have been set up in Namibia, South Africa, Zambia and Zimbabwe. Tribunals have been set up in these countries to sensitise the public and policy makers and law enforcement agents about the adverse effects of domestic violence on the advancement of women.

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[48] Southern African Development Community from hereon referred to as SADC.

[49] South Africa is also a signatory to The African Charter on Human and Peoples' Rights which calls upon States to ensure the elimination of every discrimination against women and also ensure the protection of the rights of women ... as stipulated in international declarations and conventions.(Article 18 (3)).

[50] At http://www.sadcreview.com/ accessed on 28 July 2003.

[51] At www.sardc.net/widsaa/sgm/1999/sgm_ch6 accessed on 28 July 2003.

4.3.5 BEIJING PLATFORM FOR ACTION

South Africa participated fully in another United Nations initiative in Beijing, in September 1995. It addressed as one of the critical areas of concern the need for the advancement of women and the achievement of equality between women and men as a matter of human rights and a condition for social justice. The Beijing conference was a follow up to the Nairobi Forward-looking Strategies for the Advancement of Women, where it had been decided that there was a need for women's active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making.[52] Governments' concerned where encouraged to take active participation in order to advance and empower women. Under the Ministry of Justice, specific commitments in regard to the implementation of the Beijing Platform for Action included the need to combat discrimination and inequality, and the recognition of customary and religious marriages.[53]

4.3.6 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

CEDAW is perhaps one of the more important Conventions on women signed by the South African Government. Again a by product of the United Nations Charter and the Universal Declaration of Human Rights, this Convention sought to reaffirm the fundamental principles of Equality and non-discrimination. According to Van Zyl[54] although the Convention was by far the most significant of all international instruments pertaining to women, it was not the first international mandate to concern itself with such issues. It is by far one of the most comprehensive Conventions on women's rights and focuses on the institutions, systems and ideologies within a society that deny women rights. It also recognises the role of culture and stereotyping in the gendering of society and encourages the inclusion of equality into several spheres of women's lives including

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[52] Fourth World Conference on Women Platform for Action mission statement at www.un.org/womenwatch/dow/beijing/platform/plat1.htm accessed on 26 September 2003.
[53] *ibid.*
[54] Van Zyl *op cit* at 258.

the law, family life, culture and religion.[55] It had been preceded by the Commission on the Status of Women created in 1947, which had unfortunately been fraught with technical problems. The author makes the following observations on CEDAW:

"The essence of the obligations of parties to the Women's Convention is to be found in article 2, which provides: 'State parties condemn discrimination against women in all its forms, (and) agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women' In terms of various other articles of this convention, state parties undertake *inter alia* to address discrimination in the political, social, economic and cultural fields, and in **customary and other practices** ...."[56]

The Convention has increasingly been recognised as one of the guiding principles in the formation of new legislation in South Africa. It is cited explicitly in two of South Africa's most important legislation of women namely the Promotion of Equality and Prevention of Unfair Discrimination Act[57] and the Domestic Violence Act.[58] The relevant preambles read as follows:

"South Africa also has international obligations under binding treaties and customary international law in the field of human rights, which promote equality and prohibit unfair discrimination. Among these obligations are those specified in the Convention of All forms of Discrimination against women ...." (Act 4 of 2000)

"And having regard to ... the international commitments and obligations of the State towards ending violence against women and children, including obligations under the United Nations Convention on the Elimination of All forms of Discrimination Against Women ...." (Act 116 of 1998)

Not only has the Convention been clearly recognised in legislature, but has also been acknowledged and applied in recent court judgements.[59] It is clear from the wording of the Convention that a positive obligation is placed on the state parties to ensure that all forms of discrimination against women are eradicated, be it in the public or private realm, or were custom and cultural practice is concerned.

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[55] K. Menell and M. Jobson 1995:4.
[56] *ibid.* My emphasis
[57] Act 4 of 2000.
[58] Act 116 of 1998.
[59] In *S v Buloyi* 2000 (1) BCLR 86 (CC) 94 E- 95B, the Constitutional Court emphasised the obligations incurred under the Women's Convention.

4.4 CONCLUSION: EFFECT OF SOUTH AFRICA'S RATIFICATION OF THE INTERNATIONAL CONVENTIONS[60]

What does signing all these International treaties/Conventions mean for South African women? It should be questioned whether such commitments could be viewed with the same disdain that theories of feminist jurisprudence are viewed. Is it a Euro-centric approach to African women to involve the international community as a watchdog? In terms of the Convention (CEDAW), the South African government has undertaken to:

"... take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women."[61]

An example of the weakness of such Conventions lies in the fact that they provide only mere moral pressure on the signatories involved. The Constitution of South Africa states in no uncertain terms that international law is to play a greater role in the new South African legal order, especially in the area of human rights law. Although the Constitution of South Africa enjoins the government to consider public international law when interpreting the Bill of Rights, it is also true to word that such instruments at most times impose obligations to State parties and not to the individuals involved.[62] What this means is that while State parties can lodge complaints against other State parties, the same cannot be done by individuals. Secondly, it is equally true to note that while it may seem that these conventions succeed in ensuring formal equality, they fail in taking into account actual social and economic conditions of the groups and individuals.[63] These Conventions may succeed in benefiting the minority population of women, but they fail to take into account that 50 percent of the black rural population of women are illiterate and are most often unaware of the rights they may possess and of the obligation placed on their government to ensure equality and equal opportunity.

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[60] All the Conventions concerning women to which South Africa has been a signatory.
[61] CEDAW should always be contrasted with the African Charter on Human and People's Rights to which South Africa is a signatory. The charter calls on State parties to promote positive cultural practices.
[62] Van Zyl *op cit* 263.
[63] J. De Waal *et al* 2000:184.

Further, while the government's ratification of the Conventions without reservation is in accordance with the provisions of the Constitution, such confirmation could be regarded as being in conflict with the traditional principles of customary law. The acceptance of such provisions lies not in the theoretical commitments made by heads of state, but in the actual acceptance and change by the persons whose right is being protected. It is ironic to note that while many feminists have criticised such conventions as being "masculine" in their approach, African jurists express the view that they are too Euro-centric. Before South Africa can claim to adhere to international human rights, it is essential that it bring about reform in the customary law system. Although much has been done to enact laws that transform customary practices, discriminatory still exist as will be shown in the next Chapter.

CHAPTER FIVE

5.1 INTRODUCTION - REDRESSING GENDER INEQUITY: THE ROLE OF THE SOUTH AFRICAN FEMINIST

Throughout the thesis the writer has endeavoured to present feminism as a global phenomenon, contending that feminists ought to look towards alliance building as opposed to setting limits to what theories are applicable to different contexts. While acknowledging that race and culture play an integral role in defining African women, it is the opinion of the writer that feminists must not lose sight of the universality of women's oppression. As defined in an earlier chapter, the feminist movement's first aim is the support of women's equal rights and the struggle against patriarchy and male domination. According to Parvin Paider[1] the feminist movement is so substantially diverse in its theories as to accommodate all women, yet this final chapter is a move away from an "academic debate" to one that focuses more on the reality of the rights of the African women. The writer contends that by illustrating the weaknesses that still exist in South Africa, despite legislation and policies to the contrary, African feminists can refocus their energies to what is of importance, ensuring that the rights that are enshrined in the South African Constitution become a reality.

The following was research done in the Grahamstown area. The writer's main aim was to investigate whether African women in the townships of Grahamstown were aware of their legal rights both within the Constitution and in the new legislation dealing with equality.[2] The assumption has been that while the new government has done a great deal to ensure that African women's rights are upheld, much of this effort has resulted only in "paper law", that is formal equality without the substantive effect. The writer was hoping to collect some data on this issue. The research is merely an exploratory one, and is not an accurate reflection of the opinions or views of the majority of black women in South Africa. Due to time restraints the investigation could not be extended to rural women. The aim was not to produce large-scale statistics but was merely to get an indication of how the black women in

[1] P. Paider "Encounters between Feminism, Democracy and Reformism in Contemporary Iran" in Molyneux and Razavi (eds) *Gender Justice, Development and Rights,* 2002:240.

Grahamstown perceive their legal rights in the new democratic era. Because the work is primarily on customary laws, the assumption made by the writer was that the majority of those persons, who practised customary law or are married by customary traditions, are black. The statistics are based only on those women interviewed. These women were chosen randomly. The researcher went into the Joza Township in Grahamstown and randomly selected women, based on their willingness to be interviewed and on convenience. The researcher also received permission to sit in the Department of Home Affairs where a great number of black women registering their marriages or were there for other purposes, would be located. Lastly, the writer approached randomly selected black women working in the kitchens and residences of Rhodes University. The main reason for choosing the Grahamstown location was firstly because much of it is peri-urban, not rural, but not truly urbanised. Secondly, with information received from the Legal Aid Clinic, it was discovered that Grahamstown has one of the greatest concentration of legal resource centres per capita. It can be argued that if anyone ought to know about legal rights, it would be the women in Grahamstown. There are among others, the Legal Aid Clinic which houses the Domestic Violence Unit, the Centre for Social Development which works closely with the Ikwhezi Women's Development Forum that seeks to disseminate information about the rights of women, the MTN Crime Prevention Centre housed at Rhodes University and dealing with gender violence as well as FAMSA and the High Court of Grahamstown. The question remained whether despite all this African women knew about the rights they possessed and if they applied them in their day-to day-lives. Or whether patriarchal traditions were so inculcated that laws guaranteeing equal rights had no impact in the society. The focus of research surrounds two main laws, the Recognition of Customary Marriages Act and the Domestic Violence Act, chosen specifically for their significance to African women.

5.2 THE RESEARCH METHODOLOGY

The research was conducted through structured interviews and participants were chosen randomly. Because the greater numbers of participants were Xhosa speaking, an interpreter who had a working knowledge of the law was used. It should be

[2] Including as discussed in previous chapters, the rights enshrined in Chapter 2 of the Constitution of South Africa, the Equality Act 4 of 2000 and the Recognition of Customary Marriages Act 120 of 1998.

mentioned here that the writer has a surface understanding of Xhosa and so much of what the participants said was well understood by the researcher. The research is both qualitative and quantitative in nature. Firstly, it aims to see how many women are aware of the laws that protect their rights; secondly, to provide a detailed description seeking to present the reality through the eyes of the participants.

Qualitative research is based upon the search for detailed description, seeking to represent reality through the eyes of participants and to be sensitive to the complexities of behaviour and meaning in context. What this inevitably amounts to is a research approach that stresses the importance of capturing subjectivity and construction of knowledge via a relationship between the researcher and participant.[3] It is a non-statistical means of analysing and interpreting data that is collected through interviews and document analysis.[4] Quantitative research, on the other hand, is expressible in terms of quantity. It is a procedure that relies "principally on the use of quantitative data" and then is subsequently contrasted with qualitative analysis.[5] According to Schwadt,[6] both research methodologies can be used simultaneously to produce accurate research. It is the intention of the writer to use both the methods so as to provide a comprehensive reflection of the impact that the Constitution and equality legislation as referred to above, have on women's day-to-day lives.

43 women were interviewed over a period of about 37 days. The results were varied but a few trends could be interpreted from these results. Of the 43 women, all were aware of the Constitution and the fact that as women they had rights. All of them placed much emphasis on their rights in terms of race relations. One 44 year old street vendor stated her views as follows: "We are now allowed to work and sell our wares in the street without fear of being chased away by the white man." 17 women only were aware of their rights as women, all of them citing that in the new Constitutional order men are no longer allowed to beat their wives without facing criminal sanctions. It seemed like most of the women that were confident about their rights were the young women, that is, those less than 30 years old who had some level of formal education or exposure to "town life", most either worked for the university or had

[3] W. Brohmke quoting from Henwood & Pidgeon 2001:13.
[4] T.A. Schwandt 1997: 13.
[5] *ibid.*

been educated up to matric level. All the interviewees unanimously felt that customary traditions played a critical role in their lives, *lobolo* was a central part of their marriage regimes and though they could be married under civil rites, all of the married women had had *lobolo* paid for them and felt that it was a tradition worth keeping. Of the women interviewed, 29 were married and all of them expressed the fact that they knew that patriarchal traditions still existed in society, that the man was still the head of the family and society. Family viewed the involvement of the police in marital problems, i.e. domestic violence, in a negative manner. The issue of marital rape was alien to most of them, eliciting laughter from a great number of them and confusion at the notion that a man can rape his wife.

The Xhosa culture seems to present inheritance in a different manner from either the Sotho or the Zulu tribe. It seems acceptable for a first-born girl to inherit from the deceased father and all the women expressed this without any reservations. All the women knew that there were resources available to them, yet few could correctly identify where exactly they would go, aside from the police. One woman who was selling fruit right next to the Legal Aid Board offices said adamantly that she did not know where to go in order to enforce her legal rights.

One thing that is obvious is that much more has to be done to make the women aware of their rights. This is not to completely ignore the great work that is being done by organisations such as FAMSA, yet so much more has to be done to reach the ordinary black woman. The society is still largely patriarchal and greatly oppressive to women and much of the work done by lawmakers is merely giving new laws to a society based on old traditions. These structures that are patriarchal have to be broken down in order to allow for true emancipation of women.

The following two interviews are included to illustrate some of the women's responses. They represent two differing perspectives on the issue of women's rights. One is of a 38-year-old woman who has matric as her highest standard of education and works in an environment were much is being done to make her aware of her

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[6] *ibid.*

rights. The other is a 56 year old woman who sells wares in the street and has only Grade 7 as her highest education.

5.3 INTERVIEW TRANSCRIPTIONS

Interview 1

The first woman was a catering employee at the Rhodes University kitchens; she had been working for Rhodes for 6 years. She is 38 years old and has been living Extension 4 in the township of Grahamstown for 9 years. The interview was conducted on 29 September 2003 in Xhosa and the transcription is a translation thereof.

Question: "Firstly, a few preliminary questions. How old are you?"
Answer: "I am 38 years old."
Question: "Are you married?"
Answer: "I am not married."
Question: "Where do you live?"
Answer: "'B' Street in the location area of Grahamstown."
Question: "How long have you been living there?"
Answer: "I have been living here for the past 9 years."
Question: "Where did you previously reside before coming to Grahamstown?"
Answer: "I stayed with my sister in Yeoville in Johannesburg."
Question: "How important are African customs and traditions to you as a black woman? Do you practise them often?"
Answer: "I appreciate African customs and find them very important in my day-to-day living."
Question: "In light of the new democracy, what do you as a black woman understand about your position and the legal rights that you now possess?"
Answer: "I know that I do possess rights."
(Elaborate?) "Ummm (pauses) well, well I see that we do have rights."
("Can you name any?") Well in the past we were beaten and nothing would be done about it and I was told that it was something that had to be kept silent within the family. Now I know that I have the right to go and

report it to the police."

Question: "How do the men in the society react to these changes?"

Answer: "The men you mean? They don't like it ... they don't like it at all. (Why?) "they say that we are disrespecting them and rubbing it in their faces ... so they don't like it at all."
("How do you feel about these reactions?") "Ahhhh as far as I am concerned we are not disrespecting them, they are just bitter because they don't have any power, they cant just thoroughly beat us without the law intervening."

Question: "Do you see a difference in your legal rights as a woman since the post 1994 elections and the advent of the New Constitution?"

Answer: "There is some difference, if only the men in the society would learn to accept change."

Question: "What does the equality clause mean to you? How does it impact your day-to-day lives as a woman?"

Answer: "I do understand equality and I am glad that this change has come about. Women seem to react very positively to these rights but the men in the society really hate this."

Question: "Can first born girls inherit property that is left by their deceased father? Are they allowed to inherit in terms of your traditions and customs?"

Answer: "As far as I know in the Xhosa culture, women can inherit. As long as the girl is the first born child there is no reason why she should not inherit. After all what if there is no male in the house. Who inherits then? It is only fair that girls also inherit and this is how it is practised."

Question: "Are women still considered subordinate? Do the men take a superiority attitude towards women in the society?"

Answer: "Oh they try, they really try, they are dying to do that. But now there are human rights and they don't have a chance in hell. The introduction of human rights has changed that position with regards to women as subordinate to men."

Question: "Is the payment of *lobolo* still a part of your culture and traditions. How do you feel about it, is this a good or bad practice?"

Answer: "Yes, *lobolo* is still practised, I still find that it serves a purpose in our lives. African men ought to pay *lobolo* for their woman."

("What about the assumption that men owns you? Do you not fear men saying I paid cows for you therefore you are mine - bought and delivered?").

Answer: "Ah, if he says that I will tell him, I never said that you should buy me,you saw it fit to pay money, so don't think you own me cause I never agreed to be bought."

(So what is *lobolo* to you, if its not buying ,what is it?)

"My parents raised and educated me so I could contribute to the household. He must pay for the expenses incurred by my parents in my upbringing. I am now working for his family and no longer my own, he must therefore compensate my family for this loss and these expenses."

Question: "What do you feel about polygamy?"

Answer: "No! No! No! this is no longer practised. I'm sorry I cannot accept that ... it cannot happen to us (as modern women) I will never agree I will never agree."

Question: "What do you understand by the term rape? Domestic violence?"

Answer: "Rape is when a man forces himself on a woman, and domestic violence is when he raises his hand to a woman he is married to and wants to hit her."

Question: "So with that knowledge, is it possible for a man to rape his wife?"

Answer: "A man can rape a wife, I have heard that you can report this, I wont hesistate ...."

Question: "What do your families or societies feel about and react to domestic violence or the crime of marital rape? If you were to be raped by your husband, what steps would you take both in your community and in terms of the law?"

Answer: "Its between the two of us, I will not approach the family structure because I know they will discourage me, I will just report to the police straightaway. I guess it differs from person to person. The family will make it difficult. Aunties will disapprove and tell me to resolve it. It is my right to choose the means of dealing with it. It is my right."

Question: "Are you aware of the legal resources that are available to you in Grahamstown?"

Answer: "I know them but I don't know where they are (Pause: has to consult with another fellow male worker). Where are those places (she

asks)...hmmm umm FAMSA, and, and, and what is it called ... social workers?"

Question: "Do you feel that enough is being done to protect the women in Grahamstown?"

Answer: "Yes they work especially FAMSA"

(End of Interview. Tape was stopped.)

Interview 2

The second participant was a 55 year old woman, who sold wares in the streets of Grahamstown. She had been born and raised in the farms that are just outside Grahamstown, and had a fairly better view of customary laws than the previous participant. Again the interview was conducted in Xhosa and the following is a transcription thereof. The interview was conducted and audio-recorded on the morning of 12 October 2003. It was approximately 35 minutes in duration.

Question: "Firstly, a few preliminary questions. How old are you?"

Answer: "I was born in 1948 (that makes her 55 years old)."

Question: "Are you married?"

Answer: "Yes I am, I have been married since 1977."

Question: "By custom or civil marriage?"

Answer: "I was married in 1977 by customary rites; it is only in 1989 that I married in the civil manner."

Question: "Where do you live?"

Answer: "5665 Extension 6, in the location of Grahamstown."

Question: "How long have you been living there?"

Answer: "I started saying here in 1998."

Question: "Where did you previously reside before coming to Grahamstown?"

Answer: "Before then I stayed in Joza, a location in Grahamstown. I was born and raised at a farm nearby."

Question: "How important are African customs and traditions to you as a black woman? Do you practise them often?"

Answer: "I grew up with these traditions, they have been a central part of my life. I

cannot now stop and say that I do not love these practices. What I did when I was growing up, I practise now."

Question: "In light of the new democracy, what do you as a black woman understand about your position and the legal rights that you now possess?"

Answer: "I understand about rights, I know that in the past we didn't possess these rights ("Can you name any of these rights?"). An area that has changed is in the workplace for example. There was discrimination in the workplace where men were paid more than women for the same work done. It was something that bothered us as women, caused us great pain."

Question: "How do the men in the society react to these changes?"

Answer: "We as women appreciate this change, we really do. This is more especially where there are issues of domestic violence. Men thought they could do this without any consequence, but the new democracy does not allow for this. In the past even when you knew that such happenings were wrong, a woman had to accept this without questioning. It was the way of the society. ("So are you saying that with the new democracy this does not happen any more?") Its not that this has totally changed. There are some men who still believe that it is alright to hit a woman. Those men haven't changed, they still hold on to these "cavemen" mentalities."

Question: "What does the equality clause mean to you? How does it impact your day-to-day lives as a woman?"

Answer: "I am happy that I now possess these rights, and that I can do things on an equal footing with a man, but this creates a problem especially in the Xhosa culture. The right to equality is alien to Xhosa men. Traditionally women are subservient to men. Tradition has cultured people to assume certain gender roles. Men are supposed to do manly things and women are supposed to do feminine things. With the new Constitution I need not prescribe to these gender roles."

Question: "Can first born girls inherit property that is left by their deceased father? Are they allowed to inherit in terms of your traditions and customs?"

Answer: "For the Xhosa people the first-born child inherits, it does not matter whether it is a girl or a boy as long as it is the first-born child."

Question: "Are women still considered subordinate? Do the men take a superiority

attitude towards women in the society?"

Answer: "That is going to take time to change. For example I have been married for a long time and cannot assume that my husband will change over night. He was the man of the house before the Constitution and he will remain the man of the house now that we have this new democracy. Maybe for the younger children who are marrying now, perhaps their households will be different."

Question: "Is the payment of *lobolo* still a part of your culture and traditions. How do you feel about it, is it a good or bad practice?"

Answer: "I encourage the payment of *lobolo,* I understand that modern girls may want to do away with *lobolo* but it is such an important part of our tradition. It has stood the test of time for a reason. *Lobolo* is about creating a relationship with two different families, a man has no obligation to take care of his wife if he is not obligated to her family and community. ("What about the notion believed by some men that, if he pays lobolo he owns you and has the right to do as he wishes with you?") That is the wrong interpretation of what *lobolo* is ... it is criminal that it should be interpreted as such. *Lobolo* is such a positive thing in the Xhosa culture, the exchange of cattle created a bond between the two families; it brings dignity to the families. It is an occasion that should be celebrated and brings joy to the community."

Question: "How do you feel about polygamy?"

Answer: "This was done in the past, by men who had great wealth and possessed lots of cows, in order to show off their wealth. It was a good thing in the past. The wives in the different houses respected each other and got along well. It doesn't have a place in this day; relationships between people are no longer what they used to be."

Question: "What do you understand by the term rape? Domestic violence?"

Answer: "When a man takes advantage of woman against her will. That's rape. Domestic violence is when a man beats a woman. Domestic violence is a crime. However if it happens once ... say when he is drunk that can be forgiven, but if it keeps happening over and over then it becomes a crime."

Question: "So with that knowledge, is it possible for a man to rape his wife?"

Answer: "That's a funny notion, to say a woman has been raped by her husband. I have never heard of that, how does a man rape his own wife? Women can be naughty, we have affairs and satisfy our lovers and refuse our husbands their conjugal rights. It is their rights. This is when a woman says they have been raped, when a husband demands sex."

Question: "What do your families or societies feel about and react to domestic violence or the crime of marital rape? If you were to be raped by your husband, what steps would you take both in your community and in terms of the law?"

Answer: "In my family reporting a man to the police doesn't happen. If he beats you up, it is agreed that you must come home and it will be talked through. I wouldn't go to the police. There are times when you are beaten and you feel so much anger you want to report it. Yet if I go back home its not that same, I have children to take care of and I would not want my family to look at me as if in shame."

Question: "Are you aware of the legal resources that are available to you in Grahamstown?"

Answer: "Yes FAMSA. Yet even at FAMSA they require so much, they will tell you to go back home and come back at a certain date. This is tiring and I ended up giving up."

Question: "Do you feel that enough is being done to protect the women in Grahamstown?"

Answer: "I only know FAMSA."

(End of Interview: Tape was stopped.)

The interviews clearly indicated that there was a gap between formal laws and the reality of women's lives. This is not to minimize that work done by feminists or the government; yet more could be done. It is the opinion of the writer that while recognising the differences in cultures between women from the West and African women, it should not be the main focus of the feminist agenda. Instead, the focus should be on making women's rights a reality for African women. More should be done to include African women in policy making and in providing services for the

enforcement of women's rights.[7] The system of patriarchy and male domination also has to be eradicated and African feminist ought to campaign for the retention of only those customs that respect and uphold the rights elaborated on in the Constitution of South Africa. As Thandabantu Nhlapo writes the emancipation of women requires more than a declaratory commitment to equality and legislation prohibiting discrimination:

"A declaration that there shall be no discrimination on the basis of gender is necessary and serves as a statement of intent and has a normative value. However such a declaration, whether or not it is entrenched in a constitution, can amount to no more than a token gesture, if material, ideological, educational and cultural underpinnings of gender oppression are simultaneously address so as to provide a basis for the giving of reality to notional equality."[8]

[7] See suggestions made by the writer for women's participation in Governmental initiatives such as N.E.P.A.D.
[8] T. Nhlapo 1995:2.

CHAPTER SIX

6.1 CONCLUDING REMARKS

The years between 1975-1985 represented crucial years for women all over the world, in what was known as the United Nations decade for women. It was during these years that global feminists increased the attention and awareness to women's issues and brought to the forefront the idea that women all over the world must come together in solidarity to ensure that their rights were respected.[1] For South African women, 1994 heralded the dawn of a new era. Since 1913 their rights had been sidelined in favour of the liberation struggle. With the new Constitution, not only were South African women able to demand that their rights be respected but also there was greater participation by women in the international arena. South African women were no longer alone; they became significant players in the international world. Once again and this time for positive reasons, all eyes looked upon South African women to see how they dealt with gender rights in the post apartheid years. The final Constitution was a result of much debate and compromise; South African women had to deal with the fact that, for the first time they could fully participate in the international world, yet at the same time respect the cultural and ethnic practices that existed within the country. While equality was fully entrenched in the document, the status and role of traditional leaders and customs had to be recognized. From this arose much debate on the role that feminist jurisprudence played in the development of women's right in the "new South Africa." Did the theories of feminism hold a place in the South African context? Writing in 1911 Olive Shreiner[2], having the position of African women in mind, addressed this issue. She writes that African women in the past had to deal with issues of racial discrimination and economic empowerment before dealing with the issue of gender equality. Because of this the rise of feminism in South Africa was often stifled. She comments that women of any race or class hardly ever revolt against their disabilities, however severe their suffering. In South Africa this position as martyr was emphasised all the more by the political situation of the time. In a new era of democracy, it is the opinion of the writer that the challenge of the modern feminist go far beyond mere academic rhetoric

[1] U.I. Bola 1995:85.
[2] O. Shreiner is quoted by Simons 1968:10.

and to challenge structures that allow for the continuation of practices that are oppressive to women. To question whether theories of Marxist feminism or radical feminism have a place in South Africa is not the aim; the aim should be to identify what Conaghan[3] states is the "reality gap" between women's perceived and actual positions. Feminism is not about slogans or about male bashing; it is about realizing the legitimacy of women's claim to equality. In order to do this, women have to look to those who have been through the struggle and succeeded somewhat in achieving the aim of the right to equality. What this means is that while acknowledging the fact that feminism grew out of a Euro-American context, there is no need to totally discard the principles it advocates for simply on the basis that it is not set within the African context. There can be no denying that the foundations of feminist legal scholarship are applicable to South African women. Whether one should call themselves "feminist" or "womanist" is mere semantics; what should be the aim is making equality a reality in the African woman's daily life. By recognizing that feminism is situated within different validatory frameworks, feminists will realize that different theories will be received and perceived differently.[4] This must not lead to them discarding the basis of their theories but ought to provide motivation for feminists to look to and impact all women. Feminist jurisprudence is not exclusive to Euro-American women. It is a useful theoretical and practical strategy that can be used in a sensitive manner and that can acknowledge the multiplicity of women's lives. As seen above, South Africa can respect its cultures and traditions and still actively involve themselves within the international context. It is the opinion of the writer that the variety and breadth of feminist scholarship is so great that there is no necessity in essentialising it. Where one theory may fail, the other will succeed. For every theory applicable to Western women, another is applicable to African women in their contexts. The law, both national and international, should be used as a tool for positive change for African women. The law can be used without jeopardizing those positive core values that underlie African customs and traditions. Time should not be wasted in academic debate and rhetoric about who "owns" feminism, but should be used to assess the different needs of African women and in achieving the aims set by the Constitution to ensure equality and equal opportunity for all women.

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[3] J. Conaghan 2000:351.
[4] Conaghan *op cit* 356.

ABBREVIATIONS AND LIST OF JOURNALS

ACTA JURIDICA	House Journal of the University of Cape Town Law School
AD	Appellate Division Reports
BAC	Bantu Appeal Court
BCLR	Butterworths Constitutional Law Reports Durban Butterworths 1994-
BLR	Botswana Law Reports
CC	Constitutional Court
CILSA	Comparative and International Law Journal of Southern Africa Pretoria Institute of Foreign and Comparative Law Published by the University of South Africa 1968-
CL, SA	Current Law, South Africa
CPD	Cape of Good Hope Provincial Division Reports
DE JURE	House Journal of the University of Pretoria Law Faculty 1968-
DR	De Rebus, Pretoria. The Southern African Attorneys Journal, Pretoria Association of Law Societies, Republic of South South Africa
ICHRL	Interrights Commonwealth Human Rights Law
LAWSA	The Law of South Africa, Durban, Butterworths 1976-
NAC	Native Appeal Court
NAC (C & O)	Native Appeal Court Reports for the Cape and Orange Free State Provinces
NAC (N & T)	Native Appeal Court Reports for Natal and Transvaal Provinces
NAC (S)	Native Appeal Court Reports for the Southern Division
NAC (C)	Native Appeal Court Reports for the Central Division
OBITER	House Journal of the University of Port Elizabeth Law Faculty 1979-

SAJHR	South Africa Journal of Human Rights, Cape Town, Juta 1996-
SALJ	South African Law Journal, Cape Town, Juta 1901-
SCA	Supreme Court of Appeal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg, Durban, Butterworths 1937-
ZSC	Zimbabwe Supreme Court

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3. The Communal Property Associations Act 28 of 1996
4. The Constitutional Laws Amendment Act 32 of 1987
5. The Constitution of the Republic of South Africa Act 108 of 1996
6. The Divorce Act 70 of 1979
7. The Development Facilitation Act 67 of 1995
8. The Domestic Violence Act 116 of 1998
9. The General Law Fourth Amendment Act 132 of 1993
10. The Guardianship Act 192 of 1993
11. The Interim Constitution of the Republic of South Africa Act 200 of 1993
12. The Justice Laws Rationalisation Act 18 of 1996
13. The Kwazulu Act on the code of Zulu Law Act 16 of 1985
14. The Less Formal Township Establishment Act 113 of 1991
15. The Marriage and Matrimonial Law Amendment Act 3 of 1988
16. The Matrimonial Affairs Amendment Act 13 of 1976
17. The Matrimonial Property Act 88 of 1984
18. The Native Land Act 27 of 1913
19. The Natal Code of Zulu Law Proclamation R151 of 1987
20. The Natal Native Trust Act of 1964
21. The Prevention of Family Violence Act 133 of 1993
22. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
23. The Recognition of Customary Marriages Act 120 of 1998

24. The Recognition of Equality and Prevention of Unfair Discrimination Act 4 of 2000

25. The Restitution of Land Rights Act 22 of 1994

26. The Traditional Leadership and Governance Framework Act 41 of 2003

27. The Transkeian Proclamation 145 of 1923

28. The Transkeian Proclamation 14 2 of 1910

29. The Transkei Marriage Act 21 of 1978

30. The Upgrading of Land Tenure Rights Act 112 of 1991

31. The Ugandan Land Act of 1998

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